NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

KADEEM WILLINGHAM,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether U.S.S.G. § 1B1.13 is an "applicable" policy statement that binds a district court in considering a defendant-filed motion for sentence reduction under 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act of 2018.

2. If not, whether the district court may consider the severity and disparity of stacked § 924(c) sentences before and after Congress' 2018 clarifying amendment to 18 U.S.C. § 924(c)(1)(C), as part of an individualized assessment in determining whether a defendant has shown "extraordinary and compelling reasons" for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A).

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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Kadeem Willingham ("Petitioner") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's opinion affirming the district court's denial of Petitioner's motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act of 2018, *United States v. Willingham*, 2021 WL 4130022 (11th Cir. Sept. 10, 2021) is included in the Appendix at A-1.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court. The decision of the court of appeals affirming the district court's denial of Petitioner's motion to reduce sentence was entered on Sept. 10, 2021. This petition is timely filed pursuant to Supreme Court Rule 13.1, and this Court's December 2, 2021 order extending the due date for the petition.

STATUTORY PROVISIONS INVOLVED

Section 403 of the First Step Act of 2018, titled "Clarification of Section 924(c) of Title 18, United States Code," states:

> (a) In General.—Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final".
>
> (b) Applicability to Pending Cases.—This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

18 U.S.C. § 924, as amended by Section 403 of the First Step Act of 2018, states in relevant part:

> (c)(1)(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall—
>
> > (i) be sentenced to a term of not less than 25 years ...

Section 603 of the First Step Act of 2018 states, in relevant part:

> (b) Increasing The Use And Transparency Of Compassionate Release.—Section 3582 of title 18, United States Code, is amended –

> (1) in subsection (c)(1)(A), in the matter preceding clause (i), by inserting after "Bureau of Prisons," the following: "or upon i 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"

18 U.S.C. § 3582, as amended by Section 603(b) of the First Step Act of 2018, states in relevant part:

(c) Modification of an Imposed Term of Imprisonment.—The court may not modify a term of imprisonment once it has been imposed except that—

> (1) in any case—
>
> > (A) 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 (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—
> >
> > > (i) extraordinary and compelling reasons warrant such a reduction; or...
> >
> > and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

28 U.S.C. § 994(t) states:

The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

U.S.S.G. § 1B1.13. Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) Policy Statement), states:

Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. §§ 3553(a), to the extent that they are applicable, the court determines that –

(1) (A) extraordinary and compelling reasons warrant the reduction; or.

(B) the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. §§ 3559(c) for the offense or offenses for which the defendant is imprisoned;

(2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

(3) the reduction is consistent with this policy statement.

Commentary

Application Notes:

1. **Extraordinary and Compelling Reasons**.—Provided the defendant meets the requirements of subsection (2), extraordinary and compelling reasons exist under any of the circumstances set forth below:

(A) **Medical Condition of the Defendant**.—

(i) The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of

death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.

(ii) The defendant is—

(I) suffering from a serious physical or medical condition,

(II) suffering from a serious functional or cognitive impairment, or

(III) experiencing deteriorating physical or mental health because of the aging process,

that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

(B) **Age of the Defendant**.—The Defendant (i) is at least 65 years old; (ii) is experiencing serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(C) **Family Circumstances**.—

(i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.

(ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(D) **Other Reasons**.—As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

2. **Foreseeability of Extraordinary and Compelling Reasons**.—For purposes of this policy statement, an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment. Therefore, the fact

that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement.

3. **Rehabilitation of the Defendant**.—Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of this policy statement.

4. **Motion by the Director of the Bureau of Prisons**.—A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A). The Commission encourages the Director of the Bureau of Prisons to file such a motion if the defendant meets any of the circumstances set forth in Application Note 1. The court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of reduction), after considering the factors set forth in 18 U.S.C. § 3553(a) and the criteria set forth in this policy statement, such as the defendant's medical condition, the defendant's family circumstances, and whether the defendant is a danger to the safety of any other person or to the community.

This policy statement shall not be construed to confer upon the defendant any right not otherwise recognized in law.

5. **Application of Subdivision (3)**.—Any reduction made pursuant to a motion by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement.

Background: The Commission is required by 28 U.S.C. § 994(a)(2) to develop general policy statements regarding application of the guidelines or other aspects of sentencing that in the view of the Commission would further the purposes of sentencing (18 U.S.C. § 3553(a)(2)), including among other things, the appropriate use of the sentence modification provisions set forth in 18 U.S.C. § 3582(c). In doing so, the Commission is authorized by 28 U.S.C. § 994(t) 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. This policy statement implements 28 U.S.C. § 994(a)(2) and (t).

STATEMENT OF THE CASE

The 2015 Plea and Sentence

On July 16, 2015, Petitioner—a 22-year old with no prior criminal record beyond driving without a valid driver's license—pled guilty to Counts 3 and 8 of a superseding indictment charging him with brandishing a firearm in furtherance of a crime of violence (Hobbs Act robberies on March 25th and April 6, 2015), in violation of 18 U.S.C. § 924(c)(1)(A)(ii).

The law in effect at the time required that the district court impose a term of imprisonment not less than 7 years on Count 3, and 25 years consecutive to that on Count 8, resulting in a total minimum mandatory term of 32 years. Specifically, 18 U.S.C. § 924(c)(1)(C)(i) (2015), provided that "In the case of a second or subsequent conviction under this subsection, the person shall – be sentenced to a term of imprisonment of not less than 25 years." And in *Deal v. United States*, 508 U.S. 129 (1993), this Court interpreted the "second or subsequent conviction" language in that provision to unambiguously refer to the finding of guilt by a judge or jury, including in the same case; it did not require a final judgment from a prior § 924(c) case. *Id.* at 132. Accordingly, at Petitioner's September 25, 2015 sentencing, after recognizing and commending Mr. Willingham for his "very positive attitude," the district court explained that it would be "impos[ing] a sentence which is the lowest sentence I can impose that the law allows." Thereupon, the court sentenced Petitioner to 84 months imprisonment on Count 3; followed by 300 months consecutive on Count 8, followed by 5 years supervised release to run concurrently on both counts.

Petitioner did not appeal. He filed a motion to vacate, but it was denied.

The First Step Act of 2018

In December of 2018, Congress enacted the First Step Act of 2018 which contained two provisions at issue here. First, in Section 403 of the Act, entitled "Clarification of Section 924(c) of Title 18, United States Code," Congress clarified its original intent as to proper application of the stacking provision in 924(c), by amending § 924(c)(1)(C)(i) to ensure that the 25-year consecutive term for a successive § 924(c) offense did not apply unless the defendant had a final § 924(c) conviction at the time of the instant offense. *See* Pub. L. 115-391, 132 Stat. 5222, § 403; 18 U.S.C. § 924(c)(1)(C)(Dec. 21, 2018) (striking the "second or subsequent conviction under this subsection" language in § 942(c)(1)(C)(i) and replacing it with "violation of this subsection that occurs after a prior conviction under this subsection has become final"). Pursuant to this clarifying amendment, district courts are now permitted to impose a consecutive 25-year mandatory term *only* for a recidivist violation of § 924(c)—that is, if a defendant had a final § 924(c) judgment in a prior case.

Second, in Section 603(b) of the Act, entitled "Increasing the Use and Transparency of Compassionate Release," *see* Pub. L. 115-391, 132 Stat. 5194, 5239, § 603(b) (Dec. 21, 2018), Congress changed the procedure for seeking a sentence reduction for "extraordinary and compelling reasons" by removing the Director of the Bureau of Prisons as the "gatekeeper" to such motions. Specifically, prior to that amendment, § 3582(c)(1)(A) only allowed the BOP Director to move the district court to reduce a sentence if (in the BOP's view) there were "extraordinary and compelling

reasons" to do so. Without a BOP-filed motion, sentencing courts were powerless to reduce a prisoner's sentence under § 3582(c)(1)(A). Section 603 of the Act transformed that exclusive BOP-initiated remedy, by amending § 3582(c)(1)(A) to allow defendants to seek relief for "extraordinary and compelling reasons" *directly* from the district court (after first applying to the BOP, and the passage of 30 days).

The Motion to Reduce Sentence
Pursuant to 18 U.S.C. § 3582(c)(1)(A)

On June 5, 2020, Petitioner filed a *pro se* motion to reduce his sentence under § 3582(c)(1)(A)(i) as amended by the First Step Act, identifying the clarifying amendment to § 924(c) in Section 403 as among the "extraordinary and compelling reasons" for a reduction in his case. He acknowledged that as part of the Sentencing Reform Act Congress had—in 28 U.S.C. § 994(t)—delegated the responsibility for describing what constituted "extraordinary and compelling reasons" to the U.S. Sentencing Commission, and that in 2007 the Commission had written a policy statement (U.S.S.G. § 1B1.13) that set forth in accompanying commentary several categories of qualifying reasons (relating to medical conditions, age, and family circumstances), as well as a final catch-all for "other reasons" to be determined by the Director of the BOP. However, he noted, that policy statement had not been amended since the passage of the FSA. And, its vesting of complete authority in the Director of the BOP was "now irreconcilable with the revised statute." Thus, he argued, the amended version of § 3582(c)(1)(A) "trumps the Guidelines."

As support, he noted that many courts had agreed that due to this conflict, the text of the statute controlled over § 1B1.13, and allowed a district court to determine

for itself whether extraordinary and compelling circumstances warrant a reduction and the extent of a reduction. Here, as well, he argued, there were indeed extraordinary and compelling reasons for a reduction: namely, the fact that Congress had amended § 924(c)(1) to clarify that the type of stacked sentences imposed in his case are permissible "only after a truly 'subsequent' conviction;" Congress never meant for the type of "staggering sentence" such as he received to be imposed; if he were sentenced today he would receive a much-reduced sentence; and he had no prior criminal history, only one minor disciplinary incident while incarcerated, and he had shown tremendous remorse, accepted responsibility for his actions, and turned his life around by dedicating himself to education and rehabilitation.

The government opposed a sentence reduction, arguing that "as a matter of law" the court "lack[ed] authority" to grant Petitioner relief based on the length of the mandatory sentence he received, compared to the term that would be applied under current law. As a threshold matter, it claimed, Petitioner was effectively seeking retroactive application of the Section 403 of the FSA which was impermissible. In addition, the government argued, Congress had tasked the Sentencing Commission to "define" the "permissible" grounds for compassionate release, which it did in § 1B1.13—a policy statement that "does not provide any basis for a sentence reduction based on concern over sentence length," and "is binding under § 3582(c)(1)(A)'s express terms" since that statute "direct[s] courts to grant a reduction for extraordinary and compelling reasons only as consistent with the policy statement of the Sentencing Commission." Since neither § 1B1.13 nor the BOP's regulation on compassionate

release (Program Statement 5050.50) allowed for a sentence reduction based on "reevaluation of the severity of the original sentence," the government argued, Petitioner did not meet any of the categories for relief set forth by the Commission in § 1B1.13, comment. n. 1, and there was no "allowable basis for relief consistent with the Sentencing Commission's policy statement." Alternatively, the government argued, even if Petitioner were statutory eligible for a reduction, the Court should exercise its discretion to deny him a reduction.

In a counseled reply, Petitioner argued, *inter alia*, that it was "not unreasonable for Congress to conclude that not all defendants convicted under § 924(c) should receive new sentences, even while expanding the power of the courts to relieve some defendants of those sentences on a case-by-case basis." He urged the court in his case, as in other § 924(c) stacking cases where relief had been granted, to also consider other factors such as his youth at the time of his offense, difficult childhood, absence of any prior criminal history, excellent disciplinary record for over 5 years with only one minor infraction, and demonstrated rehabilitation. Finally, he noted, as recognized in United States v. *Maumau*, 2020 WL 806121, at *8 (D. Utah Feb. 18, 2020), the court had the power under § 3582(c)(1)(A) to simply grant a downward adjustment to a "more reasonable sentence," even if not a time-served sentence.

The District Court's Denial of the § 3582(c)(1)(A) Motion

On August 5, 2020, the district court denied Petitioner any adjustment in his sentence, holding that it "lacked jurisdiction" to grant a reduction on any ground "inconsistent with the Sentencing Commission's policy statements." While

acknowledging that "the Commission has not issued a policy statement that addresses prisoner-filed motions" after the FSA, the court rejected the view of most courts that the old policy statement no longer constrained the court's independent assessment of "extraordinary and compelling reasons" for a reduction, stating:

> [I]t is clear that "the text of 18 U.S.C. § 3582(c)(2) requires courts to abide by [the Sentencing Commission's] policy statements." *United States v. Colon*, 707 F.3d 1255, 1259 (11th Cir. 2013). *See also United States v. Maiello*, 805 F.3d 992, 998 (11th Cir. 2015) ("In a section 3582(c)(2) proceeding, the Commission's policy statements are binding, and courts lack authority to disregard them.") (citing *Dillon v. United States*, 560 U.S. 817, 825-28 (2010)); *Stinson v. United States*, 508 U.S. 36, 42 (1993) ("The principle that the Guidelines Manual is binding on federal courts applies as well to policy statements.").
>
> And it is equally clear that a reduction of Defendant's sentence based principally on post-sentencing developments in the law would be inconsistent with the Sentencing Commission's policy statements.[1] Accordingly, the Court lacks jurisdiction to reduce Defendant's sentence on this basis. In so holding, this Court is among the numerous district courts that, for various reasons, "continue to follow the guidance of the Sentencing Commission's policy statement limiting the scope of 'extraordinary and compelling reasons' that warrant compassionate release under § 3582(c)(1)." *United States v. Aruda*, 2020 WL 4043496, at *4 (D. Haw. July 17, 2020) (collecting cases).

The court added that the above conclusion was "buttressed by strong policy considerations," since Congress had expressly declined to make Section 403 of the First Step Act retroactive. Adopting Petitioner's arguments in his § 3582(c)(1)(A) motion,

[1] Here, the court acknowledged in a footnote that it was "aware that Defendant 'does not rely solely on the length of this sentence in seeking a reduction under § 3582 but other factors consistent with 18 U.S.C. § 3553 and [BOP] Program Statement 5050.50.'" While it "commend[ed]" Petitioner "on his efforts to rehabilitate himself," it stated that when "limit[ing] its consideration—as it must—to those reasons that are 'consistent with applicable policy statements issued by the Sentencing Commission," it cannot find that they constitute 'extraordinary and compelling reasons' warranting a sentencing reduction."

the court stated, "would inappropriately ignore the statutory limitations Congress imposed on the § 924(c) amendment."

Finally, the court stated its agreement with the government that:

> [I]f Defendant's argument "were accepted, a judge could . . . impose a mandatory sentence as dictated by Congress, and after the judgment became final, then reduce it upon a declaration that imposing that sentence in the particular case is 'extraordinary' and unwarranted." DE 143 at 8-9. The Court agrees that this would undermine the finality of sentences and clash with Congress' constitutional authority "to say what shall be a crime and how that crime shall be punished." *United States v. Holmes*, 838 F.2d 1175, 1178 (11th Cir. 1988) (quoting *United States v. Smith*, 868 F.2d 234,239 (5th Cir. 1982)).

On August 20, 2020, Petitioner moved the district court to reconsider its denial of his motion, but the court denied that motion.

The Appeal and Affirmance of the District Court

On appeal to the Eleventh Circuit, Petitioner argued in his Initial Brief that the district court had erroneously concluded that it "lacked jurisdiction" under § 3582(c)(1)(A) as amended by Section 603(b) of the First Step Act, to grant a defendant-filed motion to reduce sentence on a ground that was "inconsistent" with a Commission policy statement that by its terms, applies only to a BOP-filed motion. And, if the court meant that it lacked statutory authority to reduce his sentence on a ground other than those stated in the policy statement, Petitioner argued, that was wrong as well since § 1B1.13 had not been amended after the First Step Act, and for the reasons stated by every circuit to have considered the issue there currently was no "applicable policy statement" for defendant-filed motions. Even *if* § 1B1.13 *were* considered to be an "applicable policy statement" for defendant-filed motions, he argued, Application Note

1(D) should be severed since it conflicted with the statute as amended by the First Step Act. And if severed, it would not bind the district court.

In its Answer Brief, the government conceded that the district court mistakenly concluded that it "lacked jurisdiction" to consider any ground for relief other than those identified by the Commission in the commentary to § 1B1.13. However, it argued, the court simply meant that it had no authority to grant Mr. Willingham's motion on the grounds he had stated because the policy statement constrained the court's discretion to determine extraordinary and compelling reasons on its own. And that was correct, the government argued, because the district court remained "bound by §1B1.13, even in light of the First Step Act's changes to § 3582(c)(1)(A)," and a "non-retroactive change in sentencing law does not qualify under this binding policy statement" since "it is not a qualifying medical condition, age-related condition or family circumstance."

After the government's Answer Brief was filed, the Eleventh Circuit handed down its 2-1 decision in *United States v. Bryant*, 996 F.3d 1243 (11th Cir. May 7, 2021) rejecting the views of every other circuit to have interpreted § 3582(c)(1)(A) as amended by the First Step Act. The *Bryant* majority held—over a vigorous dissent by Judge Martin—that § 1B1.13 policy statement remained an "applicable policy statement" even for a defendant-filed motion after the First Step Act, and precluded district courts from considering the amendment to § 924(c) or any "other reasons" beyond those identified in Application Notes 1(A-C), or determined by the BOP as per Application Note 1(D) as "extraordinary and compelling reasons" for a reduction.

In his Reply Brief, Petitioner argued that the *Bryant* majority decision was wrong for the reasons articulated by all of the other circuits and Judge Martin in dissent. In addition, he argued, to the extent that the *Bryant* majority had interpreted 28 U.S.C. § 994(t) to have granted exclusive authority to the Commission to "define" all "extraordinary and compelling reasons" for relief under §3582(c)(1)(A), that statutory interpretation had created a constitutional nondelegation problem that the *Bryant* majority had erroneously failed to consider. For indeed, if (as the *Bryant* majority held) there had been a delegation of exclusive rule-making authority to the Commission, it was unconstitutional without any intelligible principle to guide the Commission's discretion or any meaningful limit on the Commission's authority. And, if the delegation itself was unconstitutional, then the policy statement and commentary that resulted from that delegation were "inapplicable" and provided no constraint on the court's discretion. In addition, Petitioner argued consistent with Judge Martin's dissent, Application Note 1(D) had created an unconstitutional sub-delegation of authority from one agency to another, and was void since Congress had not given the BOP the conferred authority. As a matter of due process, he asked to be heard on the sub-delegation issue that the defendant in *Bryant* had waived but he now specifically pressed. Finally, he argued, since the Commission had still not discharged its duty of *describing* "the criteria to be applied" in finding extraordinary and compelling reasons as directed by Congress in § 994(t), the district court retained complete discretion to independently determine whether such reasons existed here.

The Eleventh Circuit's Decision

On September 10, 2021, without the benefit of oral argument, the Eleventh Circuit affirmed the district court. It found that the district court erred in finding it "lacked jurisdiction" to grant Petitioner's motion. Nonetheless, it agreed with the government that the district court lacked statutory authority under § 3582(c)(1)(A) to reduce Petitioner's sentence, finding that *Bryant* "foreclose[d]" Petitioner's argument that § 1B1.13 was not controlling in his case. *United States v. Willingham*, 2021 WL 4130022, at *2 (11th Cir. Sept. 10, 2021). The court noted that in his reply brief Petitioner "also attacks the validity of Section 1B1.13 on various grounds," but "refused to consider th[ose] arguments," since they had not been raised in Petitioner's initial brief. *Id.* To the extent Petitioner relied upon a combination of factors as "extraordinary and compelling reasons" for a reduction, the court agreed with the district court that "routine sentencing arguments, unrelated to medical conditions, or advanced age, do not satisfy the policy statement's eligibility criteria." *Id.*

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's holding in *United States v. Bryant*, that U.S.S.G. Remains an "Applicable" Policy Statement that Binds the District Court in Considering a Defendant-Filed Motion for Sentence Reduction under 18 U.S.C. § 3582(c)(1)(A) After the First Step Act, Conflicts With the Contrary Holdings of Nine Other Circuits; Violates the Constitutional Nondelegation Doctrine; and Upholds an Illegal Sub-Delegation of Authority from the Commission to the Bureau of Prisons.

The current version of § 1B1.13 states (consistent with the prior statutory scheme dependent on the BOP):

> *Upon motion of the Director of the Bureau of Prisons* under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment … if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent they are applicable, the court determines that –
>
> (1)(a) Extraordinary and compelling reasons warrant the reduction …
>
> (2) The defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and
>
> (3) the reduction is consistent with this policy statement.

(Emphasis added). Notably, the application notes to § 1B1.13 are likewise dependent upon a motion by the Director of the BOP. Application note 1 articulates several categories of factors (relating to a defendant's medical condition, age, and family circumstances) as *per se* "extraordinary and compelling reasons" for a sentence reduction. § 1B1.13, comment n. 1(A)-(C). But the Commission also added a final catchall category in application note 1(D) for "an extraordinary and compelling reason *other than*, or in combination with the reasons described in subdivisions (A) through (C)" "[*a*]*s determined by the Director of the Bureau of Prisons*." (Emphasis added). And indeed, if there were any doubt from the above that this policy statement applies *only* to motions brought by the Director of the Bureau of Prisons, in Application Note 4, entitled "Motion by the Director of the Bureau of Prisons," the Commission made that irrefutably clear by reiterating that "[a] reduction under this policy statement may be granted *only upon motion by the Director of the Bureau of Prisons*." § 1B1.13, comment. N. 4 (emphasis added).

Due to the absence of a quorum at the Sentencing Commission, neither § 1B1.13 nor these accompanying application notes has been amended since passage of the First

Step Act. As a result, the current version of § 1B1.13 mandates the precise mode of deference to the BOP in evaluating compassionate release requests, that Congress expressly and intentionally rejected by enacting Section 603(b) of the FSA in 2018.

For that reason, nine circuits have interpreted the requirement in § 3582(c)(1)(A) that any reduction must be "consistent with applicable policy statements issued by the Sentencing Commission" to mean that § 1B1.13 remains an "applicable policy statement" after the First Step Act *only* for *BOP-initiated* compassionate release motions. The Eleventh Circuit is the lone dissenter on this issue, and Eleventh Circuit defendants are being treated disparately and unfairly every day as a result.

A. The Courts of Appeals are Intractably Divided on the Question Presented

1. In the uniform view of the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth and D.C. Circuits, there is *no* "*applicable* policy statement" constraining the court's discretion at this time for *defendant-filed* motions after the First Step Act because § 1B1.13 contains "clearly outdated" language requiring judicial deference to the Director of the BOP. *See United States v. Brooker*, 9796 F.3d 228, 235-36 (2d Cir. 2020); *United States v. Jones*, 980 F.3d 1098, 1109-11 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020); *United States v. McCoy*, 981 F.3d 271, 275-77, 280-84 (4th Cir. 2020); *United States v. McGee*, 992 F.3d 1035, 1048-51 (10th Cir. 2021); *United States v. Maumau*, 993 F.3d 821, 832-37 (10th Cir. 2021); *United States v. Aruda*, 993 F.3d 797, 799-802 (9th Cir. 2021); *United States v. Shkambi*, 994 F.3d 338, 392-93 (5th Cir. 2021); *United States v. Long*, 997 F.3d 342, 354-59 (D.C. Cir. May 18, 2021); *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021).

As these courts have consistently found based upon the plain text and history of § 3582(c)(1)(A), § 1B1.13, and the commentary to the latter, unless and until the Commission amends § 1B1.13 to address a defendant-filed §3582(c)(1)(A)(i) motion, there is no "*applicable* policy statement" constraining a district court's discretion in ruling on such motions. For these courts, the only limitation in § 1B1.13 that remains "applicable" at this time is that rehabilitation *alone* is not an extraordinary and compelling reason for release, because that particular requirement in § 1B1.13 came directly from Congress in § 994(t). *See Brooker*, 976 F.3d at 237-38.

2. While all of these circuits have agreed that district courts have broad statutory authority, unfettered by § 1B1.13 and the judgment of the BOP, to determine on their own whether extraordinary and compelling reasons presented by a defendant warrant a reduction in sentence, in *United States v. Bryant*, 996 F.3d 1243 (11th Cir. 2021), a two-judge majority of the Eleventh Circuit ruled contrary to every other circuit by holding that the policy statement in § 1B1.13 applies to defendant-filed compassionate release motions, and binds the discretion of the courts. According to the *Bryant* majority, "1B1.13 is an applicable policy statement for all Section 3582(c)(1)(A) motions, and Application Note 1(D) does not grant discretion to courts to develop 'other reasons' that might justify a reduction in a defendant's sentence." 996 F.3d at 1248.

In the view of the *Bryant* majority, its sister circuits had erred by treating the first words of the policy statement ("Upon motion of the Director of the Bureau of Prisons"), and "the repetition of that clause in Application Note 4" ("A reduction under this policy statement may be granted only upon motion of the Director of the Bureau

of prisons"), as limiting the policy statement's applicability to motions filed by the Director. According to the *Bryant* majority, these references are simply "prefatory," and not "operative." 996 F.3d at 1259-60 (stating they were mere "prologue," reflective of the time they were written, when "there was no such thing as a defendant-filed motion").

But the *Bryant* majority rejected the suggestion that similar language in Application Note 1(D), requiring deference to the determination of the Director of the BOP on "other reasons" for a reduction, was likewise "prefatory" and not operative. And the majority saw no conflict at all between § 3582(c)(1)(A), as amended by the FSA, and the "unamended Application Note 1(D)." *Id.* at 1263-64. It held that courts still "can and should give effect" to both provisions as written, which means that district courts do *not* have independent authority to determine whether any factors "other than" those specifically identified by the Commission in Notes 1(A)-(C) or by the BOP as per Note 1(D) are sufficiently "extraordinary and compelling" to warrant a sentence reduction. *Id.*

Judge Martin, in dissent, explained why the reasoning of the other circuits was correct, and the majority's reasoning was internally inconsistent and flawed. *Id.* at 1265-72 (Martin, J., dissenting). She underscored that in insisting that § 1B1.13 and its commentary remain fully "applicable" to a defendant-filed motion at this time, the majority had to "strike at least two phrases from the policy statement and accompanying application notes," while the other circuits' interpretation of "applicable

policy statement" "preserv[es] as much of § 1B1.13 that can be saved." *Id.* at 1272 (quoting *United States v. Jones*, 980 F.3d 1098, 1111 (6th Cir. 2021)).

B. The Decision Below is Incorrect.

The Court's intervention is necessary because the Eleventh Circuit's ruling is not only wrong for the reasons stated by nine other circuits; it is wrong for constitutional reasons as well.

1. Section 1B1.13 and its commentary only apply to BOP-filed motions. For the reasons articulated by the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth and D.C. Circuits, and Judge Martin's dissent in *Bryant*, the *Bryant* majority's conclusion as to the continued "applicability" of § 1B1.13 to defendant-filed motions after the First Step Act, is incorrect. Weighing in after *Bryant*, the D.C. Circuit in *Long* not only agreed with its sister courts that the policy statement's inapplicability to a defendant-filed motion was "plain on its face," 997 F.3d at 355, and that "Courts have no license under the First Step Act to perform 'quick judicial surgery on [U.S.S.G.] § 1B1.13,* * * editing out the language that expressly confines its operation to motions filed by the Bureau of Prisons." *Id.* (citing *McCoy*, 981 F.3d at 282). It specifically criticized the *Bryant* majority's characterization of the policy statement's express text as mere "prefatory language" that just "orients the reader by paraphrasing the statute as it existed at the time the policy statement was enacted." 997 F.3d at 358. "Quite the opposite" of "mere prologue," it rightly explained, because

> the policy statement's first words—'Upon the motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A)'—set out a rigid and indispensable condition of release: that the Bureau of Prisons itself agrees that relief is warranted. In that way, the beginning of the policy

> statement puts into effect Congress's (now superseded) command that motions for compassionate release may be filed only by the Bureau of Prisons. . . . To dismiss these words as inert preface is to ignore a direct textual instruction and central statutory feature of the compassionate release scheme prior to the First Step Act.
>
> That essential function of Section 1B1.13's opening words makes stark the policy statement's inapplicability to the post-First Step Act world where Congress took compassionate release motions out of the Bureau of Prisons' exclusive control. . . . [F]or a policy statement to be "applicable," it must at minimum, take account of the relevant legislation and the congressional policy it embodies. Section 1B1.13 does not do that. And so the problem with the Eleventh Circuit's approach is that it asked the wrong question. The issue here is not the *meaning* of "applicable," but rather whether the pre-First Step Act policy statement *is* applicable. It plainly is not.

Long, 997 F.3d at 358-59.

2. As 28 U.S.C. § 994(t) was interpreted by the Eleventh Circuit in *Bryant*, the policy statement and commentary resulted from an unconstitutional delegation of legislative authority to the U.S. Sentencing Commission, which renders the entire policy and its commentary inapplicable. According to the *Bryant* majority, in 28 U.S.C. § 994(t) Congress gave the Commission complete and unfettered authority to "*define* the universe of extraordinary and compelling reasons that can justify as sentence reduction." *Bryant*, 996 F.3d at 1262.[2] But Congress used the word "*describe*," in 28 U.S.C. § 994(t). And Congress' choice to have the Commission "*describe*" rather than "*define*" what should

[2] Notably, the *Bryant* majority used the word "*define*" in describing the delegated power *12 separate times* in the opinion. *See* 996 F.3d at 1249, 1251, 1255, 1257-60, 1262, 1264-65 & n. 6.

be "extraordinary and compelling reasons" was significant. As the Tenth Circuit has explained:

> Congress, in outlining the Sentencing Commission's duties, chose to employ the word "describe" rather than the word "define." The word "describe" is commonly defined to mean "to use words to convey a mental image or impression of (a person, thing, scene, situation, event, etc.) by referring to characteristic or significant qualifies, features, or details." *Oxford English Dictionary Online* (3d ed. 2015) .... In contrast, the word "define" is commonly understood to mean "[t]o set bounds to, to limit, restrict, confine." *Id.* ....
>
> Congress's choice of the word "describe" makes sense when considered in light of the fact that the specific duty imposed by § 994(t) is part of the Sentencing Commission's overarching duty to "promulgate general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A). ... As Congress, the federal courts, and the Department of Justice have all long recognized, "general policy statements" differ from "substantive rules" ... "[G]eneral statements of policy" are issued by an agency to advise the public prospectively of the manner in which the agency intends for a discretionary power to be exercised, and thus differ from ... "substantive rules," which have the force and effect of law. ...
>
> Congress did not, by way of § 994(t), intend for the Sentencing Commission to exclusively define the phrase "extraordinary and compelling reasons," but rather for the Sentencing Commission to describe those characteristic or significant qualities or features that typically constitute "extraordinary and compelling reasons," and for those guideposts to serve as part of the general policy statements to be considered by district courts under the second part of the statutory test in § 3582(c)(1)(A).

United States v. Maumau, 993 F.3d at 821, 833-34 (10th Cir. 2021). Read in this light, § 994(t) creates no constitutional problem. If § 994(t) merely directed the Sentencing Commission to *describe* extraordinary and compelling reasons for compassionate release (as the text expressly states and the Tenth Circuit rightly holds), there is no

unconstitutional delegation because the final determination of whether such reasons exist would properly remain within the province of the district court.[3]

The *Bryant* majority, however, recast the language of § 994(t) to find that Congress directed the Commission to "*define*" what constitutes extraordinary and compelling reasons for compassionate release, rather than merely to "*describe*" such conditions.[4] And by doing so, the *Bryant* majority interpreted § 944(t)—contrary to the Tenth Circuit—to delegate that authority exclusively to the United States Sentencing Commission, with the "*only boundar*y" being that "'[r]ehabilitation ... alone shall not be considered an extraordinary and compelling reason.'" *Bryant*, 996 F.3d at 1249 (citing §994(t))(emphasis added)

If this is true, then § 994(t) violated the constitutional non-delegation doctrine. This Court has been clear that an exclusive, unguided, and boundless delegation by Congress of rulemaking authority to another branch of government is unconstitutional, because of "the separation of powers that underlies our tripartite system of

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[3] Notably, federal courts are frequently tasked with determining whether "extraordinary" circumstances warrant relief from an otherwise final judgment. *See Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11th Cir. 2009); *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005); *Makir-Marwil v. U.S. Att'y Gen.*, 681 F.3d 1227, 1229 (11th Cir. 2012); *Calderon v. Thompson*, 523 U.S. 538, 550 (1998).

[4] *See, e.g., Bryant*, 996 F.3d at 1249 (stating that Congress "directed the Commission to *define* 'what should be considered extraordinary and compelling reasons ..."), *id. at* 1251 ("one of which must *define* 'extraordinary and compelling reasons"); *id.* at 1255 ("In other words, the statutory context shows us that the Commission had an obligation to *define* 'extraordinary and compelling reasons' for all motions under the statute, and that the Commission did so in 1B1.13.") (emphasis added). In light of the fictional "*define*" language, the majority concluded that Congress "did not put district courts in charge of determining what would qualify as extraordinary and compelling reasons that might justify reducing a prisoner's sentence." *Bryant*, 996 F.3d at 1249.

Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). The framers entrusted the authority to legislate or make law solely to Congress. U.S. CONST. art. I, §§ 1, 8. And this authority carries with it a corresponding limitation: Congress cannot delegate its legislative authority to another branch of the government. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935)("Congress is not permitted to abdicate or to transfer to others [its] essential legislative functions").

Nonetheless, "in our increasingly complex society, replete with ever changing and more technical problems, '[the] Court has understood that 'Congress simply cannot do its job absent an ability to delegate power under broad general directives.'" *Gundy v. United States,* 139 S. Ct 2116, 2123 (2019) (plurality op.) (alteration and citations omitted). The Court has therefore held that "a statutory delegation is constitutional so long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to perform.'" *Id*. (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S 394, 409 (1928) (brackets in original)). "Or in a related formulation, the Court has stated that a delegation is permissible if Congress has made clear to the delegee 'the general policy' he must pursue and the 'boundaries of [his] authority." *Gundy*, 139 S.Ct. at 2129.

That did not occur in § 994(t), as construed by the *Bryant* majority to allow the Commission to "exclusively" "define" the scope of § 3582(c)(1)(A) with *only one* caveat: "Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." *See Bryant*, 996 F.3d at 1249. Telling the Commission that one circumstance, *alone*, would *not* be an extraordinary and compelling reason for release

is not the same as providing the Commission an intelligible principle for determining what circumstances *would* meet that standard—either alone or in combination with other factors. Congress did not declare any general policy regarding what circumstances should qualify as "extraordinary and compelling," and provided no meaningful limit on how broadly or narrowly those terms should be defined. Instead, if the *Bryant* majority's reading of § 994(t) is correct, Congress granted the Commission plenary authority to make these determinations on its own.

While this Court has only rarely struck a delegation as exceeding permissible bounds, "in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421, 430 (1935). In *Panama Refining*, the Court invalidated Section 9(c) of the National Industrial Recovery Act, which authorized the President to prohibit the interstate transportation of petroleum produced or withdrawn in violation of state law, because Congress delegated to the executive branch unguided authority to set standards, established no policy or "no criteria to govern the President's course," and gave the President "unlimited authority to determine the policy." 293 U.S. at 415. And in *Schechter Poultry*, the Court invalidated another NIRA provision, which authorized the President to approve or prescribe "codes of fair competition" for industry groups, because Congress had failed to clearly articulate the intended policy, or the standards that would constrain the delegated authority, invalidated the statute. 295 U.S. at 542

These cases stand in stark contrast to *Mistretta*, where the Court upheld Congress' delegation of authority to the Commission to promulgate the Sentencing Guidelines because in the Sentencing Reform Act, Congress provided a detailed guide for the Commission to create the Guidelines, specifying "what the Commission should do and how it should do it, and set[ing] out specific directives to govern particular situations." 448 U.S. at 379 (citation omitted).[5] There is nothing comparable to this in § 994(t). By contrast to the structured and detailed guidance Congress provided the Commission for promulgating Guidelines, Congress gave the Commission no guideposts or directives. It did not clearly set forth the overarching policy, nor set limits for what the Commission could or should consider in establishing criteria and a list of examples. Even by the relatively low bar set in *Gundy*, the provision at issue here as interpreted by the Eleventh Circuit, fails. *See Gundy*, 139 S. Ct. at 2130 (Alito, J., concurring in the judgment); *id*. at 2131 (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting). In short, as § 994(t) was interpreted in *Bryant*, Congress abdicated its legislative responsibility to set standards and policy for compassionate

[5] Among other directives, Congress "charged the Commission with three [enumerated] goals" and "specified four 'purposes' of sentencing that the Commission must pursue in carrying out its mandate." *Id.* at 374 (citing 28 U.S.C. § 991(b)(1) and 18 U.S.C. § 3553(a), respectively). Congress prescribed the guideline system, and directed that sentencing ranges be consistent with the provisions of the United States Code. *Id.* at 375. "Congress directed the Commission to use current average sentences 'as a starting point'" for structuring sentencing ranges," and provided detailed guidance for setting the maximum range. *Id*. (citing 28 U.S.C. §§ 994(b)(2), and (m).). Congress further directed the Commission to consider specific factors in establishing categories of both offenses and offenders. *Id*. at 375-376 (citing 28 U.S.C. §§ 994(c)(1)-(7) and (d)(1)-(11)). Thus, in specifying the Commission's duties in promulgating the Guidelines, Congress set forth far "more than merely an 'intelligible principle' or minimal standards." *Id*. at 379.

release to the Commission. With no intelligible principle set forth to guide or constrain the Commission, the resulting policy statement and its commentary are unconstitutional. And any policy statement or commentary promulgated pursuant to an unconstitutional delegation of Article I authority is necessarily unconstitutional, null and void, as well. *See Stinson v. United States*, 508 U.S. 36, 45 (1993) (commentary cannot be "controlling" if it was issued in "violat[ion] of the Constitution."). Since *Bryant*'s statutory interpretation was an unconstitutional interpretation, § 1B1.13 was inapplicable could not constrain the district court.

If there is any ambiguity in § 994(t) as to the scope of the Congressional delegation, the Court should avoid any interpretation of a statute that would render it unconstitutional or even raise serious questions of constitutionality. *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (Hughes, C.J.). *See Gundy*, 139 S.Ct. at 2123 (noting that if Gundy's reading of the statute were correct, the Court "would face a nondelegation question"); *Dept. of Transp. v. Association of American Railroads*, 575 U.S. 43, 60-63 (2015) (Alito, J., concurring).

3. Even if Congress' broad delegation of unguided and limitless authority to the Commission in § 994(t) did not itself violate the non-delegation doctrine, at the very least Application Note 1(D) was an unconstitutional sub-delegation of authority from an entity in the judicial branch to an executive agency, and inapplicable for that reason. In her dissent in *Bryant*, Judge Martin pointed out that the majority's upholding of Application Note 1(D) violated the well-settled principle that "[a]n agency cannot delegate to another

agency powers that Congress did not give that second agency." 996 F.3d at 1272 (Martin, J., dissenting) (citing *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080, 1084-85 (11th Cir. 2013) ("Even if it were not axiomatic that an agency's power to promulgate legislative regulations is limited to the authority delegate[d] to it by Congress, we would be hard-pressed to locate that power in one agency where it had been specifically and expressly delegated by Congress to a different agency")). "Congress never gave BOP th[e] authority" to describe "what should be extraordinary and compelling reasons for a sentence reduction.'" *Id.* Rather, Congress authorized the Sentencing Commission to do so. Given that the Commission is an independent body within the judicial branch, 28 U.S.C. § 991(a), it "cannot lend [its delegated] authority to the BOP Director [an Executive Branch official] any more than it can to the Administrator of the Environmental Protection Agency. Therefore, even if the majority's interpretation [of exclusive authority in the Commission] were correct, it would render Application Note 1(D) invalid. It would still not be binding as to Mr. Bryant's motion." *Id.*

For the reasons stated by Judge Martin, the Commission indeed improperly delegated its authority to *describe* what should be extraordinary and compelling reasons by setting forth criteria, to an Executive agency. And because that sub-delegation was unconstitutional, Application Note 1(D) is similarly unconstitutional. The only sub-delegations that have survived constitutional scrutiny are those that are expressly authorized by Congress within the same branch of government. *See Touby v. United* States, 500 U.S. 160 (1991). And that is not the case here. Since the

Commission's sub-delegation to the Commission in Application Note 1(D) was unconstitutional, that application note was plainly inapplicable to Petitioner's motion for sentence reduction. *See Stinson*, 508 U.S. at 45. It could not constrain the district court's discretion to determine "other reasons" for a reduction.

Notably, in responding to Judge Martin's sub-delegation argument in a footnote, even the *Bryant* majority appeared to recognize that there might indeed be a problem with the Commission's "sub-delegation" of its criteria-describing authority in § 994(t) to the BOP Director. 996 F.3d at 1264 n. 6. Nonetheless, the majority refused to address that issue because it found "no party" had sufficiently placed the issue before the Court. *Id.* Here, however, Petitioner directly raised the argument in his Reply Brief that Application Note 1(D) constitutes an unconstitutional sub-delegation of authority from the Sentencing Commission to the Director of the Bureau of Prisons, which rendered Application Note 1(D) inapplicable.

Although the *Bryant* majority correctly perceived that an illegal sub-delegation would render Application Note 1(D) severable (and therefore null and void), it erroneously opined that severing this particular application note "would not help Bryant." 996 F.3d at 1264, n. 6. Beyond the fact that this was pure *obiter dictum* since the court held that the issue had not been properly raised in the *Bryant* briefs, and thus found the issue had been waived, the *Bryant* majority misunderstood how striking and severing Application Note 1(D) could indeed help Bryant and those raising similar claims. Specifically, severance would have left nothing of nothing of substance in the

policy statement that could constrain the court's discretion to determine "extraordinary and compelling reasons" on its own.

Admittedly, the Commission has provided three examples of "extraordinary and compelling reasons," but to this day it has still not fulfilled its *second* duty in § 994(t) of "*describing* the criteria to be applied." Application Note 1(A-C) is no more than a non-exclusive list of examples. The note contains no language suggesting that "extraordinary and compelling reasons" may be found *"only*" in the circumstances listed. *See* U.S.S.G. § 1B1.13, . n.1. And therefore, if Application Note 1(D) is severed, all that would remain in the commentary would be this non-exhaustive list of "extraordinary and compelling reasons." There would be nothing to bar the district court from finding additional "extraordinary and compelling reasons" on its own.

Notably, for 22 years after § 3582(c)(1)(A) was in effect, there was *no* corresponding policy statement at all. The Commission did nothing in response to Congress' directive in § 994(t) until 2006, and only then wrote a barebones statement that simply "'parroted the statute's language." *Shkambi*, 994 F.3d at 391; U.S.S.G. amend. 683 (2006). The commentary that we have now resulted from two later amendments, Amendments 698 in 2007, and 799 in 2016. Accordingly, for more than two full decades, the district courts clearly retained full authority to determine on their own whether or not extraordinary and compelling reasons existed for compassionate release. Because the Commission has still failed to fulfill its statutory mandate to "describe . . . the criteria to be applied" in making the "extraordinary and compelling reasons" determination, the Court should find that the district courts retain the

authority to determine their own criteria—just as they did before the unconstitutional and incomplete policy statement went into effect.

C. This case is an ideal vehicle to resolve the circuit conflict

The question of the "applicability" of § 1B1.13 in a defendant-filed § 3582(c)(1)(A) motion after the First Step Act is important and recurring for Eleventh Circuit defendants, who are being treated disparately from and more harshly than defendants in nine other circuits every day. Unless and until *Bryant* is overturned, the *Bryant* majority's interpretation of § 994(t) will remain authoritative in the Eleventh Circuit. All post-*Bryant* Eleventh Circuit panels—like the one below—will be required to follow the dictates of *Bryant* even if convinced it was wrongly decided, *United States v. Steele*, 147 F.3d 1316, 117-18 (11th Cir. 1998)(en banc), and improperly ignored the constitutional nondelegation and sub-delegation problems identified below and herein. *See Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001) ("[w]e categorically reject any exception to the prior panel precedent rule based upon a perceived defect in the prior panel's reasoning").

Given the rigid way in which the Eleventh Circuit applies its prior panel precedent rule, no defendant in the Eleventh Circuit will have an opportunity for a sentence reduction under § 3582(c)(1)(A) on the grounds on which defendants in other circuits have already secured release. Only this Court can assure that the right to a sentence reduction under § 3582(c)(1)(A) is not a function of unfortunate geography.

Although this Court declined to grant the petition for writ of certiorari in *Bryant*, *Bryant v. United States*, ___ S.Ct.___, 2021 WL 5763101 (Dec. 6, 2021) (No. 20-1732),

the approach taken in *Bryant* was flawed for a number of reasons, including that the petitioner there waived the sub-delegation issue identified above both before the court of appeals and in his petition for certiorari to this Court. The instant petition presents a far better vehicle for certiorari than *Bryant* because a grant of certiorari in this case would not only allow the Court to resolve whether based upon the text and history of § 3582(c)(1)(A) and § 1B1.13 the current policy statement is an "applicable policy statement" for a defendant-filed motion within the contemplation of § 3582(c)(1)(A) as amended by the FSA. It would also allow the Court to consider the constitutional sub-delegation issue the petitioner in *Bryant* waived, the non-delegation issue the Eleventh Circuit's interpretation of § 994(t) in *Bryant* created, and the narrower circuit conflict that is the subject of Question II which the petitioner in *Bryant* declined to press before this Court as well. None of these crucial ancillary issues was fairly comprised within the single question presented in the *Bryant* petition for certiorari.

II. The Circuits are in Conflict on Whether a District Court May Consider the Severity and Disparity of Stacked § 924(c) Sentences Before and After Congress' 2018 Clarifying Amendment to 18 U.S.C. § 924(c)(1)(C), in Determining Whether a Defendant has Shown "Extraordinary and Compelling Reasons" for a Sentence Reduction Under 18 U.S.C. § 3582(c)(1)(A).

Among the nine circuits that have found no "applicable policy statement," a narrower conflict has arisen as to whether a district court may consider the severity and disparity of the sentence the defendant received under § 924(c)(1)(C), compared to that which would be imposed after Congress' clarifying amendment to the stacking procedure in Section 403 of the First Step Act, among other factors in making an individualized determination of whether a defendant has presented "extraordinary and

compelling reasons" for a sentence reduction under § 3582(c)(1)(A). That narrower conflict is likewise intractable, and should be resolved here.

A. The Courts of Appeals are Intractably Divided on the Question Presented

1. Two circuits have squarely held that the combination of the severity of the current sentence and the disparity between past and current sentencing for the same § 924(c) offenses after the First Step Act can be considered among other factors in making an individualized determination of "extraordinary and compelling" reasons for release. *See United States v. McCo*y, 981 F.3d 271, 285-87 (4th Cir. 2020); *United States v. Maumau*, 993 F.3d 821, 837 (10th Cir. 2021). These circuits have reasoned that the First Step Act's "*clarification* of § 924(c) resulted in not just any sentencing change, but an exceptionally dramatic one." *McCoy*, 981 F.3d at 285 (emphasis added); *see also id*. at 1285-86 ("We think courts legitimately may consider, under the 'extraordinary and compelling reasons' inquiry, that defendants are serving sentences that Congress itself views as dramatically longer than necessary or fair").

2. By contrast, three circuits have read a limitation into § 3582(c)(1)(A) precluding a district court from considering (even in combination with other factors) the non-retroactive changes in the law effected by the First Step Act in making the "extraordinary and compelling reasons" determination. They reason that this would be an "end run" around Congress' policy judgment to make these changes prospective only. *United States v. Jarvis*, 999 F.3d 442, 444-46 (6th Cir. 2021), *pet. for cert. filed* Oct. 19, 2021 (No. 21-568); *United States v. Andrew*s, 12 F.4th 255, 261-62 (3d Cir. 2021); *United States v. Thacker*, 4 F.4th 569, 571, 575-76 (7th Cir. 2021).

Because of the Eleventh Circuit's ruling in *Bryant* (where the defendant raised the severity and disparity of § 924(c) stacking as one of several reasons for relief) the result in the Eleventh Circuit is the same as in the Third, Sixth, and Seventh Circuits. In none of these circuits may the court consider the severity and disparity of § 924(c) sentences before and after the First Step Act, as having any relevance to whether there are "extraordinary and compelling reasons" for a reduced sentence.

3. Had Petitioner pressed his exact claim in either the Fourth or Tenth Circuits, he would have had a viable chance for relief. *See McCoy*, 981 F.3d at 285, 288 (affirming release of defendants with stacked § 924(c)s, based upon the severity and disparity of those sentences with those today, as well as the defendant's relative youth at the time of the offenses, and their demonstrated post-sentence rehabilitation); *Maumau*, 993 F.3d at 837 (emphasizing that the grant of relief was based on the district court's individualized review of all circumstances of the case including not only the stacked § 924(c) sentences, but also the defendant's youth at the time of sentencing). And indeed, numerous defendants presenting a similar combination of circumstances in these and other circuits have secured outright release, or at least a significant sentence reduction. *See McCoy*, 981 F.33d at 285 (citing cases).

B. The Decision Below is Incorrect

For the reasons identified by the Fourth and Tenth Circuits, the district court here clearly erred in holding categorically that "post-sentencing developments in the law" may not be considered in determining "extraordinary and compelling reasons" for relief under §3582(c)(1)(A). As the Fourth Circuit has rightly explained, "there is a

significant difference between automatic vacatur and resentencing of an entire class of sentences," and "allowing for the provision of individual relief in the most grievous cases. *McCoy*, 981 F.3d at 186-87 (citation and internal quotation marks omitted).

Well-settled rules of construction support the Fourth and Tenth Circuit's approach. "[T]he best evidence of Congress's intent is the statutory text." *Nat'l Fed'n of Indep. Bus. V. Sebelius*, 567 U.S. 519, 544 (2012). And here the text is clear. Congress imposed only one limitation on the district court's discretion under §3582(c)(1)(A)(i): "Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." 28 U.S.C. § 994(t). And therefore, as the Fourth and Tenth Circuits have rightly recognized, nothing in the text of § 994(t) or of § 3582(c)(1)(A) supports the conclusion 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 defendants who would be subject to much shorter sentences after Congress' clarification of its original intent and change of the stacking procedure in § 924(c)(1)(C).

If anything, the principle that "[t]he expression of one thing implies the exclusion of others" (*expressio unius est exclusio alterius*) supports the conclusion that the single "express exception" in § 994(t) "implies that there are no other" exceptions. *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018). Since Congress provided that rehabilitation alone cannot constitute an "extraordinary and compelling reason[]" for compassionate release, reading *another* exception to the district court's discretion into § 3582(c)(1)(A) contradicts the statutory text.

The additional restriction on the district court's authority that the government suggested below and the district court adopted was not only an impermissible judicial (and atextual) amendment to two federal statutes—both § 994(t) and § 3582(c)(1)(A); it also disregarded the evolution of the latter statute. The history of § 3582(c)(1)(A) shows that Congress sought to enhance the circumstances in which district courts could exercise discretion in considering motions for sentence reduction for "extraordinary and compelling reasons.

Notably, the original version of § 3582(c)(1)(A) was intended to be a broad "safety valve," adaptable to cases "in which the defendant's circumstances are so changed . . . that it would be inequitable to continue the confinement." S. Rep. No. 225, 98th Cong, 2d Sess. 121 (1983). And the Senate Report preceding enactment even recognized that "there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances including "an unusually long sentence." *See* S. Rep. No. 98-225, at 55-56 (1983). In 2018, however, Congress determined that this intended "safety valve" had not functioned as intended under the BOP's stewardship; it accordingly sought to "increas[e] the use" of compassionate release by allowing defendant-initiated motions. First Step Act, 132 Stat. 5239, § 603(b). It is significant that Congress did not implement any additional limitations on the discretion of district courts in considering the new defendant-filed motions.

As the Fourth Circuit has rightly explained, the fact that Congress chose not to make Section 403 of the First Step Act "categorically retroactive," does not imply the converse: that courts categorically may not consider this clarifying amendment in

conducting "their individualized reviews" of defense-filed motions for sentence reductions for "extraordinary and compelling reasons." *McCoy*, 981 F.3d at 286. Plainly, where Congress has intended to limit a district court's discretion in sentence reduction proceedings, it has been explicit. *Cf.* 28 U.S.C. § 994(u) (mandating that for a sentence reduction after a retroactive guideline change the Commission "shall specify in what circumstances and by what amount" sentences may be reduced). The obvious difference between proceedings under § 3582(c)(1)(A) and § 3582(c)(2) in this regard confirms that Congress knew how to use the Commission to cabin the discretion of the district court for certain types of sentence reduction motions (those tied to guideline changes), and envisioned a more expansive role for district courts under § 3582(c)(1)(A).

C. This case is an ideal vehicle to resolve the circuit conflict.

As with Question I, on Question II as well uniform standards must govern the adjudication of § 3582(c)(1)(A) motions. The right to sentencing relief under § 3582(c)(1)(A) cannot be a function of geography.

Notably, the argument made herein in support of the Fourth and Tenth Circuit's approach was specifically pressed by Petitioner both before the district court and the court of appeals below. Although the Eleventh Circuit refused to address Petitioner's argument in that regard given its ruling in *Bryant*, because that argument was pressed below it is properly before the Court in this petition and should be resolved in this case together with Question I.

Factually, this case is also a clean vehicle for resolution of Question II. Notably, unlike some courts, the district court here did not make an alternative ruling indicating

that it would deny Petitioner any sentencing relief even if it had the discretion to do so. It stated—simply and mistakenly—that it was without jurisdiction to grant relief based on a ground inconsistent with the policy statement.

And the equities here are in Petitioner's favor. This is not a case where any individualized factors militated against relief. Petitioner had no criminal history prior to this case. At the original sentencing the court made a point to emphasize that it was imposing the lowest sentence the law allowed. And in the § 3582(c)(1)(A) proceeding, the court expressly commended Petitioner for his rehabilitation. Plainly, there is a real possibility on this record that if the case were remanded with clarification that the court indeed has the discretion to grant relief on the combination of factors identified by Petitioner here, the district court would grant him a significant sentence reduction at the very least to the lowest sentence the law now allows.

The government has argued in other cases that resolution of the circuit conflict on this issue would have limited "practical significance" since the Commission can write a new policy statement that excludes a non-retroactive change in sentencing law as an extraordinary and compelling reason for relief. *See* Briefs of the United States in Opposition in *Jarvis v. United States,* No. 21-568, at 16-22 (Dec. 8, 2021); *Watford v. United States*, No. 21-551, at 2 (Dec. 15, 2021). But the government is wrong. It has misunderstood the scope of the delegation in § 994(t). Congress delegated the Commission the authority to "*describe* what should be considered extraordinary and compelling reasons" for a sentence reduction; it did *not* delegate the authority to "*foreclos*e" any ground other than "rehabilitation alone" as a potential basis for relief.

Given the parties' express disagreement as to the scope of the delegation in § 994(t) here, the Court should resolve that threshold question in this case.[6] And if the Court does so, a grant of certiorari here would have the added benefit of helping to guide the Commission once a quorum is present and it seeks to amend the pre-First Step Act policy statement, so that it does not overstep its delegated authority. Although Congress can certainly change a statute once this Court has definitively determined its meaning, the Commission cannot promulgate a guideline or policy statement that conflicts with this Court's interpretation. *See Neal v. United States*, 516 U.S. 284, 295 (1996) (citations omitted).

CONCLUSION

The petition for writ of certiorari should be granted. Alternatively, if the Court grants certiorari on either or both of the questions herein in another case, the Court should hold Petitioner's case pending that decision.

Respectfully submitted,

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[6] The government asserted in *Jarvis* that "Nobody disputes [] that the Commission has the power [to] resolve this particular issue" by "rul[ing] out the First Step Act's prospective amendment to Section 924(c) as a possible basis for finding "extraordinary and compelling reasons" for a Sentence 3582(c)(1)(A) sentence reduction." BIO, *Jarvis*, at 17-18. But the Petitioner here specifically disputes the Commission's power to do so.