NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

GREGORY NESBITT,

***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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QUESTION PRESENTED FOR REVIEW

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

INTERESTED PARTIES

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

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Gregory Nesbitt,
No. 02-20518-Cr-DMM (Dec. 29, 2020)

United States Court of Appeals (11th Cir.):

United States v. Gregory Nesbitt,
No. 21-10109 (Oct. 25, 2021)

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Gregory Nesbitt respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 21-10109 in that court on October 25, 2021, which affirmed the order of the United States District Court for the Southern District of Florida denying Mr. Nesbitt's motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A).

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit (App. A-1), is unreported but available at 2021 WL 4947105. The district court's order denying Petitioner's 18 U.S.C. § 3582(c)(1)(A) motion for compassionate release (App. A-2) is unreported.

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 OF THE UNITED STATES. The decision of the court of appeals was entered on October 25, 2021. On January 19, 2022, Justice Thomas granted Petitioner's motion to extension of time to and including February 22, 2022.

STATUTORY AND GUIDELINES PROVISIONS INVOLVED

Section 403 of the First Step Act, titled "Clarification of Section 924(c) of Title 18, United States Court," 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.

Section 603 of the First Step Act 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 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".

Title 18, U.S.C. § 3582 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; . . .
> > >
> > > > and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

United States Sentencing Guideline § 1B1.13 provides, in relevant part:

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 conditions 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; . . .

(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 subdivision (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 . . .

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

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

* * *

4. Motion by 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). . . .

STATEMENT OF THE CASE

This petition presents an important question of statutory interpretation which has resulted in a recognized, intractable, nine-to-one circuit split, with the court below standing alone. Moreover, this case presents a perfect vehicle for resolution of this lopsided split. The petition should be granted.

1. In 2002, a jury convicted Petitioner of nine drug, robbery, and firearm charges arising from his planning of a series of home-invasion robberies of persons involved in drug-dealing. Two of the nine charges were for using or carrying a firearm in violation of 18 U.S.C. § 924(c).

2. At the time, § 924(c) imposed mandatory minimum consecutive sentences of five years for the first violation of § 924(c) and twenty years for "second or subsequent" § 924(c) offenses. *See* 18 U.S.C. § 924(c) (1994). The twenty-year consecutive minimum applied to every violation of § 924(c) after the first, even if the defendant – like Petitioner – was a first-time offender charged with multiple § 924(c) violations in the same indictment. *See Deal v. United States*, 508 U.S. 129-130-37 (1993).

3. The district court sentenced Petitioner to a total term of imprisonment of 660 months, or 55 years. Twenty-five of these 55 years arose from the consecutive sentences the district court was required to impose for Petitioner's two § 924(c) convictions: a consecutive 60-month sentence for the first § 924(c) conviction, and a consecutive 240-month sentence for the second. The district

court stated at sentencing that it found the sentence harsh and that it regretted the length of the sentence, but that it was constrained by the mandatory penalties under § 924(c). *See* App. A-1 at 2.

4. Twelve years after Petitioner's convictions became final, Congress passed the First Step Act of 2018. *See* Pub. L. 115-391, 132 Stat. 5194 (Dec. 21, 2018). Section 403 of the Act amended § 924(c) to provide that the minimum consecutive penalty for second or subsequent offenses applies only after a prior conviction had become final. *Id.*, § 403(b), 132 Stat. at 5221-22. As a result of this change, if Petitioner were sentenced today, he would face mandatory minimum five-year consecutive sentences for each of his two § 924(c) violations, for a total consecutive sentence of ten years rather that the twenty-five years the district court imposed. But Congress did not make this First Step Act amendment to § 924(c) retroactively applicable. *See id.*, 132 Stat. at 5222.

5. The First Step Act also significantly expanded access to compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A). As originally enacted, § 3582(c)(1)(A) allowed a district court to reduce a defendant's sentence, "upon motion of the Director of the Bureau of Prisons, . . . after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." § 3582(c)(1)(A)(i). Sentencing Reform Act, § 212(a)(2), 98 Stat. 1998-1999. At the

time it enacted the compassionate release statute, Congress also directed the Sentencing Commission to promulgate "general policy statements regarding . . . the appropriate use of . . . the sentence modification provisions set forth in [section] 3582(c)." 28 U.S.C. § 994(c)(2)(C). In 2006, the Sentencing Commission promulgated a new policy statement – Sentencing Guideline § 1B1.13.

At present, the policy statement lists specific circumstances related to a defendant's age, medical conditions, or family circumstances as "extraordinary and compelling reasons" for a sentence reduction, as well as a catch-all category for other reasons determined by the Director of the Bureau of Prisons (BOP) to be extraordinary and compelling. *Id*. § 1B1.13, cmt. n.1. The policy statement also requires that the district court find that the "defendant is not a danger to the safety of any other person or to the community" before granting a motion for compassionate release. *Id*. § 1B1.13(2). Finally, the policy statement expressly restricts relief to motions filed by the Director of the BOP. *Id*. § 1B1.13, cmt. n.4 ("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).")

6. After the First Step Act, however, § 3582(c)(1)(A) no longer limits relief only to motions filed by the Director of the BOP. Section 603 of the Act amended § 3582(c)(1)(A) to give courts the authority to review compassionate release motions filed by defendants, so long as the defendant exhausted administrative remedies before seeking judicial review. *See* Pub. L. 115-391, § 603, 132 Stat. at 5238-5241.

7. On December 2, 2020, Petitioner filed in the district court a motion for compassionate release pursuant to § 3582(c)(1)(A). He argued that after the First Step Act amendments to § 3582(c)(1)(A), district courts were no longer bound by the policy statements in U.S.S.G. § 1B1.13 when considering motions for compassionate release. App. A-1 at 4. Specifically, he argued that the policy statements in § 1B1.13 expressly applied only to compassionate release motions filed by the Director of the BOP. Therefore, he argued, the district court could consider his risk of serious illness, the harshness of his § 924(c) sentences, and his extensive rehabilitation while in custody to be "extraordinary and compelling reasons" for his release, even though those circumstances fell outside those listed in the policy statement and its application notes. *Id.* at 4-5. Nonetheless, the district court applied the policy statements in § 1B1.13 to find that Petitioner failed to present "extraordinary and compelling" reasons justifying release, and that he was a danger to the community, and denied the motion. App. A-2. Petitioner timely appealed.

8. The Eleventh Circuit affirmed. App. A-1. It noted that in its decision in *United States v. Bryant*, 996 F.3d 1243 (11th Cir. 2021), it held that because "'§ 1B1.13 is the applicable policy statement that governs all motions under Section 3582(c)(1)(A)[,] . . . district courts may not reduce a sentence under Section 3582(c)(1)(A) unless the reduction would be consistent with 1B1.13.'" *Id.* at 6 (quoting *Bryant*, 996 F.3d at 1262). Therefore, the court of appeals reasoned, the district court properly followed *Bryant* when it rejected Petitioner's argument that,

after the First Step Act amendments, district courts considering defendant-filed compassionate release motions were no longer limited by the policy statements in U.S.S.G. § 1B1.13. App. A-1 at 7. Specifically, it held that the district court "did not err in considering whether Nesbitt's release would be consistent with the 'applicable policy statement[]" – that is, § 1B1.13; to the contrary, it was required to do so." *Id.* And, because the district court determined that (1) Petitioner "did not present an 'extraordinary and compelling' reason for his release, as that term is explained in the policy statement," and (2) Petitioner "would be a danger the community," then his release "would not be consistent with § 1B1.13 and he was not eligible for a sentence reduction under § 3582(c)(1)(A)." *Id.* (citing, *inter alia*, *Bryant*, 996 F.3d at 1248).

REASONS FOR GRANTING THE WRIT

I. The circuits are intractably split on the question presented.

To date, nine circuits have held that following enactment of the First Step Act, district courts considering § 3582(c)(1)(A) motions filed by defendants are not bound by the criteria listed by the Sentencing Commission in U.S.S.G. § 1B1.13. *See United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021); *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021) (*per curiam*); *United States v. Shkambi*, 993 F.3d 388, 392-393 (5th Cir. 2021); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021); *United States v. McCoy*, 981 F.3d 271, 281-83 (4th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020); *United States v. Jones*, 980 F.3d 1098, 1108-11 (6th Cir. 2020); *United States v. Brooker*, 976 F.3d 228, 234 (2d Cir. 2020). The Eleventh Circuit, with its contrary holding in *Bryant*, stands alone. *See Bryant*, 996 F.3d at 1262. Indeed, in *Bryant* itself, the Eleventh Circuit expressly acknowledged its lone wolf status. *See id*. at 1259-1261.

This conflict is not only openly acknowledged but intractable. Since the Eleventh Circuit's decision in *Bryant*, both the Third Circuit and the District of Columbia Circuit have joined the majority. *See Andrews*, 12 F.4th at 259; *Long*, 997 F.3d at 355. The Third Circuit deemed the question so straightforward that it addressed it in two sentences, stating that "the text of the policy statement [in U.S.S.G. § 1B1.13] explicitly limits its application to Bureau-initiated motions.

Thus, according to its plain language, the existing policy statement is not applicable—and not binding—for courts considering prisoner-initiated motions." *Id.* The Third Circuit noted that "[i]In reaching this conclusion, we align with nearly every circuit court to consider the issue," except the Eleventh. *See id.*

The D.C. Circuit's discussion was lengthier, but no less unequivocal. *See Long*, 997 F.3d at 355. That court held that the inapplicability of § 1B1.13 is "plain on its face" because, "[b]y its terms, the policy statement applies only to motions for compassionate release filed by the Bureau of Prisons, not by defendants." *Id.* And it expressly disagreed with the reasoning in *Bryant*, faulting the Eleventh Circuit for relying on dictionary definitions of "applicable" while ignoring the express terms of the policy statement. *See id.* at 358 ("But [*Bryant*]'s reliance on dictionary definitions of 'applicable' misses the forest for a tree. The decision ignores all of the other words in Section 1B1.13 that already state in plain and clear terms when the policy statement applies: 'Upon motion of the Director of the Bureau of Prisons[.]'"). The D.C. Circuit further rejected the Eleventh Circuit's conclusion that the policy statement's first words—"Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A)"—were mere "prefatory" language: "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." *Id.*

The two remaining circuits, the First and Eighth, have thus far declined to address the issue. *See United States v. Texeira-Nieves*, 23 F.4th 48, 51 (1st Cir. 2022) (acknowledging split but expressly declining to address it); *United States v. Vangh*, 990 F.3d 1138, 1141 n.3 (8th Cir. 2021) (noting this was the third time it had "sidestep[ed]" the question of whether § 1B1.13 applied to compassionate release motions filed after passage of the First Step Act). But even if they were to join the Eleventh – something that neither has yet indicated it would do – there would nonetheless remain a 9-3 split in the courts of appeal.

This is precisely the type of acknowledged, intractable split in the lower courts that warrants this Court's intervention.

II. The issue is important and recurring.

Although the First Circuit has yet to decide whether the policy statements in § 1B1.13 continue to bind the district courts after the First Step Act, it has noted the importance of the question, stating:

> This issue — at least potentially — could have significant ramifications in other cases. For example, if the current policy statement does not apply, a district court is free (within the usual constraints of statutory construction) to craft its own definition of "extraordinary and compelling reasons." As another example, if the policy statement does not apply, a district court would not need to adhere to the policy statement's requirement that the court may grant compassionate release based on extraordinary and compelling reasons only if "the defendant is not a danger to the safety of any other person or to the community." U.S.S.G. § 1B1.13(1)(A), (2).

Texeira-Nieves, 23 F.4th at 51.

In addition to the substantive importance of the issue recognized by the First Circuit, this split has immense practical implications. Any defendant serving a custodial federal sentence can move for a sentence reduction under the compassionate release provision in § 3582(c)(1)(A). And thousands of defendants are sentenced by district courts in the Eleventh Circuit each year. *See* U.S. Sentencing Commission, *2020 Annual Report and Sourcebook of Federal Sentencing Statistics* tbl. 1 at p.35, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/2020-Annual-Report-and-Sourcebook.pdf (stating that in 2020, 4970 defendants were sentenced by district courts within the Eleventh Circuit). Accordingly, the Eleventh Circuit's holding that the policy statements in § 1B1.13 apply to defendant-filed compassionate release motions affects not only Petitioner, but thousands of his fellow federal prisoners who have been sentenced by district courts within the Eleventh Circuit.

In sharp contrast, district courts in other circuits have granted numerous sentence reductions based in part on the unfairness of lengthy § 924(c) sentences that would be substantially shorter today. *See McCoy*, 981 F.3d at 285 ("As the court observed in *Bryant*, multiple district courts have concluded that the severity of a § 924(c) sentence, combined with the enormous disparity between that sentence and the sentence a defendant would receive today, can constitute an "extraordinary and compelling" reason for relief under § 3582(c)(1)(A)"); *id.* (collecting cases in

addition to those cited in *Bryant*). This is precisely the type of circuit-based disparity of treatment that requires the Court's intervention.

III. The decision below is incorrect.

As nine of her sister circuits have recognized, the Eleventh Circuit's decision is manifestly incorrect. In relying on its previous decision in *Bryant* to hold that the policy statements in U.S.S.G. § 1B1.13 apply to defendant-filed compassionate release motions, the Eleventh Circuit has disregarded both the text of § 1B1.13 and the reasons why Congress amended § 924(c) in the First Step Act.

In *Bryant*, the Eleventh Circuit engaged in a flawed inquiry by first focusing on the dictionary definition of the word "applicable" and then asking the wrong question. *See Bryant*, 996 F.3d at 1254. For example, the court of appeals concluded that, simply because *some* of the "substantive standards" within the policy statement *could* be applied by the district court, the entire policy statement was therefore "applicable." *Id.* at 1252-55. But the salient question is whether the policy statement *itself* is applicable to defendant-filed motions.

As the D.C. Circuit recently explained, "[i]t plainly is not." *Long*, 997 F.3d at 359. The first line of § 1B1.13 states that "[u]pon motion of the Director of the Federal Bureau of Prisons," a court may grant relief. The application notes to § 1B1.13 state that a court can grant relief "*only* upon motion by the Director of the Bureau of Prisons." U.S.S.G. § 1B1.13 app. n.4 (emphasis added). The policy statement does not address defendant-filed motions at all. *See* § 1B1.13. The

Eleventh Circuit's dictionary-based theory as to when the policy statement may be "applicable" cannot be reconciled with the statement's plain text, which states with particularity when it actually *is* "applicable." Only by "tak[ing] an eraser to the words [in the policy statement] that say the opposite" could the Eleventh Circuit in *Bryant* hold that the policy statement applies to defendant-filed motions. *Long*, 997 F.3d at 358.

Bryant sidestepped the plain language of § 1B1.13 by concluding that the language referring to motions by the BOP Director was merely "prefatory" and had no "operative function." But § 1B1.13's language allowing only the BOP Director to file a motion was in fact operative language that implemented Congress's command as it existed at the time the policy statement was issued. "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." *Long*, 997 F.3d at 358.

Finally, by holding § 1B1.13 "applicable" to defendant-filed motions, the Eleventh Circuit in *Bryant* subverted Congressional intent. At the time the Sentencing Commission originally promulgated the policy statement, defendant-filed compassionate release motions did not exist. Rather, although § 3582(c)(1) provided district courts the final decision-making authority over whether a sentence would be reduced, that authority could be invoked only upon motion by the Director of the BOP. Congress later amended § 3582(c) through the

First Step Act to allow for defendant-filed motions to rectify BOP's failure as gatekeeper of the federal compassionate-release program. In light of Congress's intent to divest the BOP Director of full control over the compassionate-release process, it makes little sense to interpret the First Step Act to effectively revoke a district court's authority to determine when a defendant's circumstances warrant relief.

IV. This case presents an ideal vehicle.

This case squarely and cleanly presents the issue that has divided the circuit courts. Petitioner expressly raised the inapplicability of the policy statements in U.S.S.G. § 1B1.13 to defendant-filed compassionate release motions throughout the proceedings below. *See* App. A-1 at 4-5. Both the district court and the court of appeals squarely decided the question in the government's favor. *See* App. A-1 at 5-7; App. A-2.

If Petitioner prevails in this Court, he will likely receive a sentence modification compatible with the First Step Act's amendments to § 924(c), which would reduce his overall sentence by 15 years. At present, Petitioner is scheduled to be released from BOP custody in May of 2049, when he is 81 years old. He would still be a senior citizen – 66 years of age – if his sentence were reduced by 15 years to reflect Congress's current understanding of § 924(c). But he would also be young enough to live out his golden years in freedom, rather than remain incarcerated

pursuant to a mandatory sentence enhancement that Congress has eliminated due to its unnecessary harshness.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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