No. 21-

IN THE

Supreme Court of the United States

RONALD HUNTER,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 18 U.S.C. § 3582(c)(1)(A)(i), a district court may "reduce [a] term of imprisonment" upon "motion of the defendant" if it finds that "extraordinary and compelling reasons warrant such a reduction." Separately, 28 U.S.C. § 994(t) provides that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason."

No other statutory or Sentencing Guideline provision states, specifies, or cabins what constitutes an "extraordinary and compelling" reason. Both this Court and Congress have, further, recognized the "longstanding principle that sentencing courts have broad discretion to consider various kinds of information" when imposing a punishment. *Pepper* v. *United States*, 562 U.S. 476, 488 (2011) (citing 18 U.S.C. § 3661).

Given the foregoing, may a district court consider—among other factors and on an individual, case-by-case basis—nonretroactive changes in sentencing law as a possible "extraordinary and compelling" reason warranting a sentence reduction?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Ronald Hunter. Respondent is the United States. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Eastern District of Michigan, and the United States Court of Appeals for the Sixth Circuit:

United States v. *Hunter*, No. 21-1275 (6th Cir. Aug. 30, 2021)

United States v. *Hunter*, No. 2:92-cr-81058 (E.D. Mich. Mar. 5, 2021)

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Ronald Hunter respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit is published at 12 F.4th 555 and is reproduced in the appendix to this petition at Pet. App. 1a–23a. The order of the district court is unreported but is reproduced at Pet. App. 126a. The transcript of the oral ruling of the district court granting the motion is reproduced at Pet. App. 24a–126a.

JURISDICTION

The Sixth Circuit entered judgment on August 30, 2021, Pet. App. 1a, and denied Ronald Hunter's petition for rehearing en banc on November 23, 2021, Pet. App. 127a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3582(c)(1)(A)(i) provides:

> 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;

28 U.S.C. § 994(t) provides:

> The Commission, in promulgating general policy statements regarding the sentencing modification provisions in § 3582(c)(1)(a), 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.

28 U.S.C. § 2255(a) provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum

> authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

STATEMENT OF THE CASE

A. Introduction

This petition presents a question of significant consequence to federal prisoners: what a district court may consider as an "extraordinary and compelling" reason warranting a sentence modification.

Under the sentence modification statute, colloquially referred to as "compassionate release," 18 U.S.C. § 3582(c)(1)(A), district courts may "modify a term of imprisonment" upon a finding of "extraordinary and compelling reasons [that] warrant such a reduction." For many years, courts had little opportunity to engage with this statute. That is because only the Bureau of Prisons could move for a sentence modification under 18 U.S.C. § 3582(c)(1)(A). But "[t]he BOP [did] not properly manage the compassionate release program." U.S. Dep't of Just., Off. of Inspector Gen., The Fed. Bureau of Prisons' Compassionate Release Program 11 (2013).

The BOP did not, for instance, "have clear standards on when compassionate release [was] warranted." *Id.* at i; see also *id.* at 13 ("BOP regulations and Program Statement provide no criteria for BOP staff to consider" when moving for compassionate release). Consequently, many "eligible candidates for release [were] not being considered." *Id.* at 11. Further, the BOP seldom moved for compassionate release; on average, just 20 releases were granted per year. Mary Price, *The Other Safety Valve: Sentence Reduction Motions Under*

18 U.S.C. § 3582(c)(1)(A), 13 Fed. Sent'g Rep. 188, 191 (2001).

Thus, to "increas[e] the use and transparency of compassionate release," Congress amended 18 U.S.C. § 3582(c)(1)(A) in 2018, through the First Step Act ("FSA"), First Step Act of 2018, Pub. L. No. 115-391 § 603(b), 132 Stat. 5194, 5293. Among other changes, these amendments allowed prisoners to file their own motions for a sentence modification, after first exhausting administrative remedies before the BOP. The FSA also included several other nonretroactive amendments that changed the sentencing framework for certain offenses, such as the use of a firearm in furtherance of a crime of violence, 18 U.S.C. § 924(c).

Consistent with Congress's intent, the number of sentence modification motions rose significantly following passage of the FSA. That increase has, in turn, resulted in a clear and—as reflected here—highly consequential split of authority.

Five circuits, including the Sixth Circuit, impose extratextual constraints on what a district court may consider in an "extraordinary and compelling reasons" analysis. These circuits hold that nonretroactive changes to the law after a defendant's initial sentencing can *never*, for *any* defendant in *any* case, be considered "extraordinary and compelling."

But neither law nor regulation imposes any such restriction. Instead, federal law provides only that (1) "[r]ehabilitation . . . alone shall not be considered an extraordinary and compelling reason" and that (2) the Sentencing Commission may, through a "policy statement[ ]," describe what should be considered extraordinary and compelling." 28 U.S.C. § 994(t). But the Commission has not even convened since the FSA's enactment, much less issued a policy statement.

Four circuits, by contrast, have held that district courts may, on a case-by-case basis, consider various factors and circumstances to be "extraordinary and compelling." Those factors might—in an individual case—include nonretroactive changes to the law. These courts have held that such considerations track both the specific discretion afforded to district courts under 18 U.S.C. § 3582(c) and 28 U.S.C. § 994(t), and the broad discretion that district courts wield in sentencing matters more generally.

In short, without intervention from this Court, incarcerated individuals will receive widely divergent decisions on their sentence modification motions. For someone like Ronald Hunter, geography alone has meant the difference between commencing supervised release and remaining incarcerated for the rest of his life. And although the Sentencing Commission could possibly offer some guidance on this issue, the Commission has operated without a quorum for three years and counting.

The posture of this petition differs from that of every prior petition related to the same or substantially similar issues. Unlike those other cases, the district court here granted Mr. Hunter's motion after exercising its discretion under § 3582(c)(1)(A) to assess the relevant facts of his case. It considered, as part of its analysis, the effect of *United States* v. *Booker*, 543 U.S. 220 (2005), as well as factors that, because of pre-*Booker* law, the original district court was prohibited from considering at the time of Mr. Hunter's initial sentencing. The Sixth Circuit subsequently reversed, cabining district court discretion far beyond what the text of § 3582(c) says. There is therefore no question that Mr. Hunter would obtain relief if this Court were to overturn the Sixth Circuit's decision.

The Sixth Circuit's decision is wrong, the circuit split implicated is intractable, and proper administration of Congress's sentence-modification scheme is critical. This Court should grant review and reverse the decision below.

B. Factual Background

Petitioner Ronald Hunter was sentenced in 1998 for killing Monica Johnson on behalf of a drug enterprise and using a gun in relation to that killing. Mr. Hunter was twenty-three years old at the time. Pet. App. 4a. Mr. Hunter was prosecuted alongside twenty-one other co-defendants and sentenced to life in prison. Under pre-*Booker* law, life imprisonment was the minimum sentence he could have received based on the then-mandatory Guidelines. Mr. Hunter unsuccessfully sought various forms of post-conviction relief. *Id.* at 5a.

C. District Court Proceedings

In 2020, Mr. Hunter filed a motion for a sentence modification under 18 U.S.C. § 3582(c)(1)(A). At the time, Mr. Hunter was fifty-two years old and had spent twenty-one years in prison. *Id.* The district court granted the motion, citing four factors. *Id.* at 96a-100a.

First, when Mr. Hunter was initially sentenced, the Sentencing Guidelines were mandatory. Consequently, Mr. Hunter could not have made any arguments to the sentencing court about his difficult childhood, his relative youth, or disparities between his co-defendants. *United States* v. *Booker*, a case decided seven years after Mr. Hunter's initial sentence, opened that door for defendants by restoring district courts' discretion in sentencing. According to the district court, had Mr. Hunter been able to put forth these arguments at his original sentencing, he would have had "a fighting and meaningful shot at a below guideline

sentence." *Id.* at 104a. The district court buttressed that conclusion by examining Sentencing Commission data demonstrating that many people sentenced under the first-degree murder guideline receive sentences shorter than life. *Id.* at 102a–104a.

Second, Mr. Hunter's age at the time of the crime and his past drug and alcohol abuse—circumstances that he was foreclosed from pointing to at his initial sentencing—counted in Mr. Hunter's favor. According to the district court, as a twenty-three-year-old at the time of his sentencing, Mr. Hunter was still within the range of incomplete brain development according to relevant neurological science. Further, alcohol and drug use at a young age made it "reasonable to regard his brain as still in [a] relative youthful stage." *Id.* at 96a.

Third, there were unjustifiable sentencing disparities between Mr. Hunter and his co-defendants. *Id.* at 98a–99a. Three cooperating co-defendants who had important leadership roles were released between 2003 and 2013, including one who admitted responsibility for three murders and another who was responsible for ordering the killings of eight people. *Id.* at 99a.

Finally, Mr. Hunter's educational efforts, which included teaching himself to read, earning a GED, completing many other courses including drug treatment and the intensive Challenge residential program, and achieving "a substantial period of more than ten years . . . where he had no violations at all" on his disciplinary record, favored release. *Id.* at 99a–100a.

The district court held that these four factors, taken together, constituted "extraordinary and compelling reasons" warranting a sentence modification.

D. Proceedings Before the Sixth Circuit

The Sixth Circuit analyzed the district court's ruling in piecemeal fashion, separately examining each of the four factors identified by the district court. The court of appeals held that each proffered reason was legally infirm and concluded that the district court had committed an abuse of discretion in granting Mr. Hunter's motion.

First, "[t]he district court erred when it considered *Booker*'s nonretroactive change in sentencing law as a factor to support an 'extraordinary and compelling' reason for [Mr.] Hunter's release." Pet. App. 10a. In reaching this holding, the Sixth Circuit pointed to precedent, finality, and overlap with the federal habeas statute, 28 U.S.C. § 2255(a).

On precedent, the court relied on *United States* v. *Jarvis*, 999 F.3d 442, 445–46 (6th Cir. 2021), which "held that [certain] nonretroactive statutory reforms in the First Step Act of 2018—as a matter of law—cannot be used to find 'extraordinary and compelling reasons' for a sentence reduction," Pet. App. 10a. That holding "appl[ied] with equal force here," because there was "no reason to take a different approach" for "nonretroactive precedent" like *Booker*, as "opposed to statutes," like the FSA. *Id.* at 11a.

As to finality, "[s]entence modifications are the exception, not the rule." *Id.* at 7a. And "[t]he vague and amorphous phrase 'extraordinary and compelling reasons' in a narrow sentence reduction statute does not remotely suggest that Congress intended to effect the monumental change of giving district courts the discretion to treat nonretroactive precedent as a basis to alter a final judgment." *Id.* at 13a.

Finally, "there is a more specific statute that takes priority"—the "federal habeas statute." *Id.* at 15a. That statute gives prisoners a right to relief based on

"new rule[s] of . . . law[] made retroactive to cases on collateral review by the Supreme Court." *Id.* (citing 28 U.S.C. § 2255(h) (emphasis omitted)).

On the *second* and *third* factors behind the district court's decision—Mr. Hunter's age and sentencing disparities with his co-defendants—the Sixth Circuit held that these "were impermissible factual considerations because those facts existed at sentencing." *Id.* at 17a

As it explained, 18 U.S.C. § 3582(c)(1)(A) was not an "open-ended invitation" to "relitigate" an individual's 18 U.S.C. § 3553(a) factors, even though those factors were never litigated in Mr. Hunter's case in the first place because of the pre-*Booker* mandatory guidelines. *Id.* at 18a. Rather, in the Sixth Circuit's view, the reweighing of § 3553(a) factors is a distinct part of the analysis, separate from determining the existence of "extraordinary and compelling reasons." Hence, when undertaking an "extraordinary and compelling" analysis, courts may focus only on post-sentencing factual developments. *Id.*

Having disposed of the first, second, and third factors, "[t]he only reason left standing is [Mr.] Hunter's rehabilitation in prison." *Id.* at 22a. "[B]ecause Congress was emphatically clear that rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason," there is "no extraordinary and compelling reason to reduce [Mr.] Hunter's sentence." *Id.* The Sixth Circuit denied rehearing en banc on November 23, 2021. *Id.* at 127a.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION PRESENTED IMPLICATES A WIDE AND SIGNIFICANT CIRCUIT SPLIT.

Nine circuits have ruled on what constitutes "extraordinary and compelling reasons" for a sentence reduction. They sharply disagree on whether additional restrictions exist—beyond rehabilitation of the defendant alone—that limit district court discretion when undertaking an "extraordinary and compelling" analysis.

A. Five Circuits Impose Extratextual Restrictions on the "Extraordinary and Compelling" Analysis.

The Sixth, Seventh, Third, Eighth, and Eleventh Circuits read 18 U.S.C. § 3582(c)(1)(A) narrowly, adopting restrictions not found in the statutory text. Notably, these circuits all categorically prohibit district courts from considering nonretroactive changes to sentencing law in the "extraordinary and compelling" analysis.

Before the case at bar, the Sixth Circuit had held that district courts may not "treat the First Step Act's nonretroactive amendments, whether by themselves or together with other factors, as 'extraordinary and compelling' explanations for a sentencing reduction." *Jarvis*, 999 F.3d at 445.[1] Although Mr. Hunter's case

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[1] There is some dispute over *Jarvis*'s precedential value, specifically about whether it conflicts with *United States* v. *Owens*, 996 F.3d 755 (6th Cir. 2021), a case predating *Jarvis*. The Sixth Circuit has recognized this tension and recently voted to rehear a case presenting this question en banc. *See United States* v. *McCall*, 20 F.4th 1108, 1113 (6th Cir. 2021). In any event, the "question posed in *Hunter*"—whether "non-retroactive judicial decisions 'extraordinary and compelling reasons'"—has been recognized by the Sixth Circuit as "resolv[ing] a question different from that raised in prior cases," including in *Owens* and *McCall*, and any dispute would not impact this Court's review. *United States* v. *McKinnie*, 24 F.4th 583, 589 (6th Cir. 2022).

involved nonretroactive precedent—*i.e.*, *Booker*—rather than nonretroactive statutory language—*i.e.*, the FSA—that distinction was immaterial for the *Hunter* panel. Comparing how someone would have been sentenced in a post-*Booker* world against their pre-*Booker*, mandatory Guidelines sentence was, according to the Sixth Circuit, tantamount to "giving retroactive effect to *Booker*" and thus impermissible. Pet. App. 12a.

Similarly, while the Seventh Circuit has on the one hand acknowledged that "district courts have broad discretion to determine what . . . may constitute 'extraordinary and compelling reasons' warranting a sentence reduction," it has, on the other hand, held that this discretion "cannot be used to effect a sentencing reduction at odds with Congress's express determination" that changes in relevant sentencing law "apply only prospectively." *United States* v. *Thacker*, 4 F.4th 569, 573–74 (7th Cir. 2021).

The Third Circuit has prohibited consideration of changes in law as well, holding both (1) that "[t]he duration of a lawfully imposed sentence," no matter if the law has since changed, "does not create an extraordinary or compelling circumstance" and (2) "nonretroactive changes to the § 924(c) mandatory minimums [enacted by the FSA] also cannot be a basis for compassionate release." *United States* v. *Andrews*, 12 F.4th 255, 260–61 (3d Cir. 2021); *accord id.* at 261 ("We join the Sixth and Seventh Circuits in reaching this conclusion.").

The Eighth Circuit, too, recently "ruled that a nonretroactive change in law cannot be an extraordinary and compelling circumstance." *United States* v. *Crandall*, 25 F.4th 582, 585 (8th Cir. 2022).

For somewhat different reasons, the Eleventh Circuit has also concluded that changes in the law are not an extraordinary and compelling reason for sentence modification. *United States* v. *Bryant*, 996 F.3d 1243, 1247 (11th Cir. 2021).

As noted above, along with barring rehabilitation alone as an "extraordinary and compelling reason," 28 U.S.C. § 994(t) also gives the Sentencing Commission authority to "describe what should be considered extraordinary and compelling reasons for sentence reduction" by "promulgating general policy statements."

Currently, the relevant policy statement is U.S.S.G. § 1B1.13. Application Note 1 to that Guideline provision provides illustrations of what may fall within the category of "extraordinary and compelling reasons." Those reasons include, for example, a defendant's age, medical condition, and family circumstances. U.S.S.G. § 1B1.13 cmt. n.1. The Application Note also provides a "catch-all" category that allows the Bureau of Prisons to find that there "exists in the defendant's case an extraordinary and compelling reason" other than those above. *United States* v. *McCoy*, 981 F.3d 271, 283 (4th Cir. 2020) (quoting U.S.S.G. § 1B1.13 cmt. n.1(D)). But § 1B1.13 was last amended in 2018, before the FSA's passage—and the text of § 1B1.13 itself makes clear that it applies to "motion[s] of the Director of the Bureau of Prisons." U.S.S.G. § 1B1.13. Hence, nearly every circuit has determined that U.S.S.G. § 1B1.13 is "inapplicable to prisoner-initiated motions." *United States* v. *Ruvalcaba*, 26 F.4th 14, 20 (1st Cir. 2022); see *id.* at 21 (collecting cases from D.C., Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits).

The Eleventh Circuit is the sole circuit to hold that U.S.S.G. § 1B1.13 "is still an applicable policy statement for a Section 3582(c)(1)(A) motion, no matter who

files it." *Bryant*, 996 F.3d at 1247. The Eleventh Circuit prohibits considering nonretroactive changes in law not necessarily because it believes doing so would give those changes retroactive effect, but "[b]ecause post-sentencing developments in law are not an extraordinary and compelling reason under Section 1B1.13." *United States* v. *Willingham*, 2021 WL 4130022, at *1 (11th Cir. Sept. 10, 2021) (per curiam).

B. Four Circuits Allow District Courts to Wield Broad Discretion, Including Weighing Changes to the Law.

The Fourth, First, Fifth, and Tenth Circuits, as well as district courts within the Ninth Circuit, have adopted a broad reading of 18 U.S.C. § 3582(c)(1)(A). They have held that post-sentence, nonretroactive changes in sentencing law are a permissible consideration when determining whether there are "extraordinary and compelling reasons" for a sentence reduction.

The Fourth Circuit has affirmed lower court decisions which consider "the extent of the disparity between the defendants' sentences and those provided for under the First Step Act." *McCoy*, 981 F.3d at 286. In so doing, it rejected the argument that "district courts impermissibly gave [the FSA] provision retroactive effect." *Id.* Rather, the court pointed to the "difference between automatic vacatur and resentencing"—which a federal habeas proceeding might merit—versus "allowing for the provision of individual relief in the most grievous cases"—which falls under the purview of the sentence modification statute. *Id.* at 286–87.

Contrary to the Sixth Circuit, the Fourth Circuit emphasized that nonretroactive changes in the law constitute just one part of the "full consideration of the

defendants' individual circumstances." *Id.* Other factors might include "the defendants' relative youth . . . at the time of their offenses" and "the substantial sentences the defendants had served at the time of their motions"—factors that the Sixth Circuit explicitly rejected in *Hunter*. *Id.* In other words, had Mr. Hunter's case been reviewed in the Fourth Circuit, rather than the Sixth Circuit, he would likely be on supervised release, rather than in federal prison.

The First Circuit is in accord. In *United States* v. *Ruvalcaba*, it "concluded that there is enough play in the joints for a district court to consider the FSA's non-retroactive changes in sentencing law (in combination with other factors) and find an extraordinary and compelling reason in a particular case." 26 F.4th 14, 24 (1st Cir. 2022). "Nowhere has Congress expressly prohibited district courts from considering non-retroactive changes in sentencing law." *Id.* at 25. Thus, there is "no textual support for concluding that such changes in the law may never constitute part of a basis for an extraordinary and compelling reason." *Id.* at 26.

The Fifth Circuit has similarly allowed district courts to exercise their discretion, on a case-by-case basis, to consider nonretroactive changes in the law. *United States* v. *Cooper*, 996 F.3d 283, 289 (5th Cir. 2021) ("We leave for the district court to consider . . . whether the nonretroactive sentencing changes to his § 924(c) convictions, either alone or in conjunction with any other applicable considerations, constitute extraordinary and compelling reasons for a reduction in sentence."); see also *United States* v. *Cabrera*, No. 09-317, 2022 WL 93614, at *5 n.2 (E.D. La. Jan. 10, 2022) ("[C]ourts can consider 'nonretroactive sentencing changes.'" (quoting *Cooper*, 996 F.3d at 289)).

The Tenth Circuit has reached this same conclusion: nonretroactive changes in sentencing law are legitimate considerations in the "extraordinary and compelling" inquiry. *United States* v. *McGee*, 992 F.3d 1035, 1047 (10th Cir. 2021) ("We find the Fourth Circuit's analysis [in *McCoy*] persuasive."); *United States* v. *Maumau*, 993 F.3d 821, 837 (10th Cir. 2021) (no abuse of discretion to "conclu[de] that a combination of factors warranted relief, including . . . the incredible length of his stacked mandatory sentences under § 924(c); the First Step Act's [nonretroactive] elimination of sentence-stacking under § 924(c); and the fact that [defendant], if sentenced today, . . . would not be subject to such a long term of imprisonment." (internal quotation marks omitted)).

Finally, although the Ninth Circuit has yet to weigh in on this issue, district courts within the Ninth Circuit have taken the more expansive approach towards 18 U.S.C. § 3582(c)(1)(A). See *United States* v. *Jones*, 482 F. Supp. 3d 969, 981 (N.D. Cal. 2020) ("The Court therefore concludes that FSA § 403's lack of blanket retroactivity is not a bar to relief under § 3582(c)(1) on a case-by-case basis."); *United States* v. *Smith*, 538 F. Supp. 3d 990, 1000 (E.D. Cal. 2021) ("[T]he court agrees with Smith that changes to § 924(c) can be one of any number of 'extraordinary and compelling reasons' to grant a motion for compassionate release, if a defendant's individual characteristics support that finding.").

In sum, nine circuits have weighed in definitively on the issue. Taken together, these circuits account for

most individuals in federal custody—around 85%.[2] If the Ninth Circuit is included, this figure rises to 97%.

II. THE LOWER COURT'S DECISION IS WRONG.

The Sixth Circuit's reading of 18 U.S.C § 3582(c)(1)(A) is flawed in several fundamental ways. Its holding (1) contravenes the statutory text, (2) conflicts with the broad discretion afforded sentencing courts, (3) miscasts the framework for sentence modifications, (4) improperly conflates sentence modifications with federal postconviction relief, and (5) perverts the rule of finality.

First, if "[s]tatutory interpretation, as we always say, begins with the text," *Ross* v. *Blake*, 578 U.S. 632, 638 (2016), then the Sixth Circuit's reasoning foundered at step one.

Central to its decision here were two holdings: (1) that "non-retroactive changes in the law cannot be relied upon as 'extraordinary and compelling' explanations for a sentence reduction," and (2) that "facts [that] existed at sentencing" are "impermissible . . . considerations," Pet App. 17a, in an "extraordinary and compelling" analysis.

But neither of these holdings can be squared with the statutory text. Indeed, there is "*no* textual support for concluding that [nonretroactive] changes in the law may *never* constitute part of a basis for an extraordinary and compelling reason." *Ruvalcaba*, 26 F.4th at 26 (emphases added). The sole limitation on a district court's discretion is that "rehabilitation [ ] *alone* shall not be considered an extraordinary and compelling

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[2] *See* Fed. Bureau of Prisons, Population Statistics, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited Apr. 11, 2022).

reason." 28 U.S.C. § 994(t) (emphasis added). There is nothing from the text suggesting that Congress intended to include any additional unwritten categorical exclusions, especially "in light of [the] specific statutory exclusion regarding rehabilitation." *Ruvalcaba*, 26 F.4th at 26.

Put another way, the twin limitations imposed by the Sixth Circuit—categorical nonretroactivity and facts known at sentencing—are extratextual constraints, unmoored from the language of the statute itself. Such judicial blue-penciling is plainly improper. See *Nasrallah* v. *Barr*, 140 S. Ct. 1683, 1692 (2020) ("[I]t is not the proper role of the courts to rewrite the laws passed by Congress and signed by the President."); *Wis. Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2074 (2018) ("Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences.").

Second, "[t]his Court has long recognized that sentencing judges 'exercise a wide discretion' in the types of evidence they may consider when imposing [a] sentence." *Pepper* v. *United States*, 562 U.S. 476, 480 (2011) (citing *Williams* v. *People of State of New York*, 337 U.S. 241, 246 (1949)). That is because, as the Chief Judge of the Sixth Circuit has recognized, "trial judges sentence individuals face to face for a living." *United States* v. *Poynter*, 495 F.3d 349, 351 (6th Cir. 2007). Appellate courts, on the other hand, "review transcripts for a living. No one sentences transcripts." *Id.* "All of this suggests that we should acknowledge the trial courts' comparative advantages—its ring-side perspective on the sentencing hearing and its experience over time in sentencing other individuals—and give considerable deference to their sentencing decisions." *Id.* at 351–52.

Nothing in the FSA suggests that Congress sought to upset this balance. To the contrary, the "First Step Act *freed* district courts to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release." *United States* v. *Brooker*, 976 F.3d 228, 237 (2d Cir. 2020) (emphasis added). Considering prospective changes in law "fits seamlessly with the history and purpose of the compassionate-release statute." *Ruvalcaba*, 26 F.4th at 26. By reversing the district court—the only court that interacted with Mr. Hunter, the Sixth Circuit went against this conventional and well-established norm.

Third, the Sixth Circuit's decision fundamentally misunderstands the case-specific, individualized review required by 18 U.S.C. § 3582(c)(1)(A). In the Sixth Circuit's view, the decision is binary. Either a district court must *always* consider the effect of nonretroactive precedent, or it must *never* consider said impact. See Pet. App. 12a ("[C]ourts cannot use that statute to circumvent binding precedent declaring the non-retroactive effect of new rules of criminal procedure.").

Such an understanding overlooks another possibility: That, in *some* cases and for *some* individuals, considering the effect of nonretroactive changes in the law may be warranted. And when is it warranted? According to four circuits—and consistent with the text of 18 U.S.C. § 3582(c)(1)(A)—when the effect is "extraordinary and compelling." *McCoy*, 981 F.3d at 286–87 (citing cases); see also, *e.g.*, *Maumau*, 993 F.3d at 821; *Ruvalcaba*, 26 F.4th at 26 (§ 3582(c)(1)(A) must "serve as a safety valve" and "encompass an individualized review of a defendant's circumstances and permit a sentence reduction . . . based on any combination of factors (including unanticipated post-sentencing developments in the law)").

Such individualized review tracks not only the aims of the FSA, but also federal legislation more generally. The Sentencing Reform Act, for instance, was enacted specifically to eliminate "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). The Sixth Circuit's reading, though, creates new disparities between sentences for defendants who happened to be sentenced under an unconstitutional scheme and defendants sentenced afterwards.

Fourth, and relatedly, the sentence modification statute, 18 U.S.C. § 3582(c)(1)(A), and the federal habeas statute, 28 U.S.C. § 2255(a), are not the same. The Sixth Circuit's attempt to treat them as such lacks merit.

Section 2255(a) applies when an incarcerated person is "claiming the right to be released" because of specific, enumerated violations. It does not provide relief outside of those listed violations, even if other circumstances are extraordinary and compelling. If a listed violation is found, the court has no discretion: it "*shall* vacate and set the judgment aside." 28 U.S.C. § 2255(b) (emphasis added).

In contrast, a motion for modification under 18 U.S.C. § 3582(c)(1)(A)(i) does not claim a right of any kind. It is not necessarily a request for immediate release or resentencing. Unlike § 2255, when a court grants a § 3582(c)(1)(A)(i) motion, a valid sentence may be modified. But because relief under § 3582(c)(1)(A)(i) is discretionary, there is "no inconsistency with the habeas statute or rules," *Gonzalez* v. *Crosby*, 545 U.S. 524, 533 (2005), as it does not seek "core" habeas corpus relief, *Wilkinson* v. *Dotson*, 544 U.S. 74, 81 (2005); see also *McCoy*, 981 F.3d at 287 ("There is a significant difference between automatic

vacatur and resentencing of an entire class of sentences—with its avalanche of applications and inevitable resentencings—and allowing for the provision of individual relief in the most grievous cases." (internal quotation marks omitted)).

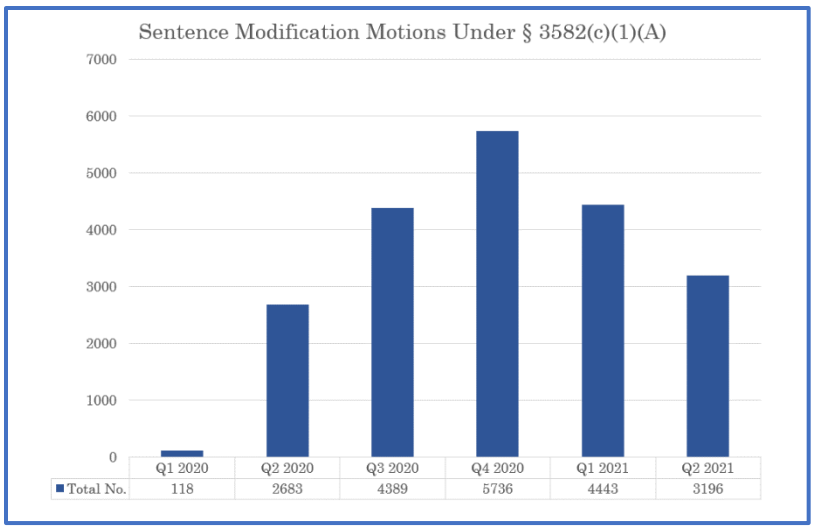
Finally, the Sixth Circuit's reliance on the rule of finality is misplaced. The very purpose of § 3582(c)(1)(A) is to create an exception to this general rule. This blind adherence to both the rule of finality and mandatory Guidelines substitutes Congressional wisdom with judicial preference.

III. THE COURT SHOULD GRANT REVIEW.

A. The Issues Presented Are Recurring and Important.

From January 2020 to June 2021, more than 20,000 sentence modification motions were filed. U.S. Sent'g Comm'n, U.S. Sent'g Comm'n Compassionate Release Data Report 4 (September 2021). More than 1,000 of

these motions were from individuals sentenced in 2004 or earlier—*i.e.*, pre-*Booker*. *Id.*



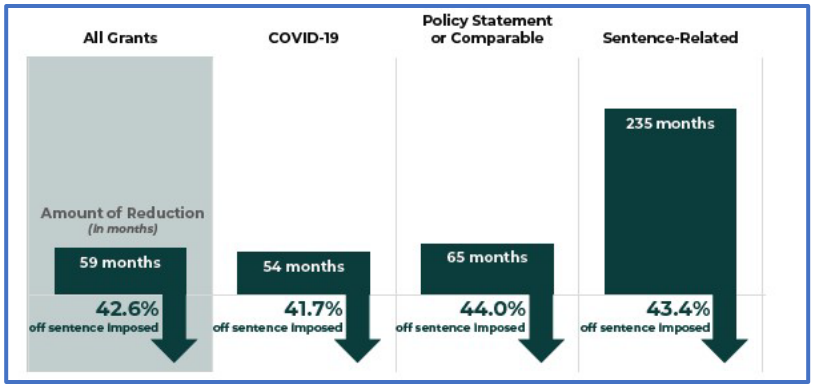
Although the number of modification motions peaked at the beginning of the COVID-19 pandemic, thousands of motions continue to be filed each month. That dwarfs the handful of motions filed before the FSA.

Thus, many applicants are or will be in the same shoes as Mr. Hunter: Hoping to marshal arguments based on nonretroactive changes in the law, including changes like *Booker*. If these applicants have the misfortune of being in the Third, Sixth, Seventh, Eighth, or Eleventh Circuits, their arguments are categorically dismissed. That summary dismissal can mean the difference between the possibility of release and continued, prolonged imprisonment.

Indeed, sentence-related reasons, which "most often" concern nonretroactive changes in the law, constitute a relatively low percentage of sentence modification denials and grants (1.6% and 3.2% respectively). But

relief, when granted, is almost four times higher than that seen for any other basis, with almost twenty years of reduction. U.S. Sent'g Comm'n, Compassionate Release: The Impact of the First Step Act and COVID-19 Pandemic 5, 11, 39, 44, 50 (March 2022) (for fiscal year 2020, the average reduction was "nearly five years (59 months)" but relief for "a sentence-related reason received an average reduction of 235 months, nearly four times longer than the reductions for Offenders Granted Relief overall").

The chart below, excerpted from the 2022 Sentencing Commission report on compassionate release, illustrates this difference.



Id. at 38.

B. This Split Will Not Resolve Absent Intervention From the Court.

The Court should not sit on the sidelines, hoping that this split will resolve on its own. This is not an instance where there is a single outlier circuit. Rather, the nine circuits that have weighed in on the issue are split five-to-four. Considering district courts in the Ninth Circuit, there is an even five-to-five split.

Although it is typically "the responsibility of the Sentencing Commission . . . to ensure fair and uniform application of the Guidelines," *Guerrant* v. *United States*, 142 S. Ct. 640, 640–41 (2022) (statement of Sotomayor, J.), and the Commission could, in theory, provide guidance here, several obstacles stand in its way.

First, there is no realistic possibility that the Commission will weigh in anytime soon. The Commission has lacked a quorum since 2019 and today consists of a single member whose term expired in October of last year. Further, its most recent guidance on "extraordinary and compelling reasons" predates the FSA. As a result, the "overwhelming majority" of circuits treat that guidance "inapplicable" to the sort of defendant-filed motions at issue. *Ruvalcaba*, 26 F.4th at 21; but see *Bryant*, 996 F.3d at 1247.

Second, the Sentencing Commission's statutory mandate is to "'describe' (and not define) what should be considered an 'extraordinary and compelling' reason." *Ruvalcaba*, 26 F.4th at 25 (quoting § 994(t)). It is unclear whether the Commission's descriptive role could extend so far as to overrule federal circuit precedent on a matter of statutory interpretation. See, *e.g.*, *Barnhart* v. *Sigmon Coal Co., Inc.*, 534 U.S. 438, 461 (2002) ("Our role is to interpret the language of the statute enacted by Congress."); *Doe* v. *Dep't of Veterans Affs.*, 519 F.3d 456, 461 (8th Cir. 2008) ("Our role is to interpret and apply statutes as written."). In other words, regardless of the Commission's guidance, lower courts might insist that they are directly interpreting the statutory text, rendering any Commission guidance hollow. Cf. Pet App. 8a, 12a–17a.

Third, even if the Sentencing Commission were to update its "description," and even if lower courts agreed to follow this updated guidance, that would not necessarily settle the matter. The Commission could

clarify, for example, that Application Note 1 of U.S.S.G. § 1B1.13 applies to prisoner-filed motions too. But that would still leave unanswered whether Application Note 1 presents an exhaustive list of permissible considerations. Compare *Maumau*, 993 F.3d at 834 ("[W]e conclude that Congress did not, by way of 994(t), intend for the Sentencing Commission to *exclusively* define the phrase 'extraordinary and compelling reasons.'" (emphasis added)), with *Bryant*, 996 F.3d at 1248 ("[Guideline 1B1.13] Application Note 1(D) does not grant discretion to courts to develop 'other reasons' that might justify a reduction in a defendant's sentence.").

The time has come for this Court to clarify the meaning, ambit, and scope of "extraordinary and compelling reasons" set forth in § 3582(c)(1)(A).

C. This Case is an Ideal Vehicle for Review.

Timely resolution of this division in authority is crucial, both for Mr. Hunter and for the many others who are similarly situated. This case is an ideal vehicle to resolve the split.

The issues surrounding nonretroactivity and facts known at sentencing have been preserved and addressed in all courts below. Moreover, the district court here *granted* Mr. Hunter's § 3582(c)(1)(A) motion. Consequently, unlike prior certiorari petitions,[3] there

[3] *See United States* v. *Jarvis*, 999 F.3d 442 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 760 (2022) (affirming denial of defendant-filed § 3582(c)(1)(A) motion); *United States* v. *Watford*, No. 21-1361, 2021 WL 3856295 (7th Cir. Aug. 2, 2021), *cert. denied*, 142 S. Ct. 760 (2022) (same); *United States* v. *Sutton*, 854 F. App'x 59 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 903 (2022); *United States* v. *Corona*, 858 F. App'x 897 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 864 (2022) (same); *United States* v. *Tingle*, No. 20-3401, 2021 WL 4953733 (7th Cir. July 22, 2021), *cert. denied*, 142 S. Ct. 1132

is no guesswork needed as to Mr. Hunter's likelihood of success on remand.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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(2022) (same); *United States* v. *Tomes*, 990 F.3d 500 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 780 (2022) (same).