No. _____

In the Supreme Court of the United States

ROSS THACKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court may consider the 2018 amendment to the sentences mandated by 18 U.S.C. § 924(c) in determining whether a defendant has shown "extraordinary and compelling reasons" warranting a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i).

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

United States v. Thacker, No. 20-2943 (7th Cir.) (opinion affirming the judgment below and denying motion for sentence reduction issued July 15, 2021).

United States v. Thacker, No. 2:03-cr-20004-MMM (C.D. Ill.) (order denying motion for compassionate release issued October 8, 2020).

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JURISDICTION

The decision of the court of appeals was entered on July 15, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 403 of the First Step Act, 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.

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"

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.

18 U.S.C. § 3553(a) states, in relevant part:

> (a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> > (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> >
> > (2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

> (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; . . .
>
> (5) any pertinent policy statement—
>
> (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
>
> (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

INTRODUCTION

This case squarely presents an important issue of statutory interpretation that has deeply divided the federal courts of appeals: whether a district court

may consider the First Step Act's amendment to 18 U.S.C. § 924(c), which dramatically reduced the mandatory consecutive sentences for "second or successive convictions" under that law in virtually all cases, in determining whether a sentence should be reduced under 18 U.S.C. § 3582(c)(1)(A)(i).

Three courts of appeals, including the Seventh Circuit, have answered that question in the negative. These courts have held that because the amendment to Section 924(c) was not made categorically retroactive, it cannot be considered, either standing alone or in combination with other factors, in determining whether "extraordinary and compelling reasons" warrant a sentence reduction under Section 3582(c)(1)(A)(i). Two courts of appeals have reached the opposite conclusion, correctly holding that the plain language of Section 3582(c)(1)(A)(i) permits district courts to consider the First Step Act's seismic changes to Section 924(c) when determining whether such reasons are present. Three courts of appeals have acknowledged the split of authority on this question.

The question presented concerns two important provisions of the First Step Act. The first is Section 403, which effectively reversed this Court's 1993 interpretation of 18 U.S.C. § 924(c) that led to the imposition of draconian, enhanced mandatory sentences (like the one in this case) for "second or successive" Section 924(c) convictions when the defendant had no prior conviction under that provision. The amendment put an end to the absurdly long sentences resulting from a prosecutorial practice known as "§ 924(c) stacking," which, according to three Sentencing Commission reports over a span of fourteen years, had been invoked by prosecutors for decades

in a manner that discriminated against Black men. The amendment, titled a "Clarification of Section 924(c)," made clear that the law's dramatically enhanced mandatory and consecutive sentences (in Petitioner's case, a minimum of 25 years for his second Section 924(c) conviction) would henceforth be *recidivism-based* enhancements, mandated only when Section 924(c) convictions are obtained after a prior conviction under that statute has become final. Finally, the amendment was made retroactive, but only partially so: Congress directed that it be applicable to crimes committed before the First Step Act was enacted, but only if those defendants had not yet been sentenced.

The second is Section 603(b), which amended 18 U.S.C. § 3582(c)(1)(A), the sentence-reduction law that has become known as the compassionate release statute. The amendment removed the Bureau of Prisons (the "BOP") as the gatekeeper for such motions, and empowered defendants to make them directly, because the BOP had too infrequently opened the gate, improperly curtailing the sentence reduction authority that Congress gave district courts. *See, e.g.*, DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM 11 (2013) ("The BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered.").[1] The title of Section 603(b) explained its purpose: it was aimed at "Increasing the Use and Transparency of Compas-

[1] DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN, THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM, (2013), https://oig.justice.gov/reports/2013/e1306.pdf.

sionate Release". *See* 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Cardin) ("[T]his legislation includes several positive reforms from the House-passed FIRST STEP Act. . . . The bill expands compassionate release under the Second Chance Act and expedites compassionate release applications.").

As relevant here, Section 3582(c)(1)(A)(i) authorizes a sentence reduction when a district court, after considering the factors set forth in 18 U.S.C. § 3553(a), finds that "extraordinary and compelling reasons warrant such" relief and that "a reduction is consistent with applicable policy statements issued by the Sentencing Commission." This latter requirement has its roots in the Sentencing Reform Act of 1984, which directed the Sentencing Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction." 28 U.S.C. § 994(t). Critically, in that same statute, Congress demonstrated its ability to place particular factors out of bounds. Specifically, it noted that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." *Id.* Nothing in Section 3582 itself, the First Step Act, or any other statute otherwise limits the factors a district court may consider in determining whether extraordinary and compelling reasons warrant a sentence reduction.

In recent months, however, the Third, Sixth, and Seventh Circuits have grafted onto Section 3582(c)(1)(A)(i) just such a limitation; they have held that district courts are prohibited from considering the 2018 amendment to Section 924(c) in deciding whether to reduce the draconian sentences produced by stacking. Their rationale: because Congress chose not to make the amendment to Sec-

tion 924(c) categorically retroactive for *all* of the more than 2,500 inmates serving stacked Section 924(c) sentences, its dramatic revision to that sentencing regime cannot be considered in *any* such case, even on a compassionate release motion. Pet. App. 6a.–8a.

Not only does this aggressive, judicially created amendment to Section 3582(c)(1)(A)(i) find no support in the text of any relevant statute, but also it goes far beyond Section 994(t)'s limitation on considering rehabilitation *alone*. These three courts of appeals have not merely held that the amended Section 924(c) sentencing regime cannot, standing alone, warrant a reduction (as is the case for rehabilitation), they have directed that it cannot be considered *at all*, even in combination with other relevant factors on a case-by-case basis. Pet. App. 13a. The result is perverse. In considering whether to reduce sentences that often equate to life without parole, district judges in those circuits must ignore that fact that both Congress and President Trump deemed stacked Section 924(c) sentences so obviously excessive that they acted to make sure no one in the same circumstances would ever again be subjected to them. It is difficult to conjure a factor more relevant to determining whether an indefensible mandatory sentence should be reduced than the fact that it is decades (sometimes centuries) longer than the mandatory sentence that would be applicable today, especially when the harshness of that repudiated regime was visited upon defendants in a racially discriminatory fashion. That is precisely the absurdity that the Fourth and Tenth Circuits have pointed out in correctly holding that, when deciding whether extraordinary and compelling reasons warrant a sen-

tence reduction, a district court may consider the amendment to Section 924(c).

This case offers an ideal vehicle to resolve the circuit split on this issue. Both the district court and the Seventh Circuit considered and addressed the issue, and it is cleanly presented here. There are no threshold issues that would preclude this Court from reaching the question presented, which was the only basis for the Seventh Circuit's affirmance. Indeed, the Seventh Circuit expressly held that Section 403 could never constitute an extraordinary and compelling reason for purposes of compassionate release. *See* Pet. App. 10a, 13a. Finally, timely resolution of the conflict is particularly important because similar sentence reduction motions are currently being filed in substantial numbers around the country. This Court should grant certiorari and reverse the decision below.

STATEMENT

1. In 1984, Congress amended 18 U.S.C. § 924(c) as part of the Comprehensive Crime Control Act. In relevant part, it revised Section 924(c) such that "[i]n the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for ten years." Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005(a), 98 Stat. 2138-2139. In 1988, Congress amended Section 924(c) yet again by replacing the 10-year sentence for a "second or subsequent conviction" with a 20-year sentence. Pub.L. No. 100-690, § 6460, 102 Stat. 4373 (1988).

In 1993, this Court considered whether a defendant's second through sixth convictions under Sec-

tion 924(c), all obtained in the same proceeding as his first, constituted "second or subsequent conviction[s]" within the meaning of that provision. *Deal v. United States*, 508 U.S. 129 (1993). This Court answered the question in the affirmative. Five years later, Congress increased the mandatory minimum penalty for second or subsequent convictions under Section 924(c) from 20 to 25 years. Pub. L. No. 105–386, 112 Stat. 3469 (1998).

In the years that followed *Deal*, the practice of § 924(c) stacking attracted significant criticism. The Judicial Conference of the United States urged Congress on multiple occasions to amend the draconian penalties it produced.[2] On one such occasion, the Chair of the Criminal Law Committee described Section 924(c) as one of the "most egregious mandatory minimum provisions that produce the unfairest, harshest, and most irrational results in the cases sentenced under their provisions."[3]

The Sentencing Commission also has repeatedly reported that the enhanced sentences for "second or successive" convictions under Section 924(c) were disproportionately invoked by prosecutors against

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[2] U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM ("MANDATORY MINIMUM REPORT") 360–361, n.904 (2011), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_12.pdf.

[3] *Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834, and H.R. 1466 Before the Subcomm. on Crime, Terrorism and Homeland Security of H. Comm. on the Judiciary*, 111th Cong. 60–61 (2009) (statement of Chief Judge Julie E. Carnes on behalf of the Judicial Conference of the United States).

Black defendants, and went so far on one of those occasions as to call upon Congress to "eliminate the 'stacking' requirement and amend 18 U.S.C. § 924(c) to give the sentencing court discretion to impose sentences for multiple violations of section 924(c) concurrently with each other." *See* MANDATORY MINIMUM REPORT at 368; *see also* U.S. SENT'G COMM'N., FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 90, 113 (2004) ("If a sentencing rule has a disproportionate impact on a particular demographic group, however unintentional, it raises special concerns about whether the rule is a necessary and effective means to achieve the purposes of sentencing."); U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (2018) ("Black offenders were convicted of a firearms offense carrying a mandatory minimum more often than any other racial group. . . . The impact on Black offenders was even more pronounced for offenders convicted either of multiple counts under section 924(c) or offenses carrying a mandatory minimum penalty under the Armed Career Criminal Act.").

Finally, in 2018, the First Step Act put an end to *Deal*'s interpretation of the law. Section 403, titled "Clarification of Section 924(c)," re-wrote that provision so that the enhanced mandatory sentences are mandated only by a Section 924(c) conviction that occurs after a prior such conviction has become final. The amendment was made retroactive, but only partially so: Congress directed that the new regime was applicable to convictions under Section 924(c) based

on conduct committed before the date of enactment, but only if the sentence on such a conviction had not yet been imposed.

2. In the Comprehensive Crime Control Act of 1984, Congress abolished federal parole and created a "completely restructured guidelines sentencing system." S. Rep. No. 225, 98th Cong., 1st Sess. 52, 53 n.196 (1983). Having eliminated parole as a "second look" at lengthy sentences, Congress recognized the need for an alternative:

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which *other extraordinary and compelling circumstances justify a reduction of an unusually long sentence*, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment.

Id. at 55–56 (emphasis added). Put differently, the statute replaced the Parole Commission's opaque review of every federal sentence with a much narrower judicial review of cases presenting "extraordinary and compelling reasons" for relief from unusually long prison terms. By lodging that authority in federal district courts, this change kept "the sentencing power in the judiciary[,] where it belongs." *Id.* at 52, 53 n.196, 121.

But the law also established a gatekeeper—the authority could be exercised only upon a motion by

the Director of the BOP. Unsurprisingly, the BOP too rarely exercised this power, leaving the sentence reduction authority visited upon judges by Congress dramatically underutilized.[4] In response, Congress amended Section 3582(c)(1)(A) in Section 603 of the First Step Act. Under the amended statute, defendants are permitted to present compassionate release motions to the sentencing court on their own if the BOP declines to make a motion on their behalf within 30 days of being asked to do so. 18 U.S.C. § 3582(c)(1)(A).

3. In January 2002, Petitioner and Semaji Warren committed three robberies that were "notable for the small amounts each one yielded." *United States v. Thacker*, 206 F. App'x 580, 581 (7th Cir. 2006). No guns were discharged, and only about $1,000 in cash and cigarettes was stolen. *Id.* Petitioner was initially charged in connection with all three robberies in state court, where he pleaded guilty to one of the robberies and was sentenced to six years imprisonment. *Id*. at 582.

In April 2003, a superseding indictment was filed in the Central District of Illinois charging Petitioner with two counts of interference with commerce by threats of violence under 18 U.S.C. §§ 1951 and 1952, and two counts of carrying a firearm in connection with a crime of violence under 18 U.S.C. § 924(c). *See* Pet. App. 16a; *see also* Brief and Required Short Appendix of Defendant-Appellant, Ross

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[4] *See, e.g.*, DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM 11 (2013) ("The BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered."), https://oig.justice.gov/reports/2013/e1306.pdf.

Thacker ¶ 1, *United States v. Thacker*, Case No. 20-2943 (7th Cir. Jan.11, 2021), ECF No. 14.

At trial, Petitioner was convicted of one count of interference with commerce and one count of carrying a firearm in connection with a crime of violence arising out of one robbery, and a mistrial was declared on the same charges arising out of the other robbery. Pet. App. 15a.–16a. Petitioner was retried, and found guilty of the remaining charges. Pet. App. 16a. The district court sentenced Petitioner to a total of 400 months — more than 33 years — imprisonment. Pet. App. 16a. On Counts 1 and 5 (the interference with commerce counts), the district court imposed concurrent terms of imprisonment of 16 months each. On Count 6 (the first Section 924(c) count), the court imposed a mandatory, consecutive term of 84 months. On Count 2 (the stacked Section 924(c) count), the court imposed mandatory, consecutive term of 300 months.[5]

In May 2020, Petitioner requested that Warden Hudgins of FCI Gilmer move for a sentence reduction on his behalf. *See* Amended Motion for Compassionate Release, at 2, *United States v. Thacker*, Case No. 2:03-cr-20004-MMM (C.D. Ill Sept. 8, 2020), ECF No. 244. Petitioner based his request on (1) his concern for his health in light of the COVID-19 pandemic and his underlying health conditions (Type 2 diabetes mellitus, hypertension, and hyperlipidemia); and (2)

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[5] Petitioner was not charged with counts 3, 4, and 7 of the indictment, which related to the robbery to which Petitioner had previously pleaded guilty in state court. *See Thacker v. United States*, Case No. 2:08-cv-2095, 2009 WL 3381061 at *1 (C.D. Ill. Oct. 19, 2009); *see also* Judgment, *United States v. Warren*, Case No. 2:03-cr-20004-MMM0-1 (C.D. Ill. March 10, 2005), ECF No. 185.

the shocking length of his sentence and the change in the mandatory sentencing regime as a result of the First Step Act. On May 19, 2020, Warden Hudgins denied Petitioner's request. *Id.*

On August 25, 2020, Petitioner filed a *pro se* Motion for Compassionate Release in the district court. Pet. App. 16a. The district court appointed counsel, and allowed an amendment to Petitioner's initial motion. Pet. App. 16a. After briefing, the district court denied Petitioner's motion, finding that the reasons put forth in support of a sentence reduction—including the amendment to the sentences mandated by 18 U.S.C. § 924(c) — were not "extraordinary and compelling." *See* Pet. App. 19a., 23a.–24a. In particular, the district court held that, "[b]ecause Congress had indicated that [section 403] is not retroactive," the dramatic change in the sentencing regime, ushered in by the First Step Act, cannot constitute "extraordinary and compelling" reasons. Pet. App. 23a.–24a.

The Seventh Circuit affirmed, holding that the "'extraordinary and compelling' reason warranting a sentence reduction . . . cannot include, whether alone or in combination with other factors, consideration of the First Step Act's amendment to § 924(c)." Pet. App. 13a. The district court cannot, the Seventh Circuit held, use the authority conferred by § 3582(c)(1)(A) to "effect a sentencing reduction at odds with Congress's express determination . . . that the amendment to § 924(c)'s sentencing structure apply only prospectively." Pet. App. 8a. In so holding, the Seventh Circuit expressly acknowledged the circuit split on this issue, Pet. App. 11a., and noted that that the position taken in the opinion would

create a conflict among the circuits, Pet. App. 13a.–14a. (citing Seventh Circuit Rule 40(e)).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve the circuit split concerning whether a district court may consider the First Step Act's amendment to Section 924(c) in determining whether a defendant sentenced under the pre-amendment regime has shown "extraordinary and compelling reasons" warranting a possible sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i).

This case meets all of the Court's criteria for granting certiorari. First, the question presented concerns an intractable, acknowledged circuit split on a recurring question of statutory interpretation that only this Court can resolve. Second, the Seventh Circuit's conclusion that a district court is prohibited from considering that a defendant is serving a sentence decades longer than the one Congress believes is appropriate, is incorrect. The holdings of the Third, Sixth, and Seventh Circuits cannot be reconciled with the plain text of Section 3582(c)(1)(A)(i), and the limitation those holdings engraft onto the law also undermines a clear purpose of that provision. Third, the question presented is important and will profoundly affect a large number of defendants who are serving indefensible sentences that current law would not permit. Fourth, this case is an ideal vehicle.

A. The Question Presented Concerns an Intractable, Acknowledged Circuit Split on a Recurring Question Only This Court Can Resolve.

Five courts of appeals have considered whether the 2018 amendment to Section 924(c) can be considered in determining whether extraordinary and compelling reasons warrant a reduction in sentence pursuant to Section 3582(c)(1)(A)(i) where the defendant was sentenced under the pre-amendment regime. Those decisions have produced an active 3-2 circuit split. This Court should grant review to resolve the conflict.

1. Three Courts of Appeals Have Held District Courts Cannot Consider the First Step Act's Changes to Section 924(c).

Three courts of appeals have held that a district court is prohibited from considering the First Step Act's amendment to Section 924(c) in determining whether "extraordinary and compelling reasons" warrant a sentence reduction on a defendant-filed compassionate release motion.

In *United States v. Jarvis*, a divided panel of the Sixth Circuit affirmed the district court's conclusion that a defendant's stacked, mandatory Section 924(c) sentences that could not be imposed today cannot be considered as grounds for a sentence reduction, even in combination with other bases for relief. 999 F.3d 442, 442 (6th Cir. 2021). The court reasoned that a contrary conclusion would render "useless" Congress's decision that the amendment would not apply

to cases in which sentence had already been imposed at the time of enactment. *Id.* at 443. The Sixth Circuit acknowledged a split with the Fourth and Tenth Circuits, *id.* at 444 ("We appreciate that the Fourth Circuit disagrees with us, and that the Tenth Circuit disagrees in part with us."), but concluded that the applicable law "does not permit us to treat the First Step Act's non-retroactive amendments, whether by themselves or together with other factors, as 'extraordinary and compelling' explanations for a sentencing reduction," *id.* at 445.[6]

Similarly, in the opinion below, the Seventh Circuit held that "the discretionary authority conferred by § 3582(c)(1)(A) . . . cannot be used to effect a sentencing reduction at odds with Congress's express determination embodied in § 403(b) of the First Step Act that the amendment to § 924(c)'s sentencing structure apply only prospectively." Pet App. 8a. The court also expressed "broader concerns with allowing § 3582(c)(1)(A) to serve as the authority for relief from mandatory minimum sentences" based on "principles of separation of powers." Pet. App. 8a.–

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[6] The majority acknowledged that a different panel of the Sixth Circuit had reached the opposite result the month before in a published opinion affirming a sentence reduction that was in part based on Section 403 of the First Step Act. *See id.* at 445 (citing *United States v. Owens*, 996 F.3d 755 (6th Cir. 2021)). The *Jarvis* majority concluded that *Owens* conflicted with an earlier-decided case holding "that a non-retroactive First Step Act amendment fails to amount to an 'extraordinary and compelling' explanation for a sentencing reduction." *Id.* (citing *United States v. Tomes*, 990 F.3d 500 (6th Cir. 2021)). But as the *Jarvis* dissent correctly observed, "nothing in *Tomes* precludes a district court from considering a sentencing disparity due to a statutory amendment along with other grounds for release." *Id.* at 450 (Clay, J., dissenting).

9a. The court acknowledged the circuit split on this question, observing that "courts have come to principled and sometimes different conclusions as to whether the change to § 924(c) can constitute an extraordinary and compelling reason for compassionate release." Pet. App. 11a. ("The Fourth Circuit, on the one hand, takes the view that the sentencing disparity resulting from the anti-stacking amendment to § 924(c) may constitute an extraordinary and compelling reason for release.").

Since the decision below was issued, the Third Circuit has also weighed in and adopted the same rule, concluding that "[t]he nonretroactive changes to the § 924(c) mandatory minimums . . . cannot be a basis for compassionate release." *United States v. Andrews*, 12 F.4th 255, 261 (3d Cir. 2021). The Third Circuit reasoned that "Congress specifically decided that the changes to the § 924(c) mandatory minimums would not apply to people who had already been sentenced," declining to "construe Congress's nonretroactivety directive as simultaneously creating an extraordinary and compelling reason for . . . release." *Id.* The Third Circuit "join[ed] the Sixth and Seventh Circuits," and acknowledged a split with the Tenth and Fourth Circuits. *Id.* The Third Circuit recently denied a petition for rehearing *en banc*. Order Denying Petition for Rehearing, *United States v. Andrews,* Case No. 20-2768 (3d Cir. Dec. 2, 2021), ECF No. 51.

2. Two Courts of Appeals Have Held District Courts May Consider the First Step Act's Changes to Section 924(c).

Two courts of appeals have held, in clear conflict with the Third, Sixth, and Seventh Circuits, that district courts may consider the disparity between the mandatory sentences imposed and the mandatory sentences applicable under current law in deciding whether extraordinary and compelling reasons warrant a reduction.

The Fourth Circuit was the first to establish this rule in *United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020). The defendants in that case had been charged with multiple Section 924(c) counts and sentenced to between 35 and 53 years of imprisonment, largely due to stacking. *Id.* at 274. Each defendant's motion for compassionate release relied heavily on the severity of the sentences then mandated by Section 924(c) and the First Step Act's fundamental changes to those sentences, as well as his exemplary conduct while incarcerated. *Id.* The district courts granted each defendant a sentence reduction, and the Fourth Circuit affirmed. *Id.* at 288. In so doing, the panel held that district courts may treat "as 'extraordinary and compelling reasons' for compassionate release the severity of the defendants' § 924(c) sentences and the extent of the disparity between the defendants' sentences and those provided for under the First Step Act." *Id.* at 286. It further explained that Congress's decision "not to make § 403 of the First Step Act categorically retroactive does not mean that courts may not consider that legislative change in conducting their individualized reviews of motions for compassionate release." *Id.* The court

found "nothing inconsistent about Congress's paired First Step Act judgments: that 'not *all* defendants convicted under § 924(c) should receive new sentences,' but that the courts should be empowered to 'relieve *some* defendants of those sentences on a case-by-case basis.'" *Id.* at 287 (citation omitted).

In similar circumstances, and based on the same reasoning, the Tenth Circuit affirmed a sentence reduction in *United States v. Maumau*. 993 F.3d 821 (10th Cir. 2021). The court explained that district courts "have the authority to determine for themselves what constitutes 'extraordinary and compelling reasons,'" including "the 'incredible' length of [ ] stacked mandatory sentences under § 924(c); the First Step Act's elimination of sentence-stacking under § 924(c); and the fact that [the defendant], if sentenced today, . . . would not be subject to such a long term of imprisonment." *Id.* at 834, 837 (citation omitted).

3. The Circuit Conflict Will Not Resolve Without a Decision From This Court.

This split among the circuits is entrenched and unlikely to resolve without action from this Court. Like the Seventh Circuit in the opinion below, Pet. App. 11a. ("[W]e are not the only court to deal with this issue. In fact, it has come up across the country, and courts have come to principled and sometimes different conclusions as to whether the change to § 924(c) can constitute an extraordinary and compelling reason for compassionate release."), both the Third and Sixth Circuits have explicitly recognized the circuit split. *See Andrews*, 12 F.4th at 261 ("We join the Sixth and Seventh Circuits in reaching this

conclusion."); *Jarvis*, 999 F.3d at 444 ("We appreciate that the Fourth Circuit disagrees with us, and that the Tenth Circuit disagrees in part with us."). The Third and Sixth Circuits both recently denied rehearing *en banc*, *see* Order Denying Petition for Rehearing, *United States v. Andrews,* Case No. 20-2768 (3d Cir. Dec. 2, 2021), ECF No. 51; Order, *United States v. Jarvis*, Case No. 20-3912 (6th Cir. Sep. 8, 2021), ECF No. 41, and the Seventh Circuit below expressly stated that "[n]o judge in active service requested to hear [the] case *en banc*," Pet. App. 13a.–14a. There is no realistic prospect that the circuit conflict will resolve without the Court's intervention, and thus the issue need not percolate further. Five courts of appeals have addressed the question presented, and the arguments on both sides have been fully aired.

Finally, this Court's review is especially necessary because the holdings of the Third, Sixth, and Seventh Circuits undermine the explicit goal of Section 603 of the First Step Act to increase the use of compassionate release. Leaving this split unresolved will exacerbate one of the very problems the First Step Act was designed to correct, and will cause defendants within the Third, Sixth, and Seventh Circuits to be unable to obtain sentence reductions that similarly situated defendants in the Fourth and Tenth Circuits can receive.

B. The Decision Below is Incorrect.

The Seventh Circuit's decision in this case fundamentally misunderstands the nature and purpose of Section 3582(c)(1)(A) and the scope of the authority Congress granted to district courts under that

framework. The Seventh Circuit below affirmed the district court's denial of Petitioner's compassionate release motion and reiterated that Congress's clarification of the penalty scheme in Section 924(c) cannot be considered, either alone or in conjunction with other reasons, as the basis for a sentence reduction. Pet. App. 13a. That holding is plainly incorrect.

First, it places out of bounds one of the most "extraordinary and compelling reasons" one could imagine when it comes to deciding whether circumstances "justify a reduction of an unusually long sentence." S. Rep. No. 225, 98th Cong., 1st Sess. 55–56, 121 (1983). As the Fourth Circuit correctly pointed out in *McCoy*, the First Step Act's amendment to Section 924(c) is "not just any sentencing change, but an exceptionally dramatic one" because it eliminated a misuse of Section 924(c)'s recidivist enhancements that for decades produced unusually cruel sentences that were decades longer "than what Congress has now deemed an adequate punishment for comparable . . . conduct." 981 F.3d at 285 (quoting *United States v. Redd,* 444 F. Supp. 3d 717, 723 (E.D. Va. 2020)). In other words, it is precisely the type of change in the law that should weigh heavily in a judicial "second look" under Section 3582(c)(1)(A).

Second, the Seventh Circuit's holding — that an "'extraordinary and compelling' reason warranting a sentence reduction [under Section 3582(c)(1)(A)(i)] . . . cannot include, whether alone or in combination with other factors, consideration of the First Step Act's Amendment to § 924(c)," Pet. App. 13a. — arrogated to the court a power only Congress possesses. The text of the relevant statutes provides no support for the decision to place this particular factor out of bounds. The error is placed in even sharper relief by

the fact that the legislative framework shows that Congress knows well how to do exactly that; 28 U.S.C. § 994(t) specifically provides that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." The Seventh Circuit not only erred by adding another factor to the out-of-bounds list, but also exacerbated that error by extending it beyond any sensible purpose. Rather than merely holding that the amendment to Section 924(c) cannot, standing alone, be the basis of a sentence reduction, the court held that a district court cannot consider *at all* the fact that Congress deemed the sentences previously mandated by that provision to be so obviously excessive they will never again be imposed. *See, e.g.*, Pet. App. 2a.

Third, the ruling below precludes consideration of a number of related bases for sentence reductions that are "extraordinary and compelling." For example, it ignores the grossly disproportionate nature of the sentences that the old Section 924(c) regime mandated as compared to the average sentences imposed for crimes like murder.[7] It ignores the racially disparate deployment of these draconian provisions by prosecutors for decades, a problem heralded by the Sentencing Commission repeatedly until Sec-

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[7] From 2015 to 2020, the average federal sentence for murder was 264 months. *See* U.S. SENT'G COMM'N, INTERACTIVE DATA ANALYZER, https://ida.ussc.gov/analytics/saw.dll?Dashboard; *see also, e.g.*, *United States v. Decator*, 452 F. Supp. 3d 320, 326 (D. Md. 2020) (granting release and noting that defendant's 633-month sentence is "roughly twice as long as federal sentences imposed today for murder").

tion 924(c) was amended in 2018.[8] Under the Seventh Circuit's rationale, these entirely valid bases for a sentence reduction are similarly off limits. Only Congress has the authority to do that.

The lower court's judicial amendment to Section 3582(c)(1)(A)(i) was impermissible, and that is enough to require reversal. In addition, its rationale was wrong. The Seventh Circuit's decision was based on its view that allowing district judges to consider a dramatic legislative change no one could truly ignore would be "at odds with Congress's express determination embodied in § 403(b) of the First Step Act that the amendment to § 924(c)'s sentencing structure apply only prospectively." Pet. App. 8a. But there is no sense in which allowing courts to consider the prospective outlawing of onerous mandatory sentences is "at odds" with a decision not to make the change categorically retroactive to every prior case. The same Congress that elected against full retroactivity used the same statute to open a different (if narrower) window for potential relief by amending Section 3582(c)(1)(A) to afford defendants direct access to courts to seek sentence reductions based on extraordinary and compelling reasons like

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[8] *See* U.S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING 90, 131 (2004), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf; MANDATORY MINIMUM REPORT at ch. 9, https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system; MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 24–25 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf.

this change. There is "nothing inconsistent about Congress's paired First Step Act judgments: that 'not *all* defendants convicted under § 924(c) should receive new sentences,' but that the courts should be empowered to 'relieve *some* defendants of those sentences on a case-by-case basis.'" *McCoy*, 981 F.3d at 287 (citation omitted); *see also Maumau*, 993 F. 3d at 837 (affirming compassionate release based on district court's "individualized review of all the circumstances," including "'the First Step Act's elimination of sentence-stacking under § 924(c)'") (citation omitted).

For the foregoing reasons, the approach adopted by the Fourth and the Tenth Circuits is the only one consistent with the text and purpose of Section 3582(c)(1)(A). As those courts have described, there is nothing in the statutory text that supports the crabbed view of the breadth of a district court's discretion adopted by the Third, Sixth, and Seventh Circuits, especially in the context of a statutory scheme that was created precisely to allow judges to take a second look at unusually long sentences after some time had passed. Just as nothing in the statute *compels* a sentence reduction in every case involving § 924(c) stacking under the old regime, there is no textual basis for *precluding* a reduction based, at least in part, on those seismic, and long overdue, changes to the law.

C. The Issue is Important and Recurring.

The question of whether a district court may consider the 2018 amendment to Section 924(c) in determining whether "extraordinary and compelling reasons" warrant the reduction of an unusually long

sentence imposed based on the pre-amendment regime is an important and recurring question of federal law. District courts across the country have granted a large number of sentence reductions based in part on the unfairness of lengthy sentences that would be substantially shorter today, and new motions are being filed every day.

Among the harms caused by the holding below, and similar ones in the Third and Sixth Circuits, is that the outcome of motions based on virtually indistinguishable grounds, stemming from essentially identical conduct, now depends entirely on the circuit in which a defendant was convicted. In the Fourth and Tenth Circuits, district courts are reducing these indefensible sentences by decades or centuries, and defendants are being released from prison. In the Third, Sixth, and Seventh Circuits, defendants like Petitioner will die in prison instead, or be released at extremely advanced ages. These unwarranted disparities in outcomes across circuits warrant review of the issue presented by this Court.

D. This Case Presents an Ideal Vehicle.

This case squarely and cleanly presents the issue that has divided the circuit courts. It is therefore an ideal vehicle for resolving the question presented.

Petitioner raised the question presented throughout the proceedings below. *See* Pet. App. 4a. He argued in the district court that a sentence reduction was appropriate due to the severity of his Section 924(c) sentences and the disparity between the mandatory sentence imposed and one he would face today, and the district court squarely decided the issue in the government's favor. *See* Pet. App. 19a.–

20a., 23a.–24a. Petitioner raised the issue again in the Seventh Circuit, which also squarely decided it in the government's favor and affirmed the district court's judgment solely on this basis. Pet. App. 13a. (holding that a reason for a sentence reduction under Section 3582(c)(1)(A)(i) "cannot include, whether alone or in combination with other factors, consideration of the First Step Act's amendment to § 924(c).").

There are also no threshold issues that would limit this Court's review. The issue was clearly presented and preserved below, and the Seventh Circuit based its decision solely on the question presented, without reference to any other bases for relief raised by Petitioner in his initial motion. Pet. App. 5a.–6a. (holding that the district court's erroneous application of the Sentencing Commission's policy statement "is of no moment on appeal" because the district court "expressly addressed [Petitioner's] argument [with respect to the First Step Act] on the merits").

Timely resolution of the conflict is important. Compassionate release motions are being filed and decided on a seemingly daily basis in the district courts. While other petitions presenting this issue may be filed in the future, there is no reason for this Court to delay — and every reason for it to move swiftly — to resolve this circuit split. The longer this Court waits, the more judicial resources will be wasted if the Court rejects the Seventh Circuit's position. And defendants like Petitioner, whose motions for a sentence reduction have been denied pursuant to the flawed rubric established by the court below and in two other circuits, will continue to serve excessively long prison terms.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 20-2943

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

vs.

ROSS THACKER,

Defendant - Appellant.

Appeal from the United States District Court
for the Central District of Illinois.

ARGUED MAY 13, 2021 — DECIDED JULY 15, 2021

Before SYKES, Chief Judge, and SCUDDER and KIRSCH, Circuit Judges.

SCUDDER, *Circuit Judge*. Ross Thacker is serving a 33-year federal sentence for a series of armed robberies he committed in 2002. The sentence included so-called stacked penalties—imposed to run consecutively to one another—for two convictions under 18 U.S.C. § 924(c) for using and carrying a firearm during two of the robberies. The first § 924(c) conviction resulted in a mandatory minimum sentence of 7 years, and the second added a mandatory consecutive sentence of at least 25 years. In September 2020 Thacker invoked 18 U.S.C. § 3582(c)(1)(A) and sought to reduce his sentence based not only on the health risks of exposure to COVID-19 within prison, but also on the amendment Congress enacted in the First Step Act of 2018 to limit the circumstances in which multiple sentences for violations of § 924(c) can be stacked. The district court denied Thacker's motion, concluding in part that the discretion in § 3582(c)(1)(A) to reduce a sentence upon finding "extraordinary and compelling reasons" does not include the authority to reduce § 924(c) sentences lawfully imposed before the effective date of the First Step Act's anti-stacking amendment.

Federal courts across the country have—and continue to— weigh in on this question, sometimes reaching different conclusions. We now weigh in too—and agree with the district court. Given Congress's express decision to make the First Step Act's change to § 924(c) apply only prospectively, we hold that the amendment, whether considered alone or in connection with other facts and circumstances, cannot constitute an "extraordinary and compelling" reason to authorize a sentencing reduction. So we affirm.

I.

A

Ross Thacker and a friend committed several armed robberies in and around Champaign, Illinois in 2002. Federal charges followed and two jury trials resulted in Thacker being convicted of two violations of 18 U.S.C. § 1951 (commercial robbery) and two accompanying violations of 18 U.S.C. § 924(c) for using and carrying a firearm in furtherance of a crime of violence.

The district court sentenced Thacker to 33 years and 4 months' imprisonment and 5 years of supervised release. Seven of those 33 years came from the sentence imposed for Thacker's first § 924(c) violation. See 18 U.S.C. § 924(c)(1)(A)(ii) (2002). A consecutive 25 years followed for the second violation of § 924(c). See *id*. § 924(c)(1)(C)(i) (2002). Those sentences reflected the mandatory minimum and consecutive terms of imprisonment Congress prescribed for violations of § 924(c) at the time of Thacker's sentencing. In short, the district court had no choice but to sentence Thacker to at least 7 years for the first § 924(c) violation and then to at least 25 consecutive years for the second. We affirmed Thacker's convictions on direct appeal. See *United States v. Thacker*, 206 F. App'x 580 (7th Cir. 2006).

B

In August 2020, after exhausting his remedies within the Bureau of Prisons, Thacker filed a *pro se* motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A). Upon reviewing Thacker's motion, the district court appointed counsel to represent him.

Thacker's counsel then submitted an amended motion. The amended motion pointed to the significance of the First Step Act's change to § 924(c)'s penalty structure and added health-related considerations amid the COVID-19 pandemic. Thacker explained that he suffered from Type-2 diabetes and hypertension and faced an increased risk of exposure to and complications from COVID-19 within the federal correctional institution in Gilmer County, West Virginia, where he is serving his sentence.

The First Step Act of 2018 effected significant changes to aspects of federal criminal sentencing. See Pub. L. No. 115-391, 132 Stat. 5194. For one, federal prisoners acquired the right under 18 U.S.C. § 3582(c)(1)(A) to request a reduction in their sentences. No longer do they have to persuade and de-pend on the Bureau of Prisons to bring the motion on their behalf, which rarely happened before the First Step Act. For another, Congress amended the penalties mandated by certain statutes, including § 924(c).

Before the Act, a second or subsequent conviction under § 924(c) mandated the imposition of a minimum sentence of 25 years to run consecutive to all other sentences, including any sentence imposed (even in the same case) for a first conviction under § 924(c). See 18 U.S.C. § 924(c)(1)(C)(i) (2002). The First Step Act changed that. An enhanced sentence for a second or subsequent conviction under § 924(c) now applies only when the first § 924(c) conviction arises from a separate case and becomes final before the second conviction. See § 403, 132 Stat. at 5221–22.

Had Ross Thacker been sentenced after the First Step Act became law, he would have faced a 14-year mandatory minimum—7 years for each of his two § 924(c) convictions for brandishing a firearm during an armed robbery. Instead, Thacker faced a 32-year sentence for his two § 924(c) convictions. That 18-year difference understandably means all the world to Thacker.

The district court denied Thacker's motion for two primary reasons. First, the district court found that COVID-19 was well controlled within FCI Gilmer and otherwise that Thacker's health conditions were being managed with medication. In short, the district court concluded that Thacker's health conditions did not amount to an extraordinary and compelling reason for early release.

Second, and as for the First Step Act's amendment to § 924(c), the district court observed that the amendment, by its terms, applied only prospectively and therefore that the sentencing disparity highlighted by Thacker could not serve as an extraordinary and compelling reason warranting a sentencing reduction.

In denying Thacker's motion, the district court lacked the benefit of our recent decision in *United States v. Gunn*, 980 F.3d 1178 (7th Cir. 2020). As a result, the district court made the mistake of resting a part of its reasoning on the Sentencing Commission's policy statement defining what may constitute an extraordinary and compelling reason for purposes of a discretionary compassionate release sentencing reduction under § 3582(c)(1)(A)(i). In *Gunn*, we concluded that while the policy statement could serve as a guide to district courts, it was binding only on

compassionate release motions made by the Director of the Bureau of Prisons. See *id.* at 1179.

But that mistake is of no moment on appeal because the district court also expressly addressed Thacker's argument on the merits, and observed that Congress, in § 403(b) of the First Step Act, expressly made the anti-stacking amendment effective only prospectively. Congress's choice, the district court concluded, meant that the sentencing disparity resulting from the amendment to § 924(c) could not constitute an extraordinary and compelling reason for a discretionary sentencing reduction and early release under § 3582(c)(1)(A).

Reasoning in the alternative, the district court also underscored that, even if the First Step Act's amendment to § 924(c) were retroactive, the court would not exercise its discretion to grant Thacker early release. On this front, the district court applied the factors in 18 U.S.C. § 3553(a) and found that Thacker, in light of his offense conduct and criminal history, continued to present a danger to the community.

Thacker now appeals.

II.

Congress made plain in § 403(b) of the First Step Act that the amendment to 18 U.S.C. § 924(c) "shall apply to any offense that was committed before the date of the enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." By its terms, then, the First Step Act's anti-stacking amendment applies prospectively.

There is no way to read that choice as anything other than deliberate, for Congress charted a

different course in other provisions of the First Step Act. Consider, for example, § 404, in which Congress permitted defendants who were sentenced before the Fair Sentencing Act of 2010 to benefit from that law's sentencing reform—including the elimination of mandatory minimum sentences for simple possession and the increased threshold quantity of crack cocaine necessary to trigger mandatory penalties. Congress made those changes retroactive. These distinctions matter, and they are ones reserved for Congress to make. Interpreting § 403 to apply retroactively would unwind and disregard Congress's clear direction that the amendment apply prospectively. The district court was right to see Thacker's motion, at least in part, as an attempted end-run around Congress's decision in the First Step Act to give only prospective effect to its amendment of § 924(c)'s sentencing scheme.

The compassionate release statute, § 3582(c)(1)(A), affords district courts discretion to reduce a term of imprisonment upon finding, among other requirements, "extraordinary and compelling reasons to warrant such a reduction." If a district court finds such reasons exist, it then must weigh any of the applicable sentencing factors in 18 U.S.C. § 3553(a) in determining whether to reduce a sentence. See 18 U.S.C. § 3582(c)(1)(A). Many a federal prisoner has invoked the extraordinary and compelling reasons provision as part of seeking a sentencing reduction, often citing extraordinary health circumstances involving terminal illness. See *Gunn*, 980 F.3d at 1179. We recently explained that, until the Sentencing Commission updates its policy statement to reflect prisoner-initiated compassionate release motions, district courts have broad discretion

to determine what else may constitute "extraordinary and compelling reasons" warranting a sentence reduction. See *id*. at 1180–81.

But the discretionary authority conferred by § 3582(c)(1)(A) only goes so far. It cannot be used to effect a sentencing reduction at odds with Congress's express determination embodied in § 403(b) of the First Step Act that the amendment to § 924(c)'s sentencing structure apply only prospectively. To conclude otherwise would allow a federal prisoner to invoke the more general § 3582(c) to upend the clear and precise limitation Congress imposed on the effective date of the First Step Act's amendment to § 924(c). See *United States v. Jarvis*, 999 F.3d 442, 2021 WL 2253235, at *2 (6th Cir. June 3, 2021). Put another way, there is nothing "extraordinary" about leaving untouched the exact penalties that Congress prescribed and that a district court imposed for particular violations of a statute. See *United States v. Maumau*, 993 F.3d 821, 838 (10th Cir. 2021) (Tymkovich, C.J., concurring) ("Indeed, the imposition of a sentence that was not only permissible but statutorily required at the time is neither an extraordinary nor a compelling reason to now reduce that same sentence.").

We harbor broader concerns with allowing § 3582(c)(1)(A) to serve as the authority for relief from mandatory minimum sentences prescribed by Congress. We see nothing preventing the next inmate serving a mandatory minimum sentence under some other federal statute from requesting a sentencing reduction in the name of compassionate release on the basis that the prescribed sentence is too long, rests on a misguided view of the purposes of sentencing, reflects an outdated legislative choice by

Congress, and the like. Rationales along those lines cannot supply an extraordinary and compelling reason to reduce a lawful sentence whose term Congress enacted, and the President signed, into law. Any other conclusion offends principles of separation of powers.

In making this observation, we are not saying that extraordinary and compelling individual circumstances, such as a terminal illness, cannot in particular cases supply the basis for a discretionary sentencing reduction of a mandatory minimum sentence. See *Gunn*, 980 F.3d at 1179. But we are saying that the discretion conferred by § 3582(c)(1)(A) does not include authority to reduce a mandatory minimum sentence on the basis that the length of the sentence itself constitutes an extraordinary and compelling circumstance warranting a sentencing reduction.

And so too do we worry that a contrary conclusion about the scope of the discretion conferred by § 3582(c)(1)(A) would allow the compassionate release statute to operate in a way that creates tension with the principal path and conditions Congress established for federal prisoners to challenge their sentences. That path is embodied in the specific statutory scheme authorizing post-conviction relief in 28 U.S.C. § 2255 and accompanying provisions. See *Hrobowski v. United States*, 904 F.3d 566, 567–68 (7th Cir. 2018).

We previously affirmed Thacker's convictions on direct appeal. And Thacker already unsuccessfully attacked his sentence under § 2255, so he would need express authorization to bring a second or successive request for post-conviction relief. See 28 U.S.C. § 2244(a). But he cannot do so, at least not on the

basis of the First Step Act's amendment to § 924(c). Congress permits a second or successive § 2255 motion only if it contains "newly discovered evidence" or relies on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2255(h)(1)–(2); see *Hrobowski*, 904 F.3d at 568. We have already twice rejected Thacker's attempts at a successive § 2255 appeal. See *Thacker v. United States*, No. 16-3530 (7th Cir. October 6, 2016); *Thacker v. United States*, No. 16-1191 (7th Cir. March 2, 2016). He presents no new evidence nor has the Supreme Court made any such ruling with respect to the § 924(c) stacking provision. To the contrary, the Supreme Court has found no constitutional infirmity with the prior § 924(c) stacked sentencing scheme. See *Deal v. United States*, 508 U.S. 129, 136–37 (1993) (involving a challenge that § 924(c)(1) is facially ambiguous).

In the end, our conclusion is limited. We hold only that the discretionary sentencing reduction authority conferred by § 3582(c)(1)(A) does not permit—without a district court finding some independent "extraordinary or compelling" reason—the reduction of sentences lawfully imposed before the effective date of the First Step Act's amendment to § 924(c). Nothing about our holding precludes district courts, upon exercising the discretion conferred by § 3582(c)(1)(A) and determining that a sentence reduction is warranted, from considering the First Step Act's amendment to § 924(c) in determining the length of the warranted reduction. In fact, as other courts have persuasively explained, this may be the more effective way to get at the § 924(c) sentencing disparity. See *Jarvis*, 999 F.3d 442, 2021 WL 2253235, at *3.

III.

In closing, we observe that we are not the only court to deal with this issue. In fact, it has come up across the country, and courts have come to principled and sometimes different conclusions as to whether the change to § 924(c) can constitute an extraordinary and compelling reason for compassionate release.

The Fourth Circuit, on the one hand, takes the view that the sentencing disparity resulting from the anti-stacking amendment to § 924(c) may constitute an extraordinary and compelling reason for release. See *United States v. McCoy*, 981 F.3d 271, 285–87 (4th Cir. 2020).

On the other hand, a panel of the Sixth Circuit more recently took the opposite view. See *Jarvis*, 999 F.3d 442, 2021 WL 2253235, at *3. This followed from a previous decision of the Sixth Circuit concluding that another nonretroactive change to sentencing law in the First Step Act could not, by itself, constitute an extraordinary and compelling reason for release. See *United States v. Tomes*, 990 F.3d 500, 505 (6th Cir. 2021). To a lesser extent and with little elaboration, the Eighth Circuit seems to be on this side of the ledger too. See *United States v. Loggins*, 966 F.3d 891, 892–93 (8th Cir. 2020) (observing that the district court did not misstate the law in finding "that a non-retroactive change in law did not support a finding of extraordinary or compelling reasons for release").

The Tenth Circuit has adopted a middle ground, determining that the sentencing disparity resulting from a nonretroactive change to sentencing law in the First Step Act may serve in combination with

other rationales as an extraordinary and compelling reason for early release. See *United States v. McGee*, 992 F.3d 1035, 1048 (10th Cir. 2021); see also *Maumau*, 993 F.3d at 837. Another panel of the Sixth Circuit, in a decision issued before *Jarvis*, echoed this same approach for the change to § 924(c). See *United States v. Owens*, 996 F.3d 755, 764 (6th Cir. 2021).

Our own court is familiar with this debate too. We heard *United States v. Black*, — F.3d —, 2021 WL 2283876 (7th Cir. June 4, 2021), Thacker's appeal, and a third case, *United States v. Sutton*, No. 20-2876 (7th Cir. argued Apr. 27, 2021), earlier this year. All three appeals implicated, to one degree or another, the First Step Act's amendment to § 924(c) and its relation to a request for a compassionate release sentencing reduction under § 3582(c)(1)(A). But whether the change to § 924(c) could constitute an extraordinary and compelling reason for release was squarely presented in only this appeal and *Sutton*. *Black*, by contrast, principally concerned whether the district court in that case should have weighed the change to § 924(c) when applying the § 3553(a) factors after the prisoner identified serious medical concerns as an independent extraordinary and compelling reason for release.

In vacating the district court's denial of compassionate release in *Black*, we cited with favor the views of both the Fourth and Tenth Circuits, while also observing that Congress's changes to the statutory sentencing scheme in § 924(c) might factor into a district court's individualized determination of whether the § 3553(a) sentencing factors weighed in favor of Eural Black's early release. See *Black*, — F.3d —, 2021 WL 2283876, at *3. We then remanded

the case with instructions allowing the district court to consider the change to § 924(c) as part of deciding Black's request for a sentencing reduction. *Black*'s broad language and express reliance on the Fourth Circuit's decision in *McCoy* left the opinion open to the observation that we had concluded Congress's recent amendment to § 924(c) can itself constitute an extraordinary and compelling reason justifying early release under § 3582(c)(1)(A). See *id.* at *5 n.3 (Kirsch, J., dissenting) (advancing this precise point).

We take the opportunity here to answer squarely and definitively whether the change to § 924(c) can constitute an extraordinary and compelling reason for a sentencing reduction. It cannot.

The proper analysis when evaluating a motion for a discretionary sentencing reduction under § 3582(c)(1)(A) based on "extraordinary and compelling" reasons proceeds in two steps. At step one, the prisoner must identify an "extraordinary and compelling" reason warranting a sentence reduction, but that reason cannot include, whether alone or in combination with other factors, consideration of the First Step Act's amendment to § 924(c). Upon a finding that the prisoner has supplied such a reason, the second step of the analysis requires the district court, in exercising the discretion conferred by the compassionate release statute, to consider any applicable sentencing factors in § 3553(a) as part of determining what sentencing reduction to award the prisoner.

Before issuing this opinion, we circulated it to the full court under Circuit Rule 40(e). No judge in active

service requested to hear this case *en banc* [*] Accordingly, the legal framework articulated in this opinion reflects the law of the Circuit.

For these reasons, we AFFIRM the district court's denial of Thacker's compassionate release motion.

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[*] Circuit Judge Jackson-Akiwumi did not participate in the consideration or decision of this case.

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 03-20004**
	)	
ROSS THACKER	)	
	)	
Defendant.	)	

ORDER AND OPINION

This matter is now before the Court on Defendant Thacker's Motions for Compassionate Release (Docs. 240 and 244) and the Government's Response (Doc. 248). For the reasons set forth below, Defendant's Motions are DENIED.

BACKGROUND[1]

On April 19, 2004, Defendant Thacker appeared for a jury trial. On April 22, 2004, the jury returned

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[1] For the sake of judicial economy, the information provided in the Background and Standard of Review is repeated from Magistrate Judge Bivins' Report and Recommendation and is only updated to include Plaintiff's objection (Doc. 42) and the undersigned's analysis of the same.

a verdict of guilty on Counts 5 and 6 of the Superseding Indictment and a mistrial was declared on Counts 1 and 2. On May 3, 2004, Defendant was retried and found guilty of Counts 1 and 2. In sum, Defendant was found guilty of two counts of robbery and two counts of carrying a firearm in furtherance of a crime of violence. (Doc. 187). On March 9, 2005, Defendant was sentenced to a total of 400 months of imprisonment and five years of supervised release. (Doc. 187). Defendant is currently housed at The Federal Correctional Institution, Gilmer in West Virginia (FCI Gilmer). (Doc. 244). His projected release date is December 5, 2033. (*Id*.)

On August 25, 2020, Defendant filed a *pro se* Motion for Compassionate Release. (Doc. 240). The Court appointed the Federal Public Defender's Office to represent him, and on September 8, 2020, appointed counsel filed an Amended Motion for Compassionate Release on his behalf. (Doc. 244). On September 21, 2020, the Government filed its Response in opposition to compassionate release. (Doc. 248). This Order follows.

LEGAL STANDARD

Before filing a motion for compassionate release, a defendant is required to first request that the Bureau of Prisons (BOP) file a motion on his behalf. 18 U.S.C. § 3582(c)(1)(A). A court may grant a motion only if it was filed "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 after 30 days have passed "from the receipt of such a request by the warden of the defendant's facility, whichever is earlier." *Id*.

The compassionate release statute directs the Court to make three considerations: (1) whether extraordinary and compelling reasons warrant a sentence reduction; (2) whether a reduction is consistent with the factors listed in 18 U.S.C. § 3553(a); and (3) whether a reduction would be "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1).

If an inmate has a chronic medical condition identified by the Centers for Disease Control (CDC) as elevating the inmate's risk of becoming severely ill from COVID-19, that condition may satisfy the standard of "extraordinary and compelling reasons." A chronic condition reasonably may be found to be "serious" and to "substantially diminish the ability of the defendant to provide self-care within the environment of a correctional facility." USSG § 1B1.13, cmt. n.1(A)(ii)(I).

"The mere presence of COVID-19 in a particular prison cannot justify compassionate release—if it could, every inmate in that prison could obtain release." *See, e.g., United States v. Melgarejo*, 2020 WL 2395982 at *5 (C.D. Ill. May 12, 2020). Rather, "a prisoner [may] satisfy the extraordinary and compelling reasons requirement by showing that his particular institution is facing a serious outbreak of COVID-19 infections, the institution is unable to successfully contain the outbreak, and his health condition places him at significant risk of complications should he contract the virus." *Id.* at 5–6.

Finally, a court must deny a sentence reduction unless it determines that a defendant "is not a

danger to the safety of any other person or to the community." USSG § 1B1.13(2).

DISCUSSION

A. Eligibility for compassionate release related to Defendant's health.

The parties appear to agree that Defendant has exhausted his BOP administrative remedies, and the Government focuses its response on the merits on Defendant's claims. The Government agrees that Defendant, who is thirty-eight years old, has Type 2 diabetes, hypertension, and other medical issues that appear to be less relevant to COVID-19, including acute periodontists, hemorrhoids, and hyperlipidemia. The Government further agrees that diabetes increases Defendant's risk for severe illness and that hypertension might increase his risk for a severe infection. However, the Government argues that Defendant's conditions are treated with medication and his condition is overall stable. Accordingly, the Government argues that Defendant is not suffering from "a serious physical or medical condition . . . that substantially diminishes the ability to provide self-care." U.S.S.G. § 1B1.13 comment n.1(A)(ii).

Further, in contrast to some of the other BOP facilities where COVID-19 outbreaks are uncontrolled, there are currently only three inmates and no staff members who are positive for COVID-19 at FCI Gilmer where Defendant is housed. (https://www.bop.gov/coronavirus/ last visited on 10/7/2020). As previously stated, "[t]he mere presence of COVID-19 in a particular prison cannot

justify compassionate release – if it could, every inmate in that prison could obtain release." *See e.g., United States v. Melgarejo*, 2020 WL 2395982 (C.D. Ill. May 12, 2020). Given the fairly limited number of infections present at the facility, the Court believes the BOP's approach to containing the outbreak at this facility is adequate. Therefore, the Court finds Defendant has failed to meet his burden of establishing extraordinary and compelling circumstances justifying his release.

B. The amendment of 924(c) is not a basis to grant Defendant compassionate release.

Defendant further argues that the Court should grant his Motion due to his unusually long sentence and a subsequent change to the law that would subject him to a much lower mandatory minimum sentence. Defendant argues that Section 403 of the First Step Act, titled "Clarification of Section 924(c)" explains that Congress intended 18 U.S.C. § 924(c) to be a recidivist statute so that the enhanced 25-year minimum applies only when a § 924(c) conviction happens after a prior conviction has become final. Here, Defendant was indicted for two § 924(c) crimes at the same time. When he was sentenced, he was subject to a 7-year mandatory minimum on one of his § 924(c) convictions and a 25-year mandatory minimum on the other because it was considered a second § 924(c) conviction. Defendant argues that today he would instead be subject to two 7-year mandatory minimum terms for brandishing a weapon, because the Court imposed a 25-year mandatory minimum even though his second

conviction happened before he had a final conviction for a § 924(c) violation.

Defendant makes a variety of arguments that the Court has the power to determine whether Defendant's unusually long sentence and the subsequent change to the sentencing law qualify as an extraordinary and compelling reason to grant relief. Defendant argues that the text of the statute and legislative history reveal that Congress intended to give courts additional to power to reduce sentences and expand the use of compassionate release. Defendant further asserts that by revising the law regarding § 924(c), Congress was acknowledging that it had previously made a mistake and that the law was too draconian.

The current policy statement on compassionate release outlines four categories which constitute "extraordinary and compelling reasons" as a basis for compassionate release: (1) the defendant's medical condition; (2) the defendant's age; (3) the defendant's family circumstances; and (4) "other reasons" as determined by the Director of the BOP. U.S.S.G. § 1B1.13. The Government describes the enumerated reasons as individualized reasons and argues that making a sentencing change retroactive is not the sort of individualized reason contemplated in the sentencing guidelines. Plaintiff argues that his sentence could fall under the "other reasons" category because the fact that he was subject to the more draconian sentencing guideline that is no longer applicable is unfair to him.

As the Government points out, the determination of the retroactivity of a statutory provision is made by Congress. *Dorsey v. United States*, 567 U.S. 260, 274 (2012). It is generally presumed that a change to

criminal penalties does not apply retroactively, unless Congress provides otherwise. *Id*. at 272; *see also Middleton v. City of Chicago*, 578 F.3d 655, 662 (7th Cir. 2009) ("a court should not apply a newly enacted statutory provision retroactively unless Congress has clearly mandated such an extension."). The controlling statute, 1 U.S.C. § 109, provides: "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." Here, Congress stated its intent explicitly that "[t]his 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." First Step Act § 403(b). Given that Defendant was sentenced before December 21, 2018, Section 403 does not apply in this case, and Defendant's sentence remains intact. The Court is not persuaded that the statute related to compassionate release can be used to avoid Congress's explicit language and find that this statute is retroactive for some defendants. Congress knows how to make a sentencing change retroactive; it did not do so here. This Court cannot read retroactivity into the guidelines or the statute without clear language indicating that it is appropriate for the Court to do so.

Additionally, the first appellate decision on a similar issue agreed with the Government's view. In *United States v. Saldana*, the Tenth Circuit held that

compassionate release is not available based on a change in sentencing law that would produce a lower sentence today. *United States v. Saldana*, -- F. App'x --, 2020 WL 1486892 (10th Cir. Mar. 26, 2020). The Tenth Circuit stated: "neither the § 1B1.13 commentary nor BOP Program Statement 5050.50 identify post-sentencing developments in case law as an 'extraordinary and compelling reason' warranting a sentence reduction." Accordingly, the Tenth Circuit held that courts lack jurisdiction to reduce a sentence on this basis.

While the Seventh Circuit has not directly addressed this issue, another judge from this district addressed a similar issue where the defendant would have faced a lower guideline sentence range because under *Johnson v. United States*, 576 U.S. 591 (2015), one of his predicate offenses would no longer qualify as a crime of violence such that he would be subject to the career offender guidelines. *United States v. Thomas*, No. 10-30046, 2020 WL 4917730, at *1 (C.D. Ill. Aug. 21, 2020). There, the court considered the fact that the defendant's sentence would likely be over had he not been subject to the career offender guidelines as one factor in considering Defendant's request for compassionate release. The court also considered the COVID-19 outbreak at the defendant's institution, the defendant's lack of risk factors related to COVID-19, and that the defendant had little time remaining on his sentence. *Id*. The court still concluded that the defendant had not shown extraordinary and compelling circumstances to warrant compassionate release.

The Court acknowledges that other district courts are split on the issue of whether changes in the law that would result in a substantially lowered

sentencing guideline range or a substantially lower mandatory minimum is an extraordinary and compelling justification for compassionate release. Indeed, some defendants were subject to mandatory minimums or guideline ranges that are decades longer than the current sentencing scheme would require. Some district courts find that result is so unfair that they believe it is an extraordinary and compelling reason to reduce defendants' sentences under the compassionate relief statute. *See e.g. United States v. Millan*, 2020 WL 1674058 (S.D.N.Y. Apr. 6, 2020); *United States v. Decator*, 2020 WL 1676219 (D. Md. Apr. 6, 2020); *United States v. Haynes*, 2020 WL 1941478 (E.D.N.Y. Apr. 22, 2020); *United States v. Marks*, 2020 WL 1908911, at *7 (W.D.N.Y. Apr. 20, 2020). These cases are not binding on this court, and many district courts agree that if Congress wished to empower the courts to reduce sentences on that basis, it needed to do so explicitly. *See e.g., United States v. Neubert*, 2020 WL 1285624, at *3 (S.D. Ind. Mar. 17, 2020) ("a reduction under § 3582(c)(1)(A) is not warranted because the disparity between Mr. Neubert's actual sentence and the one he would receive if he committed his crimes today is not an 'extraordinary and compelling circumstance.' Instead, it is what the plain language of § 403 [of the First Step Act] requires."); *United States v. Pitts*, 2020 WL 1676365, at *7 (W.D. Va. Apr. 6, 2020) (refusing to commit an inappropriate "end-around" the non-retroactivity of Section 403 of the First Step Act, that amended 924(c) penalties).

Because Congress has indicated that the relevant statute is not retroactive and because the compassionate relief guidelines focus on

individualized health and family circumstances, this Court is unable to conclude that Defendant has presented an "extraordinary and compelling" a reason to qualify him for compassionate release.

C. The Court is unable to conclude that Defendant would not be a danger to his community.

In any event, Defendant has not demonstrated that he would not be a danger to his community. Before releasing a defendant, the Court is required find that a defendant is not a danger to the community. U.S.S.G § 1B1.13. Based on Defendant's criminal history and disciplinary record, the Court is unable to do so here. He is currently imprisoned for a series of robberies and as the Seventh Circuit observed, during one of the robberies "one of the defendants pistol-whipped an employee." *United States v. Thacker,* 2006 WL 3374174, at *1 (7th Cir. Nov. 11, 2006). Despite being only twenty-two years old at the time of sentencing, Defendant had 10 criminal history points from prior convictions for residential burglary, burglary, and armed robbery. (Doc. 187 at ¶¶ 50– 52). He committed the instant offense while on state parole and within two years of release from state imprisonment. (*Id*. at ¶ 53). While imprisoned, Defendant has had numerous disciplinary infractions, including four infractions for assaulting without serious injury, two infractions for being absent from an assignment, possessing drugs or alcohol, fighting with another person, phone abuse, and possessing intoxicants. (Doc. 248 at 3). His most recent infraction was from 2019 for refusing to obey an order, and his most recent

fighting charge was from 2014. (Doc. 244 at 16). The BOP has also assessed Defendant as a high risk of recidivism. (*Id*.). While Defendant argues that he has worked hard to prepare himself for life after release by taking dozens of classes, that is not enough in light of his long history of violent behavior and the BOP's assessment that he is at high risk of recidivism.

CONCLUSION

For the reasons set forth above, it is ORDERED that Defendant's Motions [240] and [244] are DENIED.

ENTERED this 8th day of October, 2020.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge