

No. 21-877

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**In the Supreme Court of the United States**

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ROSS THACKER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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In the First Step Act of 2018, Pub. L. No. 115-391, Tit. IV, § 403(a), 132 Stat. 5221-5222, Congress amended the penalties for using or carrying a firearm during a crime of violence, in violation of 18 U.S.C. 924(c). Congress specified that the amendment “shall apply to any offense that was committed before the date of enactment of [the First Step Act], if a sentence for the offense has not been imposed as of such date of enactment.” § 403(b), 132 Stat. 5222.

Petitioner contends (Pet. 23-27) that Congress’s decision not to extend the First Step Act’s amendment to Section 924(c) to offenders who have already been sentenced can constitute an “extraordinary and compelling” reason for reducing a previously imposed final sentence under 18 U.S.C. 3582(c)(1)(A).<sup>1</sup> This Court has

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<sup>1</sup> Other pending petitions for writs of certiorari raise similar issues. See *Tingle v. United States*, No. 21-6068 (filed Oct. 15, 2021);

recently denied petitions for writs of certiorari raising similar issues. See *Sutton v. United States*, No. 21-6010 (Jan. 24, 2022); *Corona v. United States*, 142 S. Ct. 864 (2022) (No. 21-5671); *Tomes v. United States*, 142 S. Ct. 780 (2022) (No. 21-5104); *Jarvis v. United States*, 142 S. Ct. 760 (2022) (No. 21-568); *Watford v. United States*, 142 S. Ct. 760 (2022) (No. 21-551); *Gashe v. United States*, 142 S. Ct. 753 (2022) (No. 20-8284). The same result is warranted here.

For the reasons stated in the government’s brief in opposition to the petition for a writ of certiorari in *Jarvis, supra* (No. 21-568), the decision below correctly recognizes that the First Step Act’s amendment to Section 924(c) cannot serve as an “extraordinary and compelling” reason for a Section 3582(c)(1)(A) reduction to a preexisting sentence, either by itself or as an addition to other proffered factors. See Br. in Opp. at 12-16, *Jarvis, supra* (No. 21-568).<sup>2</sup> And although courts of appeals have reached different conclusions on the issue, the practical importance of the disagreement is limited, and the Sentencing Commission could promulgate a new policy statement that deprives a decision by this Court of any practical significance. See *id.* at 16-22; see also *United States v. McCall*, 20 F.4th 1108, 1112-1114 (6th Cir. 2021) (suggesting, in case not involving the First Step Act, that First Step Act circuit precedent conflicts with earlier circuit decision and is nonbinding), petition for reh’g en banc pending, No. 21-3400 (6th Cir. filed Feb. 1, 2022); *United States v. McKinnie*, No. 21-3608, 2022 WL 221539, at \*4 (6th Cir. Jan. 26, 2022) (suggesting

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*Williams v. United States*, No. 21-767 (filed Nov. 19, 2021); *Chantharath v. United States*, No. 21-6397 (filed Nov. 19, 2021).

<sup>2</sup> We have served petitioner with a copy of the government’s brief in opposition in *Jarvis*.

that *McCall* erred in treating First Step Act circuit precedent as nonbinding).

Even if the question presented otherwise warranted review, this case would be a poor vehicle in which to address it. Under Section 3582(c)(1)(A), any sentence reduction must be supported not only by “extraordinary and compelling reasons,” but also by “the factors set forth in [18 U.S.C.] 3553(a) to the extent that they are applicable.” 18 U.S.C. 3582(c)(1)(A)(i). Here, the court of appeals understood the district court’s denial of petitioner’s Section 3582(c)(1)(A) motion to rest on the “alternative” ground that the Section 3553(a) factors do not support a sentence reduction. Pet. App. 6a; see Pet. C.A. Br. 36 (acknowledging that, “[a]fter determining that [petitioner] had not established extraordinary and compelling circumstances, the [district] court went on to state, in one paragraph, that the 18 U.S.C. § 3553(a) factors did not support release”). Thus, this Court’s resolution of the question presented is unlikely to be outcome-determinative.

As the district court emphasized, petitioner “is currently imprisoned for a series of robberies”; by the age of 22, he “had 10 criminal history points from prior convictions for residential burglary, burglary, and armed robbery”; he “committed the instant offense while on state parole”; he “has had numerous disciplinary infractions,” including for “assaulting without serious injury” and for “fighting with another person,” while in prison; and the Bureau of Prisons has determined that “he is at high risk of recidivism.” Pet. App. 24a-25a. Thus, even if petitioner could demonstrate extraordinary and compelling reasons for a sentence reduction, he would be unable to show that the Section 3553(a) factors support such a reduction. See 18 U.S.C. 3553(a)(2)(C) (specifying

the “need for the sentence imposed \* \* \* to protect the public from further crimes of the defendant” as a factor that a court “shall consider” in “determining the particular sentence to be imposed”).

The petition for a writ of certiorari should be denied.<sup>3</sup>

Respectfully submitted.

ELIZABETH B. PRELOGAR  
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FEBRUARY 2022

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<sup>3</sup> The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.