No. 21-877

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

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

The Government's opposition relies almost exclusively on its arguments opposing certiorari in *Jarvis v. United States*, No. 21-568 ("*Jarvis* Opp. Br."). But in the time since the *Jarvis* opposition was filed—and after this Court denied review in that case—the circuit split addressed by these petitions has deepened. Two more Circuits, the First and the Eighth, have now come down on different sides of the questions presented here, raising the number of appellate courts that have resolved this issue to seven. *See United States v. Ruvalcaba*, --F.4th--, 2022 WL 468925, at *8 (1st Cir. Feb. 15, 2022) (noting that its opinion on this question is not written on a "pristine page."). This Court's review is needed to ensure the proper interpretation and application of the law.

Further, as a growing number of courts have acknowledged, the Government's argument that the Sentencing Commission can resolve the question presented is incorrect. *See, e.g.*, *United States v. McCoy*, 981 F.3d 271, 284 (4th Cir. 2020); *Ruvalcaba*, 2022 WL 468925 at *9. That position misapprehends both the authority of the Commission and the effect of any amendment to U.S.S.G. § 1B1.13 after the Commission regains a quorum. Because there is no prospect that the challenge raised here will be mooted by future Commission action, this petition should be granted.

In its opposition in *Jarvis*, the Government did not meaningfully dispute that, in light of the First Step Act's amendment to Section 3582(c)(1)(A)—which now permits defendants to bring compassionate release motions before the courts—Section

1B1.13 is not an "applicable policy statement" to defendant-filed motions within the meaning of the statute. *Jarvis* Opp. Br. at 12, 17. Rather, the Government hung its hat on its assertion that issue presented here will be resolved when the Commission regains a quorum, because it will almost certainly amend Section 1B1.13 to make it applicable to all Section 3582(c)(1)(A) motions. *Id.*at 20–21.

That argument passes in the night with the question presented here, that is, whether the 2018 amendment to the punishments mandated by Section 924(c) can be considered an "extraordinary and compelling reason" within the meaning of 18 U.S.C. § 3582(c)(1)(A). That is a question of statutory interpretation, and the Commission has no authority to override circuit court determinations. In other words, even if the amended Section 1B1.13 purports to make the revised Section 924(c) regime an eligible reason for a sentence reduction, the courts of appeals in four circuits have already construed the *statute* to prohibit that result, and the Commission has no authority to overrule or "moot" those decisions.

Finally, the Government suggests that this case presents a poor vehicle for review because of the Petitioner's specific circumstances. That, too, is unavailing. The Seventh Circuit squarely decided the question presented, without reaching any other basis for relief raised by Petitioner in his initial motion or any alternative holding by the district court below. There is also no threshold issue that would limit this Court's review of the question presented, and timely resolution of the conflict is important and will affect

similar petitions currently being litigated in district courts around the country.

For all these reasons, this Court should grant certiorari and reverse the decision below.

A. There Is a Deep and Entrenched Circuit Split on the Question Presented That Cannot Be Resolved by the Sentencing Commission.

To date, seven courts of appeals have squarely addressed the question whether district courts have the statutory authority to consider the First Step Act's amendment to Section 924(c) in determining whether a sentence should be reduced under Section 3582(c)(1)(A)(i). Since this Petition was originally filed, the First and Eighth Circuits have weighed in on opposite sides of this question. The decisions of those two circuits highlight the deep and intractable nature of the split and make clear that it will not be resolved without intervention from this Court. *See generally*, *United States v. Crandall*, --F.4th--, 2022 WL 385920 (8th Cir. Feb. 9, 2022); *Ruvalcaba*, 2022 WL 468925.

In *Crandall*, the Eighth Circuit expressly sided with the Third, Sixth, and Seventh Circuits. It stated that the First Step Act "is comparable to the decision of a sentencing judge in 2018 to impose a lesser sentence than a predecessor imposed in 1990 for the same offense. Neither circumstance is a sufficient ground to support a reduction of the previously imposed sentence under § 3582(c)(1)(A)." *Crandall*, 2022 WL 385920, at *3. Consequently, the Eighth Circuit, like the court below, held that the First Step Act's amendment to Section 924(c) could never con-

stitute an "extraordinary and compelling reason" to reduce a sentence. *Id*.

The First Circuit reached the opposite conclusion in *Ruvalcaba*, and expressly rejected the position described above. *Ruvalcaba*, 2022 WL 468925, at *10–11. Instead, like the Fourth and Tenth Circuits, the First Circuit properly concluded that there is no "textual basis in the [First Step Act] for a categorical prohibition anent non-retroactive changes in sentencing law." *Id*. at *9. It went on to point out that, "given the language that Congress deliberately chose to employ," it saw "no textual support for concluding that such changes in the law may never constitute part of a basis for an extraordinary and compelling reason" and declined to "infer that Congress intended such a categorical and unwritten exclusion." *Id*. The First Circuit held that the arguments advanced by the Third, Seventh, and Eighth Circuits "cannot support a categorical rule that non-retroactive changes in sentencing law, even when considered on an individualized basis, may never support a reason for a sentence reduction." *Id*. at *10.

The Government dismisses this clear circuit split as "a divergence of views" that "could be addressed by the Sentencing Commission." *Jarvis* Opp. Br. at 16. Specifically, it asserts that the Commission could "promulgate a new policy statement, binding on district courts in considering prisoner-filed sentence-reduction motions, that rules out the First Step Act's prospective amendment to Section 924(c) as a possible basis for finding 'extraordinary and compelling reasons' for a Section 3582(c)(1)(A) sentence reduction." *Jarvis* Opp. Br. at 18.

This argument misapprehends the role and authority of the Sentencing Commission. The circuit

split at issue in this petition is not over the construction of a guideline, policy statement, or commentary—that is, the sort of split resolved by the Commission. Instead, it relates to the scope of the *legal authority* granted to the courts by Section 3582(c)(1)(A). That is not something the Commission can resolve. *Stinson v. United States*, 508 U.S. 36, 38 (1993) ("We decide that commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.").

Additionally, the Government simply ignores the possibility that a repopulated Sentencing Commission could decide the opposite. In other words, it fails to contend with the possibility that the Commission's amended policy statement could continue to leave the determination of what constitutes an "extraordinary and compelling reason" to judges, as the existing policy statement does. U.S.S.G. § 1B1.13 ("The court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of reduction) . . ."). Indeed, that would be aligned not only with the current commentary issued by the Commission, but also with the many dozens of district court decisions that have reduced draconian sentences like the one in this case, and the decisions by the First, Fourth, and Tenth Circuits that have held that, as a matter of federal statutory law, Section 3582(c)(1)(A) authorizes district courts to consider the First Step Act's amendment to Section 924(c).

As with the opposite outcome, however, this also would not resolve the issue presented here, because it would remain the case that the Commission's

amended policy statement will be for naught in the Third, Sixth, Seventh, and Eighth Circuits,. In those circuits, under the controlling case law challenged by this petition, the courts have held that Section 3582(c)(1)(A)(i) *prohibits* consideration of the First Step Act's amendment to Section 924(c) in deciding a motion for a sentence reduction. The Government concedes that the Commission "could not describe 'extraordinary and compelling reasons' to include consideration of a factor that, as a statutory matter, may not constitute such a reason," *Jarvis* Opp. Br. at 20, and there is no question that the Third, Sixth, and Seventh Circuits would find such a Guidelines provision foreclosed by the statute; indeed, that is precisely what they have already held.

In short, although it is certainly the Commission's task to determine the content of the Guidelines Manual, its guardrails include an obligation to ensure that its determinations do not conflict with federal statutes. In this important setting, only this Court can decide what those statutes permit.

Further, the Government is wrong in asserting that "the practical significance of the current disagreement among the circuits is limited" because the First Step Act's amendment to Section 924(c) can be considered by a district court when deciding "whether the Section 3553(a) factors support a sentence reduction." *Jarvis* Opp. Br. at 21–22. The dispute here relates to a predicate determination—whether extraordinary and compelling reasons for a sentence reduction exist—not to the subsequent inquiry into whether, if it does, the reduction is consistent with Section 3553(a). They are separate inquiries, and allowing consideration of the amended penalties under Section 924(c) at the Section 3553(a) stage does

not remediate the harm caused by the artificially—and impermissibly—restrictive view of what a defendant may rely on to show that extraordinary and compelling circumstances warrant relief in the first instance. This is illustrated by the fact that, in the Third, Sixth, Seventh, and Eighth Circuits, defendants like Petitioner are precluded from obtaining relief on this basis even when the district court acknowledges that the Section 3553(a) factors weigh in favor of substantially reduced sentence.

B. The Decision Below Is Incorrect.

The Government defends the decision below by invoking "Congress's deliberate choice not to make the First Step Act's change to Section 924(c) applicable to defendants who had already been sentenced." *Jarvis* Opp. Br. at 13. But that interpretation of the First Step Act reads into it provisions found nowhere in its text that are inconsistent with the statute.

First, 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.'" *United States v. McCoy*, 981 F.3d 271, 287 (4th Cir. 2020) (citation omitted) (emphasis in original); *see also United States v. Maumau*, 993 F. 3d 821, 837 (10th Cir. 2021) (affirming sentence reduction 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); *Ruvalcaba*, 2022 WL 468925, at *9 ("To serve as a safety valve, section 3582(c)(1)(A) must encompass

an individualized review of a defendant's circumstances and permit a sentence reduction—in the district court's sound discretion—based on any combination of factors (including unanticipated post-sentencing developments in the law)."). Indeed, this approach is entirely consistent with Congress's decision to expand the use of sentence reductions. 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 the change in sentencings under Section 924(c).

Second, no part of any relevant statute supports the authority of a court to place any particular factor—with the exception of "rehabilitation of the defendant *alone*," *see* 28 U.S.C. § 994(t) (emphasis added)—out of bounds. Indeed, the very fact that Congress, when it wants to make a factor off-limits to judges deciding compassionate release motions, will say so explicitly, demonstrates the flaw in the Government's argument.

Third, the Government's repeated attempt to characterize the First Step Act's changes to Section 924(c) as part of "'the ordinary practice' in 'federal sentencing' of 'apply[ing] new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced,'" *Jarvis* Opp. Br. at 13 (quoting *Dorsey v. United States*, 567 U.S. 260, 280 (2012)), inappropriately diminishes the importance of those monumental changes. 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." *McCoy*, 981 F.3d at 285 (*quoting United States v. Redd*, 444 F. Supp. 3d 717, 723 (E.D. Va. 2020)); *see also Ruvalcaba*, 2022 WL 468925, at *12–13 (Barron, J., concurring). 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).

More importantly, the government's argument misses the point. Petitioner's sentence reduction motion does not seek retroactive application of the amendment to Section 924(c). We acknowledge that there is no respect in which Section 403 of the First Step Act made defendants who were subjected to Section 924(c) sentences *categorically* eligible for sentence reductions, as Section of 404 of the statute did for certain drug defendants. This petition raises a different issue: whether the circuit courts may properly decide that, in connection with a motion under Section 3582(c)(1)(A), Congress's decision to jettison the cruelly excessive sentence enhancement to which the defendant was subjected can *never* be considered, standing alone *or* in combination with other factors, in deciding whether to reduce the sentence. Nothing in the text or history of the statutes at issue permits that perverse outcome.

C. This Case Presents an Ideal Vehicle.

The Government's opposition exaggerates the potential vehicle issues that this case may present. This case squarely and cleanly presents the issue

that has divided the circuit courts and is an ideal vehicle for resolving that question.

Petitioner here raised the question presented throughout the proceedings below, and argued before both the district court and the Seventh Circuit that a sentence reduction was appropriate due in part to the severity of his stacked Section 924(c) sentences and the disparity between the mandatory sentence imposed and the one he would face today. *See* Pet. App. 13a, 19a–20a, 23a–24a.

In addition, the Seventh Circuit squarely based its decision solely on the question presented, holding that 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. It did so without consideration of any other bases for relief raised by Petitioner in his initial motion, including the district court's erroneous application of the Sentencing Commission's policy statement, or any alternative holding by the district court about Petitioner's specific circumstances. Pet. App. 5a–6a. Rather, the Seventh Circuit made clear that it was "tak[ing] 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." Pet. App. 13a.

Moreover, timely resolution of this conflict is important, and, as recent decisions from the First and Eighth Circuits highlight, the split in authorities is unlikely to resolve without intervention from this Court. The ongoing split in authorities means that defendants like Petitioner, whose motions for a sentence reduction have been denied based on a flawed

rubric established by the court below and three other circuits, will continue to serve excessively long prison terms. *See Ruvalcaba*, 2022 WL 468925, at *12 (Barron, J., concurring) (noting the "stark sentencing differential" between the sentence the defendant in that case received and the one he would have received had he been charged today). This Court should grant review to resolve this dispute and ensure that defendants like Petitioner have the opportunity to show that their individual circumstances warrant relief.

CONCLUSION

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

Respectfully submitted,

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