No. _____

In the Supreme Court of the United States

NATHANIEL RIMPSON III, CHARLES SCOTT, AND CARL BUGGS,

Petitioners,

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. Rimpson et al., No. 20-3467 (7th Cir.) (order granting summary affirmance issued September 22, 2021).

United States v. Rimpson, No. 2:99-CR-00086-JTM-APR-1 (N.D. Ind.) (order denying motion for sentence reduction issued December 3, 2020)

United States v. Scott, No. 2:99-CR-00086-JTM-APR-2 (N.D. Ind.) (order denying motion for sentence reduction issued December 18, 2020).

United States v. Buggs, No. 2:99-CR-00086-JTM-APR-4 (N.D. Ind.) (order denying motion for sentence reduction issued December 3, 2020)

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JURISDICTION

The decision of the court of appeals was entered on September 22, 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; or . . .
> >
> > > 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 subsequent 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 subsequent" 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, consecutive 25-year sentences 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.*, U.S. DEP'T OF JUSTICE, OFF. OF THE INSPECTOR GEN., THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM 11 (2013)[1] ("The BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered."). The title of Section 603(b) explained its purpose: It was aimed at "Increasing the Use and Transparency of Compassionate 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

[1] Available at https://oig.justice.gov/reports/2013/e1306.pdf.

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 under Section 3582(c)(1)(A)(i). 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 engrafted 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 Section 924(c) categorically retroactive for *all* of the more than 2,500 inmates serving stacked Section 924(c) sen-

tences, its dramatic revision to that sentencing regime cannot be considered in *any* such case, even on a compassionate release motion.

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 it also goes far beyond Section 994(t)'s narrow 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. The result is perverse. In considering whether to reduce sentences that often equate to life without parole, district judges in those circuits must ignore the fact that both Congress and President Trump deemed § 924(c) stacking 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 sentence 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. 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. 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 Section 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, § 1, 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 subsequent" convictions under Section 924(c) were disproportionately invoked by prosecutors against 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,

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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 Sec. 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).

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. 98-225, at 52, 53 n.74 (1983). Hav-

ing 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.74, 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

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[4] *See, e.g.*, U.S. DEP'T OF JUSTICE, OFF. OF THE INSPECTOR GEN., THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE

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. Between August 1997 and March 1998, Petitioners and other individuals participated in a series of robberies of grocery stores and a barber shop in Gary, Indiana. No firearms were discharged and no one was physically harmed during the commission of any these robberies. Petitioners used the proceeds from the robberies primarily to post bail for friends who had been arrested.

Rimpson and Scott were indicted on three counts of robbery, one count of conspiracy to commit robbery, and three counts of carrying a firearm in relation to a crime of violence under 18 U.S.C. § 924(c). Rimpson was also indicted on one count of possession of a defaced firearm. Buggs was indicted on two counts of robbery, one count of conspiracy to commit robbery, and two counts of carrying a firearm in connection with a crime of violence under 18 U.S.C. § 924(c). In July 1999, Petitioners went to trial and were convicted on all counts, except that Rimpson was acquitted of possession of a defaced firearm.

Rimpson was sentenced to a total of 675 months—56 years and 3 months—imprisonment. On Count 1 (the conspiracy count) and Counts 2, 4, and 6 (the robbery counts), the district court imposed

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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.

concurrent terms of 135 months. On Count 3 (the first Section 924(c) count), the court imposed a mandatory, consecutive term of 60 months. On Counts 5 and 7 (the stacked Section 924(c) counts), the court imposed mandatory, consecutive terms of 240 months.

Scott was sentenced to a total of 618 months—50.5 years—imprisonment. On Count 1 (the conspiracy count) and Counts 2, 4, and 8 (the robbery counts), the district court imposed concurrent terms of 78 months. On Count 3 (the first Section 924(c) count), the court imposed a mandatory, consecutive term of 60 months. On Counts 5 and 9 (the stacked Section 924(c) counts), the court imposed mandatory, consecutive terms of 240 months.

Buggs was sentenced to a total of 378 months—31.5 years—imprisonment. On Count 1 (the conspiracy count) and Counts 2, 4, and 6 (the robbery counts), the district court imposed concurrent terms of 78 months. On Count 7 (the first Section 924(c) count), the court imposed a mandatory, consecutive term of 60 months. On Count 9 (the stacked Section 924(c) count), the court imposed a mandatory, consecutive term of 240 months.

Between 2019 and 2020, each Petitioner individually petitioned the wardens at their respective institutions to move for compassionate release on their behalf. The Warden of FCI Fairton did not respond to Rimpson's request. On September 10, 2019, the Warden of FCI Milan denied Buggs's request. On September 24, 2020, the Warden of USP Terre Haute denied Scott's request.

In 2020, Petitioners then individually moved in the district court for compassionate release. They each argued that a reduction in sentence was appro-

priate based upon a review of each of their individual circumstances, including the mandatory, draconian 20-year sentences that the district court was forced to impose on the second (and, for Rimpson and Scott, the third) § 924(c) counts. Petitioners also cited their relatively young ages at the time of the robberies (they were each 22 or 23 years old), the two decades they had each already served in prison, their extraordinary post-sentencing rehabilitation, and the fact that Congress had made clear that their excessive sentences based on § 924(c) stacking should never have been imposed.

The district court denied Petitioners' motions, finding that the reasons they put forth in support of sentence reductions—including the amendment to the sentences mandated by 18 U.S.C. § 924(c)—were not "extraordinary and compelling." *See* Pet. App. 10a–14a (Buggs); 21a–25a (Rimpson); 32a–37a (Scott).

The Seventh Circuit summarily affirmed, applying its recent precedent holding "that a reason for a sentence reduction under § 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. 2a (quoting *United States v. Thacker*, 4 F.4th 569, 576 (7th Cir. 2021)).

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 (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.[5]

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[5] 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

In *Thacker*, the Seventh Circuit reached the same conclusion. 4 F.4th 569. There, the panel explained 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." *Id.* at 574. 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." *Id.* 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." *Id.* at 575; *see also id.* ("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.").

And in *United States v. Andrews*, the Third Circuit adopted the same rule, concluding that "[t]he nonretroactive changes to the § 924(c) mandatory

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(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).

minimums . . . cannot be a basis for compassionate release." 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.* at 261–62.

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 previously 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 (internal quotation marks 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 (internal quotation marks 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 by this Court. The Third, Sixth, and Seventh Circuits have explicitly recognized the circuit split. *See Andrews*, 12 F.4th at 261–62 ("We join the Sixth and Seventh Circuits in reaching this conclusion," and acknowledging the contrary Fourth and Tenth Circuit decisions); *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."); *Thacker*, 4 F.4th at 575 ("[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."). The Sixth Circuit recently denied rehearing en banc, *see* Order, *United States v. Jarvis*, No. 20-3912 (6th Cir. Sep. 8, 2021), ECF No. 41, and the Seventh Circuit stated in *Thacker* that "[n]o judge in active service requested to hear [the] case *en banc*," 4 F.4th at 576. 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 conclusion 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, is incorrect. It 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.

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. 98-225, at 55–56 (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. 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 "a reason for a sentence reduction under

§ 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. 2a (quoting *Thacker*, 4 F.4th at 576)—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.

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.[6] It ignores the racially

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[6] In 2020, the average federal sentence for murder was 255 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

disparate deployment of these draconian provisions by prosecutors for decades, a problem heralded by the Sentencing Commission repeatedly until Section 924(c) was amended in 2018.[7] 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." *Thacker*, 4 F. 4th at 574. 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

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sentence is "roughly twice as long as federal sentences imposed today for murder").

[7] *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 274, 289, http://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system; U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6, 24–25 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf.

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 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 (internal quotation marks 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)").

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 Petitioners 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.

Petitioners raised the question presented throughout the proceedings below. They each argued

in the district court that a sentence reduction was appropriate due to the severity of their Section 924(c) sentences and the disparity between the mandatory sentence imposed and one they would face today, and the district court squarely decided the issue in the government's favor. *See* Pet. App. *See* Pet. App. 10a–14a; 21a–25a; 32a–37a. Petitioners raised the issue again in the Seventh Circuit, which also squarely decided it in the government's favor. *See* Pet. App. 2a ("The government urges us to summarily affirm the judgments because *United States v. Thacker*, 4 F.4th 569, 571 (7th Cir. 2021), forecloses appellants' arguments for compassionate release. We agree. In *Thacker* we held that a reason for a sentence reduction under § 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).'")

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.[8] The longer this Court waits, the more judicial resources will be wasted if the Court ultimately rejects the Seventh Circuit's position. And defendants like Petitioners, whose motions for a sentence reduction have been denied pursuant to the flawed rubric established by

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[8] This question is also raised in *Watford v. United States*, No. 21-551 (docketed Oct. 12, 2021); *Jarvis v. United States*, No. 21-568 (docketed Oct. 15, 2021); *Williams v. United States*, No. 21-767 (docketed Nov. 23, 2021); and *Thacker v. United States*, No. _____ (filed Dec. 10, 2021).

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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December 2021