No. 22-1216

In the Supreme Court of the United States

DWAYNE FERGUSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in finding that "extraordinary and compelling reasons" did not support reducing petitioner's preexisting sentence under 18 U.S.C. 3582(c)(1)(A), where his motion relied on alleged errors at his trial and sentencing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 55 F.4th 262. The opinion of the district court (Pet. App. 20a-31a) is not published in the Federal Supplement but is available at 2021 WL 1701918.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 2022. A petition for rehearing was denied on December 28, 2022 (Pet. App. 32a). On February 23, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 26, 2023, and the petition was filed on May 24, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiring to distribute heroin, cocaine base, and cocaine hydrochloride, in violation of 21 U.S.C. 846; possessing heroin with intent to distribute, in violation of 21 U.S.C. 841; possessing cocaine base with intent to distribute, in violation of 21 U.S.C. 841; maintaining a place for distribution of controlled substances, in violation of 21 U.S.C. 856; and possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c). C.A. App. 33. The district court sentenced petitioner to 765 months of imprisonment, to be followed by five years of supervised release. *Id.* at 34-35. The court of appeals affirmed, 172 Fed. Appx. 539, and this Court denied a petition for a writ of certiorari, 549 U.S. 926.

Petitioner filed an unsuccessful motion under 28 U.S.C. 2255 to vacate his sentence, 431 Fed. Appx. 223; the court of appeals denied a certificate of appealability, *ibid.*; and this Court denied certiorari, 565 U.S. 1239. The district court subsequently reduced his term of imprisonment to 622 months under 18 U.S.C. 3582(c)(2). D. Ct. Doc. 205 (Oct. 24, 2016). The court also dismissed a petition for a writ of habeas corpus under 28 U.S.C. 2241. 2021 WL 4429939.

Petitioner filed a pro se motion for a sentence reduction under 18 U.S.C. 3582(c)(1)(A). C.A. App. 40-50. After the district court appointed counsel to represent him, petitioner filed a renewed Section 3582(c)(1)(A) motion. *Id.* at 87, 90-129. The district court denied the renewed motion, Pet. App. 20a-31a, and the court of appeals affirmed, *id.* at 1a-19a.

1. a. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987 (18 U.S.C. 3551 *et seq.*), "overhaul[ed] federal sentencing practices." *Tapia* v. *United States*, 564 U.S. 319, 325 (2011). To make prison terms more determinate, Congress "established the Sentencing Commission and authorized it to promulgate Sentencing Guidelines and to issue policy statements." *Dillon* v. *United States*, 560 U.S. 817, 820 (2010); see 28 U.S.C. 991, 994(a).

Congress also abolished the practice of federal parole, specifying that a "court may not modify a term of imprisonment once it has been imposed" except in certain enumerated circumstances. 18 U.S.C. 3582(c); see *Tapia*, 564 U.S. at 325. One of those circumstances is set forth in 18 U.S.C. 3582(c)(1)(A). As originally enacted in the Sentencing Reform Act, Section 3582(c)(1)(A) stated:

> the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering the factors set forth in [18 U.S.C.] 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Sentencing Reform Act § 212(a)(2), 98 Stat. 1998-1999. Congress made clear that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." 28 U.S.C. 994(t); see Sentencing Reform Act § 217(a), 98 Stat. 2023.

Congress also directed the Sentencing Commission to promulgate "general policy statements regarding * * * the appropriate use of * * * the sentence modification provisions set forth in [Section] 3582(c)." 28 U.S.C.

994(a)(2)(C); see Sentencing Reform Act § 217(a), 98 Stat. 2019. Congress instructed "[t]he Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, [to] describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." 28 U.S.C. 994(t); see Sentencing Reform Act § 217(a), 98 Stat. 2023.

The Commission did not promulgate an applicable policy statement until 2006, when it issued Sentencing Guidelines § 1B1.13. See Sentencing Guidelines App. C, Amend. 683 (Nov. 1, 2006). As amended in 2016, the commentary to Section 1B1.13 described four categories of reasons that should be considered extraordinary and compelling: "Medical Condition of the Defendant," "Age of the Defendant," "Family Circumstances," and "Other Reasons." Sentencing Guidelines § 1B1.13, comment. (n.1(A)-(D)) (2016) (emphases omitted); see Sentencing Guidelines App. C Supp., Amend. 799 (Nov. 1, 2016). The fourth category—"Other Reasons"—encompassed any reason determined by the BOP director to be "extraordinary and compelling" "other than, or in combination with," the reasons described in the other three categories. Sentencing Guidelines § 1B1.13, comment. (n.1(D)) (2016) (emphasis omitted).

b. In the First Step Act of 2018, Pub. L. No. 115-391, Tit. VI, § 603(b), 132 Stat. 5239, Congress amended Section 3582(c)(1)(A) to allow defendants, as well as the BOP itself, to file motions for a reduced sentence. As amended, Section 3582(c)(1)(A) now states:

> 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 * * * , after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that * * * 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. 3582(c)(1)(A) (emphasis added).

After the First Step Act's enactment, the Fourth Circuit determined that the 2016 version of Sentencing Guidelines § 1B1.13, including its description of what should be considered "extraordinary and compelling" reasons, was not applicable to Section 3582(c)(1)(A) motions filed by defendants. See *United States* v. *McCoy*, 981 F.3d 271, 280-284 (2020).

2. From 2001 to 2003, petitioner participated in a conspiracy to distribute controlled substances in the Richmond, Virginia area. Presentence Investigation Report (PSR) ¶¶ 14-16. As part of the conspiracy, petitioner was "instrumental in obtaining and maintaining an apartment and a house in order to store and distribute drugs." 172 Fed. Appx. at 541. When law-enforcement officers executed a search warrant at the house, they found drug paraphernalia and multiple firearms, including a .45-caliber handgun, a .223-caliber assault rifle, a .45-caliber MP-10 firearm, and a silencer for the MP-10. PSR ¶ 18.

A federal grand jury in the Eastern District of Virginia indicted petitioner on eight counts arising out of the drug-trafficking operation. C.A. App. 142-149. Fol-

lowing a trial, a jury found petitioner guilty on one count of conspiring to distribute heroin, cocaine base, and cocaine hydrochloride, in violation of 21 U.S.C. 846; one count of possessing heroin with intent to distribute, in violation of 21 U.S.C. 841; one count of possessing cocaine base with intent to distribute, in violation of 21 U.S.C. 841; one count of maintaining a place for distribution of controlled substances, in violation of 21 U.S.C. 856; and one count of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c). C.A. App. 154-157; see *id.* at 142-143, 145-148. With respect to the Section 924(c) count, the jury specifically found that petitioner possessed the .45-caliber handgun, the .223-caliber assault rifle, the .45-caliber MP-10 firearm, and the silencer. *Id.* at 157.

A conviction for violating Section 924(c) carries a default statutory-minimum sentence of five years of imprisonment, to be served consecutively to any other term of imprisonment. 18 U.S.C. 924(c)(1)(A)(i) and (D)(ii). If, however, "the firearm possessed by a person convicted of a violation of [Section 924(c)] is equipped with a firearm silencer," Section 924(c)(1)(B)(ii) specifies an enhanced statutory-minimum consecutive sentence of 30 years of imprisonment. 18 U.S.C. 924(c)(1)(B)(ii). The Probation Office determined that petitioner was subject to that enhanced statutory minimum on his Section 924(c) conviction because he had possessed a firearm "equipped with a silencer." C.A. App. 334. Petitioner did not challenge that determination. See Sent. Tr. 52-71; Pet. 11.

The district court sentenced petitioner to 405 months of imprisonment on the Section 841 and 846 counts and 240 months on the Section 856 count, to be served concurrently. C.A. App. 34. The court sentenced petitioner

to 360 months on the Section 924(c) count, to be served consecutively to the sentences on the other counts. *Ibid.* The court of appeals affirmed, 172 Fed. Appx. 539, and this Court denied a petition for a writ of certiorari, 549 U.S. 926.

3. In 2009, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence, alleging, among other things, that his trial counsel had rendered ineffective assistance in failing to object that Section 924(c)(1)(B)(ii)'s "silencer" enhancement was not charged in the indictment. D. Ct. Doc. 177, at 8-10 (Nov. 6, 2009). The district court denied the motion as untimely. D. Ct. Doc. 186, at 5-11 (Jan. 3, 2011). The court of appeals denied petitioner's application for a certificate of appealability, 431 Fed. Appx. 223, and this Court denied his petition for a writ of certiorari, 565 U.S. 1239.

In 2016, petitioner moved for a sentence reduction under Section 3582(c)(2) based on a retroactive amendment to the Sentencing Guidelines that had lowered base offense levels for drug-trafficking offenses. D. Ct. Doc. 197, at 3 (Mar. 21, 2016); see Sentencing Guidelines App. C Supp., Amend. 782 (Nov. 1, 2014). The district court granted the motion, reducing petitioner's sentence on the Section 841 and 846 counts to 262 months of imprisonment, thereby lowering his total sentence to 622 months. D. Ct. Doc. 205.

In 2018, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241, challenging the validity of his conviction and sentence on the Section 924(c) count on the ground that Section 924(c)(1)(B)(ii)'s "silencer" enhancement was never charged or submitted to the jury. 18-cv-98 D. Ct. Doc. 1-1, at 1-5 (N.D. W. Va. May 2, 2018). A magistrate judge determined that petitioner's challenge was not cognizable in a Section 2241

petition. 2021 WL 4437500. The district court agreed and dismissed the petition. 2021 WL 4429939.

4. In June 2020, petitioner filed a pro se motion for a sentence reduction under Section 3582(c)(1)(A). C.A. App. 40-49. After the district court appointed counsel to represent petitioner, *id.* at 87, petitioner filed a renewed Section 3582(c)(1)(A) motion, *id.* at 90-129.

Petitioner's motion cited the risk of contracting COVID-19 and the alleged ineffective assistance of trial counsel as extraordinary and compelling reasons for a sentence reduction. C.A. App. 107-129. Petitioner also contended that "intervening case law"—namely, *United States* v. *O'Brien*, 560 U.S. 218 (2010), and *Alleyne* v. *United States*, 570 U.S. 99 (2013)—constituted "an extraordinary and compelling reason to merit compassionate release." C.A. App. 96. In particular, he argued that under those decisions, Section 924(c)(1)(B)(ii)'s "silencer" enhancement is "an element, not a sentencing factor," *ibid.*, and that because the enhancement was not charged in the indictment or submitted to the jury, the court should "vacate [his Section 924(c)] conviction, or reduce the sentence to 5 years," *id.* at 97; see *id.* at 96-106.

The district court denied petitioner's motion. Pet. App. 20a-31a. The court determined, as a threshold matter, that petitioner had failed to demonstrate any extraordinary and compelling reasons for a sentence reduction. *Id.* at 24a-26a, 29a-31a. The court found that petitioner had not shown either a "particularized susceptibility" to COVID-19 or a "particularized risk" of contracting it at his prison facility. *Id.* at 24a (citation omitted); see *id.* at 24a-26a. And the court rejected petitioner's reliance on "alleged errors at trial and sentencing." *Id.* at 29a. The court explained that Section

3582(c)(1)(A) does not allow defendants to evade "the requirements for" filing "a second 28 U.S.C. § 2255 motion" by "mak[ing] arguments that were, or could have been, raised in direct appeal or collateral review." *Ibid.*

The district court further determined that the sentencing factors set forth in 18 U.S.C. 3553(a) did not support a sentence reduction. Pet. App. 26a-28a. The court explained that "[c]ompassionate release * * * is appropriate only where the defendant is not a danger to the safety of any other person or of the community." *Id.* at 27a. The court rejected petitioner's assertion that "he is not a danger to the community," observing that he "was convicted of conduct that itself presents a danger to society" and that "the presence of extensive weaponry in [his] possession is evidence of his willingness to do violence in defense of his illegal trade." *Ibid.* And after considering "the seriousness of the offense and the danger that it represents, the vast quantities of the drugs distributed, the leadership role in the conspiracy, and the possession of firearms in furtherance of the conspiracy," the court determined that petitioner's existing sentence remains appropriate even "when one takes into account" his "record of self-betterment while in prison." *Id.* at 27a-28a; see *id.* at 27a ("The original sentence, as reduced [via a prior Guidelines-based motion under Section 3582(c)(2)], protects society, promotes respect for the law and serves as a deterrent to the defendant.").

5. The court of appeals affirmed. Pet. App. 1a-19a. The court upheld the district court's determination that "arguments challenging the validity of a conviction or sentence [may] not, as a matter of law, constitute 'extraordinary and compelling reasons warranting compassionate release.'" *Id.* at 13a (citation omitted). The

court of appeals explained that "[b]ecause § 2255 is the exclusive method of collaterally attacking a federal conviction or sentence, a criminal defendant is foreclosed from the use of another mechanism, such as compassionate release, to sidestep § 2255's requirements." *Id.* at 15a. The court further explained that because petitioner's non-medical arguments "constitute[d] quintessential collateral attacks on his convictions and sentence that must be brought via § 2255," *id.* at 16a, the district court "properly denied relief," *id.* at 19a.

ARGUMENT

Petitioner contends (Pet. 28-35) that errors in his trial and sentencing can serve as an "extraordinary and compelling" reason for a sentence reduction under Section 3582(c)(1)(A). That contention lacks merit. And although courts of appeals have reached different conclusions on the issue, petitioner overstates the extent of the disagreement, and the Sentencing Commission recently issued an amended policy statement that undermines the practical significance of prior circuit disagreement. Furthermore, were the Court nevertheless inclined to consider the question presented, this case would be a poor vehicle in which to do so because petitioner would not be entitled to a sentence reduction even if the question presented were resolved in his favor. This Court has repeatedly and recently denied petitions for writs of certiorari that presented similar issues.[1] It should follow the same course here.

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[1] See, *e.g.*, *McCall* v. *United States*, 143 S. Ct. 2506 (2023) (No. 22-7210); *Gibbs* v. *United States*, 143 S. Ct. 1796 (2023) (No. 22-5894); *King* v. *United States*, 143 S. Ct. 1784 (2023) (No. 22-5878); *Fraction* v. *United States*, 143 S. Ct. 1784 (2023) (No. 22-5859).

1. The court of appeals correctly rejected petitioner's contention that errors in his trial or sentencing can constitute an "extraordinary and compelling" reason for a sentence reduction under Section 3582(c)(1)(A). Pet. App. 13a-19a.

a. The overarching principle of federal sentencing law is that a "federal court generally 'may not modify a term of imprisonment once it has been imposed.'" *Dillon* v. *United States*, 560 U.S. 817, 819 (2010) (quoting 18 U.S.C. 3582(c)). Section 3582(c)(1)(A) provides a limited "except[ion]" to that rule. 18 U.S.C. 3582(c). To disturb the finality of a federal sentence under that provision, the district court typically must identify "extraordinary and compelling reasons" for doing so. 18 U.S.C. 3582(c)(1)(A)(i); see 18 U.S.C. 3582(c)(1)(A)(ii) (providing specific statutory criteria for reducing the sentence of certain elderly prisoners who have already served lengthy terms).

The extraordinary and compelling reason that petitioner asserts here (Pet. 2-3) is the absence of an allegation in the indictment, or a finding by the jury, of the prerequisites for a statutory-minimum 30-year sentence under Section 924(c). He contends that under this Court's decisions in *United States* v. *O'Brien*, 560 U.S. 218 (2010), and *Alleyne* v. *United States*, 570 U.S. 99 (2013), Section 924(c)(1)(B)(ii)'s "silencer" enhancement is an element of the Section 924(c) offense that requires those steps. C.A. App. 96-106. And he argues that because "the jury never found that any of the guns [he] possessed were 'equipped with' the silencer," Pet. 9, his conviction and sentence on the Section 924(c) count are infected with "legal error," Pet. 3.

The assertion of such an error is neither an "extraordinary" nor a "compelling" reason for a sentence reduc-

tion under Section 3582(c)(1)(A). Consistent with the "'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute,'" *Wisconsin Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2074 (2018) (citation omitted), the word "extraordinary" should be understood "to mean 'most unusual,' 'far from common,' and 'having little or no precedent,'" *United States* v. *McCall*, 56 F.4th 1048, 1055 (6th Cir. 2022) (en banc) (quoting *Webster's Third New International Dictionary of the English Language* 807 (1971) (*Webster's*)), cert. denied, 143 S. Ct. 2506 (2023). There is "nothing 'extraordinary'" about a challenge to the trial or sentencing proceedings, because such challenges "are the ordinary business of the legal system, and their consequences should be addressed by direct appeal or collateral review under 28 U.S.C. § 2255." *United States* v. *King*, 40 F.4th 594, 595 (7th Cir. 2022), cert. denied, 143 S. Ct. 1784 (2023); see *Gonzalez* v. *Crosby*, 545 U.S. 524, 536 (2005) (observing that "[i]t is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation" of a federal statute).

Such an assertion of error likewise cannot constitute a "compelling" reason for a Section 3582(c)(1)(A) sentence reduction. When Congress enacted the Sentencing Reform Act of 1984, "[c]ompelling" meant "forcing, impelling, driving." *McCall*, 56 F.4th at 1055 (quoting *Webster's* 463). Thus, for a reason to be "compelling" under Section 3582(c)(1)(A), it must provide a "powerful and convincing" reason to disturb the finality of a federal sentence. *United States* v. *Jenkins*, 50 F.4th 1185, 1197 (D.C. Cir. 2022) (citation omitted). "But given the

availability of direct appeal and collateral review under section 2255 of title 28," there is no powerful and convincing reason to allow prisoners to challenge the legal validity of a conviction or sentence under Section 3582(c)(1)(A). *Id.* at 1200.

Section 2255 is the "remedial vehicle" Congress "specifically designed for federal prisoners' collateral attacks on their sentences." *Jones* v. *Hendrix*, 599 U.S. 465, 473 (2023). Treating an asserted legal error in the original proceedings as an "extraordinary and compelling" reason for a sentence reduction would permit defendants to "avoid the restrictions of the post-conviction relief statute by resorting to a request for compassionate release instead." *United States* v. *Crandall*, 25 F.4th 582, 586 (8th Cir.), cert. denied, 142 S. Ct. 2781 (2022). And it "would wholly frustrate explicit congressional intent to hold that [defendants] could evade" those restrictions "by the simple expedient of putting a different label on their pleadings." *Preiser* v. *Rodriguez*, 411 U.S. 475, 489-490 (1973).

Accordingly, an asserted legal error in the original trial or sentencing cannot serve as an "extraordinary and compelling reason[]" for a sentence reduction either in isolation or as adding to a package of such "reasons." 18 U.S.C. 3582(c)(1)(A)(i). Whether considered alone or in combination with other asserted factors, such an asserted error is a "legally impermissible" consideration for purposes of determining whether an extraordinary and compelling reason exists. *Jenkins*, 50 F.4th at 1202 (citation omitted).

b. Petitioner's contrary arguments lack merit. Petitioner contends that Section 3582(c)(1)(A) "limits a district court's discretion in only two express ways": by requiring that district courts "adhere to 'applicable pol-

icy statements' from the Sentencing Commission," Pet. 33 (citation omitted), and by specifying that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason," Pet. 34 (brackets in original) (quoting 28 U.S.C. 994(t)). That contention disregards the express textual requirement that the reason for a reduction be both "extraordinary and compelling." 18 U.S.C. 3582(c)(1)(A)(i). And as explained above, the asserted legal invalidity of a conviction or sentence is "neither extraordinary nor compelling." *Jenkins*, 50 F.4th at 1200.

Petitioner argues (Pet. 30) that granting a Section 3582(c)(1)(A) sentence reduction based on trial or sentencing error would not in fact intrude on the domain of Section 2255, on the theory that "[a] finding that [his] reasons for a sentence modification are extraordinary and compelling would not necessarily imply the invalidity of his conviction or sentence." But petitioner asserts (Pet. 2-3) that the jury did not find an essential element of his Section 924(c) offense. A court could not accept that assertion, either on its own or in the context of finding his attorney's advice deficient, without "necessarily" concluding that his conviction and sentence contained precisely the sort of legal invalidity that would provide the basis for collateral relief under Section 2255. *Jenkins*, 50 F.4th at 1204. As the court of appeals observed, treating petitioner's asserted reasons as extraordinary and compelling and then granting his Section 3582(c)(1)(A) motion on that basis "would have the practical effect of correcting a purportedly illegal sen-

tence, a remedy that is exclusively within the province of § 2255." Pet. App. 19a.[2]

Petitioner also suggests (Pet. 33-34) that the decision below conflicts with this Court's decision in *Concepcion* v. *United States*, 142 S. Ct. 2389 (2022). That suggestion is misplaced. In *Concepcion*, the Court considered the scope of a district court's discretion under Section 404 of the First Step Act, which provides an explicit statutory mechanism for a court to revisit the sentence of a defendant convicted of a crack-cocaine offense "the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010." First Step Act § 404(a), 132 Stat. 5222; see § 404(b), 132 Stat. 5222; *Concepcion*, 142 S. Ct. at 2397. The Court explained that, in adjudicating a motion under Section 404 of the First Step Act, a district court "may consider other intervening changes" of law or fact, beyond the changes made by those Sections of the Fair Sentencing Act. *Concepcion*, 142 S. Ct. at 2396.

Unlike Section 404 of the First Step Act, which directly authorizes sentence reductions for a specifically defined subset of previously sentenced drug offenders, Section 3582(c)(1)(A)(i) contains a threshold requirement that a district court identify "extraordinary and compelling reasons" warranting a sentence reduction. 18 U.S.C. 3582(c)(1)(A)(i). Indeed, the Court in *Concep-*

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[2] Petitioner's suggestion (Pet. 30) that the district court could grant a Section 3582(c)(1)(A) reduction simply on the view that his attorney's advice was "extraordinarily unfair (but not unconstitutional)" would simply exacerbate the problem. It would be an even more extreme end-around to Section 2255 to premise a sentence reduction on a claim in the nature of, but insufficient to warrant, relief on direct or collateral review.

cion identified Section 3582(c)(1)(A) as a statute in which "Congress expressly cabined district courts' discretion" in a way that Section 404 does not. 142 S. Ct. at 2401.

2. Petitioner contends (Pet. 14-24) that the courts of appeals are divided on whether a claim like his can constitute an extraordinary and compelling reason for a sentence reduction under Section 3582(c)(1)(A). But petitioner overstates the level of disagreement in the courts of appeals, and a recent amendment to Sentencing Guidelines § 1B1.13 undercuts the prospective significance of any such disagreement.

a. Petitioner acknowledges (Pet. 17-21) that most of the courts of appeals that have considered the question have determined that a claim like his cannot constitute an extraordinary and compelling reason for a sentence reduction under Section 3582(c)(1)(A). See Pet. App. 13a-19a; *United States* v. *Escajeda*, 58 F.4th 184, 188 (5th Cir. 2023); *United States* v. *West*, 70 F.4th 341, 346-347 (6th Cir. 2023); *United States* v. *Von Vader*, 58 F.4th 369, 371 (7th Cir. 2023); *Crandall*, 25 F.4th at 586 (8th Cir.); *United States* v. *Wesley*, 60 F.4th 1277, 1283-1286 (10th Cir. 2023); *Jenkins*, 50 F.4th at 1200-1204 (D.C. Cir.).[3]

Petitioner errs in asserting (Pet. 14-17), however, that three other circuits have taken a different approach. Although the First Circuit has taken the view that an asserted legal error can form part of an individualized

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[3] Citing nonprecedential district-court decisions, petitioner asserts (Pet. 23) that even among those "circuits that apply the same purported Section 2255 bar," "identical arguments are being treated differently." But petitioner does not contend that any of those circuits would have decided his case differently than the Fourth Circuit did here.

assessment of whether extraordinary and compelling reasons exist in a particular defendant's case, see *United States* v. *Trenkler*, 47 F.4th 42, 48-49 (2022), petitioner incorrectly categorizes (Pet. 15-17) the Second and Ninth Circuits as having adopted that view. In the Second Circuit decision that petitioner cites (Pet. 16), that court stated that, in the absence of an applicable policy statement issued by the Sentencing Commission, district courts may "consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release." *United States* v. *Brooker*, 976 F.3d 228, 237 (2020). But the Second Circuit did not address the specific question whether an asserted legal error in the original proceedings may qualify as such a reason. Cf. *United States* v. *Amato*, 48 F.4th 61, 65 n.3 (2d Cir. 2022) (per curiam) (similarly declining to address that question), cert. denied, 143 S. Ct. 1025 (2023).

Likewise, in the Ninth Circuit decision that petitioner cites (Pet. 16-17), that court stated that prospective statutory amendments enacted by Congress can form part of an individualized determination of whether extraordinary and compelling reasons exist for reducing a preexisting sentence. *United States* v. *Chen*, 48 F.4th 1092, 1093 (2022). But the court did not address whether the type of reason asserted here—a trial or sentencing error that amounts to the legal invalidity of the conviction or sentence—can constitute an extraordinary and compelling reason. Cf. *United States* v. *Roper*, 72 F.4th 1097, 1102 (9th Cir. 2023) (noting the issue, but deciding the case without resolving it because the defendant "does not claim that his original sentence violated the Constitution or federal law"). Petitioner

therefore overstates the level of disagreement in the courts of appeals.

b. In any event, the Sentencing Commission's recent amendment to Sentencing Guidelines § 1B1.13, which took effect on November 1, 2023, supersedes any disagreement in the circuits. The amendment revised Section 1B1.13 to "extend[] the applicability of the policy statement to defendant-filed motions." 88 Fed. Reg. 28,256 (May 3, 2023). The amendment also revised Section 1B1.13 to "expand[] the list of specified extraordinary and compelling reasons that can warrant sentence reductions." *Ibid.* Even as expanded, however, that list does not include the type of reason asserted here. See *id.* at 28,254-28,255.

Under Section 3582(c)(1)(A), any sentence reduction must be "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(1)(A). Because the Commission has now issued an amended policy statement applicable to defendant-filed motions, and because that amended policy statement does not permit reliance on the asserted legal invalidity of a conviction or sentence in the determination of whether extraordinary and compelling reasons for a sentence reduction exist, any disagreement among the circuits on the question presented lacks prospective significance. Even in those circuits that petitioner views as having adopted his position on the question presented under then-current law, district courts will now be limited by the amended policy statement's description of what may be considered extraordinary and compelling reasons and therefore may not rely on the type of reason petitioner asserts here. See *United States* v. *Ruvalcaba*, 26 F.4th 14, 23-24 (1st Cir. 2022) (acknowledging that "[i]f and when the Sentencing Commission

issues updated guidance applicable to prisoner-initiated motions," district courts "will be required to ensure that their determinations of extraordinary and compelling reasons are consistent with that guidance"); *Chen*, 48 F.4th at 1098 (acknowledging that district courts "are bound by" applicable policy statements).

Petitioner observes (Pet. 25) that the amended policy statement specifies that "a change in the law * * * may be considered in determining whether the defendant presents an extraordinary and compelling reason" under certain circumstances. 88 Fed. Reg. at 28,255. But while that provision purports to allow a district court to consider a statutory amendment enacted by Congress, a legal error of the sort asserted here would not qualify as "a change in the law" within its scope. See *United States* v. *Wesley*, 78 F.4th 1221, 1222 (10th Cir. 2023) (Tymkovich, J., concurring in the denial of rehearing en banc) (explaining that the "amended policy statement * * * contains not a word about errors in a conviction or sentence as a basis for compassionate release"). Petitioner does not rely on any change to Section 924(c) since his conviction and sentencing.

Instead, petitioner relies on intervening judicial decisions to argue that the "silencer" enhancement has *always* been an element of the offense, even at the time he was convicted and sentenced. The decisions that he cites—*United States* v. *O'Brien*, 560 U.S. 218 (2010), and *Alleyne* v. *United States*, 570 U.S. 99 (2013)—describe what the statute and the Sixth Amendment have always required. See *id.* at 103 (relying on "the original meaning of the Sixth Amendment"); *O'Brien*, 560 U.S. at 231 ("[W]hen th[e] Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it be-

came law.") (quoting *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994)) (first set of brackets in original). Petitioner was therefore able to raise his Sixth Amendment claim in his original proceedings—as, for example, the defendant in *Alleyne* did in challenging the Court's prior decision in *Harris* v. *United States*, 536 U.S. 545 (2002). See *Alleyne*, 570 U.S. at 104.

Nothing in the policy statement or its commentary shows that the Sentencing Commission intended to allow relief based on judicial decisions that vindicated claims that were available in the original proceedings—particularly when, as here, those decisions themselves lack retroactive effect. See *Schriro* v. *Summerlin*, 542 U.S. 348, 351-358 (2004) (holding that analogous decision was not retroactive). Petitioner observes (Pet. 25) that the amended policy statement "gives courts discretion to consider, as extraordinary and compelling, any circumstance or combination of circumstances similar in gravity to the reasons the guidance specifically lists." But for reasons explained above, his assertion of error is not similar to any of the listed reasons. See pp. 11-13, *supra*.

Petitioner suggests (Pet. 26) that the amended policy statement cannot resolve circuit disagreement because it will not lead the circuits that disallow Section 3582(c)(1)(A) reductions based on claims like his to reconsider their positions. But as even the circuits petitioner cites as supporting him agree, the statute requires districts courts to "ensure that their determinations of extraordinary and compelling reasons are consistent with" the amended policy statement. *Ruvalcaba*, 26 F.4th at 23-24; see 18 U.S.C. 3582(c)(1)(A) (requiring that any reduction be "consistent with applicable policy statements issued by the Sentencing Commission"); pp. 18-19, *supra*. They would thus be bound by the lim-

its that it imposes. At a minimum, there is no sound reason for the Court to consider the question presented in a case that predates the amended policy statement and any relevant circuit consideration of that policy statement.

3. Finally, even if the question presented otherwise warranted review, this case would be a poor vehicle in which to address it, because the issue would not be outcome determinative. 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 section 3553(a) to the extent that they are applicable." 18 U.S.C. 3582(c)(1)(A). Here, after considering the Section 3553(a) factors, the district court determined that a sentence reduction was not "appropriate." Pet. App. 28a; see *id.* at 27a ("The original sentence, as reduced [via a prior Guidelines-based motion under Section 3582(c)(2)], protects society, promotes respect for the law and serves as a deterrent to the defendant.").

The district court reached that determination after "tak[ing] into account the entire record," including petitioner's "record of self-betterment while in prison." Pet. App. 27a-28a. As the court explained, "the seriousness of the offense and the danger that it represents, the vast quantities of the drugs distributed, the leadership role in the conspiracy, and the possession of firearms in furtherance of the conspiracy militate against a finding that compassionate release is appropriate here." *Id.* at 28a. Petitioner asserts (Pet. 27-28) that the district court determined that a sentence reduction was unwarranted "*without* consideration of the arguments it considered barred by Section 2255." But in weighing the Section 3553(a) factors, the court ex-

plained that a Section 3582(c)(1)(A) sentence reduction "is appropriate *only where* the defendant is not a danger to the safety of any other person or of the community." Pet. App. 27a (emphasis added). The court then determined that petitioner is "a danger to the community," citing, among other things, "the presence of extensive weaponry in [his] possession" as "evidence of his willingness to do violence in defense of his illegal [drug] trade." *Ibid.* Thus, even if petitioner could demonstrate extraordinary and compelling reasons for a sentence reduction, he would be unable to show that "he is not a danger to the community" and that the Section 3553(a) factors therefore support such a reduction. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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