No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANTONIO M. TAYLOR,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court may consider nonretroactive changes in sentencing law in determining whether a defendant has shown "extraordinary and compelling reasons" for a sentence reduction as required by 18 U.S.C. § 3582(c)(1)(A)(i)?

RELATED PROCEEDINGS

United States v. Taylor, 28 F.4th 929 (8th Cir. 2022) (opinion affirming order of the district court).

United States v. Taylor, No. 12-00242-01-CR-W-BP (W.D. Mo.) (district court order denying motion for sentence reduction).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Antonio M. Taylor respectfully requests this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 18, 2022.

OPINION BELOW

The Eighth Circuit opinion affirming the district court's denial of Taylor's motion for reduction of sentence is reported at *United States v. Taylor*, 28 F.4th 929 (8th Cir. 2022) and is included in the Appendix (herein "App.").

JURISDICTION

The Eighth Circuit entered judgment on March 18, 2022, App. B, and subsequently denied the petition for rehearing by panel and rehearing en banc on April 22, 2022, App. C. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 403 of the First Step Act, entitled "Clarification of Section 924(c) of Title 18, United States Code," provides:

> (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 provides, 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"

Section 3582 of Title 18 of the United States Code provides, 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 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

INTRODUCTION

Thousands of individuals across the country are serving lengthy prison sentences imposed before the enactment of the First Step Act, which eliminated the stacking[1] provision of 18 U.S.C. § 924(c) and significantly reduced mandatory consecutive sentences for "second or subsequent convictions" under § 924(c) in nearly all cases. This case squarely presents a question that has divided the federal courts: whether district courts may consider nonretroactive changes of law, particularly the amendment to § 924(c) made by the First Step Act, in determining whether a sentence reduction is warranted under 18 U.S.C. § 3582(c)(1)(A)(i).

[1] In *Deal v. United States*, this Court "interpreted § 924(c)(1)(C) to require penalty stacking" for convictions on "multiple § 924(c) counts within one indictment." *United States v. Havens*, 374 F. Supp. 3d 628, 632 (E.D. Ky. 2019). Courts were required to impose five years for the first § 924(c) conviction and then 20 years for each additional § 924(c) conviction in the same proceeding. *See Deal v. United States*, 508 U.S. 129, 131–32 (1993). This permitted prosecutors to "stack" multiple § 924(c) charges in one indictment and expose first-time offenders to the same harsh penalties as reoffenders. *See Deal*, 508 U.S. at 145 (Stevens, J., dissenting); *see also United States v. Redd*, 444 F. Supp. 3d 717, 723 (E.D. Va. 2020).

Courts of appeal are sharply divided over district courts' authority to consider the First Step Act's amendment of § 924(c) when considering motions for compassionate release under 18 U.S.C. § 3582(c)(1)(A). The Third and Seventh Circuits held that, because Congress did not make the First Step Act's amendment of § 924(c) categorically retroactive, the amendment cannot be considered, alone or in combination with other relevant factors, in determining whether extraordinary and compelling reasons for sentence reduction exist as required by 18 U.S.C. § 3582(c)(1)(A). *See United States v. Andrews*, 12 F.4th 255, 261 (3d Cir. 2021); *United States v. Thacker*, 4 F.4th 569, 573 (7th Cir. 2021). In the case below, the Eighth Circuit joined these courts of appeal.

By contrast, two courts of appeal, the Fourth and Tenth Circuits, have correctly held that district courts may consider the First Step Act's changes to § 924(c) in determining if extraordinary and compelling reasons exist to warrant sentence reduction. *See United States v. McCoy*, 981 F.3d 271, 286 (4th Cir. 2020); *United States v. Maumau*, 993 F.3d 821, 837 (10th Cir. 2021). The Sixth Circuit has an active intra-circuit conflict regarding the question presented. *See, e.g.*, *United States v. Jarvis*, 999 F.3d 442, 444–45 (6th Cir. 2021). There is no reason to believe that the circuits will resolve this conflict on their own without action by this Court.

This circuit split leaves thousands of incarcerated individuals with different rights under the First Step Act based on nothing more than the happenstance of geography. If Mr. Taylor, for example, had been sentenced in the Fourth or Tenth Circuits, the district court could have considered that he would have faced a

significantly shorter mandatory minimum sentence under the First Step Act's amendment to § 924(c) if he were sentenced today in resolving Mr. Taylor's motion for compassionate release. Mere geography has denied him this relief.

This Court recently held in *Concepcion v. United States* that "the First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence pursuant to the First Step Act." 142 S. Ct. 2389, 2404 (2022). In *Concepcion*, the Court did not specifically consider whether nonretroactive changes of law can be considered in the context of compassionate release motions under § 3582(c)(1)(A), but its holding bolsters Mr. Taylor's arguments below and supports the Fourth and Tenth Circuits' approaches to the question presented. *Id*. In *Concepcion* this Court explained that district courts have largely unlimited discretion in choosing what to consider in sentence modification proceedings and are only restricted by limitations set by Congress or the Constitution. *Id.* at 2398–2400. Given that the Sentencing Commission has promulgated no relevant policy statements, there is only one express limitation on district courts' discretion under § 3582(c)(1)(A)—that "[r]ehabilitation of the defendant alone" is not sufficient to justify sentence reduction. 28 U.S.C. § 994(t). Thus, the Eighth Circuit's decision below—and the Third and Seventh Circuits' approach to the question presented—is incorrect.

This case meets this Court's criteria for granting certiorari. First, there is a deeply entrenched, acknowledged circuit conflict concerning the question presented in this case. Second, the Eighth Circuit's conclusion below that district courts may

not consider the First Step Act's nonretroactive amendment to § 924(c), or any nonretroactive change of law, is incorrect and ignores the text and purpose of the First Step Act. Third, the question presented is important and impacts a significant number of incarcerated individuals serving stacked § 924(c) convictions. Finally, this case is an ideal vehicle for resolving the question presented.

STATEMENT OF THE CASE

Legal background

In 1984, Congress passed the Comprehensive Crime Control Act, which amended 18 U.S.C. § 924(c). This amendment imposed a ten-year mandatory minimum sentence for "second or subsequent conviction[s]" for use of a firearm during a federal crime of violence. Pub. L. No. 98-473, § 1005(a), 98 Stat. 1837, 2138 (1984). Congress amended § 924(c) again four years later, replacing the ten-year sentence with a twenty-year sentence for "second or subsequent conviction[s]." Pub. L. No. 100-690, § 6460, 102 Stat. 4181, 4373 (1988).

Five years later, in 1993, this Court was asked to interpret the meaning of "second or subsequent conviction" within § 924(c)(1)(C), and the Court concluded that this language permitted the "stacking" of mandatory minimums for § 924(c) convictions obtained in the same proceeding. *Deal v. United States*, 508 U.S. 129, 132 (1993). After *Deal*, courts had to impose a minimum sentence of at least five years for the first § 924(c) conviction and then twenty-year sentences, to be served consecutively, for "second and subsequent" § 924(c) convictions. *Id.* at 130–31. Shortly thereafter, though, Congress again increased the mandatory minimum for

second or subsequent convictions under § 924(c)—from twenty to twenty-five years. Pub. L. No. 105-386, § 1, 112 Stat. 3469, 3469 (1998).

Section 924(c) stacking received widespread criticism in the years following *Deal*. Judges, defense attorneys, and prosecutors across the country criticized § 924(c) stacking for its capacity to produce unjustly severe and disproportionate sentences. *See* U.S. Sent'g Comm'n, 2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 359–60 (2011).[2] Chief Judge Julie Carnes, for example, identified § 924(c)'s stacking provision as among the "most egregious mandatory minimum provisions that produce the unfairest, harshest, and most irrational results." *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*, 11th Cong. 60–61 (2009) (statement of Chief Judge Julie E. Carnes, Judicial Conference of the United States); *see also United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004), *aff'd*, 433 F.3d 728 (10th Cir. 2006) (stating that fifty-five-year, statutorily-mandated stacked sentence was "unjust, cruel, and even irrational").

Additionally, § 924(c) was long criticized for its disproportionate—and disproportionately harsh—impact on Black defendants. *See* U.S. Sent'g Comm'n, Fifteen Years of Guidelines Sentencing 90 (2004) ("Notably, Blacks accounted for 48 percent of the offenders who appeared to qualify for a charge under 18 U.S.C. § 924(c) but represented 56 percent of those who were charged under the statute and

[2] https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_12.pdf.

64 percent of those convicted under it."); U.S. Sent'g Comm'n, Mandatory Minimum Penalties for Firearm Offenses in the Federal Criminal Justice System 6 (2018) ("Black offenders also generally received longer average sentences for firearm offenses carrying a mandatory minimum penalty than any other racial group.").

In 2018, Congress put an end to § 924(c) stacking with the First Step Act. Pub. L. No. 115-391, 132 Stat. 5194. With § 403, entitled "Clarification of Section 924(c) of Title 18," Congress rewrote § 924(c) so that only § 924(c) convictions "that occur[] after a prior conviction under this subsection has become final" carry the twenty-five-year mandatory minimum penalty, rather than "second or subsequent" convictions in the same proceeding. *Id.* § 403(a). Congress, however, limited the applicability of this anti-stacking amendment, making it only retroactive regarding offenses "committed before the date of enactment" of the First Step Act "if a sentence for the offense has not been imposed as of such date." *Id.* § 403(b).

Congress also used the First Step Act to expand access to compassionate release. Long before the First Step Act, Congress used the Comprehensive Crime Control Act to replace federal parole review of sentences with judicial review of cases where there are "extraordinary and compelling reasons" to relieve individuals of sentences. Pub. L. No. 98-473, § 212, 98 Stat. 1837, 1998–99 (1984); S. Rep. No. 98-225, at 53 n.74, 121 (1983). However, this relief could be sought only through a motion filed by the Director of the Bureau of Prisons (BOP). § 212, 98 Stat. at 1998. In practice, the BOP rarely filed these motions, which "result[ed] in inmates who may be eligible . . . not being considered" for compassionate release. U.S. Dep't of

Just., Off. of the Inspector Gen., The Federal Bureau of Prisons' Compassionate Release Program 11 (2013).[3] To remedy this, Congress amended 18 U.S.C. § 3582(c)(1)(A) with § 603 of the First Step Act, appropriately titled "Increasing the Use and Transparency of Compassionate Release." Pub. L. No. 115-391, § 603, 132 Stat. 5194, 5239 (2018). With this amendment, Congress gave defendants the authority to file their own motions for compassionate release if the BOP fails to make a motion on the defendant's behalf within 30 days of receiving a request to do so. 18 U.S.C. § 3582(c)(1)(A).

Proceedings below

Following a jury trial in 2014, Mr. Taylor was convicted of nine offenses, including three convictions for possession of a firearm in furtherance of a drug-trafficking crime in violation of 18 U.S.C. § 924(c). *United States v. Taylor*, 28 F.4th 929, 930 (8th Cir. 2022). The district court sentenced Mr. Taylor to a total term of sixty years of imprisonment. *Id.* He received fifty-five years for the three § 924(c) convictions, as the law, at the time, required the district court to impose consecutive terms of five years, twenty-five years, and twenty-five years. *Id.*

In 2018, several years after Mr. Taylor was sentenced, Congress passed the First Step Act, which repealed mandatory consecutive sentences for multiple § 924(c) convictions. In 2020, Mr. Taylor filed a *pro se* motion for reduction of sentence under 18 U.S.C. § 3582(c)(1)(A), seeking compassionate release. *Id.* To show "extraordinary and compelling reasons" for sentence reduction, 18 U.S.C. §

[3] https://oig.justice.gov/reports/2013/e1306.pdf.

3582(c)(1)(A)(i), Mr. Taylor argued that, because of the First Step Act's amendment to § 924(c), his mandatory minimum sentence would have been significantly shorter—fifteen years instead of fifty-five—had he been sentenced under current law, *Taylor*, 28 F.4th at 930. He also cited his "'significant' rehabilitative efforts." *Id.* Mr. Taylor moved to have his sentence reduced to twenty years. App. A. The district court denied Mr. Taylor's motion, concluding that "a non-retroactive change in law could not constitute an extraordinary and compelling reason for a reduction in sentence." *Taylor*, 28 F.4th at 930.

On appeal, the Eighth Circuit affirmed the district court's order denying Mr. Taylor's motion, relying on precedent that non-retroactive changes in law could not "contribute to a finding of 'extraordinary and compelling reasons' for a reduction." *Id.* (quoting *United States v. Crandall*, 25 F.4th 582, 586 (8th Cir. 2022)). In a concurring opinion, Judge Kelly cited cases from the Fourth and Tenth Circuits permitting the consideration of the First Step Act's nonretroactive amendment to § 924(c) but ultimately concluded that circuit precedent necessitated the majority's conclusion. *Id.* (Kelly, J., concurring).

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Deeply Divided Over the Question Presented.

Six courts of appeal have considered whether the First Step Act's 2018 amendment to § 924(c) can be considered in determining whether extraordinary and compelling reasons warrant a reduction in sentence under § 3582(c)(1)(A)(i) for a defendant who was sentenced under the pre-amendment sentencing regime. An

active circuit split exists because of these decisions. This Court, therefore, should grant review to resolve this entrenched circuit conflict.

A. Three Circuits Have Held That District Courts Cannot Consider the First Step Act's Changes to Section 924(c).

The majority approach—employed by the Third, Seventh, and now, Eighth Circuits—provides that district courts may *not* consider the First Step Act's 2018 amendment to § 924(c), alone or in combination with other reasons, in assessing whether extraordinary and compelling reasons warrant a sentence reduction in a compassionate release petition under § 3582(c)(1)(A).

In *United States v. Thacker*, the Seventh Circuit concluded that the First Step Act's amendment of § 924(c) only applies prospectively and, therefore, cannot be considered an extraordinary and compelling reason for sentence reduction. 4 F.4th 569, 573 (7th Cir. 2021). The court reasoned that compassionate release "cannot be used to effect a sentencing reduction at odds with Congress's express determination embodied in § 403(b)." *Id.* at 574. The court even expressed concern that "[a]ny other conclusion offends . . . separation of powers." *Id.* In reaching its conclusion, the Seventh Circuit acknowledged the circuit split on the issue and observed that other "courts have come to principled and sometimes different conclusions."[4] *Id.* at 575.

[4] In an earlier case, *United States v. Black*, the Seventh Circuit cited with favor the Fourth and Tenth Circuits' approaches to the question presented and instructed the district court that it could consider, on remand, whether the amendment to § 924(c) could constitute an extraordinary and compelling reason for sentence reduction. 999 F.3d 1071, 1075–76 (7th Cir. 2021). In *Thacker*, the court "squarely and definitively" decided "[i]t cannot." 4 F.4th at 576.

Likewise, in *United States v. Andrews*, the Third Circuit adopted the same rule: "nonretroactive changes to the § 924(c) mandatory minimums . . . cannot be a basis for compassionate release." 12 F.4th 255, 261 (3d Cir. 2021). The court acknowledged its split from the Fourth and Tenth Circuits but ultimately concluded that it would "sow conflict within the statute" to "construe Congress's nonretroactivity directive as simultaneously creating an extraordinary and compelling reason for early release." *Id.*

Finally, in the case below, a panel of the Eighth Circuit aligned itself with this approach.[5] *See United States v. Taylor*, 28 F.4th 929, 930 (8th Cir. 2022). The court held that "a non-retroactive change in law, whether offered alone or in combination with other factors, cannot contribute to a finding of 'extraordinary and compelling reasons' for a reduction in sentence." *Id.* (quoting *United States v. Crandall*, 25 F.4th 582, 586 (8th Cir. 2022)).

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

The Fourth and Tenth Circuits, in conflict with the Third, Seventh, and Eighth Circuits, have held that district courts may consider the First Step Act's anti-stacking amendment in its compassionate release analysis and that wide disparities between pre- and post-amendment sentences can constitute extraordinary and compelling reasons for sentence reduction.

[5] The Eighth Circuit had previously concluded in *United States v. Loggins* that the district court "did not misstate the law" when it "found that a non-retroactive change in the law did not support a finding of extraordinary or compelling reasons for release." 966 F.3d 891, 893 (8th Cir. 2020).

In *United States v. McCoy*, in affirming the district court's decision to grant the defendants' sentence reductions, the Fourth Circuit concluded that district courts can "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." 981 F.3d 271, 286 (4th Cir. 2020). That the amendment was not retroactive, according to the court, "does not mean that courts may not consider that legislative change in conducting their individualized reviews of motions for compassionate release under § 3582(c)(1)(A)(i)." *Id.* at 286. The court reasoned that there was "nothing inconsistent" about Congress deciding that "not *all* defendants convicted under § 924(c) should receive new sentences" but also empowering courts to "relieve *some* of those defendants of those sentences on a case-by-case basis." *Id.* at 287 (quoting *United States v. Bryant*, No. 95-202-CCB-3, 2020 WL 2085471, at *3 (D. Md. Apr. 30, 2020)). The court concluded that "courts legitimately may consider, under the 'extraordinary and compelling reasons' inquiry, that defendants are serving sentences that Congress itself views as dramatically longer than necessary or fair." *Id.* at 285–86.

In *McCoy*, the Fourth Circuit also acknowledged a growing consensus amongst district courts that the severity of § 924(c) sentences and "enormous disparit[ies] between that sentence and the sentence a defendant would receive today[] can constitute an 'extraordinary and compelling reason for relief." *Id.* at 285 (citing *United States v. Jones*, 482 F. Supp. 3d 969, 980 (N.D. Cal. 2020); *United*

States v. Rodriguez, 451 F. Supp. 3d 392, 397–99 (E.D. Pa. 2020); *United States v. Redd*, 444 F. Supp. 3d 717, 724–25 (E.D. Va. 2020); *United States v. Beck*, 425 F. Supp. 3d 573, 579 (M.D.N.C. 2019)).

The Tenth Circuit adopted the same approach. *See United States v. Maumau*, 993 F.3d 821 (10th Cir. 2021); *see also United States v. McGee*, 992 F.3d 1035 (10th Cir. 2021) (First Step Act's nonretroactive amendment to § 841(b)(1)(A) can serve, in combination with other factors, as a basis for sentence reduction under § 3582). In *Maumau*, the court affirmed the district court's decision to reduce the defendant's sentence based on a "combination of factors," including the defendant's youth at the time of sentencing; "the 'incredible' length of his stacked mandatory sentences under § 924(c); the First Step Act's elimination of sentencing stacking . . . ; and the fact that [the defendant], 'if sentenced today, . . . would not be subject to such a long term of imprisonment.'" 993 F.3d at 837 (quoting *United States v. Maumau*, No. 2:08-cr-00758-TC-11, 2020 WL 806121, at *7 (D. Utah Feb. 18, 2020)). The court concluded that district courts "have the authority to determine for themselves what constitutes 'extraordinary and compelling reasons" for sentence reduction, including the First Step Act's non-retroactive elimination of § 924(c) stacking. *Id.* at 834, 837. It affirmed the district court's conclusion that the fact that the amendment to § 924(c) was not made retroactive was "not dispositive" and did not necessarily remove "the power of the courts to relieve some defendants of" stacked sentences "on a case-by-case basis." *Id.* at 828.

C. One Circuit Has an Active Intra-Circuit Split Regarding Whether Courts May Consider the First Step Act's Changes to Section 924(c).

The Sixth Circuit has an active intra-circuit conflict regarding whether district courts may consider the First Step Act's amendment to § 924(c) in determining if extraordinary and compelling reasons exist for sentence reduction and has, in the last year, released decisions that fall on both sides of the circuit conflict.

In *United States v. Tomes*, a panel of the Sixth Circuit held that the district court did not abuse its discretion in denying the defendant's motion for compassionate release "based on its . . . weighing of the § 3553(a) factors." 990 F.3d 500, 504 (6th Cir. 2021). The court, offering "[o]ne last point," also concluded that the First Step Act's amendment to 21 U.S.C. § 841(b)(1)(A), which Congress made nonretroactive in the same manner as its amendment to § 924(c), could not serve as a basis for compassionate release because the amendment was "inapplicable" to the defendant, whose sentence was imposed before the enactment of the First Step Act. *Id.* at 505. There is deep intra-circuit conflict regarding whether this conclusion in *Tomes* was dicta. *See, e.g.*, *United States v. Jarvis*, 999 F.3d 442, 446 (6th Cir. 2021) ("We appreciate that *Owens* and our colleague in dissent today interpret this part of *Tomes* as dicta."); *id.* at 447 (Clay, J., dissenting) ("But in fact, *Tomes*' conclusion . . . amounts to dicta that we are not bound to follow.")

In *United States v. Owens*, decided two months after *Tomes*, a different panel of the Sixth Circuit reached the opposite conclusion. 996 F.3d 755, 760 (6th Cir. 2021). In *Owens*, the panel held that "in making an individualized determination

about whether extraordinary and compelling reasons merit compassionate release, a district court may include, along with other factors, the disparity between a defendant's actual sentence and the sentence that he would receive if the First Step Act applied." *Id.* The court reasoned that *Tomes* merely held that a defendant may not rely on the First Step Act's nonretroactive amendments *alone* when seeking to establishing extraordinary and compelling reasons for sentence reduction. *Id.* at 760, 763.

One month later, in *United States v. Jarvis*, a divided panel of the Sixth Circuit grappled with the conflict between *Tomes* and *Owens*. 999 F.3d 442, 444–45 (6th Cir. 2021). In *Jarvis*, the court concluded that *Owens* failed to follow binding precedent and inaccurately "claim[ed] that *Tomes* held only that a defendant may not rely on a non-retroactive amendment *alone* when trying to establish extraordinary and compelling reasons." *Id.* at 445–46. The majority ultimately concluded that it was bound to follow *Tomes*, as it was decided before *Owens*. *Id.* at 445. In his dissent, Judge Clay reached the opposite conclusion, asserting that "*Tomes*' conclusion that a non-retroactive sentence amendment cannot support a motion for compassionate release amounts to dicta" and that the majority incorrectly ignored the court's precedent in *Owens*. *Id.* 447–48 (Clay, J., dissenting).

In *Jarvis*, the majority affirmed the district court's conclusion that the First Step Act's non-retroactive change to § 924(c) "could not as a matter of law be an 'extraordinary and compelling' reason" for sentence reduction. 999 F.3d at 443. The court reasoned that allowing district courts to consider the change would render

"useless" the non-retroactivity language in § 403 of the First Step Act and make eligible for compassionate release individuals who Congress deliberately excluded from the First Step Act's changes to § 924(c) sentences. *Id.* at 443–44. The court noted its split with the Fourth and Tenth Circuits but ultimately concluded that the First Step Act's non-retroactive amendments, "whether by themselves or together with other factors," cannot be considered extraordinary and compelling reasons for sentence reduction. *Id.* at 444–45.

The intra-circuit *Tomes-Owens-Jarvis* conflict has continued to frustrate the Sixth Circuit. *See United States v. Hunter*, 12 F.4th 555, 564 (6th Cir. 2021); *United States v. McCall*, 20 F.4th 1108, 1114 (6th Cir. 2021). In *McCall*, a panel responded by concluding that "*Jarvis*, by contravening *Owens*, created an intra-circuit split" and stated that it was bound to follow *Owens*, which was decided before *Jarvis*. *United States v. McCall*, 20 F.4th 1108, 1114 (6th Cir. 2021). The Sixth Circuit, however, granted a rehearing *en banc* of this decision and vacated the decision. *United States v. McCall*, 29 F.4th 816 (6th Cir. 2022). The court's most recent decision on this issue, *United States v. McKinnie*, heavily criticized both *McCall* and *Owens*. 24 F.4th 583, 589–90 (6th Cir. 2022).

D. The Circuit Conflict Will Not Resolve Without a Decision from this Court.

This circuit split is deeply entrenched, and there is no reason to believe that the circuits will resolve this conflict on their own without action by this Court. The Third, Sixth, and Seventh Circuits have explicitly acknowledged the circuit split. *See United States v. Jarvis*, 999 F.3d 442, 444 (6th Cir. 2021) ("We appreciate that

the Fourth Circuit disagrees with us, and that the Tenth Circuit disagrees in part with us."); *United States v. Thacker*, 4 F.4th 569, 575 (7th Cir. 2021) ("[W]e observe that we are not the only court to deal with this issue . . . and courts have come to principled and sometimes different conclusions."); *United States v. Andrews*, 12 F.4th 255, 261 (3d Cir. 2021) (acknowledging that it "join[s] the Sixth and Seventh Circuits" but citing Fourth and Tenth Circuit decisions with contrary approach). Yet, the circuits remain firm in their different, conflicting approaches.

The Eighth Circuit's opinion below has only added to the conflict among the circuits. Further, the fact that the Fifth Circuit has recently remanded a compassionate release motion to the district court "to consider, in the first instance, whether the nonretroactive sentencing changes to . . . § 924(c) convictions, either alone or in conjunction with any other applicable considerations, constitute extraordinary and compelling reasons for a reduction in sentence," *United States v. Cooper*, 996 F.3d 283, 289 (5th Cir. 2021), and has left this question open, *United States v. Coats*, 853 F. App'x 941, 942–43 (5th Cir. 2021), indicates that the conflict may only become more deeply entrenched. Additionally, the Sixth Circuit's rehearing of *United States v. McCall,* 20 F.4th 1108 (6th Cir. 2021), *reh'g granted*, 29 F.4th 816 (6th Cir. 2022), can only further contribute to the conflict.

Moreover, when asked to address this issue *en banc* several circuits have declined to do so. In *Thacker*, the Seventh Circuit stated that "[n]o judge in active service requested to hear this case *en banc*." 4 F.4th at 576. Likewise, the Sixth Circuit denied rehearing *en banc* in *United States v. Jarvis*, 999 F.3d 442 (6th Cir.

2021) (rehearing *en banc* denied Sept. 8, 2021) and in *United States v. Hunter*, 12 F.4th 555 (6th Cir. 2021) (rehearing *en banc* denied Nov. 23, 2021).[6] Further, in the case below, the Eighth Circuit denied rehearing *en banc* on April 22, 2022. App. C. There is no realistic prospect that the circuits will resolve this conflict without this Court's intervention. Only this Court can provide clarity.

The Sentencing Commission cannot resolve this circuit conflict. Congress delegated authority to the Commission to "promulgat[e] general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) . . . [and] 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 also* U.S. Sent'g Guidelines Manual § 1B1.13 cmt. background (U.S. Sent'g Comm'n 2018). Thus, "Congress expressly cabined district courts' discretion by requiring courts to abide by the Sentencing Commission's policy statements." *Concepcion v. United States*, 142 S. Ct. 2389, 2401 (2022). The Commission, however, has lacked a voting quorum since shortly after the First Step Act was enacted. *United States v. Maumau*, 993 F.3d 821, 836 (10th Cir. 2021). Thus, it "has been unable to comply with its statutory duty of promulgating [] post-First Step Act policy statement[s] regarding the appropriate use" of compassionate release. *Id.*; *see also* Douglas Berman, *Any Guesses For When We Might Again Have*

[6] The Sixth Circuit did grant a rehearing en banc of the decision of the *McCall* decision. *United States v. McCall*, 29 F.4th 816 (6th Cir. 2022). Given the Sixth Circuit's recent decision in *McKinnie*, which heavily criticized *McCall* and *Owens*, 24 F.4th at 589–90, it is possible that, on rehearing, the court will align the circuit with its *Jarvis* decision, which would only further entrench the circuit conflict on the question presented.

A Fully Functioning US Sentencing Commission?, Sent'g L. & Pol'y (Feb. 15, 2021)[7] ("[T]he US Sentencing Commission was only somewhat functional for a small portion of the last four years, and the [U.S.S.C.] has not had [a] complete set of commissioners firmly in place for the better part of a decade.")

There is only a dim prospect it will fulfill its duty anytime soon. President Biden has only recently announced nominees for the Commission. *President Biden Nominates Bipartisan Slate for the United States Sentencing Commission*, The White House (May 11, 2022).[8] In a hearing before Congress, the nominees indicated that they, if confirmed, would prioritize the resolution of circuit splits. *Nomination Hearing*, Comm. on the Judiciary (June 8, 2022).[9] However, it is unclear when a committee vote and full Senate vote on these nominees will occur. *See* Douglas Berman, *Senate Conducts Hearing for Nominees for US Sentencing Commission*, Sent'g L. & Pol'y (June 8, 2022).[10]

Regardless, Congress did not grant the Commission exclusive authority to define what constitutes "extraordinary and compelling reasons" for sentence reduction. In § 994(t), Congress gave the Commission authority to "describe"—*not* define—"what should be considered extraordinary and compelling." Presumably, Congress knowingly used "describe" in directing the Commission. *Maumau*, 993 F.3d at 833–34; *see also id* ("The word 'describe' is commonly defined to mean 'to use

[7] https://sentencing.typepad.com/sentencing_law_and_policy/2021/02/anyone-have-any-guess-for-whether-we-will-have-a-functioning-us-sentencing-commission-anytime-soon.html.
[8] https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/11/president-biden-nominates-bipartisan-slate-for-the-united-states-sentencing-commission/.
[9] https://www.judiciary.senate.gov/meetings/06/08/2022/nominations.
[10] https://sentencing.typepad.com/sentencing_law_and_policy/2022/06/nominees-for-us-sentencing-commission-receive-interesting-confirmation-hearing-.html.

words to convey . . . impression of (a person, thing, scene, situation, event, etc.) by referring to . . . qualities, features, or details.' . . . In contrast, the word 'define' is commonly understood to mean '[t]o set bounds to, to limit, restrict, confine.'"); *cf.* *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms.") Thus, though the district courts' discretion is technically "cabined" by Congress's requirement that they "abide by" the Commission's policy statements, *Concepcion*, 142 S. Ct. at 2401, it is ultimately the district courts that "decide for themselves whether 'extraordinary and compelling reasons' exist in a given case" while the Sentencing Commission merely sets "guideposts" for the courts by "describ[ing] those characteristics . . . that typically constitute 'extraordinary and compelling reasons.'" *Maumau*, 993 F.3d at 834.

The First Step Act was signed into law three and half years ago. In this time, the Sentencing Commission has failed, and continues to fail, to act. Meanwhile, district courts have continued to "make their own independent determinations of what constitutes an 'extraordinary and compelling reason[]" for sentence reduction under § 3582(c)(1)(A), *United States v. McCoy*, 981 F.3d 271, 284 (4th Cir. 2020), and the federal courts remain starkly, intractably divided on this question. Federal judges will continue to disagree on the question, and federal prisoners will continue to receive different outcomes based on their geographic location. Absent a policy statement from the Commission or a definition of "extraordinary and compelling reasons," this Court should act. The Court should intervene, as it recently did in

Concepcion v. United States to address whether a district court may consider other intervening changes of law or fact in deciding a motion under the First Step Act. *See* 142 S. Ct. 2389 (2022). *Contra Braxton v. United States*, 500 U.S. 344, 348–49 (1991) ("We choose not to resolve the first question presented . . . because the Commission has already undertaken a proceeding that will eliminate circuit conflict over the meaning of [Guideline] § 1B1.2.")

II. The Eighth Circuit's Decision is Incorrect.

The Eighth Circuit's conclusion that Congress's 2018 amendment of § 924(c) cannot, either alone or in combination with other factors, contribute to a district court's finding of extraordinary and compelling reason for a sentence reduction is incorrect.

This Court recently held in *Concepcion v. United States* that "the First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence pursuant to the First Step Act." 142 S. Ct. 2389, 2404 (2022). The Court reasoned that "[t]he only limitations on a court's discretion to consider any relevant materials . . . in modifying [a] sentence are those set forth by Congress in a statute or by the Constitution," *id.* at 2400, establishing a presumption that district courts may consider anything, even intervening changes of law, unless *explicitly* told not to.

Nothing in the First Step Act or § 3582 limits what district courts may consider in determining if extraordinary and compelling reasons for sentence reduction exist. Congress has only set one limit on what can constitute

extraordinary and compelling reason: "Rehabilitation of the defendant alone" is not sufficient. 28 U.S.C. § 994(t). Congress has imposed no other explicit limits. This is consistent with the broad, largely unlimited discretion district courts have historically had in choosing what they may consider at sentencing and sentence modification. *Concepcion*, 142 S. Ct. at 2398–99. The Eighth Circuit—and its sister circuits that hold that the amendment to § 924(c) cannot be considered in resolving compassionate release motions—has impermissibly added another factor to the single limitation expressed by Congress in 28 U.S.C. § 994(t).

The approach of the Third, Seventh, and Eighth Circuit—and of certain Sixth Circuit decisions—contravenes Congress's purpose in enacting the First Step Act and revising the compassionate release framework. That the First Step Act ended § 924(c) stacking was an "exceptionally dramatic" sentencing change, *United States v. McCoy*, 981 F.3d 271, 285 (4th Cir. 2020), so dramatic that a court described it as the "extraordinary" ending of a "modern-day dark ages . . . of prosecutorial § 924(c) windfall," *United States v. Haynes*, 456 F. Supp. 2d 492, 502 (E.D.N.Y. 2020). Further, Congress titled the anti-stacking amendment "*Clarification* of § 924(c)," indicating "that *Congress never intended that the brutal sentence[s]*" defendants received under the pre-amendment sentencing regime "*be imposed*." *Id.* To remove this from district courts' consideration is to remove perhaps one of the most extraordinary and compelling reasons for sentence reduction. Congress itself viewed "unusually long sentence[s]" as one of the clearest examples of circumstances justifying a reduction in sentences. S. Rep. No. 98-225 (1983).

The Third, Seventh, and Eighth Circuits rest their conclusions on the faulty logic that Congress's decision to not amend § 924(c) in a categorically retroactive manner precludes any and all consideration of this amendment in compassionate release analyses. However, as the Fourth Circuit rightfully noted, there is "nothing inconsistent about" Congress deciding both that "'not *all* defendants convicted under § 924(c) should receive new sentences,' [and] that the courts should be empowered to 'relieve *some* defendants of those sentences on a case-by-case basis.'" *McCoy*, 981 F.3d at 286 (quoting *United States v. Bryant*, No. 95-202-CCB-3, 2020 WL 2085471, at *3 (D. Md. Apr. 30, 2020)). Just because Congress decided individuals should not automatically be entitled to a new sentence under the First Step Act does not mean it forbade courts from considering its significant change to § 924(c) in applying § 3582(c)(1)(A).

Additionally, Congress reformed § 3582(c)(1)(A)'s compassionate release procedure with the First Step Act because it wanted to expand the use and "boost grants of compassionate release." *United States v. Jones*, 980 F.3d 1098, 1104 (6th Cir. 2020); *see also* 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Ben Cardin) ("The bill expands compassionate release . . . and expedites compassionate release applications."). Congress even titled § 603 of the First Step Act "Increasing the Use and Transparency of Compassionate Release." Pub. L. No. 115-391, § 603, 132 Stat. 5194, 5239 (2018). The Eighth Circuit's approach denies defendants the ability to seek relief under this reformed compassionate release process merely because Congress did not make the amendment fully retroactive,

even though "the very purpose of § 3582(c)(1)(A) is to provide a 'safety valve' that allows for sentence reductions when there is *not* a specific statute that already affords relief." *McCoy* 981 F.3d at 286 (quoting *United States v. Jones*, 483 F. Supp. 3d 969, 980 (N.D. Cal. 2020)).

For these reasons, the Fourth and Tenth Circuits' approach is more consistent with the text and purpose of § 3582(c)(1)(A), and the Eighth Circuit's decision below is incorrect.

III. The Question Presented is Undeniably Important.

The question presented—whether district courts may consider the First Step Act's repeal of the stacking provision of § 924(c) in determining whether extraordinary and compelling reasons warrant the reduction of lengthy pre-amendment sentences—is an important, recurring question in the federal courts. The First Step Act's amendment to § 3582 authorizing defendants to file their own compassionate release motions already facilitated an increase in the use of compassionate release, but the number of individuals seeking and obtaining this relief "dramatically increased" in 2020, "primarily in response to the COVID-19 pandemic." Julie Zibulsky, Christine Kitchens, Alyssa Purdy & Kristen Sharpe, Compassionate Release: The Impact of the First Step Act and COVID-19 Pandemic 1–3 (U.S. Sent'g Comm'n 2022).[11] District courts face this question and new motions for compassionate release seemingly every day.

[11] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220310_compassionate-release.pdf.

According to the Sentencing Commission, over 2,400 people are currently serving pre-amendment, stacked § 924(c) sentences. U.S. Sent'g Comm., *Estimate of the Impact of Selections Sections of S. 1014, The First Step Act Implementation Act of 2021* 1 (2021).[12] Many of these individuals are serving significantly, sometimes decades, longer sentences than those sentenced for identical conduct today. *See, e.g.*, *United States v. McCoy*, 981 F.3d 271, 274 (4th Cir. 2020) ("Today, the defendants' sentences would be dramatically shorter—in most cases, by 30 years—than the ones they received."); *United States v. Young*, 458 F. Supp. 3d 838, 848 (M.D. Tenn. 2020) ("[A]s a result of the First Step Act, if [defendant] were sentenced now, he would be subject to a mandatory minimum sentence of 25 years, rather than 92.") These are stark, disturbing disparities.

But whether these individuals can receive relief from these lengthy sentences depends entirely on geographic happenstance. Defendants in the Fourth and Tenth Circuits are being released from prison, while defendants in the Third, Seventh, and Eighth Circuits (and potentially the Sixth Circuit), with nearly identical motions, will remain incarcerated by virtue of geography. These months, years, and even decades of difference "understandably mean[] all the world to" defendants. *United States v. Thacker,* 4 F.4th 569, 572 (7th Cir. 2021); *see also United States v. Jenkins*, 854 F.3d 181, 192 (2d Cir. 2017) ("Additional months in prison . . . have exceptionally severe consequences for the incarcerated individual . . . [and] for society which bears the direct and indirect costs of incarceration.") This Court's

[12] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/October_2021_Impact_Analysis_for_CBO.pdf.

review of the issue presented is needed to address these disparities in outcomes across the circuits.

IV. This Case Presents an Ideal Vehicle for Resolving the Question Presented.

This case is an excellent vehicle for resolving the question presented as it cleanly presents this issue dividing the circuit courts.

Mr. Taylor raised the question presented throughout the proceedings below. In the district court, Mr. Taylor argued that a sentence reduction was warranted because of the significant disparity between the fifty-five years he received in 2014 for his § 924(c) convictions and the fifteen-year mandatory minimum he would face if he was sentenced today, after the enactment of the First Step Act. App. A. On appeal, Mr. Taylor argued that the district court erred in deciding that the nonretroactive amendment to § 924(c), considered with his rehabilitative efforts, could not constitute an "extraordinary and compelling reason" to reduce his sentence. *United States v. Taylor*, 28 F.4th 929, 930 (8th Cir. 2022). The Eighth Circuit decisively stated that, following precedent, "a non-retroactive change in law, whether offered alone or in combination with other factors, cannot contribute to a finding of 'extraordinary and compelling reasons' for a reduction in sentence under § 3582(c)(1)(A)." *United States v. Taylor*, 28 F.4th 929, 930 (8th Cir. 2022) (quoting *United States v. Crandall*, 25 F.4th 582, 586 (8th Cir. 2022)).

Timely resolution of this circuit split is essential. The Eighth Circuit's opinion has added to the conflict among the circuits.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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