**NO:**

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 2021**

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**ORVILLE TUCKER,**

***Petitioner*,**

**v.**

**UNITED STATES OF AMERICA,**

***Respondent*.**

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**On Petition for Writ of Certiorari to the**
**United States Court of Appeals**
**for the Eleventh Circuit**

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Did Congress, in 28 U.S.C. § 994(t), delegate complete authority to the U.S. Sentencing Commission to "define" an exclusive list of "extraordinary and compelling reasons" for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A), as the Eleventh Circuit has held, or is that interpretation of § 994(t) not only counter-textual for the reasons identified by the Tenth Circuit, but unconstitutional under the non-delegation doctrine?

2. Given the Court's holding in *Concepcion* that when a district court exercises its discretion under Section 404(b) of the First Step Act the record must demonstrate that the court at least "considered" a defendant's arguments based on unrelated, non-retroactive changes in sentencing law, does a district court abuse its discretion under 18 U.S.C. § 3582(c)(1)(A) by exercising its "discretion" to deny compassionate release, if the record does not confirm that the court considered a defendant's arguments under 18 U.S.C. § 3553(a) based upon intervening changes in sentencing law that that would result in a reduced Guideline range and lesser sentence today?

## INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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Orville Tucker ("Petitioner") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINION BELOW

The Eleventh Circuit's opinion affirming the district court's denial of Petitioner's motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act of 2018, *United States v. Tucker*, 2022 WL 1561485 (11th Cir. May 18, 2022), is included in the Appendix at A-1.

## STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court. The decision of the court of appeals affirming the district court's denial of Petitioner's motion to reduce sentence was entered on May 18, 2022. This petition is timely filed pursuant to Supreme Court Rule 13.1, and this Court's August 8, 2022 order extending the due date for the petition.

## STATUTORY PROVISIONS INVOLVED

**28 U.S.C. § 994(t) states:**

> The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

**18 U.S.C. § 3582, as amended by Section 603(b) of the First Step Act of 2018, 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.

**U.S.S.G. § 1B1.13. Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A) Policy Statement), states:**

Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. §§ 3553(a), to the extent that they are applicable, the court determines that—

(1) (A) extraordinary and compelling reasons warrant the reduction; or

(B) the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison pursuant to a sentence imposed under 18 U.S.C. §§ 3559(c) for the offense or offenses for which the defendant is imprisoned;

(2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

(3) the reduction is consistent with this policy statement.

**Commentary**

**Application Notes:**

1. **Extraordinary and Compelling Reasons**.—Provided the defendant meets the requirements of subsection (2), extraordinary and compelling reasons exist under any of the circumstances set forth below:

(A) **Medical Condition of the Defendant**.—

(i) The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.

(ii) The defendant is—

(I) suffering from a serious physical or medical condition,

(II) suffering from a serious functional or cognitive impairment, or

(III) experiencing deteriorating physical or mental health because of the aging process,

that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

(B) **Age of the Defendant**.—The Defendant (i) is at least 65 years old; (ii) is experiencing serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(C) **Family Circumstances**.—

(i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.

(ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(D) **Other Reasons**.—As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

2. **Foreseeability of Extraordinary and Compelling Reasons**.—For purposes of this policy statement, an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment. Therefore, the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement.

3. **Rehabilitation of the Defendant**.—Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of this policy statement.

4. **Motion by the Director of the Bureau of Prisons**.—A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A). The Commission encourages the Director of the Bureau of Prisons to file such a motion if the defendant meets any of the circumstances set forth in Application Note 1. The court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of reduction), after considering the factors set forth in 18 U.S.C. § 3553(a) and the criteria set forth in this policy statement, such as the defendant's medical condition, the defendant's family circumstances, and whether the defendant is a danger to the safety of any other person or to the community.

This policy statement shall not be construed to confer upon the defendant any right not otherwise recognized in law.

5. **Application of Subdivision (3)**.—Any reduction made pursuant to a motion by the Director of the Bureau of Prisons for the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement.

**Background**: The Commission is required by 28 U.S.C. § 994(a)(2) to develop general policy statements regarding application of the guidelines or other aspects of sentencing that in the view of the Commission would further the purposes of sentencing (18 U.S.C. § 3553(a)(2)), including among other things, the appropriate use of the sentence modification provisions set forth in 18 U.S.C. § 3582(c). In doing so, the Commission is authorized by 28 U.S.C. § 994(t) 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. This policy statement implements 28 U.S.C. § 994(a)(2) and (t).

## STATEMENT OF THE CASE

### The Charges, Convictions, and Sentence

In 1997, Petitioner Orville Tucker was convicted after a jury trial of conspiracy to commit a Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) (Count 1); Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) and § 2 (Count 2); using and carrying a firearm during a "crime of violence" (the Hobbs Act robbery) in violation of 18 U.S.C. § 924(c) (Count 3); carjacking in violation of 18 U.S.C. § 2119 (Count 6); and using and carrying a firearm during a "crime of violence" (the carjacking) in violation of 18 U.S.C. § 924(c) (Count 7).

In the Pre-Sentence Investigation Report (PSI), the Probation Officer grouped the Hobbs Act robbery and carjacking counts, and determined that Petitioner's adjusted offense level for those counts was 26. With a criminal history of V, he faced a then-mandatory guideline range of 110-137 months imprisonment. However, because the Probation Officer determined that both the Hobbs Act and carjacking convictions were for "crimes of violence," and that Petitioner had two prior felony convictions for "crimes of violence" (Florida convictions for burglary of a dwelling and resisting an officer with violence/battery on a law enforcement officer), he was designated a Career Offender which raised his offense level to 32.

As a Career Offender with a criminal history category of VI, Petitioner faced a then-mandatory enhanced guideline imprisonment range of 210-262 months imprisonment. On top of that, under the then-applicable "second or subsequent conviction under this subsection" language in 18 U.S.C. § 924(c)(1)(C)(i), he faced an

additional 300 months consecutive (5 years on count 3, followed by 20 years on count 7) due to his two § 924(c) count convictions.

At the July 24, 1998 sentencing, the district court found Petitioner's Hobbs Act and carjacking convictions in the instant case, and the listed predicate offenses all qualified as "crimes of violence." Based on those findings, it sentenced him to a total term of 510 months imprisonment, as follows: 210 months (the bottom of the mandatory Career Offender range) on Counts 1 and 2 (the Hobbs Act conspiracy/substantive Hobbs Act charges); 180 months concurrent on Count 6 (the carjacking charge—based on the finding that he qualified as a Career Offender); 60 months consecutive on Count 3 (the first § 924(c) for using/carrying a firearm during the Hobbs Act robbery); and 240 months consecutive to that on Count 7 (the second § 924(c) for using/carrying a firearm during the carjacking).

Petitioner's conviction and sentence were affirmed on appeal, and he filed three motions to vacate his sentence pursuant to 28 U.S.C. § 2255, which were denied.

**The Motion to Reduce Sentence**
**Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i)**

On December 21, 2018, Congress passed the First Step Act (FSA). In Section 603(b) of the Act, Congress changed the procedure for seeking a sentence reduction for "extraordinary and compelling reasons" by removing the Director of the Bureau of Prisons as the "gatekeeper" to such motions. Specifically, prior to that amendment, § 3582(c)(1)(A) only allowed the BOP Director to move the district court on a defendant's behalf to reduce a sentence if (in the BOP's view) there were "extraordinary and compelling reasons" to do so. Section 603 of the FSA transformed that exclusive BOP-

initiated remedy, by amending § 3582(c)(1)(A) to allow *defendants* to seek relief for "extraordinary and compelling reasons" *directly* from the district court (after first applying to the BOP, so long as 30 days had lapsed since the request to the BOP was made). The purpose of this statutory change, as stated in the title of that amendment, was to "Increas[e] the Use and Transparency of Compassionate Release."

Pursuant to that newly-available remedy, on December 3, 2020, Petitioner moved the district court *pro se* to reduce his sentence under 18 U.S.C. § 3582(c)(1)(A)(i) for "extraordinary and compelling reasons." In that and several succeeding pleadings filed with the assistance counsel, Petitioner explained that there were a combination of factors that resulted in "extraordinary and compelling reasons" for release in his case, namely: in Section 403 of the FSA Congress had amended 18 U.S.C. § 924(c)(1)(C) to clarify that the enhanced stacked penalties for "second or subsequent convictions" were only applicable after a prior conviction had become final; the disparity and severity of his sentence vis-a-vis those sentenced for the same offenses with the same prior history after this clarification of Congress' intent was severe; the Federal Sentencing Guidelines were no longer mandatory; and he was no longer a Career Offender since the counted predicates no longer qualified as "crimes of violence."

Based upon these intervening changes in the law, Petitioner advised the court, he had overserved the likely sentence that would be imposed today for a defendant who committed his exact crimes and who had his exact criminal history. Aside from the greatly reduced § 924(c) sentence of 168 rather than 300 months with First Step Act's changes to § 924(c)(1)(C), he noted, as a non-Career Offender he would face an

advisory Guideline range today of 110-137 months, as opposed to the mandatory 210-262 range he faced as a Career Offender when sentenced. That intervening change in law applicable to Counts 1, 2, and 6 would have cut his likely sentence on those counts to half of what it was before—assuming that the court imposed the bottom of the guideline range (110 months) on Counts 1, 2, and 6, as before. He argued that his release was warranted by the injustice of having to serve out a term of incarceration far longer than that both Congress and the Commission now deems necessary for the precise crimes in his case.

The government, however, opposed any relief for Petitioner. It argued that the court had no authority "on its own" to identify "extraordinary and compelling reasons" apart from those described in the guideline policy statement, § 1B1.13, comment. n. 1 (A–C), or the "other reasons" identified by the BOP as per § 1B1.13, comment n. 1(D). Moreover, the government argued, as *per* Section 403(b) of the FSA, Congress had explicitly chosen not to apply Section 403(a) retroactively. And, even if Petitioner *could* meet the "'extraordinary and compelling' threshold," the government argued, the court should still deny him any sentence reduction given his potential danger to the community, the seriousness of his offenses, criminal history, and disciplinary history that involved possession of weapons, fighting, and an inability to follow rules.

Petitioner replied, *inter alia*, that if the court had any concern about recidivism, it should impose a term of home confinement as a condition of supervised release as extra assurance. Indeed, he noted, other district courts had done just that. Moreover, if the court had concerns about the disciplinary incidents noted by the government, it

should reduce the inequity in his sentence "substantially, but not completely—require him to serve several more years in jail, but not the full 14 remaining at this time." Many other courts had done so in § 924(c) stacking cases, he noted. Petitioner thereafter filed an "Updated Individualized Needs Plan—BOP Program Review as of 3.15.2021," which indicated additional educational courses he had taken, and recognized that he had had no incident reports for the last 6 months and had progressed to SMU Level 2 on 3/1/2021 because he had "maintained clear conduct."

In a final pleading containing supplemental authority, Petitioner advised that another judge in the district had just granted a § 3582(c)(1)(A) motion based on the disparity and severity of pre-FSA stacked § 924(c) sentences compared to what would be imposed today—and had also taken into account the defendant's youth at the time he committed the offense which indicated less culpability, as well as the disparity in the sentence a juvenile co-defendant received. He asked the court to take that precise combination of factors into account in his case as well.

**The Decision in *Bryant*, and the Parties' Responses**

Before the district court could rule, the Eleventh Circuit handed down a 2-1 decision in *United States v. Bryant*, 996 F.3d 1243 (11th Cir. May 7, 2021) rejecting the views of every other circuit to have interpreted § 3582(c)(1)(A) as amended by the First Step Act. The *Bryant* majority held—over a vigorous dissent—that the § 1B1.13 policy statement remained an "applicable policy statement" even for a defendant-filed motion after the First Step Act. As such, the decision precluded district courts from considering the amendment to § 924(c)(1)(C) or any "other reasons" beyond those

identified in Application Notes 1(A–C) for a defendant-filed motion—thus setting a different standard for defendant- and BOP-filed motions (according to Note 1(D), the latter could be based upon "other reasons" determined by the BOP).

The government immediately filed *Bryant* as supplemental authority, arguing that it confirmed that the policy statement in § 1B1.13 limited what may be considered "extraordinary and compelling" in a defendant-filed § 3582(c)(1)(A) motion, and rendered Petitioner "ineligible" for relief on the grounds he had stated.

On May 24, 2021, Petitioner filed a response noting that to the extent the *Bryant* majority had interpreted 28 U.S.C. § 994(t) to have granted exclusive authority to the Sentencing Commission to "define" all "extraordinary and compelling reasons" for relief under § 3582(c)(1)(A), that statutory interpretation had created a constitutional non-delegation problem that the *Bryant* majority had not considered but the district court must. For indeed, Petitioner explained, if (as the *Bryant* majority held) there had been a delegation of *exclusive* rule-making authority to the Commission, it was unconstitutional without any intelligible principle to guide the Commission's discretion or any meaningful limit on the Commission's authority. And, if the delegation itself were unconstitutional, then the policy statement and commentary that resulted from it were "inapplicable" and did not constrain the court.

Finally, Petitioner argued consistent with the *Bryant* dissent, Application Note 1(D) had created an unconstitutional sub-delegation of authority from one agency to another, and was void since Congress had not given the BOP the conferred authority. And, since the Commission had still not yet discharged its duty of *describing* "the

criteria to be applied" in finding extraordinary and compelling reasons as directed by Congress in § 994(t), Petitioner argued, the district court retained complete discretion even after *Bryant* to independently determine whether such reasons existed here.

**The District Court's Denial of the § 3582(c)(1)(A)(i) Motion**

On June 8, 2021, the Clerk of Court reassigned Mr. Tucker's case to a different district judge. Three days after the reassignment, the new district judge issued a brief order denying Petitioner's motion, stating:

> Defendant is again complaining about the legality of his sentence. He has alleged that a warden has denied his request or not acted on it for thirty (30) days. Assuming the Court has jurisdiction, the Court does not find that there are extraordinary and compelling reasons to warrant any relief. Such relief would not promote respect for the law or act as a deterrent. Such relief would not promote respect for the law or act as a deterrent.[1] The Court does not consider extraneous sentencing issues on a § 3582 motion. *U.S. v. Bravo*, 203 F.3d 778 (11th Cir. 2000). The court does not find that a "change in the law" is an extraordinary and compelling basis for granting relief." *United States v. Bryant*, 996 F.3d 1243 (11th Cir. 2021). The First Step Act did not overrule *Bravo*. On May 20, 2002 [DE-11 in 01-2413CV]; June 26, 2012 [DE-11 in 11-24485CV]; June 6, 2016 [DE-11 in 16-21050CV] and April 21, 2020 [DE-6 in 20-21040CV], previous Motions to Vacate were denied. The First Step Act did not repeal the ban on successive motions to vacate. Defendant may seek permission from the Eleventh Circuit to file a successive collateral attack.
>
> The Court is not comfortable utilizing the First Step Act as an authorization for the Court to become a *de facto* parole board, *but see, U.S. v. Brooker*,[2] 976 F.3d 228 (2d Cir. 2020).
>
> The Court DENIES the motion.

[1] Here, the court stated in a footnote, citing the PSI: "When he committed these violent crimes, Tucker already had eleven (11) criminal convictions, which, at the time, qualified him as a career offender."

[2] Here, the court stated in a footnote: "Even under the more liberal *Brooker* standard, the Court would not exercise discretion and grant relief."

## The Appeal to the Eleventh Circuit

On appeal to the Eleventh Circuit, Petitioner argued that the district court erroneously found that he had not demonstrated "extraordinary and compelling" reasons for relief under 18 U.S.C. § 3582(c)(1)(A), because a change in law was not an extraordinary and compelling reason. That holding was wrong as a matter of law for multiple reasons.

First, Petitioner argued, for the reasons stated by the other circuits and the *Bryant* dissent, the district court erroneously found U.S.S.G. § 1B1.13 to be an "applicable policy statement" after the First Step Act, constraining its discretion to independently determine "extraordinary and compelling reasons" for a sentence reduction. At this time, he argued, there was no "*applicable* policy statement" for defendant-filed motions and § 3582(c)(1)(A)'s consistency requirement was not implicated. Unless and until the Sentencing Commission updated § 1B1.13 to address defendant-filed motions, he argued, district courts retained broad discretion to independently determine whether any circumstance or cluster of circumstances—including the severity and disparity of pre-FSA stacked § 924(c) sentences—constitutes "extraordinary and compelling reasons" for a sentence reduction.

Second, Petitioner argued, so long as *Bryant* remains the law in the Eleventh Circuit, its interpretation of 28 U.S.C. § 994(t) as conferring exclusive authority on the Commission to "define" the "universe" of "extraordinary and compelling reasons" creates a constitutional non-delegation problem that the *Bryant* majority had erroneously failed to consider. For indeed, if as the *Bryant* majority held, there had

been a delegation of exclusive rule-making authority to the Commission, it was unconstitutional without any intelligible principle to guide the Commission's discretion or any meaningful limit on the Commission's authority.

And, Petitioner argued, if the delegation itself were unconstitutional, then the policy statement and commentary that resulted from that delegation were "inapplicable" and provided no constraint on the court's discretion. He argued that Application Notes 1(A–C) to the policy statement were inapplicable for that reason, and Application Note 1(D) was likewise inapplicable as a clearly-unauthorized sub-delegation of rule-making authority by the Commission. Nothing in an unconstitutional application note, he argued, could have constrained the district court's discretion here. Moreover, since the Commission had *still* not discharged its duty of *describing* "the criteria to be applied" in finding extraordinary and compelling reasons as directed in § 994(t)—and current Application Notes 1(A)–(C) merely constituted a non-exclusive list of *examples*—he argued that the court retained complete discretion, as it did for the 22 years before this Note was written, to independently determine whether such reasons existed here.[3]

[3] Petitioner underscored in his brief that for the first 22 years that § 3582(c)(1)(A) was in effect, there was *no* corresponding policy statement at all. The Commission did nothing in response to Congress' directive in § 994(t) until 2006, and only then wrote a barebones statement that simply "parroted the statute's language." *United States v. Shkambi*, 993 F.3d 388, 391 (5th Cir. 2021); U.S.S.G. amend. 683 (2006). The commentary that we have now resulted from two later amendments, Amendments 698 in 2007, and 799 in 2016. S*ee United States v. Ruvalcaba*, 26 F.4th 14, 20 (1st Cir. 2022); U.S. Sent'g Comm'n, The First Step Act of 2018, One Year of Implementation (2020) at 46 n. 135, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf.
Accordingly, for more than two full decades, district courts clearly retained full

Third, Petitioner argued, neither the text of § 994(t) or of § 3582(c)(1)(A) prohibits the district court from considering a significant change in law, and the disparity with sentences imposed today, as "extraordinary and compelling reasons" for a reduction. To the extent the district court read such a prohibition into these provisions, that was an unauthorized judicial amendment of the relevant statutes.

Although the court alternatively held that "even under the more liberal standard" of the other circuits it would exercise its discretion to deny relief, Petitioner argued that in so holding—without considering either the intervening change in the law effected by Section 403 of the First Step Act or the fact that he would no longer be sentenced as a Career Offender today—the court abused its discretion.

Finally, because the court failed to state reasons for its alternative discretionary denial and did not address his arguments as to the § 3553(a) factors including arguments based upon changed facts and intervening changes in the law, he argued, the record was incapable of meaningful appellate review and remand was required.

In its Answer Brief, the government notably did not dispute that Petitioner's sub-delegation and non-delegation issues were matters of first impression for the Eleventh Circuit; that consideration of these issues was *not* precluded by *Bryant*; and that they should be reviewed *de novo* by the court. Nor did the government dispute that Application Note 1(D) was an unconstitutional sub-delegation of authority from one agency to another and should be severed from § 1B1.13.

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authority to determine on their own whether or not extraordinary and compelling reasons existed for compassionate release.

That agreement, Petitioner pointed out in his Reply, narrowed the issue before the court to whether—without Application Note 1(D)—the policy statement could be read to place any limit on the discretion of the district courts. While the government argued that Application Notes 1(A)–(C) set forth an "exclusive and comprehensive" list of "extraordinary and compelling reasons" for relief—allowing the district courts no discretion to determine such reasons on their own—Petitioner argued that in these application notes the Commission merely set forth a non-exclusive list of examples, consistent with § 994(t). The government's (and *Bryant* court's) contrary reading, he explained, would result in a violation of the non-delegation doctrine.

Finally, Petitioner pointed out that the government had chosen to ignore the district court's alternative discretionary ruling in its brief. Perhaps, he argued, that was because the government could *not* dispute that there was *no* evidence in the record that the court had considered any of his § 3553(a) arguments—including that he was no longer a Career Offender and had already overserved his likely sentence today—before summarily denying relief under § 3553(a).

**The Eleventh Circuit's Affirmance of the District Court**

On May 18, 2022, without the benefit of oral argument, the Eleventh Circuit affirmed the district court. *United States v. Tucker*, 2022 WL 1561485 (11th Cir. May 18, 2022). The court held that under its prior panel precedent rule it remained bound by *Bryant* where it had previously held that the Commission's "*definition* of extraordinary and compelling reasons" was "binding upon the court; that there was no conflict between Application Note 1(D) and § 3582(c)(1)(A); and "district courts

must still follow the extraordinary and compelling reasons as determined by the BOP and may not independently determine what extraordinary and compelling reasons exist for reducing a defendant's sentence." *Id.* at *2 ("district courts do not have the discretion under the catch-all provision to develop other reasons outside of those listed in § 1B1.13 that might justify a reduction;" citing *Bryant*, 996 F.3d at 1263-65).

While finding that Petitioner's "argument that there was not an applicable policy statement constraining the district court's discretion" was "foreclosed" by *Bryant*, *id.*, the court at no time addressed—or even acknowledged—Petitioner's non-delegation or sub-delegation arguments, even though the government did not dispute they were properly before the court for *de novo* review, and the sub-delegation argument was meritorious. The court simply reiterated that *Bryant* held "district courts do not have the discretion under the catch-all provision to develop other reasons outside of those listed in § 1B1.13 that might justify a reduction in a defendant's sentence." *Id.* at *2 (citing *Bryant*, 996 F.3d at 1263-65).

With regard to the district court's alternative "discretionary" ruling, the Eleventh Circuit stated conclusorily that the district court:

> did not abuse its discretion because it did not give significant weight to an improper or irrelevant factor, did not commit a clear error of judgment when it considered the proper factors, and did not disregard relevant factors that were due significant weight. Finally, the district court provided an adequate basis for our appellate review.

*Id.* at *3. It did not address any of Petitioner's specific arguments in mitigation.

## REASONS FOR GRANTING THE WRIT

### I. Whether Congress, in 28 U.S.C. § 994(t), gave the U.S. Sentencing Commission complete and unfettered authority to "define the universe of extraordinary and compelling reasons that can justify a sentence reduction" under 18 U.S.C. § 3582(c)(1)(A), is an important and far-reaching question of federal statutory interpretation calling into play the constitutional non-delegation doctrine, which has not been but should be resolved by this Court.

As of this writing, ten circuits have interpreted the requirement in 18 U.S.C. § 3582(c)(1)(A) that any reduction must be "consistent with applicable policy statements issued by the Sentencing Commission" to mean that U.S.S.G. § 1B1.13 remains an "*applicable* policy statement" after the First Step Act *only* for *BOP-initiated* compassionate release motions, because § 1B1.13 contains "clearly outdated" language referring only to motions initiated by the BOP. In reviewing a defendant-filed motion after the First Step Act in the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth and D.C. Circuits, district courts now have discretion to determine "extraordinary and compelling reasons" on their own.[4]

The Eleventh Circuit is the lone dissenter on this issue. In *United States v. Bryant*, 996 F.3d 1243 (11th Cir. 2021), the Eleventh Circuit ruled contrary to every

[4] *See United States v. Brooker*, 976 F.3d 228, 235-36 (2d Cir. 2020); *United States v. Jones*, 980 F.3d 1098, 1109-11 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020); *United States v. McCoy*, 981 F.3d 271, 275-77, 280-84 (4th Cir. 2020); *United States v. McGee*, 992 F.3d 1035, 1048-51 (10th Cir. 2021); *United States v. Maumau*, 993 F.3d 821, 832-37 (10th Cir. 2021); *United States v. Aruda*, 993 F.3d 797, 799-802 (9th Cir. 2021); *United States v. Shkambi*, 994 F.3d 338, 392-93 (5th Cir. 2021); *United States v. Long*, 997 F.3d 342, 354-59 (D.C. Cir. 2021); *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021); *United States v. Ruvalcaba*, 26 F.4th 14, 10-23 (1st Cir. 2022).

other circuit by holding not only that the policy statement in § 1B1.13 applies to defendant-filed compassionate release motions, but that this policy statement binds the discretion of the courts because in 28 U.S.C. § 994(t) Congress gave the Commission complete and unfettered authority to "define the universe of extraordinary and compelling reasons that can justify as sentence reduction." *Bryant*, 996 F.3d at 1262.

And notably, unless and until this Court rejects that interpretation of § 994(t), it will remain authoritative in the Eleventh Circuit. Indeed, even assuming the newly-constituted U.S. Sentencing Commission[5] quickly amends the current version of § 1B1.13 to delete all references to the requirement of a BOP-filed motion,[6] the question *Bryant* has raised as to the scope of the Commission's delegated authority will remain.

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[5] On August 5, 2022, the U.S. Senate confirmed a slate of seven new bipartisan commissioners. As such, the Commission now has a quorum for the first time in three years and can begin to make amendments to the U.S. Sentencing Guidelines, including the policy statement in § 1B1.13. https://www.ussc.gov/about/news/press-releases/august-5-2022.

[6] In August of 2020, the Commission issued a Report recognizing that "the policy statement at § 1B1.13 does not reflect the First Step Act's changes." U.S. Sent'g Comm'n, The First Step Act of 2018, One Year of Implementation (2020) at 47, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf. In March 2022, the Commission issued another Report recognizing that "the developing case law and data illuminate the growing need for a post-First Step Act compassionate release policy statement that can provide guidance to courts and facilitate greater uniformity in the application of section 3582(c)(1)(A)." U.S. Sent'g Comm'n, Compassionate Release: The Impact of the First Step Act and COVID-19 Pandemic at 46 (2000), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220310_compassionate-release.pdf.

### A. The courts of appeals are intractably divided on how to interpret the plain text of 28 U.S.C. § 994(t)

The Tenth and Eleventh Circuits are in conflict as to the significance of the word "*describe*" in 28 U.S.C. § 994(t)—whether it permits or precludes the district court from exercising discretion to determine whether "extraordinary and compelling reasons" exist for a sentencing reduction. Indeed, *Bryant*'s ruling diverging from that of 10 other circuits rests in significant part on the majority's use of the word "*define*," where Congress used the word "*describe*," in § 994(t). That was not an accidental misstatement by the *Bryant* majority. Notably, it used the word "*define*" in describing the delegated power *12 separate times* in the opinion. *See* 996 F.3d at 1249, 1251, 1255, 1257-60, 1262, 1264-65 & n. 6. And the government did the same subtle word switch in its notice of supplemental authority below, referring to "3582's mandate that the Sentencing Commission, not courts, *define* what constitutes 'extraordinary and compelling' reasons." (Emphasis added). But that is not the language Congress used. And that word switch has tremendous import for the district court's authority.

Title 18 U.S.C. § 3582(c)(1)(A) grants district courts the authority to reduce a defendant's sentence for "extraordinary and compelling reasons," after consideration of the § 3553(a) sentencing factors, and provided that any such reduction is "consistent with any applicable policy statements issued by the Sentencing Commission." In the statutory text Congress did not expressly define what constitutes extraordinary and compelling reasons for compassionate release. But, contrary to the Eleventh Circuit's holding in *Bryant*, neither did Congress direct the Sentencing Commission to do so.

Instead, as the Tenth Circuit has underscored, in § 994(t) Congress directed that the Commission "in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall *describe* what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." (Emphasis added). And therefore, according to the Tenth Circuit, Congress' choice to have the Commission "*describe*" rather than "*define"* what should be "extraordinary and compelling reasons" illuminates the actual scope of both the Commission's and the district court's authority. The Tenth Circuit explained:

> Congress, in outlining the Sentencing Commission's duties, chose to employ the word "describe" rather than the word "define." The word "describe" is commonly defined to mean "to use words to convey a mental image or impression of (a person, thing, scene, situation, event, etc.) by referring to characteristic or significant qualifies, features, or details." *Oxford English Dictionary Online* (3d ed. 2015) .... In contrast, the word "define" is commonly understood to mean "[t]o set bounds to, to limit, restrict, confine." *Id.* ....
>
> Congress's choice of the word "describe" makes sense when considered in light of the fact that the specific duty imposed by § 994(t) is part of the Sentencing Commission's overarching duty to "promulgate general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A). ... As Congress, the federal courts, and the Department of Justice have all long recognized, "general policy statements" differ from "substantive rules" ... "[G]eneral statements of policy" are issued by an agency to advise the public prospectively of the manner in which the agency intends for a discretionary power to be exercised, and thus differ from ... "substantive rules," which have the force and effect of law. ...
>
> Congress did not, by way of § 994(t), intend for the Sentencing Commission to exclusively define the phrase "extraordinary and compelling reasons," but rather for the Sentencing Commission to describe those characteristic or significant qualities or features that typically constitute "extraordinary and compelling reasons," and for those *guideposts* to serve as part of the general policy statements to be

> considered by district courts under the second part of the statutory test in § 3582(c)(1)(A).

*United States v. Maumau*, 993 F.3d at 821, 833-34 (10th Cir. 2021) (emphasis added); *see also id.* at 834 (clarifying that what this means in practical terms is that "in applying the first part of § 3582(c)(1)(A)'s statutory test," the district courts "have the authority to determine for themselves what constitutes 'extraordinary and compelling reasons,'" and at the second part of the test, they must simply consider the Commission's "*guideposts*" ) (emphasis added); *United States v. McGee*, 992 F.3d 1035, 1043-46 (10th Cir. 2021) (same).

The Sixth Circuit likewise understands § 1B1.13's commentary to simply set forth guideposts, *not* an exclusive list of "extraordinary and compelling reasons." In fact, the Sixth Circuit has expressly recognized that:

> Reading Application Note 1 to confine "extraordinary and compelling circumstances" to the three circumstances listed in § 1B1.13 cmt. n.1(A)–(C) or to situations that the Director of the BOP determines exists (per § 1B1.13 cmt. n.1(D)) risks contradicting 28 U.S.C. § 994(t) and raises a whole host of administrative law concerns. [*United States v.*] *Ruffin*, 978 F.3d [1000,] 1007-08 [(6th Cir. 2020)] (acknowledging that "courts have read basic administrative-law principles as cutting both ways" on the question of whether courts must defer to [§ 1B1.13]). Section 994(t) commands the Sentencing Commission to provide a "list of specific examples" of "what should be considered extraordinary and compelling circumstances." We do not read § 994(t)'s text as allowing the Sentencing Commission to prescribe an *exhaustive* list of examples of extraordinary and compelling reasons.

*United States v. Jones*, 980 F.3d 1098, 1110 n.18 (6th Cir. 2020) (emphasis in original). Notably, in *Jones*, the government took a different position than it did before the Eleventh Circuit. Indeed, it "appear[ed] to concede that § 1B1.13 cmt. n.1 does not provide a circumscribed list of 'extraordinary and compelling reasons'"—which is why

the Sixth Circuit noted that it "need not elaborate [the above] point further." *Id.* at 1110 n. 18.

If § 994(t) is read in the way the Tenth and Sixth Circuits have indicated, it creates no constitutional problem. If Congress merely directed the Sentencing Commission in this provision to *describe* extraordinary and compelling reasons for compassionate release (as the text expressly states and the Tenth Circuit holds), there is no unconstitutional delegation because the final determination of whether such reasons exist would properly remain within the province of the district court.[7]

The Eleventh Circuit, however, recast the language of § 994(t) to find that Congress directed the Commission to "*define*" what constitutes extraordinary and compelling reasons for compassionate release, rather than merely to "*describe*" such conditions.[8] In so doing, the Eleventh Circuit has interpreted § 944(t) to delegate that authority entirely to the United States Sentencing Commission. "The *only boundar*y the SRA placed on the Commission's definition," the *Bryant* court held, "was that

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[7] Notably, federal courts are frequently tasked with determining whether "extraordinary" circumstances warrant relief from an otherwise final judgment. *See Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11th Cir. 2009); *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005); *Makir-Marwil v. U.S. Att'y Gen.*, 681 F.3d 1227, 1229 (11th Cir. 2012); *Calderon v. Thompson*, 523 U.S. 538, 550 (1998).

[8] *See, e.g., Bryant*, 996 F.3d at 1249 (stating that Congress "directed the Commission to *define* 'what should be considered extraordinary and compelling reasons ..."), *id. at* 1251 ("one of which must *define* 'extraordinary and compelling reasons"); *id.* at 1255 ("In other words, the statutory context shows us that the Commission had an obligation to *define* 'extraordinary and compelling reasons' for all motions under the statute, and that the Commission did so in 1B1.13.") (emphasis added). In light of the fictional "*define*" language, the Eleventh Circuit concluded that Congress "did not put district courts in charge of determining what would qualify as extraordinary and compelling reasons that might justify reducing a prisoner's sentence." *Bryant*, 996 F.3d at 1249.

'[r]ehabilitation ... alone shall not be considered an extraordinary and compelling reason.' ... And it required district courts to follow that *definition*." *Id.* (citing §994(t)) (emphasis added). But if this is true, then § 994(t) clearly violated the constitutional non-delegation doctrine.

### B. The decision below is not only incorrect for textual reasons, but for Constitutional reasons as well

As a matter of statutory construction, the Eleventh Circuit clearly misinterpreted § 994(t). Indeed, well-settled rules of construction support the Tenth Circuit's approach. "The preeminent canon of statutory interpretation requires [the Court] to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *Bedroc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (citation omitted). "[T]he best evidence of Congress's intent is the statutory text." *Nat'l Fed'n of Indep. Bus. V. Sebelius*, 567 U.S. 519, 544 (2012). And here the text is clear. Congress used the word "describe," not "define," and these words have different dictionary—and ordinary—meanings. Courts "should assume the contextually-appropriate ordinary meaning unless there is reason to think otherwise." Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 70 (2012). And here there is no reason to think otherwise. To the contrary, another fundamental rule of construction is that "a statute should be interpreted in a way that avoids placing its constitutionality in doubt." *Id.* at 247 (citing cases).

The constitutional-doubt canon is directly applicable here. For indeed, the constitutional non-delegation doctrine is what most easily confirms the Eleventh Circuit's expansive interpretation of § 994(t) cannot be correct. An exclusive and

unguided delegation by Congress of authority to the Commission to *define* all "extraordinary and compelling reasons" for relief under §3582(c)(1)(A), would plainly be unconstitutional.

As 28 U.S.C. § 994(t) was interpreted by the Eleventh Circuit in *Bryant*, §1B1.13 and its commentary resulted from an unconstitutional delegation of legislative authority to the U.S. Sentencing Commission, which renders the entire policy statement and its commentary inapplicable. If Congress in § 994(t) delegated complete authority to the Commission to determine "extraordinary and compelling reasons" for release, with the "*only boundar*y" being that "'[r]ehabilitation ... alone shall not be considered an extraordinary and compelling reason,'" *Bryant*, 996 F.3d at 1249 (citing §994(t))(emphasis added), then § 994(t) easily violates the constitutional non-delegation doctrine.

This Court has been clear that an exclusive, unguided, and boundless delegation by Congress of rulemaking authority to another branch of government is unconstitutional, because of "the separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). The framers entrusted the authority to legislate or make law solely to Congress. U.S. Const. art. I, §§ 1, 8. And this authority carries with it a corresponding limitation: Congress cannot delegate its legislative authority to another branch of the government. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935)("Congress is not permitted to abdicate or to transfer to others [its] essential legislative functions").

Nonetheless, "in our increasingly complex society, replete with ever changing and more technical problems, '[the] Court has understood that 'Congress simply cannot do its job absent an ability to delegate power under broad general directives.'" *Gundy v. United States,* 139 S. Ct 2116, 2123 (2019) (plurality op.) (alteration and citations omitted). The Court has therefore held that "a statutory delegation is constitutional so long as Congress 'lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to perform.'" *Id.* (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S 394, 409 (1928) (brackets in original)). "Or in a related formulation, the Court has stated that a delegation is permissible if Congress has made clear to the delegee 'the general policy' he must pursue and the 'boundaries of [his] authority." *Gundy*, 139 S.Ct. at 2129.

Notwithstanding this allowance, "in every case in which the [delegation] question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421, 430 (1935). *See id.* at 415 (invalidating Section 9(c) of the National Industrial Recovery Act, because Congress delegated to the executive branch unguided authority to set standards, established no policy or "no criteria to govern the President's course," and gave the President "unlimited authority to determine the policy"); *Schechter Poultry*, 295 U.S. at 542 (invalidating another NIRA provision because Congress had again failed to clearly articulate the intended policy, or the standards that would constrain the delegated authority).

Because no intelligible principle was set forth in § 994(t) to guide or constrain the Commission under the Eleventh Circuit's reading in *Bryant*, that delegation would similarly fall within this category of constitutionally impermissible abdications of authority to another branch. Unlike *Mistretta*—where the Court upheld Congress' delegation of authority to the Commission to promulgate the Sentencing Guidelines, because Congress specified "what the Commission should do and how it should do it, and set out specific directives to govern particular situations," 448 U.S. at 379 (citation omitted)[9]—*Bryant* finds that Congress, in § 994(t), allowed the Commission to "exclusively" "define" the scope of "extraordinary and compelling reasons" in § 3582(c)(1)(A) with *only one* caveat: "Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." *See Bryant*, 996 F.3d at 1249.

But telling the Commission that one circumstance, *alone*, would *not* be an "extraordinary and compelling reason" for release is *not* the same as providing the Commission with an intelligible principle for determining what circumstances *would* meet that standard—either alone or in combination with other factors. Unlike the

[9] Among other directives, Congress "charged the Commission with three [enumerated] goals" and "specified four 'purposes' of sentencing that the Commission must pursue in carrying out its mandate." *Id.* at 374 (citing 28 U.S.C. § 991(b)(1) and 18 U.S.C. § 3553(a), respectively). Congress prescribed the guideline system, and directed that sentencing ranges be consistent with the provisions of the United States Code. *Id.* at 375. "Congress directed the Commission to use current average sentences 'as a starting point'" for structuring sentencing ranges," and provided detailed guidance for setting the maximum range. *Id.* (citing 28 U.S.C. §§ 994(b)(2), and (m).). Congress further directed the Commission to consider specific factors in establishing categories of both offenses and offenders. *Id.* at 375-376 (citing 28 U.S.C. §§ 994(c)(1)–(7) and (d)(1)-(11)). Thus, in specifying the Commission's duties in promulgating the Guidelines, Congress set forth far "more than merely an 'intelligible principle' or minimal standards." *Id.* at 379.

structured and detailed guidance Congress provided the Commission for promulgating the Guidelines generally, in § 994(t) Congress did not declare any overarching policy regarding what circumstances should qualify as "extraordinary and compelling." It provided no guideposts or directives to the Commission. And plainly, Congress did not provide any meaningful limit upon what the Commission could or should consider in establishing "criteria" for courts to determine "extraordinary and compelling reasons." Instead—if the Eleventh Circuit's reading of § 994(t) is correct—Congress granted the Commission plenary authority to make the "extraordinary and compelling reason" determination on its own. And indeed, even by the relatively low bar set in *Gundy*, such a delegation cannot stand. *See Gundy*, 139 S. Ct. at 2130 (Alito, J., concurring in the judgment); *id*. at 2131 (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting).

In short, as § 994(t) was interpreted in *Bryant*, Congress completely abdicated its legislative responsibility to set standards and policy for compassionate release to the Commission. And because such a delegation would be unconstitutional, any commentary issued pursuant to that delegation would be unconstitutional as well. *See Stinson v. United States*, 508 U.S. 36, 45 (1993) (commentary cannot be "controlling" if it was issued in "violat[ion] of the Constitution.").

If there is any ambiguity in § 994(t) as to the scope of the Congressional delegation, the Court should avoid an interpretation that would render § 994(t) unconstitutional or even raise serious questions of constitutionality. *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (Hughes, C.J.); *see also Gundy*, 139 S.Ct. at 2123

(noting that if Gundy's reading of the statute were correct, the Court "would face a nondelegation question"); *West Virginia v. Environmental Protection Agency*, 142 S.Ct. 2587, 2619 (2022) (Gorsuch, J., and Alito, J., concurring) (noting that the Court has "routinely enforced 'the nondelegation doctrine' through 'the interpretation of statutory texts, and, more particularly, [by] giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional;'" citing *Mistretta*, 488 U.S. at 373 n. 7).

### C. This case is an ideal vehicle to resolve the circuit conflict.

This case is an ideal vehicle to resolve the circuit conflict because uniform standards must govern the adjudication of § 3582(c)(1)(A) motions. The right to sentencing relief under § 3582(c)(1)(A) cannot be a function of geography. The statutory interpretation raised herein based on the non-delegation doctrine was preserved both before the district court and on appeal. It comes to this Court upon *de novo* review. While admittedly, the court below refused to address it due to its prior panel precedent rule, because the argument was pressed below it is properly before the Court in this petition.

### D. The non-delegation question is important and will recur even now that there is a quorum at the Commission to amend § 1B1.13.

There can be no dispute that the question raised herein as to proper interpretation of § 994(t)—and in particular, the scope of Congress' delegation in that provision—is important and recurring for Eleventh Circuit defendants who are being treated disparately from and more harshly than defendants in ten other circuits every day. Unless and until the interpretation of § 994(t) in *Bryant* is overturned, it will

remain authoritative in the Eleventh Circuit. All Eleventh Circuit panels—like the one below—will be required to follow the dictates of *Bryant*, and ignore the never-considered constitutional non-delegation problem identified below and herein.

Indeed, in *United States v. Woods*, 2022 WL 577667 (11th Cir. Feb. 25, 2022), the Eleventh Circuit could not have been more clear that: "Woods's argument that *Bryant* was wrongly decided and created an unconstitutional delegation of power is foreclosed by our prior panel precedent rule." *Id.* at *2 (citing *United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) for the principle that "A subsequent panel cannot overrrule a prior panel even if it believes that the prior panel was wrong"); *see also Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001) ("We categorically reject any exception to the prior panel precedent rule based upon a perceived defect in the prior panel's reasoning"). Given the rigid way in which the Eleventh Circuit applies its prior panel precedent rule, no defendant in the Eleventh Circuit will have an opportunity for a sentence reduction under § 3582(c)(1)(A) on grounds on which defendants in other circuits have secured release. *See infra* note 4, and *supra* at 33-34. Only this Court can assure that the right to a sentence reduction under § 3582(c)(1)(A) is not a function of unfortunate geography.

While it can be expected that the newly-constituted Commission will update § 1B1.13 to reflect the changes made by the First Step Act, thus no longer requiring a motion by the BOP, that amendment alone cannot help Eleventh Circuit defendants since *Bryant* deems Application Notes 1(A)–(C) to control and foreclose any other grounds for relief. With *Bryant* still on the books, no Eleventh Circuit court can even

entertain the argument Petitioner made below that in these application notes the Commission merely provided three *examples* of "extraordinary and compelling reasons;" to this day, the Commission has still not fulfilled its *second* duty in § 994(t) of "*describing* the criteria to be applied;" and thus nothing constrains the discretion of district courts to determine "extraordinary and compelling reasons" on their own.

In short, without a reversal of *Bryant*, no Eleventh Circuit court can treat current Application Notes 1(A–C) as what it truly is: no more than a non-exclusive list of examples. Although Application Note 1 contains *no* language suggesting that "extraordinary and compelling reasons" may be found *"only*" in the circumstances listed—and Application Notes 3 and 4 strongly suggest the Commission *itself* never intended Application Note 1 to be an exclusive list depriving district courts of the ultimate authority to determine "extraordinary and compelling reasons" on their own[10]—the Eleventh Circuit will continue to find based on *Bryant* that Application Note 1 bars a district court from finding any additional "extraordinary and compelling reasons" on its own. *Bryant* will tie district court judges' hands.

And notably, on this point, the question raised herein as to the scope of the delegation is not only important for Eleventh Circuit defendants going forward. For indeed, however the Commission may wish to rewrite § 1B1.13, it must know in advance whether Congress delegated it exclusive authority to "define" extraordinary

[10] *See* U.S.S.G. § 1B1.13, comment. n.3 (suggesting that *rehabilitation together with other factors* may constitute "extraordinary and compelling reasons" for a reduction); comment. n. 4 ("*The court* is in a unique position *to determine* whether the circumstances [identified in a BOP motion] warrant a reduction") (emphasis added).

and compelling reasons for relief, or rather whether its authority is limited to "describing" what should be considered "extraordinary and compelling reasons. And the lower courts in every circuit must know as well. The Court's guidance, will be crucial in several ways.

First, *even if* the Court were to agree with the Eleventh Circuit that the Commission has the authority to exclusively "*define* extraordinary and compelling reasons," and *even if* such an exclusive delegation were somehow constitutional, the authority Congress delegated plainly *does not include* the authority to impose additional conditions on a grant of compassionate release *after* a showing of "extraordinary and compelling reasons." In going beyond the terms of § 994(t) through Amendment 698 in 2007, and adding a "non-dangerousness" requirement in § 1B1.13(2) which employs the rigid, pretrial standard of 18 U.S.C. § 3142(g) as yet another condition to relief, the Commission—in its first amendment to § 1B1.13—usurped Congress' Article I power, and violated the separation of powers doctrine. In promulgating § 1B1.13(2), the Commission (an independent body within the judicial branch, *see* 28 U.S.C. § 991(a)) plainly legislated without authority. As such, and even if the rest of § 1B1.13 can be upheld as constitutional, the Commission must be informed that § 1B1.13(2) clearly was *not*. It was promulgated in violation of the non-delegation doctrine.

Second, in the ten circuits that have found current § 1B1.13 only applicable to BOP-filed motions, and "inapplicable" to defendant-filed motions, courts will need to understand—in order to honor the "consistency" requirement in § 3582(c)(1)(A)—

whether any new policy statement the Commission may write for defendant-filed motions is simply an advisory "guidepost" (allowing district courts to retain some discretion over the ultimate "extraordinary and compelling reason" determination), or instead, binding and preclusive—leaving courts no discretion whatsoever. While the First Circuit has rightly recognized that "when the Sentencing Commission issues updated guidance applicable to prisoner-initiated motions," district courts faced with such motions will "be required to ensure that their determination of extraordinary and compelling reasons are consistent with that guidance," *Ruvalcaba*, 26 F.4th at 23-24, whether the Commission's "guidance" is simply advisory or binding will depend upon this Court's determination of the scope of the delegation in § 994(t).

Finally, as of this writing there is a well-entrenched circuit conflict on whether the severity of a past sentence and disparity with current sentences imposed for the same conduct may be considered among "extraordinary and compelling reasons" for relief. At one end of the current divide lies the Eleventh Circuit which precludes a district court from considering *any* change in sentencing law—whether resulting from a statutory or Guideline amendment, or an intervening judicial decision—among "extraordinary and compelling reasons" for relief. At the other end of the divide, four circuits—the First, Fourth, Ninth, and Tenth—hold that the severity/disparity resulting from non-retroactive changes in sentencing law together with other factors may be considered "extraordinary and compelling reasons" for relief. *See United States v. McCoy*, 981 F.3d 271, 285-87 (4th Cir. 2020); *United States v. Maumau*, 993 F.3d 821, 837 (10th Cir. 2021); *United States v. Ruvalcaba*, 26 F.4th 14, 25-28 (1st Cir.

2022); *United States v. Chen*, 2022 WL 4231313, at **4-5; ____F.4th ___ (9th Cir. Sept. 14, 2022). But three other circuits—the Third, Seventh, and Eighth—disagree on that specific point. *See United States v. Andrews*, 12 F.4th 255, 261-62 (3d Cir. 2021); *United States v. Thacker*, 4 F.4th 569, 571, 575-76 (7th Cir. 2021); *United States v. Crandall*, 25 F.4th 582, 585-86 (8th Cir. 2022). And the Sixth Circuit, notably, has rendered decisions on both sides of that divide, *cf. United States v. Jarvis*, 999 F.3d 442, 443-45 (6th Cir. 2021) *with United States v. Owens*, 996 F.3d 775, 764 (6th Cir. 2021). It is set to resolve the issue en banc in *United States v. McCall*, Case No. 21-3400, argued in June.

Notably, in response to prior petitions seeking resolution of this circuit split the government argued that this Court's resolution of that split would have limited "practical significance" since the Commission could write a new policy statement that excludes a non-retroactive change in sentencing law as an "extraordinary and compelling reason" for relief. *See* Briefs of the United States in Opposition in *Jarvis v. United States,* No. 21-568, at 16-22 (Dec. 8, 2021); *Watford v. United States*, No. 21-551, at 2 (Dec. 15, 2021). Indeed, the government asserted in *Jarvis* that "Nobody disputes [] that the Commission has the power [to] resolve this particular issue" by "rul[ing] out the First Step Act's prospective amendment to Section 924(c) as a possible basis for finding 'extraordinary and compelling reasons' for a Section 3582(c)(1)(A) sentence reduction." BIO, *Jarvis*, at 17-18.

But while there might not have been a dispute between the parties on that issue in *Jarvis*, that is *not* true here since Petitioner specifically disputes—on non-

delegation grounds—the Commission's power to "rule out" the disparity in sentences for identical offenses resulting from Congress' 2018 clarification of the stacking procedure in § 924(c)(1)(C). If the Commission cannot "rule out" such ground, district courts should rightly retain the power to consider that ground, among other factors including the fact that a defendant is no longer a Career Offender and no longer subject to mandatory Guidelines, in determining if there are extraordinary and compelling reasons for relief.

And in fact, there is even a narrower circuit split now on whether a change in sentencing law through a non-retroactive judicial decision may be considered among other facts as "extraordinary and compelling reasons" for a reduction. *Compare United States v. McKinnie*, 24 F.4th 583, 587-89 (6th Cir. 2022) (intervening change in circuit law confirming that defendant was erroneously sentenced as a Career Offender could not be considered among other health-related factors in determining whether there were "extraordinary and compelling reasons" for release); *United States v. Hunter*, 12 F.4th 55, 560 (6th Cir. 2021) (non-retroactive judicial decision such as *Booker* may not be considered among "extraordinary and compelling" reasons for a sentence reduction) *with United States v. Johnson*, 858 F. App'x 381 (D.C. Cir. June 4, 2021) (finding reversible plain error in the failure of a district court to at least consider an intervening judicial decision making clear that defendant was erroneously sentenced as a Career Offender).

If the Commission wishes to resolve these protracted circuit conflicts, it must know in advance whether its grant of authority from Congress includes the power to

"foreclose" any other ground for relief beyond the single one (rehabilitation alone) Congress identified in § 994(t). At least one circuit has already drawn a distinction between a policy statement that merely provides advisory guidance and one that "prohibits the district court from taking specified action," finding only the latter "binding." *United States v. Marcussen*, 15 F.4th 855, 859 (8th Cir. 2021) (citing *Williams v. United States*, 503 U.S. 193, 201 (1992)). And if the Court agrees with the Tenth and Sixth Circuits that Congress merely delegated the Commission the authority to "*describe* what should be considered extraordinary and compelling reasons" for a sentence reduction, and rejects the Eleventh Circuit's contrary view in *Bryant*, that would mean Congress did *not* delegate the authority to "*foreclose*" any ground other than "rehabilitation alone" as a potential basis for relief. Notably, the principle that "[t]he expression of one thing implies the exclusion of others" (*expressio unius est exclusio alterius*) supports the conclusion that the single "express exception" in § 994(t) "implies that there are no other" exceptions. *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018).

For all of these reasons, a grant of certiorari to resolve the question presented in this case will have the added benefit of helping to guide the newly-constituted Commission going forward so that it does not overstep its delegated authority. Although Congress can certainly change a statute once this Court has definitively determined its meaning, the Commission cannot promulgate a guideline or policy statement that conflicts with this Court's interpretation. *See Neal v. United States*, 516 U.S. 284, 295 (1996) (citations omitted).

## Issue II

**In light of *Concepcion*, and the absence of any record assurance that the district court considered any of Petitioner's arguments in mitigation before issuing a single-sentence, alternative "discretionary" denial of compassionate release, the Court should GVR with directions that the district court specifically consider Petitioner's arguments under 18 U.S.C. § 3553(a) in mitigation, including that an intervening change in sentencing law has rendered him a non-Career Offender and reduced his likely sentence today.**

In *Concepcion v. United States*, 142 S.Ct. 2389 (2022), the Court confirmed what type of arguments in mitigation may properly be considered under Section 404(b) of the First Step Act of 2018, and the court's duty of explanation under that provision. On the first point, the Court held that in exercising its discretion under Section 404(b), a district court may consider intervening developments in the law since the original sentencing—including unrelated, non-retroactive Guideline amendments—if a party raises such a change in law as a ground for a reduced sentence. *Id.* at 2396, 2403 (underscoring that "[n]othing express or implicit in the First Step Act" prohibits a district court from "consider[ing] nonretroactive Guideline amendments to help inform whether to reduce sentences at all, and if so by how much"); *see also id.* at 2402 (noting that nothing in the First Step Act "limit[s] the information a district court may use to inform its decision whether and how much to reduce a sentence").

On the second point, clarifying the court's duty of explanation, the Court confirmed in *Concepcion* that in Section 404 proceedings, just like other sentencing and re-sentencing proceedings, "district courts bear the standard obligation to explain their decisions and demonstrate that they considered the parties' arguments." *Id.* at

2404. While noting that a district court need not "expressly rebut each argument" by the parties, the Court was emphatic that a district court must at least "make clear" that it has "considered the arguments before it," and "reasoned through" those arguments. *Id.* at 2404-05 (citations omitted).

Notably, a court in a compassionate release case—*unlike* a Section 404(b) case, but *like* a proceeding under 18 U.S.C. § 3582(c)(2)—is *also* statutorily mandated to "consider the 3553(a) factors to the extent they are applicable" before granting or denying relief. And, as the Ninth Circuit rightly held in a § 3582(c)(2) case even prior to *Concepcion*, where it is not clear from the record that the district court recognized that an unrelated, non-retroactive intervening change in sentencing law is relevant to the exercise of its discretion at the § 3553(a) phase of the inquiry, the case must be remanded. *United States v. Lizarraras-Chacon*, 14 F.4th 961, 967-68 (9th Cir. 2021).

Now, the Fourth Circuit has indicated that *Conception*'s basic explanation rule logically extends to a compassionate release denial and actually requires more than § 3553(a) might alone. Indeed, the Fourth Circuit has held, even where the record confirms that the district court "appropriately considered the § 3553(a) factors" in its denial of compassionate release, if the record does not *also* "demonstrate that [the district court] considered [the defendant's] arguments in mitigation," the court's denial of relief must be vacated and the case remanded for reconsideration of the defendant's motion in light of *Concepcion*. *United States v. Byers*, 2022 WL 3210703, at *1 (4th Cir. Aug. 9, 2022) (vacating and remanding where the district court did not have the benefit of *Concepcion* at the time it issued its order denying compassionate

release, and the record did not demonstrate that the court considered any of his arguments in mitigation); *see also United States v. Brice*, 2022 WL 3715086, at *2 (4th Cir. Aug. 29, 2022) (while acknowledging that *Concepcion* "ar[ose] in an admittedly different posture," vacating and remanding in a compassionate release case "for further consideration in light of *Concepcion*" given that the district court relied on the non-retroactivity of an intervening decision confirming the defendant no longer qualified as a Career Offender "to conclude that the advanced postsentencing legal developments could not satisfy the "extraordinary and compelling reasons" standard).

Plainly, if Mr. Tucker's case were before either the Fourth or Ninth Circuits, his case would be remanded to the district court for further consideration of his arguments under § 3553(a) that:

- the Guidelines are no longer mandatory;
- he is no longer a Career Offender;
- if sentenced today, the reduced Career Offender range is the Commission's current determination of a sentence that is "sufficient but not greater than necessary" for his Hobbs Act and carjacking offenses, and a defendant with his criminal history;
- irrespective of the change to the stacking rules for his § 924(c) offenses, simply due to the Guideline reduction he would likely receive a lesser sentence today;

  and

- the district court has the authority under § 3582(c)(1)(A) to reduce a sentence substantially to accord with current law, even if it does not reduce the sentence completely to time served.

These arguments were clearly non-frivolous grounds for mitigation under § 3553(a). Indeed, they related directly to: the need for the sentence imposed "to reflect

the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," § 3553(a)(2)(A); the need for the sentence imposed "to afford adequate deterrence to criminal conduct," § 3553(a)(2)(B); "the kinds of sentences available," § 3553(a)(4); the kinds of sentence and the sentencing range established for "the applicable category of defendant" as set forth in the Guidelines, § 3553(a)(4)(A)(i); and the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," § 3553(a)(6). And, there is *no* evidence in the record that the court considered any of the above arguments relating to these factors.

To assure that justice does not vary by locale, the Court should grant certiorari, vacate the decision below, and remand with instructions that the district court consider Petitioner's arguments under § 3553(a) based upon changes in sentencing law.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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