No. 22-5859

IN THE SUPREME COURT OF THE UNITED STATES

MARCAL FRACTION, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in finding that "extraordinary and compelling reasons" did not support reducing petitioner's preexisting sentence under 18 U.S.C. 3582(c)(1)(A), where his motion was premised on a decision of the court of appeals interpreting the Sentencing Guidelines that did not apply retroactively to preexisting sentences.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (M.D. Pa.):

Fraction v. United States, No. 17-cv-1456 (Sept. 29, 2017)

United States v. Fraction, No. 14-cr-305 (Sept. 23, 2021)

United States Court of Appeals (3d Cir.):

United States v. Fraction, No. 18-1270 (Sept. 27, 2019)

United States v. Fraction, No. 20-3578 (May 24, 2021)

United States v. Fraction, No. 21-1270 (Aug. 5, 2021)

United States v. Fraction, No. 21-2867 (Sept. 12, 2022)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is available at 2022 WL 4128846. The order of the district court (Pet. App. 4a-7a) is not published in the Federal Supplement but is available at 2021 WL 9426779. A prior opinion of the court of appeals (Pet. App. 8a-12a) is not published in the Federal Reporter but is reprinted at 855 Fed. Appx. 72. A prior order of the district court (Pet. App. 13a-16a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 2022. The petition for a writ of certiorari was filed on October 11, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted on one count of conspiring to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. 846. Judgment 1. The district court sentenced petitioner to 120 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. Petitioner did not appeal. The district court denied petitioner's subsequent motion under 28 U.S.C. 2255 to vacate his sentence, and the court of appeals denied a certificate of appealability (COA). C.A. App. 175-206; 20-3578 C.A. Order (Apr. 26, 2021).

In December 2020, petitioner filed a motion for a sentence reduction under 18 U.S.C. 3582(c)(1)(A). C.A. App. 208-212. The district court denied the motion, Pet. App. 13a-16a, and the court of appeals affirmed, id. at 8a-12a. In August 2021, petitioner filed a second motion for a sentence reduction under Section 3582(c)(1)(A). C.A. App. 267-285. The district court denied that motion as well, Pet. App. 4a-7a, and the court of appeals affirmed, id. at 1a-3a.

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

Congress also abolished the practice of federal parole, specifying that a "court may not modify a term of imprisonment once it has been imposed" except in certain enumerated circumstances. 18 U.S.C. 3582(c); see Tapia, 564 U.S. at 325. One such circumstance is when the Sentencing Commission has made a retroactive amendment to the sentencing range on which the defendant's term of imprisonment was based. 18 U.S.C. 3582(c)(2); see Hughes v. United States, 138 S. Ct. 1765, 1772-1773 (2018). Another such circumstance is when "extraordinary and compelling reasons" warrant the defendant's "compassionate release" from prison. Sentencing Guidelines App. C Supp., Amend. 799 (Nov. 1, 2016); see 18 U.S.C. 3582(c)(1)(A).

As originally enacted in the Sentencing Reform Act, Section 3582(c)(1)(A) stated:

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

> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

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

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

b. In 2006, the Sentencing Commission promulgated a new policy statement -- Sentencing Guidelines § 1B1.13, p.s. -- as a "first step toward implementing the directive in 28 U.S.C. § 994(t)" that required the Commission to "'describe what should be considered extraordinary and compelling reasons for sentence reduction.'" Sentencing Guidelines App. C, Amend. 683 (Nov. 1, 2006) (citation omitted). Although the initial policy statement

primarily "restate[d] the statutory bases for a reduction in sentence under [Section] 3582(c)(1)(A)," ibid., the Commission updated the policy statement the following year "to further effectuate the directive in [Section] 994(t)," id. App. C, Amend. 698 (Nov. 1, 2007). That amendment revised the commentary (or "Application Notes") to Section 1B1.13 to describe four circumstances that should be considered extraordinary and compelling reasons for a sentence reduction under Section 3582(c)(1)(A). Ibid.

In 2016, the Commission further amended the commentary to Section 1B1.13 to "broaden[] the Commission's guidance on what should be considered 'extraordinary and compelling reasons'" that might justify a sentence reduction. Sentencing Guidelines App. C Supp., Amend. 799. In its current form, Application Note 1 to Section 1B1.13 describes four categories of reasons that should be considered extraordinary and compelling: "Medical Condition of the Defendant," "Age of the Defendant," "Family Circumstances," and "Other Reasons." Id. § 1B1.13, comment. (n.1(A)-(D)) (emphasis omitted). Application Note 1(D) explains that the fourth category -- "Other Reasons" -- encompasses any reason "determined by the Director of the Bureau of Prisons" (BOP) to be "extraordinary and compelling" "other than, or in combination with," the reasons described in the other three categories. Id. § 1B1.13, comment. (n.1(D)) (emphasis omitted).

In its 2016 amendment to Section 1B1.13, the Commission also added a new Application Note "encourag[ing] the Director of the Bureau of Prisons" to file a motion under Section 3582(c)(1)(A) whenever "the defendant meets any of the circumstances set forth in Application Note 1." Sentencing Guidelines § 1B1.13, comment. (n.4). The Commission explained that it had "heard testimony and received public comment concerning the inefficiencies that exist within the Bureau of Prisons' administrative review of compassionate release applications, which can delay or deny release, even in cases where the applicant appears to meet the criteria for eligibility." Id. App. C Supp., Amend. 799.

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

> the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment * * * , after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that * * * extraordinary and compelling reasons warrant such a reduction * * * and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. 3582(c)(1)(A) (emphasis added).

The First Step Act also added a new Section 3582(d), which imposes additional obligations on the BOP with respect to motions for a Section 3582(c)(1)(A) sentence reduction. Sections 3582(d)(2)(A) and (B) require the BOP, when a defendant is "diagnosed with a terminal illness" or "is physically or mentally unable to submit a request for a sentence reduction pursuant to subsection (c)(1)(A)," to notify the defendant's attorney, partner, and family members that they may prepare and submit a request for a sentence reduction on the defendant's behalf, and to assist in the preparation of such requests. 18 U.S.C. 3582(d)(2)(A)(i), (iii), (B)(i), and (iii). Section 3582(d)(2)(C) requires the BOP to provide notice to all defendants of their ability to request a sentence reduction, the procedures for doing so, and their "right to appeal a denial of a request * * * after all administrative rights to appeal within the Bureau of Prisons have been exhausted." 18 U.S.C. 3582(d)(2)(C).

2. From January 2013 to November 2014, petitioner participated in a conspiracy to distribute cocaine in northeastern Pennsylvania. Presentence Investigation Report (PSR) ¶¶ 1, 6-17. In the course of the conspiracy, suppliers in Puerto Rico mailed parcels of cocaine to addresses in the Wilkes-Barre area. PSR ¶¶ 6-7, 10. A confidential informant identified an employee at Sharp Cuts, a barber shop in Wilkes-Barre, as a distributor of the cocaine. PSR ¶ 8. Investigators intercepted the distributor's communications with petitioner, PSR ¶ 13, and learned that the

distributor provided cocaine to petitioner for further distribution, PSR ¶¶ 12-13.

A federal grand jury in the Middle District of Pennsylvania indicted petitioner on one count of conspiring to distribute and to possess with intent to distribute cocaine, in violation of 21 U.S.C. 846. Indictment 1-2. Petitioner pleaded guilty. D. Ct. Doc. 412 (Oct. 5, 2016); Judgment 1.

Applying the 2016 version of the Sentencing Guidelines, the Probation Office's presentence report calculated an advisory guidelines range of 151 to 188 months of imprisonment. PSR ¶¶ 21, 64. In calculating petitioner's advisory guidelines range, the Probation Office determined that petitioner qualified as a career offender under Sentencing Guidelines § 4B1.1(a) (2016). PSR ¶ 29. A defendant is a career offender under that provision if, inter alia, his instant offense of conviction is a felony "controlled substance offense" and he has at least two prior felony convictions for a "controlled substance offense." Sentencing Guidelines § 4B1.1(a) (2016).

Petitioner did not object to his designation as a career offender, but he argued for a below-guidelines sentence based on the assertion that his career-offender designation overrepresented his criminal history. D. Ct. Doc. 497 (Jan. 20, 2017); Sent. Tr. 3-4. The district court adopted the Probation Office's guidelines calculation and imposed a below-guidelines sentence of 120 months

of imprisonment. Sent Tr. 5, 28; Judgment 2. Petitioner did not appeal.

3. In August 2017, petitioner moved under 28 U.S.C. 2255 to vacate his sentence, contending that his trial counsel rendered ineffective assistance in failing to file a notice of appeal. D. Ct. Doc. 540, at 2 (Aug. 16, 2017). Petitioner asserted that he had instructed his counsel to file an appeal challenging his career-offender designation on the theory that he did not have at least two prior felony convictions for a "controlled substance offense." D. Ct. Doc. 541, at 3, 4-5 (Aug. 16, 2017).

The district court denied petitioner's Section 2255 motion, finding that because the presentence report had correctly determined that petitioner had at least two prior felony convictions for a "controlled substance offense," "no 'rational defendant'" would have filed an appeal. D. Ct. Doc. 544, at 14 (Sept. 29, 2017); see id. at 12-14. The court of appeals granted a COA and then granted the government's unopposed motion to remand for an evidentiary hearing. See 18-1270 C.A. Order 2 (Mar. 28, 2019); 18-1270 C.A. Order (Sept. 10, 2019).

After the evidentiary hearing, the district court again denied petitioner's Section 2255 motion, finding credible the testimony of petitioner's trial counsel that petitioner "did not, at any time, direct his counsel to file a notice of appeal." C.A. App. 201. The court of appeals denied a COA. 20-3578 C.A. Order (Apr. 26, 2021).

4. In April 2020, petitioner filed a motion in the district court for a sentence reduction under Section 3582(c)(1)(A), contending that the risk that he might contract COVID-19 in prison was an extraordinary and compelling reason warranting a sentence reduction. C.A. App. 71-75; see also id. at 85-88 (motion to amend). The district court denied the motion without prejudice after determining that petitioner had failed to exhaust his administrative remedies. Id. at 156; see id. at 153-173.

In December 2020, after exhausting administrative remedies, petitioner filed a renewed motion, again citing the risk of contracting COVID-19. C.A. App. 208-212, 215-216. The district court denied the motion. Pet. App. 13a-16a. The court determined that petitioner had failed to show any "extraordinary and compelling reasons for compassionate release." Id. at 15a. The court explained that petitioner "is only 40 years old" and "does not have any diagnosed medical condition that render[s] him susceptible to suffer serious complications if he does contract" COVID-19. Ibid.

The district court further determined the sentencing factors set forth in 18 U.S.C. 3553(a) did not support a sentence reduction. Pet. App. 16a. The court found that petitioner continued to pose "a significant danger to the safety of the community based on the serious nature of his current drug trafficking conspiracy conviction * * * as well as his prior drug convictions," "which supported his sentence as a career

offender." Ibid. The court also observed that petitioner had "shown no signs of remorse." Ibid. And the court emphasized that petitioner had "already received a sentence significantly below the advisory guideline range" and had served only a "relative[ly] short period" of that sentence. Ibid.

The court of appeals affirmed. Pet. App. 8a-12a. The court found no abuse of discretion in the district court's determination that the Section 3553(a) factors did "not support relief." Id. at 11a. The court of appeals highlighted that petitioner's "offense was serious," that petitioner "qualified as a career offender based on his extensive criminal history," that his "sentence already included a significant downward variance from the guidelines range," and that he "had served approximately only 40% of his sentence." Ibid.

5. In August 2021, petitioner filed a second motion for a sentence reduction under Section 3582(c)(1)(A). C.A. App. 267-285. In that motion, petitioner asserted that, if sentenced today, he would not be considered a career offender under the Sentencing Guidelines in light of the court of appeals' intervening decision in United States v. Nasir, 982 F.3d 144 (3d Cir. 2020) (en banc), vacated, 142 S. Ct. 56 (2021), and cert. denied, 142 S. Ct. 275 (2021). C.A. App. 268. Overruling circuit precedent, the court in Nasir held that inchoate offenses like attempt and conspiracy do not qualify as controlled substance offenses under the career-offender guideline. 982 F.3d at 160; see United States v. Nasir,

17 F.4th 459, 462 & n.1, 468-472 (3d Cir. 2021) (en banc) (adhering to that decision following remand from this Court).[1]

The district court denied the motion. Pet. App. 4a-7a. The court explained that petitioner's contention that he "is no longer a career offender" is "a claim that must be brought in a § 2255 motion" and that his sentence-reduction motion was "really an attempt to circumvent the denial of his request for a [COA]" on the denial of his Section 2255 motion. Id. at 5a.

6. The court of appeals affirmed. Pet. App. 1a-3a. The court observed that petitioner "was sentenced before Nasir" and "does not argue that his sentence was unlawful at the time it was imposed." Id. at 3a. Relying on circuit precedent, the court explained that "'the duration of a lawfully imposed sentence does not create an extraordinary or compelling circumstance'" and that "'nonretroactive changes' in statutory sentencing law 'cannot be a basis for compassionate release.'" Ibid. (quoting United States v. Andrews, 12 F.4th 255, 260-261 (3d Cir. 2021), cert. denied, 142 S. Ct. 1446 (2022)) (brackets omitted). The court therefore rejected petitioner's contention that "his lawfully imposed sentence should have been modified based on Nasir's nonretroactive change in the law." Ibid.

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[1] The government agrees that if petitioner were sentenced today, he would no longer qualify as a career offender under Nasir because his "instant offense of conviction" for conspiring to distribute and to possess with intent to distribute cocaine would not qualify as a "controlled substance offense." Sentencing Guidelines § 4B1.1(a) (2016); see Gov't C.A. Br. 18-19.

ARGUMENT

Petitioner contends (Pet. 5, 9-10) that a nonretroactive change in the law can serve as an "extraordinary and compelling" reason for a sentence reduction under Section 3582(c)(1)(A). That contention lacks merit. And although courts of appeals have reached different conclusions on the issue, the Sentencing Commission is currently considering the issue during the guidelines amendment cycle ending May 1, 2023, and could promulgate a new policy statement that would deprive a decision by this Court of practical significance. Were the Court nevertheless inclined to consider the question presented, this case would be a poor vehicle in which to do so, because it does not appear that petitioner complied with Section 3582(c)(1)(A)'s exhaustion requirement, and because petitioner would not be entitled to a sentence reduction even if the question presented were resolved in his favor. This Court has recently and repeatedly denied petitions for writs of certiorari raising similar issues.[2] It should follow the same course here.

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[2] See, e.g., Thacker v. United States, 142 S. Ct. 1363 (2022) (No. 21-877); Williams v. United States, 142 S. Ct. 1207 (2022) (No. 21-767); Chantharath v. United States, 142 S. Ct. 1212 (2022) (No. 21-6397); Tingle v. United States, 142 S. Ct. 1132 (2022) (No. 21-6068); Sutton v. United States, 142 S. Ct. 903 (2022) (No. 21-6010); Corona v. United States, 142 S. Ct. 864 (2022) (No. 21-5671); Tomes v. United States, 142 S. Ct. 780 (2022) (No. 21-5104); Jarvis v. United States, 142 S. Ct. 760 (2022) (No. 21-568); Watford v. United States, 142 S. Ct. 760 (2022) (No. 21-551); Gashe v. United States, 142 S. Ct. 753 (2022) (No. 20-8284). Other pending petitions for writs of certiorari raise similar issues. See, e.g., King v. United States, No. 22-5878 (filed Oct.

1. Petitioner contends (Pet. 5, 9-10) that a nonretroactive change in the law can constitute an "extraordinary and compelling" reason for a sentence reduction under Section 3582(c)(1)(A). The court of appeals correctly rejected that contention. Pet. App. 3a.

a. The overarching principle of federal sentencing law is that a "federal court generally 'may not modify a term of imprisonment once it has been imposed.'" Dillon v. United States, 560 U.S. 817, 819 (2010) (quoting 18 U.S.C. 3582(c)). Section 3582(c)(1)(A) provides a limited "except[ion]" to that rule. 18 U.S.C. 3582(c). To disturb the finality of a federal sentence under that provision, the district court typically must identify "extraordinary and compelling reasons" for doing so. 18 U.S.C. 3582(c)(1)(A)(i); see 18 U.S.C. 3582(c)(1)(A)(ii) (providing specific statutory criteria for reducing the sentence of certain elderly prisoners who have already served lengthy terms). A nonretroactive change in the law, however, is neither an "extraordinary" nor a "compelling" reason for a sentence reduction under Section 3582(c)(1)(A).

When a change in the law is not retroactively applicable to a sentence that is already final, nothing is "extraordinary" about that final sentence reflecting prevailing law at the time when it

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11, 2022); Gibbs v. United States, No. 22-5894 (filed Oct. 19, 2022); Tovar v. United States, No. 22-5958 (filed Oct. 4, 2022); Eye v. United States, No. 22-6096 (filed Apr. 7, 2022); Thompson v. United States, No. 22-6448 (filed Dec. 15, 2022).

was imposed. Consistent with the "'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute,'" Wisconsin Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018) (citation omitted), the word "extraordinary" should be understood "to mean 'most unusual,' 'far from common,' and 'having little or no precedent,'" United States v. McCall, 56 F.4th 1048, 1055 (6th Cir. 2022) (en banc) (quoting Webster's Third New International Dictionary of the English Language 807 (1971) (Webster's)). Far from being unusual, uncommon, or unprecedented, petitioner's sentence simply reflects the law at the time he was sentenced. Any potential disparity between his sentence and the sentence that he might receive today merely reflects the operation of ordinary nonretroactivity principles.

A nonretroactive change in sentencing law likewise cannot constitute a "compelling" reason for a Section 3582(c)(1)(A) sentence reduction. When Congress enacted the Sentencing Reform Act of 1984, "[c]ompelling" meant "forcing, impelling, driving." McCall, 56 F.4th at 1055 (quoting Webster's 463). Thus, for a reason to be "compelling" under Section 3582(c)(1)(A), it must provide a "forcing, impelling, [or] driving" reason to disturb the finality of a federal sentence. Ibid. (citation omitted). Ordinary principles of nonretroactivity, however, already consider, and reject, the notion that all changes in the law should

be allowed to disturb final convictions and sentences -- the very point of the doctrine is to identify the small subclass of changes in the law that should. For a district court to treat a nonretroactive change in the law as a "compelling" reason to disturb a final sentence would thus undo the balance already struck by ordinary nonretroactivity principles, replacing it with the diametrically opposing balance preferred by a particular individual judge. Nothing about a nonretroactive change in the law forces, impels, or drives such a nonsensical outcome.

Reducing sentences based on nonretroactive changes in the law would also undermine congressional design. The "principal path" that "Congress established for federal prisoners to challenge their sentences" is "embodied in the specific statutory scheme authorizing post-conviction relief in 28 U.S.C. § 2255 and accompanying provisions." United States v. Thacker, 4 F.4th 569, 574 (7th Cir. 2021), cert. denied, 142 S. Ct. 1363 (2022). Treating a nonretroactive change in the law as an "extraordinary and compelling" reason for a sentence reduction would allow defendants to "avoid the restrictions of the post-conviction relief statute by resorting to a request for compassionate release instead." United States v. Crandall, 25 F.4th 582, 586 (8th Cir.), cert. denied, 142 S. Ct. 2781 (2022). And it "would wholly frustrate explicit congressional intent to hold that [defendants] could evade" those restrictions "by the simple expedient of putting

a different label on their pleadings." Preiser v. Rodriguez, 411 U.S. 475, 489-490 (1973).

Accordingly, a nonretroactive change in the law cannot serve as an "extraordinary and compelling reason[]" for a sentence reduction either in isolation or as adding to a package of such "reasons." 18 U.S.C. 3582(c)(1)(A)(i). Whether considered alone or in combination with other asserted factors, the possibility that a previously sentenced defendant might receive a lower sentence if he were sentenced today is still the ordinary and expected result of established nonretroactivity principles. See United States v. Jarvis, 999 F.3d 442, 444 (6th Cir. 2021), cert. denied, 142 S. Ct. 760 (2022) (explaining that a prospective change to sentencing law is a "legally impermissible ground" for finding an "extraordinary and compelling reason," even when it is "combined with" other considerations).

b. Petitioner's counterarguments lack merit. Petitioner contends (Pet. 9) that, beyond specifying that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason," 28 U.S.C. 994(t), Congress placed no textual limit on the reasons that might warrant a sentence reduction. That contention disregards the express textual requirement that the reason for a reduction be both "extraordinary and compelling." 18 U.S.C. 3582(c)(1)(A)(i). That requirement ensures that the ordinary operation of nonretroactivity principles does not have the self-contradictory effect of opening, or

widening, the door for Section 3582(c)(1)(A) motions by everyone sentenced before the nonretroactive change in the law.

Petitioner also suggests (Pet. 10) that the decision below conflicts with this Court's recent decision in Concepcion v. United States, 142 S. Ct. 2389 (2022). That suggestion is misplaced. In Concepcion, the Court considered the scope of a district court's discretion under Section 404 of the First Step Act, which provides an explicit statutory mechanism for a court to revisit the sentence of a defendant convicted of a crack-cocaine offense "the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010." First Step Act § 404(a), 132 Stat. 5222; see § 404(b), 132 Stat. 5222; Concepcion, 142 S. Ct. at 2397. The Court explained that, in adjudicating a motion under Section 404 of the First Step Act, a district court "may consider other intervening changes" of law or fact, beyond the changes made by those Sections of the Fair Sentencing Act. Concepcion, 142 S. Ct. at 2396.

Unlike Section 404 of the First Step Act, which directly authorizes sentence reductions for a specifically defined subset of previously sentenced drug offenders, Section 3582(c)(1)(A)(i) contains a threshold requirement that a district court identify "extraordinary and compelling reasons" warranting a sentence reduction. 18 U.S.C. 3582(c)(1)(A)(i). Indeed, the Court in Concepcion identified Section 3582(c)(1)(A) as a statute in which "Congress expressly cabined district courts' discretion" in a way

that Section 404 does not. 142 S. Ct. at 2401. Petitioner's reliance on Concepcion therefore is misplaced.

2. Petitioner asserts (Pet. 10-13) that the courts of appeals are divided on whether a nonretroactive change in the law may constitute an "extraordinary and compelling" reason for a sentence reduction under Section 3582(c)(1)(A). But a divergence of views on that issue does not warrant this Court's review at this time because the Sentencing Commission is currently considering whether and how to address the issue in a proposed amendment to the Guidelines.

a. In accord with the decision below, the Sixth, Seventh, Eighth, and D.C. Circuits have recognized that nonretroactive changes in the law, "whether considered alone or in connection with other facts and circumstances, cannot constitute an 'extraordinary and compelling' reason to authorize a sentencing reduction." Thacker, 4 F.4th at 571 (7th Cir.); see McCall, 56 F.4th at 1050 (6th Cir.); Crandall, 25 F.4th at 585-586 (8th Cir.); United States v. Jenkins, 50 F.4th 1185, 1198-1200 (D.C. Cir. 2022). The Eleventh Circuit has reached a similar outcome, reasoning that Sentencing Guidelines § 1B1.13's description of what should be considered "extraordinary and compelling" reasons is applicable to prisoner-filed Section 3582(c)(1)(A) motions. See United States v. Bryant, 996 F.3d 1243, 1257 (11th Cir.), cert. denied, 142 S. Ct. 583 (2021).

The First, Fourth, Ninth, and Tenth Circuits have taken the view that nonretroactive changes in the law can form part of an "individualized assessment[]" of whether "'extraordinary and compelling reasons'" exist in a particular defendant's case. United States v. McCoy, 981 F.3d 271, 286 (4th Cir. 2020); see United States v. Ruvalcaba, 26 F.4th 14, 28 (1st Cir. 2022); United States v. Chen, 48 F.4th 1092, 1097-1098 (9th Cir. 2022); United States v. McGee, 992 F.3d 1035, 1047-1048 (10th Cir. 2021). Those circuits have held, however, that "the mere fact" that a defendant might receive a lower sentence if the defendant were sentenced today "'cannot, standing alone, serve as the basis for a sentence reduction.'" Ruvalcaba, 26 F.4th at 28 (citation omitted); see McCoy, 981 F.3d at 287; Chen, 48 F.4th at 1100; McGee, 992 F.3d at 1048.[3]

b. This Court's review is not warranted at this time because the Sentencing Commission is actively considering the issue. Under Section 3582(c)(1)(A), any sentence reduction must be "consistent with applicable policy statements issued by the Sentencing

[3] Contrary to petitioner's contention (Pet. 10), United States v. Brooker, 976 F.3d 228 (2d Cir. 2020), does not show that the Second Circuit is aligned with the First, Fourth, Ninth, and Tenth Circuits on this issue. That decision did not address whether nonretroactive changes in the law can serve as "extraordinary and compelling" reasons for a sentence reduction. Rather, the decision took the view that district courts are not bound by Sentencing Guidelines § 1B1.13's description of "extraordinary and compelling" reasons in deciding Section 3582(c)(1)(A) motions filed by prisoners, without deciding the more specific question here. See Brooker, 976 F.3d at 234-237.

Commission." 18 U.S.C. 3582(c)(1)(A). Every circuit that has held that nonretroactive changes in the law can constitute extraordinary and compelling reasons for a sentence reduction has done so on the premise that the current version of Section 1B1.13 is inapplicable to sentence-reduction motions filed by prisoners. See Ruvalcaba, 26 F.4th at 19-24; McCoy, 981 F.3d at 283; Chen, 48 F.4th at 1095; McGee, 992 F.3d at 1050. Nobody disputes, however, that the Commission has the power to amend Section 1B1.13 to make that policy statement applicable to prisoner-filed motions and to rule out nonretroactive changes in the law as a possible basis for finding "extraordinary and compelling reasons" for a Section 3582(c)(1)(A) sentence reduction.

The Sentencing Commission is currently in the process of considering revisions to Section 1B1.13. On February 2, 2023, the Sentencing Commission published a proposed amendment to Section 1B1.13 and invited public comment on its proposal by March 14, 2023. 88 Fed. Reg. 7180, 7180 (Feb. 2, 2023). The proposed amendment would revise the policy statement to render it applicable to all Section 3582(c)(1)(A) motions, including those filed by prisoners. See id. at 7183. The proposed amendment also "brackets the possibility of adding" "[c]hanges in [l]aw" as a "new" category of "extraordinary and compelling" reasons. Ibid. The proposed language of the amendment would permit courts to reduce a sentence whenever "[t]he defendant is serving a sentence that is inequitable in light of changes in the law." Ibid.

On February 15, the Department of Justice (Department) submitted comments on the proposed amendment to Section 1B1.13. See Letter from Jonathan J. Wroblewski, Director, Office of Policy & Legislation, Criminal Div., U.S. Dep't of Justice, to the Honorable Carlton W. Reeves, Chair, U.S. Sentencing Commission 2, 6-8 (Feb. 15, 2023).[4] In those comments, the Department reiterated the position that it has taken in the courts -- and with which a majority of circuits to have considered the issue have agreed -- that Section 3582(c)(1)(A) "does not authorize courts to reduce sentences based on a nonretroactive development in sentencing law." Id. at 2. Consistent with that position, the Department urged the Commission to "reject the proposed 'changes in law' provision." Ibid. The Department further explained that the Commission's proposal would "risk[] undermining the principles of finality and consistency that are the hallmarks of the Sentencing Reform Act" and would create intolerable burdens on courts and victims, id. at 7, and therefore should be rejected for policy as well as legal reasons.

At least so long as the Sentencing Commission remains engaged in considering revisions to Section 1B1.13 regarding what should be considered "extraordinary and compelling" reasons, this Court's review of the question presented would be premature. The Commission may decide to exclude nonretroactive changes in law as

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[4] https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/DOJ1.pdf.

a permissible basis for a Section 3582(c)(1)(A) sentence reduction because such changes are not "extraordinary and compelling" as a statutory matter, do not warrant a reduction as a policy matter, or both. Such a decision would resolve the circuit disagreement and obviate the need for this Court's review. Excluding changes in law as a policy matter would also deprive a decision by this Court that adopted petitioner's view of Section 3582(c)(1)(A) of practical significance.

Intervention is likewise unwarranted solely to advise the Commission as to whether it would be precluded, as a statutory matter, from including nonretroactive changes in the law as a potential "extraordinary and compelling" reason for a sentence reduction. As an initial matter, the current amendment cycle's amendments or modifications to the Sentencing Guidelines must be sent to Congress by May 1, 2023, and will take effect, absent congressional action, no later than November 1, 2023. See 28 U.S.C. 994(p). An amended policy statement therefore would be promulgated by the Commission, and likely take effect, before the Court would issue any decision on the merits in petitioner's case. The express congressional preference for Commission-based decisionmaking on the specific issue of what extraordinary and compelling reasons warrant a sentence reduction, together with the Commission's ongoing attention to the issue during the current amendment cycle, make petitioner's efforts to urge judicial intervention at this juncture particularly unsound.

c. Finally, nothing in Section 3582(c)(1)(A) or the current guidelines precludes prisoners from filing successive motions for a sentence reduction. Thus, if the Commission were to revise the description of "extraordinary and compelling reasons" without reliance on nonretroactive changes in law, or prisoners like petitioner became eligible for relief in the future in some other permissible way, the current statutory and guidelines scheme would not preclude petitioner from filing another Section 3582(c)(1)(A) motion.

3. In any event, even if the question presented otherwise warranted review at this time, this case would be a poor vehicle in which to address it, for two reasons.

First, Section 3582(c)(1)(A) provides that a movant may file a motion for a sentence reduction only once he "has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on [his] behalf" or 30 days have lapsed "from the receipt of such a request by the warden of the defendant's facility." 18 U.S.C. 3582(c)(1)(A). As the government explained below, it does not appear that petitioner exhausted his administrative remedies as to the asserted ground for a sentence reduction on which he seeks this Court's review. Gov't C.A. Br. 13, 20-21; see, e.g., United States v. Williams, 987 F.3d 700, 703 (7th Cir. 2021) (per curiam) (explaining that, to properly exhaust, a prisoner must "present the same or similar ground for compassionate release in a request to the Bureau as in a motion to

the court"). At a minimum, the need to address whether petitioner complied with Section 3582(c)(1)(A)'s exhaustion requirement could complicate this Court's review.

Second, any sentence reduction under Section 3582(c)(1)(A) must be supported not only by "extraordinary and compelling reasons," but also by "the factors set forth in section 3553(a) to the extent that they are applicable." 18 U.S.C. 3582(c)(1)(A). In denying petitioner's first Section 3582(c)(1)(A) motion, the district court determined that the Section 3553(a) factors do not support a sentence reduction. Pet. App. 16a; see id. at 6a (referencing the court's "detailed explanation" denying petitioner's first motion). As the court explained, petitioner continues to "pose[] a significant danger to the safety of the community" in light of the "serious nature" of his offense and "his prior drug convictions"; petitioner "has shown no signs of remorse"; and petitioner has served a "relative[ly] short period of time" on his "significantly" below-guidelines sentence, making "additional prison time" necessary for adequate deterrence. Id. at 16a. The court of appeals affirmed the district court's determination that "the applicable § 3553(a) factors do not support relief." Id. at 11a. Thus, this Court's resolution of the question presented is unlikely to be outcome-determinative of his Section 3582(c)(1)(A) motion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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