No. _____

IN THE
Supreme Court of the United States

WILLIAM KING,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When, whether deciding if a defendant has presented an "extraordinary and compelling" reason for a sentence modification under 18 U.S.C. § 3582(c)(1)(A), the district court may consider intervening judicial decisions and developments in the law?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

DIRECTLY RELATED CASES

This case arises from the following proceedings:

United States of America v. William King, No. 21-3196, 7th Cir. (July 7, 2022) (affirming denial of motion for sentence modification pursuant to 18 U.S.C. § 3582(c)(1)(A));

United States of America v. William King, Criminal No. 07-cr-20055-HAB-EIL (C.D. Ill. Nov. 24, 2021) (denying motion for reduced sentence pursuant to 18 U.S.C. § 3582(c)(1)(A)); and

United States of America v. William King, Criminal No. 97-cr-20016-MPM-DGB (C.D. Ill. Sept. 24, 2007) (24-month supervised release revocation sentence running consecutively to the 216-month sentence imposed in 07-cr-20055).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Petitioner William King respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

DECISIONS BELOW

The Seventh Circuit's decision is published at 40 F.4th 594 and is included as Appendix A. The November 24, 2021, Order of the United States District Court for the Central District of Illinois denying Petitioner's Section 3582(c)(1)(A) motion is unpublished, though is included as Appendix B.

JURISDICTION

The Seventh Circuit entered judgment on July 12, 2022. Pet.App. 1a. No petition for rehearing was filed. This petition is filed within 90 days of the July 12, 2022, judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3582 states, in relevant part:

> (c) Modification of an Imposed Term of Imprisonment.—The court may not modify a term of imprisonment once it has been imposed except that—
>
> (1) in any case—
>
> (A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after

considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; . . .

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

18 U.S.C. § 3553(a) states, in relevant part:

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; . . .

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

STATEMENT

This case is an ideal vehicle for resolving a deep and well-acknowledged circuit split over whether a district court may consider changes in the law which dramatically reduce sentencing ranges and mandatory minimums when determining whether a sentence should be modified under 18 U.S.C. § 3582(c)(1)(A). Section 3582(c)(1)(A), extended to prisoner-initiated motions for the first time with the passage of the First Step of 2018, is considered a safety valve permitting sentencing modifications where there otherwise might be no available avenue. S. REP. 98-225, 121, 1984 U.S.C.C.A.N. 3182, 3304.

As relevant here, Section 3582(c)(1)(A) authorizes a sentence reduction when a district court, after considering the factors set forth at 18 U.S.C. § 3553(a), finds that "extraordinary and compelling reasons warrant such relief" and that "a

reduction is consistent with applicable policy statements issued by the Sentencing Commission." This latter requirement has its roots in the Sentencing Reform Act of 1984, which directed the Sentencing Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction." 28 U.S.C. § 994(t). In that same statute, Congress demonstrated its ability to place particular factors out of bounds. Specifically, it noted that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." *Id.* Nothing in Section 3582 itself or any other statute otherwise limits the factors a district court may consider in determining whether extraordinary and compelling reasons warrant a sentence reduction.

Courts of appeal are sharply divided over the extent of district courts' authority to determine what circumstances may be considered extraordinary and compelling. This circuit conflict has left thousands of individuals, like petitioner William King, with different rights depending on where they were convicted.

In the Fourth Circuit, changes in the law that have arisen since the defendant's original sentencing can be the extraordinary and compelling reason for a sentencing modification in and of themselves. Accordingly, in the Fourth Circuit William King, who is serving a 216-month sentence based on a guideline range of 188 to 235 months' imprisonment, could have received a modified sentence based on the Guideline range of 151 to 188 months that should have applied to his original sentencing proceeding absent an error regarding his statutory sentencing range.

Similarly, in the First, Ninth, and Tenth Circuits, changes in the law can be considered extraordinary and compelling in combination with other factors. In those circuits, Mr. King, who also presented several extraordinary and compelling reasons related to his health, also could have asserted his accurate Guideline range that should have applied to his sentence from the outset as an extraordinary and compelling reason for relief.

By contrast, in the Seventh Circuit, where Mr. King was sentenced, as well as the Third and Eighth Circuits, an extra, non-textual limitation has been judicially inserted into Section 3582(c)(1)(A): that district courts are categorically prohibited from considering changes in the law in deciding what is extraordinary and compelling. The Sixth Circuit appears to reach the same result, although through sharply divided panel opinions that have created an intracircuit split. Accordingly, in these circuits, defendants like Mr. King can never assert changes in the law as part of the extraordinary and compelling analysis, no matter how extraordinary or compelling they may be for a particular, individualized defendant.

The question presented calls out for this Court's immediate review, particularly in light of this Court's recent opinion in *Concepcion v. United States*, __ U.S. __, 142 S.Ct. 2389, 2400, 213 L. Ed. 2d 731 (2022), holding that the only limitations on a court's discretion in modifying a sentence are set forth by Congress in a statute or by the Constitution. The Third, Sixth, Seventh, and Eighth Circuits go well beyond the text of Section 994(t)'s limitation on considering rehabilitation

alone. These holdings find no support in the language of Section 3582(c)(1)(A) and, as such, cannot be squared with *Concepcion*.

The conflict between the circuits is deep, widely acknowledged by the courts of appeal, and entrenched. The split is outcome determinative in this case, just like it is in thousands of other cases. Mr. King presented clear evidence that his Guideline range calculation was never correct, even at his original sentencing, but the district court refused to consider this information. Only this Court can act to restore uniformity and ensure that all defendants are considered on an equal basis, regardless of the court in which they happen to find themselves.

The Court should act now, because the conflict is too important to ignore. Section 3582(c)(1)(A) is supposed to provide relief in extraordinary and compelling circumstances when no other avenue is available. But because of the divergence of the circuits, individuals within some circuits are receiving sentencing modifications based on changes in the law, while others are being categorically barred from asserting the exact same considerations that would afford relief to their more "fortunate" counterparts who find themselves in a circuit who has correctly interpreted the law.

In sum, this case presents an ideal opportunity to resolve an intractable circuit split that continues to grow on a critical and recurring question of statutory interpretation. There are no threshold issues that would preclude this Court from reaching the question presented, which was the only basis for the Seventh Circuit's affirmance. Indeed, the district court expressly declined to engage in a Section

3553(a) analysis based on its determination that it was categorically prohibited from considering Mr. King's specific circumstances. Only this Court's intervention can resolve the split and ensure all defendants are treated equally and given the same access to § 3582(c)(1)(A) after it was expressly expanded under the First Step Act of 2018.

I. Statutory Background

In the Comprehensive Crime Control Act of 1984, Congress abolished federal parole and created a "completely restructured guidelines sentencing system." S. Rep. No. 225, 98th Cong., 1st Sess. 52, 53 n.196 (1983). Having eliminated parole as a "second look" at lengthy sentences, Congress recognized the need for an alternative:

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment.

Id. at 55-56 (emphasis added).

Put differently, the statute replaced the Parole Commission's opaque review of every federal sentence with a much narrower judicial review of cases presenting "extraordinary and compelling reasons" for relief from unusually long prison terms. By lodging that authority in federal district courts, this change kept "the sentencing power in the judiciary[,] where it belongs." *Id.* at 52, 53 n.196, 121.

However, the law also established that the authority could be exercised only upon a motion by the Director of the BOP. Unsurprisingly, the BOP too rarely exercised this power, leaving the sentence reduction authority visited upon judges by Congress dramatically underutilized. In response, Congress amended Section 3582(c)(1)(A) in Section 603 of the First Step Act. Under the amended statute, defendants are permitted to present compassionate release motions to the sentencing court on their own if the BOP declines to make a motion on their behalf within 30 days of being asked to do so. 18 U.S.C. § 3582(c)(1)(A).

II. Procedural History

Petitioner William King was sentenced to three concurrent sentences of 216 months' imprisonment for federal drug offenses on September 18, 2007. Those concurrent sentences were imposed consecutively to a twenty-four month sentence for a supervised release violation, for a total sentence of 20-years imprisonment.

1. On May 3, 2007, an indictment was filed in the Central District of Illinois charging Mr. King with three counts of distribution of heroin in violation of 21 U.S.C. §§ 841(a) and (b)(1)(C). *See* Pet.App. 5a. On June 18, 2007, the government filed a notice of its intent to enhance Mr. King's statutory maximum sentence from 20 to 30 years pursuant to 21 U.S.C. § 851. The notice was based on a prior conviction from the state of Illinois for possession with intent to deliver cocaine. In 2007, Mr. King pleaded guilty to all three counts. Pet.App. 5a. On September 18, 2007, he was sentenced to 216 months' imprisonment to run concurrently to a twenty-four month term of imprisonment imposed for a supervised release violation. Pet.App. 5a.

At sentencing, the district court applied the 2006 edition of the federal Sentencing Guidelines to calculate the sentencing range. The district court made two calculations under the Guidelines to determine which sentencing range would govern: one based on the drug quantities under U.S.S.G. § 2D1.1(c), and the other using the career-offender provisions of U.S.S.G. § 4B1.1. *See* U.S.S.G. 4B1.1(b) (requiring that the offense level for a career offender govern if it is greater than the otherwise applicable offense level).

Mr. King's base offense level under U.S.S.G. § 2D1.1(c) was a 10. His offense level under U.S.S.G § 4B1.1, however, was a significantly higher 34. This elevated base offense level was the result of the government's 21 U.S.C. § 851 notice which raised Mr. King's statutory maximum term of imprisonment from 20 to 30 years and, in turn, raised his career offender base offense level from 32 to 34. *See* U.S.S.G. § 4B1.1(b). After an adjustment for acceptance of responsibility, the base offense level and criminal history produced a Guideline range of 188 to 235 months' imprisonment. Without the § 851 notice, however, the Guideline range would have been 151 to 188 months' imprisonment, based on a statutory maximum term of 20 years' imprisonment.

2. In 2020, the United States Court of Appeals for the Seventh Circuit held that Illinois cocaine convictions do not trigger 21 U.S.C. § 841(b)(1)(C)'s sentencing enhancement. *See United States v. Ruth*, 966 F.3d 642, 650 (7th Cir. 2020). This is because Illinois defines cocaine more broadly than the federal

Controlled Substances Act, making 720 ILCS 570/206(b)(4) (Illinois' cocaine statute) categorically overbroad for the purposes of 21 U.S.C. § 851. *Id.* at 650-51.

3. Shortly after the Seventh Circuit decided *Ruth*, Mr. King sought relief under 18 U.S.C. § 3582(c)(1)(A). On March 21, 2021, he filed a *pro se* motion seeking a modified sentence. He then filed a counseled motion on April 6, 2021. Pet.App. 6a. The counseled motion raised several arguments as to why Mr. King had presented extraordinary and compelling reasons warranting a modified sentence.

First, Mr. King argued that the COVID-19 pandemic and the exponential growth of the virus within his custodial facility created a substantial risk of harm due to his underlying medical conditions, namely morbid obesity and sleep apnea. Second, Mr. King argued that his significantly reduced Guideline range that would apply after *Ruth* was extraordinary and compelling in that it would result in a much lower sentence if he were to be sentenced today.

On April 27, 2021, the district court denied Mr. King's motion. Pet.App. 6a. The district court did not reach the merits of Mr. King's Guidelines argument, finding that he failed to exhaust his administrative remedies as to that particular argument by failing to raise it in his administrative request to the warden of his facility. Pet.App. 6a. The court further found that Mr. King's health conditions did not present an extraordinary and compelling reason for a sentence modification, even in light of the COVID-19 pandemic. The district court did, however, invite Mr. King to file an additional Section 3582(c)(1)(A) motion once he had exhausted his administrative remedies as to all issues. Pet.App. 6a

On March 30, 2021, Mr. King submitted a second administrative request to the warden of his facility, this time expressly requesting a sentence modification based on his lower Guidelines range after *Ruth*. Pet.App. 6a. After the required 30 days had elapsed, Mr. King submitted a second amended motion for a modified sentence on May 19, 2021. Pet.App. 6a.

On November 24, 2021, over six months after Mr. King filed his second amended motion, the district court again denied his request for a sentence modification. Pet.App. 5a-12a. This time, the district court did address the merits of Mr. King's Sentencing Guidelines argument, but held that it "lacks the discretion to find extraordinary and compelling reasons regarding Defendant's sentencing-guidelines issue." Pet.App. 11a. Citing to Seventh Circuit case law, the district court found that Mr. King's position was contrary to Congressional intent and that "[c]hallenging the length and validity of a sentence is improper under § 3582(c)(1)(A)." Pet.App. 11a. As such, the district court held that Mr. King's Guidelines issue was "unable to constitute an extraordinary and compelling reason for a sentence reduction under the compassionate release statute." Pet.App. 12a. Mr. King filed a timely notice of appeal on November 24, 2021.

4. On June 27, 2022, after briefing in the Seventh Circuit Court of Appeals was already completed, this Court decided *Concepcion v. United States*, 597 U.S. __, 142 S.Ct. 2389 (2022). In the context of the First Step of 2018, *Concepcion* held that the only restrictions on what a district court can consider are found in the plain language of the Act. 142 S.Ct. at 2401-02. The Court noted that Congress is

not shy about placing restrictions where it deems them appropriate, and therefore district courts are free to consider any information that is not expressly prohibited by the text of the First Step Act itself. *Id.* at 2402 ("By its terms, § 404(c) does not prohibit district courts from considering any arguments in favor of, or against, sentence modification.").

On July 1, 2022, Mr. King filed a letter pursuant to Federal Rule of Appellate Procedure 28(j) in light of *Concepcion*. Pet.App. at 13a-14a. Mr. King's letter pointed out that the plain language 18 U.S.C. § 3582(c)(1)(A), much like the First Step Act, does not contain the restrictions that the district court imposed. Although Congress put express limits on what could be considered extraordinary and compelling in 18 U.S.C. § 994(t), the restriction imposed by the district judge has no support in the text of the statute. In fact, the text of § 3582(c)(1)(A) "does not so much as hint" that a district court is prohibited from considering Mr. King's situation extraordinary and compelling. As such, Mr. King argued that the district court's determination, which was based on existing Seventh Circuit precedent, could not be squared with this Court's decision in *Concepcion*. Pet.App. 14a.

Despite *Concepcion*, the Seventh Circuit affirmed on July 12, 2022. Pet.App. 1a-4a. The court reaffirmed its non-textual position that district courts are categorically barred from considering non-retroactive changes in the law or new judicial decisions as extraordinary and compelling for any defendant. Pet.App. 1a-2a. The court held that *Concepcion* did not alter its position, finding that *Concepcion* did not apply to the "threshold question" of what can be considered extraordinary

and compelling under § 3582(c)(1)(A). Pet.App. 3a. In fact, the court went as far as to say that *Concepcion* is "irrelevant" to § 3582(c)(1)(A) motions, sidestepping *Concepcion*'s discussion about the plain language of the statute and instead concluding that *Concepcion*'s plain language analysis is not relevant to how a district court exercises its discretion to consider what is or is not extraordinary and compelling. Pet.App. 4a.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve the circuit split concerning whether a district court may consider intervening changes in the law when deciding whether a defendant has shown "extraordinary and compelling" reasons warranting a possible sentence reduction under 18 U.S.C. § 3582(c)(1)(A). The question has become even more compelling in recent months after this Court said in *Concepcion* that the only restrictions on a district court's exercise of discretion are found in the plain text written by Congress.

This case meets all of the Court's criteria for granting certiorari. First, the question presented concerns an intractable, acknowledged circuit split on a recurring question of statutory interpretation that only this Court can resolve. Second, the Seventh Circuit's conclusion that a district court is categorically barred from considering changes in the law extraordinary and compelling for individual defendants is wholly inconsistent with the plain language of § 3582(c)(1)(A). The holdings of the Third, Sixth, Seventh, and Eighth Circuits cannot be reconciled with the plain text of Section 3582(c)(1)(A)(i), and the limitation those holdings engraft

onto the law also undermines a clear purpose of that provision. Third, the question presented is important and will profoundly affect a large number of defendants who are serving sentences that are exceptionally longer than they would be if imposed today. Fourth, this case is an ideal vehicle.

I. The Question Presented Concerns an Acknowledged and Deep Circuit Split on a Recurring Question Only This Court Can Resolve.

Eight courts of appeals have now considered whether changes in the law can be considered in determining whether a reduction in sentence pursuant to Section 3582(c)(1)(A)(i) where the change in the law would impact the sentence the defendant originally received. Those decisions have produced an active, even 4-4 circuit split. This Court should grant review to resolve the conflict.

A. Four Courts of Appeals Have Held District Courts Cannot Consider Changes in the Law Extraordinary and Compelling.

Four courts of appeals have held that a district court is prohibited from considering changes in the law in determining whether "extraordinary and compelling reasons" warrant a sentence reduction on a defendant-filed compassionate release motion.

In *United States v. Jarvis*, a divided panel of the Sixth Circuit affirmed the district court's conclusion that a defendant's stacked, mandatory Section 924(c) sentences that could not be imposed today cannot be considered as grounds for a sentence reduction, even in combination with other bases for relief. 999 F.3d 442, 442 (6th Cir. 2021). The Sixth Circuit acknowledged a split with the Fourth and Tenth Circuits, *id.* at 444 ("We appreciate that the Fourth Circuit disagrees with us,

and that the Tenth Circuit disagrees in part with us."), but concluded that the applicable law "does not permit us to treat the First Step Act's non-retroactive amendments, whether by themselves or together with other factors, as 'extraordinary and compelling' explanations for a sentencing reduction" *Id.* at 445.[1]

The Third Circuit, in a similar circumstance, agreed with the Sixth Circuit, and adopted the same rule, concluding that "[t]he nonretroactive changes to the § 924(c) mandatory minimums . . . cannot be a basis for compassionate release." *United States v. Andrews*, 12 F.4th 255, 261 (3d Cir. 2021). The Third Circuit "join[ed] the Sixth and Seventh Circuits," and acknowledged a split with the Tenth and Fourth Circuits. *Id.*

Shortly before this case, the Eighth Circuit joined the Third, Sixth, and Seventh Circuits and held that changes in the law can never be extraordinary and compelling for any defendant moving for a modification under Section 3582(c)(1)(A). *United States v. Crandall*, 25 F.4th 582, 585-86 (8th Cir. 2022). In doing so the Eighth Circuit also recognized that there are "conflicting decisions in the circuits," specifically noting that its conclusion was in conflict with the Fourth and Tenth Circuits, as well as two panel opinions from the Sixth Circuit. *Id.* at 585.

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[1] The majority acknowledged that a different panel of the Sixth Circuit had reached the opposite result the month before in a published opinion affirming a sentence reduction that was in part based on Section 403 of the First Step Act. *See id.* at 445 (*citing United States v. Owens*, 996 F.3d 755 (6th Cir. 2021)). The *Jarvis* majority concluded that *Owens* conflicted with an earlier-decided case holding "that a non-retroactive First Step Act amendment fails to amount to an 'extraordinary and compelling' explanation for a sentencing reduction." *Id.* (*citing United States v. Tomes*, 990 F.3d 500 (6th Cir. 2021)). But as the *Jarvis* dissent correctly observed, "nothing in *Tomes* precludes a district court from considering a sentencing disparity due to a statutory amendment along with other grounds for release." *Id.* at 450 (Clay, J., dissenting).

Most recently, in the opinion below, the Seventh Circuit adhered to its previous holdings that a defendant's extraordinary and compelling reasons for a reduced sentence can never, under any circumstances, include statutory changes or intervening judicial decisions. Pet.App. 1a-4a (*citing United States v. Thacker*, 4 F.4th 569 (7th Cir. 2021); *United States v. Brock*, 39 F.4th 462 (7th Cir. 2022)). According to the court, there is never anything "extraordinary and compelling" about new statutes or updates in caselaw, because these things, in all circumstances, "are the ordinary business of the legal system." Pet.App. 2a. The court further held that this Court's holding in *Concepcion* did not alter its viewpoint, finding that *Concepcion* applied only to Section 404(b) of the First Step Act, and had no applicability to how a district court is permitted to exercise its discretion under Section 3582(c)(1)(A). Pet.App. 3a-4a.

B. Four Courts of Appeals Have Held District Courts May Consider Changes in the Law in Some Capacity.

Four courts of appeals have held, in clear conflict with the Third, Sixth, Seventh, and Eighth Circuits, that district courts may consider changes in the law in deciding whether extraordinary and compelling reasons warrant a reduction.

Mere weeks ago the Ninth Circuit, relying in part on this Court's opinion in *Concepcion*, joined the First, Fourth, and Tenth circuits and held that district courts "may consider non-retroactive changes in sentencing law, in combination with other factors particular to the individual defendant, when analyzing extraordinary and compelling reasons for purposes of § 3582(c)(1)(A)." *United States v. Chen*, __ F.4th__, 2022 U.S. App. LEXIS 26096, at *13-*14 (9th Cir. 2022). As the court

correctly noted, "[t]here is no textual basis for precluding district courts from considering non-retroactive changes in sentencing law when determining what is extraordinary and compelling." *Id.* at *14. In fact, Congress only placed two limitations directly on extraordinary and compelling reasons: "the requirement that district courts are bound by the Sentencing Commission's policy statement, which does not apply here, and the requirement that '[r]ehabilitation . . . alone' is not extraordinary and compelling." *Id.* (*citing* 18 U.S.C. § 3582(c)(1)(A); 28 U.S.C. § 994(t)). Accordingly, *Chen* aptly recognized that "[t]o hold that district courts cannot consider non-retroactive changes in sentencing law would be to create a categorical bar against a particular factor, which Congress itself has not done." *Id.*

Chen further found that its position was consistent with both legislative history and this Court's recent opinion in *Concepcion*. *Id.* at *15-*16. As the court pointed out, "*Concepcion* confirms that, in the context of modifying a sentence under the First Step Act, '[i]t is only when Congress or the Constitution limits the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, that a district court's discretion to consider information is restrained.'" *Id.* (*citing Concepcion*, 142 S. Ct. at 2396). Because Congress did not place a third limitation on what can be extraordinary and compelling, the court declined to create one through the judiciary. *Id.* at *16. The Ninth Circuit recognized the deep split that has emerged between its position and that taken by the Third, Seventh, and Eighth circuits.

The Fourth Circuit was the first to establish the rule in relation to changes made by the First Step Act to the "stacking" of Section 924(c) sentences in *United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020). The defendants in that case had been charged with multiple Section 924(c) counts and sentenced to between 35 and 53 years of imprisonment, largely due to stacking. *Id.* at 274. Each defendant's motion for compassionate release relied heavily on the severity of the sentences then mandated by Section 924(c) and the First Step Act's fundamental changes to those sentences, as well as his exemplary conduct while incarcerated. *Id.* The district courts granted each defendant a sentence reduction, and the Fourth Circuit affirmed. *Id.* at 288. In so doing, the panel held that district courts may treat "as 'extraordinary and compelling reasons' for compassionate release the severity of the defendants' § 924(c) sentences and the extent of the disparity between the defendants' sentences and those provided for under the First Step Act." *Id.* at 286. It further explained that Congress's decision "not to make § 403 of the First Step Act categorically retroactive does not mean that courts may not consider that legislative change in conducting their individualized reviews of motions for compassionate release." *Id.*

In similar circumstances, and based on the same reasoning, the Tenth Circuit affirmed a sentence reduction in *United States v. Maumau*, 993 F.3d 821 (10th Cir. 2021). The court explained that district courts "have the authority to determine for themselves what constitutes 'extraordinary and compelling reasons,'" including "the 'incredible' length of [ ] stacked mandatory sentences under § 924(c); the First Step

Act's elimination of sentence-stacking under § 924(c); and the fact that [the defendant], if sentenced today, . . . would not be subject to such a long term of imprisonment." *Id.* at 834, 837 (citation omitted); *see also United States v. McGee*, 922 F.3d 1035, 1047 (10th Cir. 2021) (district court may consider a subsequent change in the law in its extraordinary and compelling analysis). Moreover, the Tenth Circuit has recently confirmed that this Court's holding in *Concepcion*, that a district court has the authority to consider changes in the law, applies equally to Section 3582(c)(1)(A)'s extraordinary and compelling analysis. *See United States v. Arriola-Perez*, 2022 WL 2388418, 2022 U.S. App. LEXIS 18256, at *5 (July 1, 2022).

The First Circuit in *United States v. Ruvalcaba*, 26 F.4th 14 (1st Cir. 2022) held that changes in the law can constitute an extraordinary and compelling reason for a sentence modification in conjunction with other factors. The court held there was no textual basis in the First Step Act for a categorical prohibition that would prevent all defendants from asserting a change in the law as an extraordinary and compelling reason under any circumstance. 26 F.4th at 25. The First Circuit reasoned that nothing in the First Step Act indicated "that Congress meant to deny the possibility of a sentence reduction, on a case-by-case basis, to a defendant premised in part on the fact that he may not have been subject to a mandatory sentence of life imprisonment had he been sentenced after the passage of the First Step Act." *Id.* (*citing McGee*, 992 F.3d at 1047). *Ruvalcaba* recognized the deep split that has emerged between its position and that taken by the Third, Eighth, and Seventh Circuits. *Id.* at 24-25.

II. The Circuit Conflict Continues to Deepen and Will Not Resolve Itself.

This split among the circuits is entrenched and unlikely to resolve without action from this Court. It continues to grow deeper, with the Ninth Circuit joining the First, Fourth, and Tenth Circuits as recently as September 14, 2022. The Seventh Circuit has previously recognized the split. *See Thacker*, 4 F.4th at 575 ("[W]e are not the only court to deal with this issue. In fact, it has come up across the country, and courts have come to principled and sometimes different conclusions as to whether the change to § 924(c) can constitute an extraordinary and compelling reason for compassionate release."). Both the Third and Sixth Circuits have explicitly recognized the circuit split. *See Andrews*, 12 F.4th at 261 ("We join the Sixth and Seventh Circuits in reaching this conclusion."); *Jarvis*, 999 F.3d at 444 ("We appreciate that the Fourth Circuit disagrees with us, and that the Tenth Circuit disagrees in part with us."). The First and Ninth Circuits clearly articulated the split as well. *See Ruvalcaba*, 26 F.4th at 24-25 (noting what was a three-to-two split at the time); *see also Chen*, __ F.4th __, 2022 U.S. App. LEXIS 26096, at *8-*14 (articulating the existent of the split before joining the First, Fourth, and Tenth circuits).

This split continues to grow as prisoner-initiated Section 3582(c)(1)(A) motions increase. There is no realistic prospect that the circuit conflict will resolve without the Court's intervention, and thus the issue need not percolate further. Eight courts of appeals have addressed the question presented, and the arguments on both sides have been fully aired.

A. The Decision Below is Incorrect.

The Seventh Circuit's decision in this case fundamentally misunderstands the nature and purpose of Section 3582(c)(1)(A) and the scope of the authority Congress granted to district courts under that framework. The Seventh Circuit below affirmed the district court's denial of Petitioner's compassionate release motion and reiterated that statutory changes or new judicial decisions are categorically barred from being considered as part of the extraordinary and compelling analysis for anyone. Pet.App. 1a-2a. That holding is plainly incorrect.

First, the Seventh Circuit's holding – that the district court is categorically prohibited from taking into account how changes in the law or new judicial decisions affect defendants on an individualized basis – arrogated to the court a power only Congress possesses. The text of Section 3582(c)(1)(A) provides no support for the decision to place these factors out of bounds. The error is placed in even sharper relief by the fact that the legislative framework shows that Congress knows well how to do exactly that; 28 U.S.C. § 994(t) specifically provides that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." The Seventh Circuit not only erred by adding another factor to the out-of-bounds list, but also exacerbated that error by extending it beyond any sensible purpose. Rather than merely holding that statutory changes and new judicial decisions cannot, standing alone, be the basis of a sentence reduction, the court held that a district court cannot consider these factors at all for any defendant. Pet.App. 2a.

Second, and in the same vein, as the Ninth and Tenth circuits have both recognized, the Seventh Circuit's holding is clearly at odds with this Court's recent opinion in *Concepcion*. In *Concepcion* this Court made clear that courts are not free to impose restrictions on post-conviction relief that are not found in the words of Congress. *Concepcion* expressly held that "[t]he only limitations on a court's discretion to consider any relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution." *Concepcion*, __ U.S. __, 142 S. Ct. at 2400 (citations omitted). Indeed, as this Court correctly pointed out, "Congress is not shy about placing such limits where it deems them appropriate." *Id.* In fact, the Court cited to § 3582(c)(2) and noted that in those proceedings, "Congress expressly cabined district courts' discretion by requiring courts to abide by the Sentencing Commission's policy statements." *Id.* at 2401.

There is nothing in the plain language of § 3582(c)(1)(A) suggesting that a district court is prohibited from considering statutory changes or intervening judicial decisions when deciding what is extraordinary and compelling. The only requirements Congress imposed in seeking a sentence modification under Section 3582(c)(1)(A) are: (1) exhaustion of administrative remedies; (2) extraordinary and compelling circumstances; and (3) consideration of the factors set forth at § 3553(a). Additionally, Congress has expressly stated that rehabilitation "alone" may not be extraordinary and compelling. 18 U.S.C. § 994(t). However, that is all Congress said – nothing else. There are no other restrictions in the Act.

Meaning, the text of § 3582(c)(1)(A) "does not so much as hint that district courts are prohibited from considering . . . unrelated Guidelines changes" or changes in the law in deciding what is extraordinary and compelling. *Concepcion*, 142 S. Ct. at 2401. By its terms, § 3582(c)(1)(A) "does not prohibit district courts from considering any arguments" in determining what is or is not extraordinary and compelling. *Id.*; *see also Ruvalcaba*, 26 F.4th at 25 (no textual basis for a categorical prohibition anent non-retroactive changes in sentencing law); *McGee*, 922 F.3d at 1047 (there is nothing in the First Step Act that indicates that Congress meant to prohibit district courts from granting relief to some pre-First Step Act defendants based on non-retroactive changes made by the First Step Act). Assuming the defendant has exhausted his administrative remedies, the district court must then decide what is extraordinary and compelling. That inquiry as to what can and cannot be considered extraordinary and compelling starts and stops with the restrictions expressly put in place by Congress. The only thing this Court cannot consider extraordinary and compelling is rehabilitation alone. 18 U.S.C. § 994(t).

The Seventh Circuit's decision to brush aside *Concepcion* as "irrelevant" cannot be squared with this Court's holding in that case. *See Chen*, __ F.4th __, 2022 U.S. App. LEXIS 26096, at *15-*16 (*Concepcion* confirms that the only barriers to what may be considered extraordinary and compelling appear in the text of § 3582(c)(1)(A)); *see also Arriola-Perez*, 2022 U.S. App. LEXIS 18256, at *5 (applying *Concepcion* to § 3582(c)(1)(A)). Simply put, the Seventh Circuit cannot rewrite congressional language to include restrictions that Congress did not. *See*

McCoy, 981 F.3d at 282 (refusing to do "some quick judicial surgery" on U.S.S.G. § 1B1.13 to fit the government's policy preferences).

The lower court's judicial amendment to Section 3582(c)(1)(A)(i) was impermissible, and that is enough to require reversal. Under the Seventh Circuit's holding, there is no limit to the amount of judicially-created barriers that courts can now write into statues that were not placed there by Congress. Only Congress has the authority to say what can and cannot be considered extraordinary and compelling, which it did in Section 994(t). Absent direction from Congress, there are no limits on what a district court may consider when assessing whether a particular, individual defendant has met the "extraordinary and compelling" standard, aside from rehabilitation "alone."

The approach adopted by the First, Fourth, Ninth and Tenth Circuits is the only one consistent with the text and purpose of Section 3582(c)(1)(A). As those courts have described, there is nothing in the statutory text that supports the crabbed view of the breadth of a district court's discretion adopted by the Third, Sixth, Seventh, and Eighths Circuits, especially in the context of a statutory scheme that was created precisely to allow judges to take a second look at unusually long sentences after some time had passed. Just as nothing in the statute compels a sentence reduction in every case involving a change in the law or a new judicial decision, there is no textual basis for precluding one either.

B. The Issue is Important and Recurring.

The question of whether a district court may consider changes in the law and new judicial decisions in determining whether "extraordinary and compelling reasons" warrant a sentence reduction is an important and recurring question of federal law. District courts across the country have granted a large number of sentence reductions based in part on the unfairness of lengthy sentences that would be substantially shorter today, and new motions are being filed every day. Appellate courts continue to disagree, with the Ninth Circuit weighing in as recently as September 14, 2022.

Among the harms caused by the holding below, and similar ones in the Third, Sixth, and Eighth Circuits, is that the outcome of motions based on virtually indistinguishable grounds, stemming from essentially identical conduct, now depends entirely on the circuit in which a defendant was convicted. In the First, Fourth, Ninth, and Tenth Circuits, district courts are reducing these indefensible sentences, and defendants are being released from prison. In the Third, Sixth, Seventh, and Eighth Circuits, defendants like Petitioner will be denied relief that similarly situated defendants are receiving on a daily basis. These unwarranted disparities in outcomes across circuits warrant review of the issue presented by this Court.

C. This Case Presents an Ideal Vehicle

This case squarely and cleanly presents the issue that has divided the circuit courts. It is therefore an ideal vehicle for resolving the question presented.

Petitioner raised the question presented throughout the proceedings below. See Pet.App. 4a; *id.* at 7a. He argued in the district court that a sentence reduction was appropriate due to an intervening judicial decision that said his statutory maximum term of imprisonment should have been lower, and the district court squarely decided the issue in the government's favor. *See* Pet.App. 7a-8a. Petitioner raised the issue again in the Seventh Circuit, which also squarely decided it in the government's favor and affirmed both the district court's judgment and its previous holdings solely on this basis. Pet.App. 1a-4a. (holding that *Concepcion* did not alter the Seventh Circuit's view that judges are categorically prohibited from relying on statutory changes or new judicial decisions in determining what is extraordinary and compelling).

There are also no threshold issues that would limit this Court's review. The district court expressly declined to issue a § 3553(a) finding based on its conclusion that it was prohibited from considering whether Petitioner's issues were extraordinary and compelling. Pet.App. 8a. The issue was clearly presented and preserved below, and the Seventh Circuit based its decision solely on the question presented, without reference to any other bases for relief raised by Petitioner in his initial motion. Pet.App. 4a. (holding only that Petitioner is categorically barred from raising his lower mandatory minimum sentence and subsequent Guideline change under Section 3582(c)(1)(A)).

Timely resolution of the conflict is important. Compassionate release motions are being filed and decided on a seemingly daily basis in the district courts. While

other petitions presenting this issue may have been filed in the past, after *Concepcion* made clear that only Congress can categorically restrict district courts' discretion, there is no reason to delay resolving this lingering circuit split. The longer this Court waits, the more judicial resources will be wasted if the Court rejects the Seventh Circuit's position. And defendants like Petitioner, whose motions for a sentence reduction have been denied pursuant to the flawed rubric established by the court below and in three other circuits, will continue to serve excessively long prison terms.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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October 11, 2022