No._____

IN THE SUPREME COURT OF THE UNITED STATES

TERRENCE GIBBS,
PETITIONER,

- VS. -

UNITED STATES OF AMERICA,
RESPONDENT.

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

CHRISTY MARTIN
Assistant Federal Defender
Counsel of Record

BRETT G. SWEITZER
Assistant Federal Defender
Chief of Appeals

HELEN A. MARINO
Interim Chief Federal Defender

FEDERAL COMMUNITY DEFENDER OFFICE
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
Suite 540 West – The Curtis
601 Walnut Street
Philadelphia, PA 19106
(215) 928-1100

Counsel for Petitioner

QUESTION PRESENTED

The compassionate release statute at 18 U.S.C. § 3582(c)(1)(A) states, in relevant part:

> (A) the court, . . . upon motion of the defendant . . . , 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-
>
> (i) *extraordinary and compelling* reasons warrant such a reduction; ...

(emphasis added).

The question presented is:

> Whether non-retroactive changes in federal sentencing law, which dramatically altered sentencing exposure for those later sentenced, comprise "extraordinary and compelling" circumstances making a petitioner eligible for relief under 18 U.S.C. § 3582(c)(1(A)(i).

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IN THE SUPREME COURT OF THE UNITED STATES

TERRENCE GIBBS,
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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI

Petitioner Terrence Gibbs respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit rendered in this case on July 21, 2022.

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties, namely, petitioner Terrence Gibbs and respondent United States.

OPINIONS BELOW

The order granting Appellee's Motion for Summary Affirmance by the court of appeals is attached at Appendix A (*United States v. Gibbs*, No. 21-3025, ECF 22-1 (3d Cir.)).

The district court's denial of Mr. Gibbs's motion for compassionate release is at Appendix B (*United States v. Gibbs*, No. 2-96-cr-00539-002, ECF 1277, 1278 (E.D. Pa.)).

JURISDICTIONAL GROUNDS

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. That court issued its

order affirming the district court on July 21, 2022. This petition is timely filed pursuant to Rule 13.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 603 of the First Step Act of 2018 states, in relevant part:

> (b) Increasing The Use And Transparency Of Compassionate Release.-Section 3582 of title 18, United States Code, is amended-
> (1) in subsection (c)(l)(A), in the matter pre-ceding clause (i), by inserting after "Bureau of Prisons," the following: "or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, which-ever is earlier"

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

> (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 defendant . . . , 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[.]

Section 3553(a) of Title 18, United States Code, provides:

> (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.

Section 994(t) of Title 28, United States Code, provides:

> The [Sentencing] 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.

INTRODUCTION

This case presents an opportunity for the Court to address a broad Circuit split that results in profoundly disparate circumstances for identically situated criminal defendants, based solely on the Circuit of conviction. That is, whether statutory or decisional changes in federal sentencing law that would dramatically change a defendant's sentencing exposure were they sentenced today may be deemed "extraordinary and compelling circumstances" allowing for a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(1)(A)(i).

Five courts of appeals, including the Third Circuit, have answered the question presented in the negative, holding that non-retroactive changes to 18 U.S.C. § 924(c) in the Fair Sentencing Act of 2018 may not serve as "extraordinary and compelling circumstances" allowing for relief. The Third Circuit, in *United States v. Andrews*, held more broadly that the "duration of a lawfully imposed sentence" may not serve as extraordinary and compelling circumstances. 12 F.4th 255, 260-61 (3d Cir. 2021).

Four courts of appeals have reached the opposite conclusion, correctly holding that the plain language of Section 3582(c)(1)(A)(i) permits district courts to consider non-retroactive changes in the law when determining, on an individualized basis, whether extraordinary and compelling reasons exist to warrant a sentence reduction under Section 3582(c)(1)(A)(i). A tenth court has issued conflicting panel opinions, and is expected to issue an *en banc* decision this year.

The question presented is important and will profoundly affect a large number of defendants who are serving extraordinary and lengthy sentences that current law would not permit. The outcome of any petitioner's motion, based on indistinguishable grounds, now depends entirely on the circuit in which a defendant was convicted.

STATEMENT OF THE CASE

In May 1997, Terrence Gibbs was found guilty of conspiracy to distribute cocaine, in violation of 21 U.S.C. § 846 (Count 1); bribery of a public official, in violation of 18 U.S.C. § 201(b)(1) (Count 2); use of a telephone to facilitate a drug felony, in violation of 21 U.S.C. § 843(b) (Counts 5 through 15; 17 through 20); and conspiracy to launder monetary instruments, in violation of 18 U.S.C. § 1956(h) (Counts 24 and 25). At sentencing, Mr. Gibbs had only one prior state conviction for which he was sentenced to probation. Nevertheless, his then-mandatory Sentencing Guidelines range was life imprisonment.

In 2018, Section 603(b) of the First Step Act made a fundamental change to how federal compassionate release functions. *See* First Step Act of 2018, § 603(b), Pub. L. No. 115-391, 132 Stat. 5194, 5239 (2018). Congress amended 18 U.S.C. § 3582(c)(1)(A) to provide sentencing courts the authority to entertain motions for compassionate release filed by defendants, where "extraordinary and compelling reasons warrant such a reduction." *Id*.

Mr. Gibbs petitioned the district court for a reduction in sentence pursuant to § 3582(c)(1)(A)(i) arguing, *inter alia*, that a change to federal sentencing law subsequent to his 1997 sentencing was an extraordinary and compelling circumstance warranting relief. Specifically, at the time of his sentencing the Federal Sentencing Guidelines, which in this case set a range of life imprisonment, were mandatory. In particular, this Court's later decision in *United States v. Booker*, 543 U.S. 220 (2005), rendered the Guidelines advisory and represented a monumental shift in federal sentencing. *United States v. Grier*, 475 F.3d 556, 561 (3d Cir. 2007) (*en banc*) ("There is no doubt that *Booker* . . . brought about sweeping changes in the realm of federal sentencing." (internal quotation omitted)). If sentenced today, the sentencing court could exercise its discretion to determine whether a life sentence with no opportunity for

parole was truly "not greater than necessary," as required under 18 U.S.C. § 3553(a), for a defendant with minimal criminal history in a drug case in which no overt acts of violence were alleged.

The district court denied Mr. Gibbs' motion based on the Third Circuit's decision in *United States v. Andrews*, 12 F.4th 255, 260-61 (3d Cir. 2021), which held that the "duration of a lawfully imposed sentence does not create an extraordinary or compelling circumstance" for reduction of sentence under the compassionate release statute. The Third Circuit granted the government's motion for summary affirmance in this case based on *Andrews*.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve the circuit split concerning whether a district court may consider statutory and decisional changes to federal sentencing law, and the length of a previously imposed sentence, as "extraordinary and compelling reasons" warranting a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i).

This case meets the Court's criteria for granting certiorari. The question presented concerns an intractable circuit split on a recurring question of statutory interpretation that only this Court can resolve. The Third Circuit's conclusion that a court is prohibited from considering, at the eligibility or "extraordinary and compelling" finding stage, that a defendant was sentenced under a regime now deemed unconstitutional or longer than what Congress or the court finds necessary is contrary to the text of the statute, the intent of Congress, and this Court's sentencing doctrine. Finally, the question presented is important and will profoundly affect a large number of defendants who are serving extraordinary and lengthy sentences that current law would not permit.

I. Congress' expansion of the Compassionate Release statute.

In the Comprehensive Crime Control Act of 1984, Congress created the Sentencing Guidelines system. Pub. L. 98–473, Title II, Oct. 12, 1984, 98 Stat. 1837. The Act abolished parole in the federal sentencing system, but included "safety valves" in the legislation:

> 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.

S. Rep. 98-225, 55-56, 1984 U.S.C.C.A.N. 3182, 3238-39 (emphasis added). This "compassionate release" provision, as it came to become known, was codified at 18 U.S.C. § 3582(c)(1)(A)(i), and stated that in any case, "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 section 3553(a) to the extent that they are applicable, if it finds that-- (i) extraordinary and compelling reasons warrant such a reduction." Thus, the law placed a gatekeeping authority with the Director of the Bureau of Prisons.

In the years following, the Bureau of Prisons rarely exercised this power. District court judges had little occasion, and no independent authority, to use the compassionate release statute. *See, e.g.* U.S. Dep't Of Justice, Off. of the Inspector Gen., The Federal Bureau Of Prisons' Compassionate Release Program 11 (2013) ("The BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered.") (https://www.oversight.gov/sites/default/files/oig-reports/e1306.pdf) (last accessed October 14, 2022).

In response to this, as part of sweeping criminal justice reform legislation, the First Step Act of 2018 ("FSA") was enacted into law. The FSA made fundamental changes to how federal

compassionate release functions. *See* First Step Act of 2018, § 603(b), Pub. L. No. 115-391, 132 Stat. 5194, 5239 (2018). As relevant here, Congress amended 18 U.S.C. § 3582(c)(1)(A) by providing the sentencing court with jurisdiction to entertain motions for compassionate release filed by defendants. *Id*. Specifically, the amended statute instructs that a court may modify a term of imprisonment once it has been imposed "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." 18 U.S.C. § 3582(c)(1)(A). A reduction is authorized if it is consistent with any applicable 18 U.S.C. § 3553(a) factors and if the Court finds that "extraordinary and compelling reasons warrant such a reduction." § 3582(c)(1)(A)(i). Congress, in 28 U.S.C. § 994(t), provided only a single limitation: "Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason."[1]

[1] Section 994(t) also provides 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." All but one Circuit to address the issue have held that the policy statement regarding compassionate release, U.S.S.G. § 1B1.13, issued prior to passage of the First Step Act, is not binding on prisoner-initiated motions. *See United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021); *United States v. Ruvalcaba*, 26 F.4th 14, 23 (1st Cir. 2022); *United States v. Brooker*, 976 F.3d 228, 235–36 (2d Cir. 2020); *Andrews*, 12 F.4th at 259; *United States v. McCoy*, 981 F.3d 271, 281–82 (4th Cir. 2020); *United States v. Shkambi*, 993 F.3d 388, 392-93 (5th Cir. 2021); *United States v. Jones*, 980 F.3d 1098, 1109-11 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180–81 (7th Cir. 2020); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021) (per curiam); *United States v. McGee*, 992 F.3d 1035, 1049–50 (10th Cir. 2021). *But see United States v. Bryant*, 996 F.3d 1243, 1247 (11th Cir. 2021) ("1B1.13 is still an applicable policy statement for a [compassionate release] motion, no matter who files it.").

Thus, in Section 603(b), explicitly titled "Increasing the Use and Transparency of Compassionate Release," the compassionate release statute was amended to permit defendants to present compassionate release motions to the sentencing court on their own if the Bureau of Prisons declines to make a motion, or take any action, without placing any additional limitations on the statutory basis for doing so. § 3582(c)(1)(A).

II. The Circuit Split

As noted above, the phrase "extraordinary and compelling circumstances" is not statutorily defined, and the only limitation is found in § 994(t), that is, that "[r]ehabilitation ... alone shall not be considered an extraordinary and compelling reason." Four courts of appeals have held that district courts may consider the disparity between sentences previously imposed and sentences applicable under current law in deciding whether extraordinary and compelling reasons warrant a reduction. In *United States v. Ruvalcaba*, 26 F.4th 14 (1st Cir. 2022), a defendant serving a mandatory life sentence pursuant to 21 U.S.C. § 841(b)(1)(A) sought compassionate relief based on the fact that, if sentenced following passage of the First Step Act of 2018, the mandatory sentence to which he was subject would be reduced from life imprisonment to only 25 years. In vacating the district court's finding that it lacked authority to grant relief, the Court found no "textual basis in the [First Step Act] for a categorical prohibition anent non-retroactive changes in sentencing law." *Id*. at 16, 25. And "given the language that Congress deliberately chose to employ," the court found "no textual support for concluding that such changes in the law may never constitute part of a basis for an extraordinary and compelling reason," declining to "infer that Congress intended such a categorical and unwritten exclusion." *Id*. at 26.

Ruvalcalba was preceded by similar decisions in the Fourth, Fifth, and Tenth Circuits, each holding that district courts may consider the monumental statutory changes effected by Section 403 of the First Step Act to 18 U.S.C. § 924(c), (revising enhanced sentence stacking rules), in finding extraordinary and compelling circumstances. The Fourth Circuit in *United States v. McCoy*, 981 F.3d 271, 285 (4th Cir. 2020), held that the "sheer and unusual length of the sentences [under the prior § 924(c) sentencing regime]" coupled with the "'gross disparity' between those sentences and the sentences Congress now believes to be an appropriate penalty" may be considered as "extraordinary and compelling reasons" in an individual case. The defendants there 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. The district courts had granted each defendant a sentence reduction based on an individualized assessment of that and exemplary conduct while incarcerated. The Fourth Circuit affirmed, finding that "the very purpose of § 3582(c)(1)(A) is to provide a 'safety valve' that allows for sentence reductions when there is not a specific statute that already affords relief but 'extraordinary and compelling reasons' nevertheless justify a reduction." *Id*. at 287-88.

The Tenth Circuit in *United States v. McGee*, 992 F.3d 1035, 1048 (10th Cir. 2021), held that "the fact a defendant is serving a pre-First Step Act mandatory life sentence . . . cannot, standing alone, serve as the basis for a sentence reduction" but it may in combination with "a defendant's unique circumstances [] constitute 'extraordinary and compelling'" circumstances. Shortly thereafter, in *United States v Maumau*, 993 F.3d 821, 834, 837 (10th Cir. 2021), the court explained that district courts "have the authority to determine for themselves what constitutes 'extraordinary and compelling reasons,'" which there included the length of previously imposed, stacked, mandatory sentences under § 924(c).

Finally, in *United States v. Cooper*, 996 F.3d 283, 289 (5th Cir. 2021), the Fifth Circuit determined to "leave for the district court to consider, in the first instance, whether the nonretroactive sentencing changes to his § 924(c) convictions, either alone or in conjunction with any other applicable considerations, constitute extraordinary and compelling reasons for a reduction in sentence."

Five Courts of Appeals have held that a district court may not consider non-retroactive changes in sentencing law in finding extraordinary and compelling circumstances. In *United States v Andrews*, 12 F.4th 255, 261 (3d Cir. 2021), the Third Circuit held that "[t]he nonretroactive changes to the § 924(c) mandatory minimums ... cannot be a basis for compassionate release," and further, that the Court "will not construe Congress's nonretroactivity directive as simultaneously creating an extraordinary and compelling reason for early release." The court reasoned broadly that "[t]he duration of a lawfully imposed sentence does not create and extraordinary and compelling circumstance," and that "non-retroactive changes . . . also cannot be a basis for compassionate release." *Id*. at 260-261. The D.C. Circuit, in *United States v. Jenkins*, -- F.4th --, No. 21-3089, 2022 WL 6590453 (D.C. Cir. Oct. 11, 2022), has also held broadly that intervening legal changes, occurring after a defendant's sentence has been imposed, cannot support the "extraordinary and compelling reasons" finding required to consider a post-judgment sentence reduction under 18 U.S.C. § 3582(c)(1)(A). The Eighth Circuit, in *United States v. Crandall*, 25 F.4th 582 (2022), also held that a "non-retroactive change in the law, whether offered alone or in combination with other factors, cannot contribute to a finding of 'extraordinary and compelling reasons' for a reduction in sentence." *Id*. at 586.

The Seventh Circuit, in *United States v. Thacker*, 4 F.4th 569, 574 (7th Cir. 2021), issued a more limited holding specific to the First Step Act's amendment of § 924(c). The Court held that "the discretionary authority conferred by § 3582(c)(1)(A) ... cannot be used to effect a sentencing reduction at odds with Congress's express determination embodied in § 403(b) of the First Step Act that the amendment to § 924(c)'s sentencing structure apply only prospectively."

Finally, the Eleventh Circuit departs from the other Circuits entirely, in holding that the Sentencing Commission's policy statement, defining "extraordinary and compelling reasons" for motions filed by the Director of the Bureau of Prisons (BOP), is still an "applicable policy statement" when a sentence-reduction motion is filed by a prisoner pursuant to the First Step Act. *United States v. Bryant*, 996 F.3d 1243, 1247 (11th Cir. 2021). Further, the court there has held that the catch-all provision of the Commission's policy statement requires determination of extraordinary and compelling reasons to be made by the Director, and not by the courts, for prisoner-filed motions. *Id*. at 1248. Because there is no mention of non-retroactive changes to sentencing law in the policy statement, the Eleventh Circuit does not recognize such circumstances as a basis, in whole or in part, to find extraordinary and compelling circumstances.[2]

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[2] The Sixth Circuit has issued conflicting panel opinions on the issue, and recently granted rehearing *en banc* in *United States v. McCall*, 20 F.4th 1108, 1114 (6th Cir. 2021), *reh'g en banc granted, opinion vacated* 29 F.4th 816 (6th Cir. Apr. 1, 2022), to resolve the intra-circuit conflict. *Compare United States v. Jarvis*, 999 F.3d 442, 445-46 (6th Cir. 2021) (stacked, mandatory Section 924(c) sentences that could not be imposed today cannot be considered as grounds for a sentence reduction); and *United States v. Owens*, 996 F.3d 755, 760, 763 (6th Cir. 2021) (changes implemented by the First Step Act, even if not fully retroactive, could be considered in determining whether extraordinary and compelling reasons exist).

III. The position taken in the First, Fourth, Fifth, and Tenth Circuits is the correct one.

The Third Circuit's decision below, and the reasoning of its controlling precedent in *Andrews*, is flawed in multiple ways. First, the text of the relevant statute provides no support for the decision to exclude a vast category of unique and varied circumstances from inclusion in the extraordinary and compelling calculus. *See Ruvalcaba*, 26 F.4th at 26. Congress, in § 994(t), explicitly provided a single limitation: "Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." Because no limits were placed on what a district court could find as extraordinary and compelling other than a singular presentation of rehabilitation, it is difficult to imagine a scenario where some event could make a sentence "unusually long" other than a change in sentencing law after a sentence became final. S. Rep. 98-225, 55-56, 1984 U.S.C.C.A.N. 3182, 3238-39 (noting "cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence"). While illness, incapacitation and family circumstances are noted in the legislative history and the Sentencing Commission's efforts at defining "extraordinary and compelling reasons" for motions presented by the Bureau of Prisons, those circumstances would not make a sentence "unusually long." *Id*.; U.S.S.G. § 1B1.13 n.1 (policy statement on compassionate release).

The Third Circuit here has created an additional, sweeping limitation, that a district court, in determining whether "extraordinary and compelling" circumstances exist, cannot consider at all the length of a sentence or circumstances in which either Congress or the Court has deemed previously mandated sentences or sentencing procedures excessive or unconstitutional. The ruling below also improperly precludes consideration of a number of related circumstances that are "extraordinary and compelling" such as the disproportionate nature of some sentences, disparity, and other statutory sentencing factors. *See* 18 U.S.C. § 3553(a).

Further, this Court has long recognized judicial discretion to consider any information not explicitly excluded in crafting an appropriate sentence in any individual case. "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Pepper v. United States*, 562 U.S. 476, 487- 88 (2011) (*quoting Koon v. United States*, 518 U.S. 81, 113 (1996)). In this regard, Section 3661 of Title 18 provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." "Congress and the Sentencing Commission thus expressly preserved the traditional discretion of sentencing courts to 'conduct an inquiry broad in scope, largely unlimited either as to the kind of information [they] may consider, or the source from which it may come.'" *Pepper*, 562 U.S. at 489 (*quoting United States v. Tucker*, 404 U.S. 443, 446 (1972)).

These requirements apply here as well, as made clear recently in *Concepcion v. United States*, 142 S. Ct. 2389 (2022). In holding that the First Step Act permits district courts to consider intervening changes in the law when exercising discretion to reduce a sentence under Section 404, this Court stated 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." *Id*. at 2400.

Precluding consideration of the length of previously imposed sentences in light of changes in sentencing law is also inconsistent with the purpose of both the compassionate release provision as well as the First Step Act. In the Sentencing Reform Act, Congress recognized the

need for a "safety valve" with respect to these very situations. *See* S. Rep. 98-225, 55-56, 1984 U.S.C.C.A.N. 3182, 3238-39 (contemplating "cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence"). *See McGee*, 992 F.3d at 1046-47; *Ruvalcaba* at 26 ("To serve as a safety valve, section 3582(c)(1)(A) must encompass an individualized review of a defendant's circumstances and permit a sentence reduction — in the district court's sound discretion — based on any combination of factors (including unanticipated post-sentencing developments in the law") (citing *Setser v. United States*, 566 U.S. 231, 242-43 (2012) ("[W]hen the district court's failure to anticipate developments that take place after the first sentencing produces unfairness to the defendant," section 3582(c)(1)(A) "provides a mechanism for relief." (quotations and alteration omitted)).

Finally, the Third Circuit's decision in *Andrews* confuses broadly applicable non-retroactivity of a change in the law with relief in cases where a district court finds an individual case to be extraordinary and compelling "due to [] idiosyncratic circumstances (including [a non-retroactive change in the law] under the FSA)." *Ruvalcaba*, 26 F.4th at 27 ("There is a salient "difference between automatic vacatur and resentencing of an entire class of sentences" on the one hand, "and allowing for the provision of individual relief in the most grievous cases" on the other hand.") (quoting *McGee*, 992 F.3d at 1047 and *McCoy*, 981 F.3d at 286-87)).

For the foregoing reasons, the approach adopted by the First, Fourth, Fifth and the Tenth Circuits is the 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 sweeping limitations engrafted by the Third Circuit and other courts, given the statute was amended precisely to allow judges to take a second look at unusually long sentences following some "extraordinary and compelling" circumstance.

CONCLUSION

The question of whether a district court may consider non-retroactive changes in the law and the length of a previously imposed sentence is an important and recurring question of federal law that has divided the Courts of Appeals almost evenly. District courts across the country are confronted with this issue daily. The outcome of any given petitioner's motion relative to other similarly-situated petitioners, at this time depends largely on the circuit in which a defendant was convicted.

Accordingly, certiorari should be granted.

Respectfully submitted,

/s/ Christy Martin
CHRISTY MARTIN
Assistant Federal Defender

BRETT G. SWEITZER
Assistant Federal Defender
Chief of Appeals

HELEN A. MARINO
Interim Chief Federal Defender

Federal Community Defender Office
for the Eastern District of Pennsylvania
Suite 540 West, The Curtis
601 Walnut Street
Philadelphia, PA 19106
(215) 928-1100