No. 22-5958

IN THE

Supreme Court of the United States

RAUL TOVAR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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QUESTION PRESENTED

The question presented (on which, the United States admits there is a 6-5 circuit split) is whether, particularly in light of this Court's decision in *Concepcion* v. *United States*, 142 S. Ct. 2389 (2022), district courts have discretion to consider subsequent non-retroactive changes in law among the "extraordinary and compelling reasons" warranting sentence reduction for compassionate release under 18 U.S.C. § 3582.

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When Raul Tovar was originally sentenced to life imprisonment, Judge Erickson lamented that Tovar's case was "frankly not the type of conduct that ordinarily would warrant a life sentence." Pet. App. 5. Despite his "fundamental disagreement[]" with applying the mandatory minimum, he did his job. *Id*. Congress ultimately agreed with Judge Erickson, and changed the definition of the predicate offenses for mandatory minimum lifetime sentences, but it did not make the new rules retroactive. Thus, prisoners would not *automatically* receive resentencing.

Raul Tovar sought compassionate release from his life sentence, asserting his age, his medical condition, and the fact that newly-enacted predicate offense requirements would have rendered his crime of conviction ineligible for a mandatory life sentence. D. Ct. Doc. 513 (May 21, 2020). The district court denied relief, finding it could not even *consider* the new sentencing regime. Pet. App. 9-11.

The Eighth Circuit summarily affirmed based on its binding published precedent. Pet. App. 15. That is the law in six circuits. *See infra* 2-3 (discussing Third, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits). But five other circuits disagree. *See infra* 3-4 (discussing First, Fourth, Fifth, Ninth, and Tenth Circuits).

The government acknowledges that the Circuit courts are intractably divided. But it asserts that the Court should not address the question presented because the United States Sentencing Commission will resolve all issues by propounding new guidance—and if "applicable," the district courts must ensure their rulings are "consistent with" that guidance when granting compassionate release. But whatever the Commission decides, it will not resolve this question of statutory construction,

and it will not restrain the discretion of district courts, which are not bound to the Commission's policy statements under Section 3582(c).

Petition after petition has requested this Court's intervention—but these petitions are typically cabined to application of this principle under 18 U.S.C. § 924, and often riddled with vehicle problems readily identified by the government. The government has identified no vehicle problems here, and Tovar's claims are not cabined by Section 924.

Tovar's case squarely presents the question of the scope of the district courts' discretion when reducing a sentence under Section 3582(c), and this case is an ideal vehicle to provide desperately needed guidance to the divided courts of appeals. Thus, the Court should grant the writ, reverse the decision of the Eighth Circuit, and remand the case for consideration in light of the district court's discretion to consider the subsequent change in sentencing law.

REASONS FOR GRANTING THE WRIT

I. The circuits are intractably divided.

The government readily acknowledges the intractable division in circuit authority on whether the district courts have discretion to consider subsequent changes of criminal law among the "extraordinary and compelling reasons" supporting a sentence reduction. *See* BIO at 14.

Three circuits, the First, Ninth, and Tenth, have held that a district court can consider non-retroactive changes of law when deciding a compassionate release

request in conjunction with other factors. *United States* v. *McGee*, 992 F.3d 1035, 1047–48 (10th Cir. 2021); *United States* v. *Chen*, 48 F.4th 1092, 1098 (9th Cir. 2022); *United States* v. *Ruvalcaba*, 26 F.4th 14, 28 (1st Cir. 2022). And the Fourth and Fifth Circuits have held that a subsequent change can, on its own, satisfy the "extraordinary and compelling reasons" part of the analysis. *United States* v. *McCoy*, 981 F.3d 271, 285 (4th Cir. 2020); *United States* v. *Cooper*, 996 F.3d 283, 289 (5th Cir. 2021).

At the other end, the Third, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits have held that district courts cannot consider subsequent non-retroactive changes in law at all. *United States* v. *Andrews*, 12 F.4th 255, 261 (3d Cir. 2021); *United States* v. *McCall*, 56 F.4th 1048, 1065 (6th Cir. 2022); *United States* v. *Thacker*, 4 F.4th 569, 574 (7th Cir. 2021); *United States* v. *Crandall*, 25 F.4th 582, 586 (8th Cir. 2022); *United States* v. *Bryant*, 996 F.3d 1243, 1247 (11th Cir. 2021); *United States* v. *Jenkins*, 50 F.4th 1185, 1198 (D.C. Cir. 2022).

For a time, the Sixth Circuit had an intra-circuit conflict on this issue. *McCall*, 56 F.4th at 1051. Then, the Sixth Circuit, in a recent en banc decision, voted 9-7 to join with the circuits restricting district courts' discretion. *Id*. at 1049-50. The majority acknowledged the individualized nature of compassionate release determinations but ultimately determined that the "ordinary" operation of changes in sentencing law as prospective cannot be considered when deciding whether there are "extraordinary" reasons to modify a sentence. *Id*. at 1065. The primary dissent countered that Congress's position on retroactivity—that not *all* convicts should be resentenced—

has no bearing on whether a change in law can be a factor in determining whether there are extraordinary and compelling reasons to reduce a sentence when engaging in an individualized analysis of a single person's case. *Id*. at 1070 (Moore, J. dissenting).

In sum, it is hard to find a question that is more thoroughly addressed and evenly divided among the distinguished jurists on the courts of appeals.

II. This case presents a recurring question of exceptional importance that will continue to vex the lower courts.

According to the government, the division in the circuits does not matter because the Sentencing Commission is on the way to promulgate new rules. Tovar and the Court should be content to sit and wait for the government to move the goalposts on his request for compassionate release. That justification contravenes Congress's express intent and this Court's precedents and provides no reason to deny the petition.

The district courts' discretion under the compassionate release statute is a matter for this Court, not the Commission, because it requires statutory interpretation.

The Sentencing Commission's policy statements do not define district courts' authority to grant compassionate release. As relevant here, 18 U.S.C. § 3582(c)(1)(A) allows district courts to modify sentences, if the court, "after considering" the general factors to be applied at sentencing enumerated at 18 U.S.C. § 3553(a), finds that (1) "extraordinary and compelling reasons warrant such a reduction," and (2) such a

reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Congress set out the parameters for those guidelines in 28 U.S.C. § 994(t), where it stated that the Commission "shall describe what *should* be considered extraordinary and compelling reasons for sentence reduction." (emphasis added). It further noted only one limitation—"[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." *Id.*

The plain statutory language establishes that the Commission's policy statements are advisory. After using the accepted mandatory term—"shall"—to describe the Commission's duty to make policy statements just three words prior, Congress chose to describe the Commission's policy statements as providing what "should" be considered "extraordinary and compelling reasons." *Id.* Also, Congress dictated that any sentence reduction must be "consistent with" "applicable" policy statements from the Commission. 18 U.S.C. § 3582(c)(1)(A). Congress just as easily could have written that the reduction must "comply" with the Commission's policy statements. Instead, it chose a non-mandatory word—"consistent"—then it also left it to courts whether a policy statement is "applicable" to a particular case.[1] The regime Congress enacted expresses a clear intent *against* the Sentencing Commission's policy statements binding the courts to a limited set of factors.

[1] Even if the Commission's policy statements could be controlling, there is no reason to assume that courts will find whatever the Commission propounds "applicable" and binding within the context of the statutory scheme under which the Commission operates. *See*, *e.g.*, *United States* v. *Long*, 997 F.3d 342, 359 (D.C. Cir. 2021) (finding the Commission's existing policy statement is not "applicable" and therefore not binding in light of its inconsistency with the First Step Act).

It also makes sense for Congress to render the Commission's policies advisory and not mandatory. "There is a 'long' and 'durable' tradition that sentencing judges 'enjo[y] discretion in the sort of information they may consider' at an initial sentencing proceeding." *Concepcion* v. *United States*, 142 S. Ct. 2389, 2398 (2022) (quoting *Dean* v. *United States*, 581 U.S. 62, 66 (2017)). And "[t]he discretion federal judges hold at initial sentencings also characterizes sentencing modification hearings." *Id.* at 2399. During resentencing, judges are permitted to weigh the same factors they consider during an initial sentencing in addition to any evidence of a defendant's rehabilitation, or lack thereof, since his initial sentencing. *Id*. Indeed, Congress expressed that intent explicitly with respect to compassionate release, mandating that the Court "consider[] the factors set forth in section 3553(a)," which is the base set of considerations for sentencing in the first instance.[2] Those considerations include "the need for the sentence imposed to reflect the seriousness of the offense." 18 U.S.C. § 3553(a)(2)(A).

Consistent with the rule of lenity, *United States* v. *Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 (1992) (applying "the rule of lenity and resolv[ing] the ambiguity in Thompson/Center's favor" when other principles of construction did not resolve ambiguity), and separation of powers, *Califano* v. *Yamasaki*, 442 U.S. 682, 705 (1979) (applying clear statement rule to divestiture of courts' control over equity, a

[2] The government notes the Court's statement in *Concepcion* that "'Congress expressly cabined district courts' discretion'" in Section 3582. BIO at 13-14 (quoting *Concepcion*, 142 S. Ct. at 2401). That lone statement is hardly a briefed and considered opinion of this Court, and it does not purport to fully address the nature and scope of Congress's "cabin[ing] of district courts' discretion."

traditional judicial function like sentencing), Congress would leave no doubt if it intended for the Commission's policy statements to bind the district courts. But as noted above, Congress's intent is plainly the opposite, given its statement that district courts' resentencing must be "consistent" with rather than "conform" to or "comply" with the policy statement, and that the policy statement itself only states what district courts "should" consider "extraordinary and compelling," rather than what they "shall" consider "extraordinary and compelling."

III. The merits position of the United States is wrong.

Given the broad discretion district courts have at sentencing, resentencing, and with compassionate release motions to address the plenary sentencing factors contained in Section 3553, it is reasonable for a district court to find that a revised sentencing regime is an "extraordinary and compelling" reason to modify a sentence.

The government refers to its merits argument in *Tomes* v. *United States*, 142 S. Ct. 780 (2022) (No. 21-5104) and appears to incorporate it by reference. BIO at 13 (citing BIO at 14-17, *Tomes*, *supra*, (No. 21-5104)). Of course, the government will have plenty of opportunity to make its merits argument if the writ is granted, but the argument is fundamentally flawed in any event.

The government's entire argument rests on conflating Congress's decision not to require resentencing of *every* convict sentenced under the prior regime with a choice to *disallow* consideration of the sentencing change in *any* individual case. But a key justification for non-retroactive application of sentencing changes is the extreme burden that would place on courts to be forced to resentence everyone with similar

convictions. *United States* v. *Acoff*, 634 F.3d 200, 205 (2d Cir. 2011) (Lynch, J. concurring) ("Congress may well have decided that it is simply too difficult to rewind these cases to the beginning, unscramble all of the decisions that had been made, and reprosecute the cases as they might have played out had the provisions of the FSA been in effect all along.").

The Government's own brief to this Court in *Dorsey* v. *United States*, No. 11-5683, 2012 WL 242901 (2012) at *48-49, plainly states two justifications for non-retroactivity: (1) "In many cases, the government may have declined to bring or agreed to drop other charges in reliance on the stringent mandatory minimum sentences for crack offenders. Reopening those sentences without permitting the government to revive other charges could create serious injustices, particularly if the statute of limitations or loss of evidence frustrated any such effort," and (2) "requiring full-scale resentencing under the FSA for previously sentenced defendants would impose substantial burdens on the administration of justice." Those justifications lead Congress and the courts to the *general* non-retroactivity principle and do not apply to *individualized* determinations of mercy, decency, and compassion based on considering sentencing reform *in addition to* other factors supporting compassionate release.

Allowing district courts to consider sentencing reform is particularly appropriate where, as here, the sentencing judge lamented the harshness of the regime *as applied to that individual defendant*. Tovar had two prior state drug offenses. Pet. App. 4-5. "Noting that his hands were reluctantly tied by statute, Judge Erickson sentenced

Tovar to the mandatory minimum of life imprisonment." Pet. App. 5. Thus, "ordinary operation of a statute" becomes at least arguably "extraordinary" in the uncommon and individualized case where the original sentencing judge expressly stated he would have chosen a lower sentence but for the binding "ordinary" application of a subsequently removed sentencing regime.

Under the First Step Act, Tovar would not be subject to the mandatory minimum life sentence if he were sentenced today because his two prior convictions would not have constituted "serious drug felonies" under 21 U.S.C. § 802(57) and 18 U.S.C. § 924(e)(2)(A). Pet. App. 9-10. Moreover, his sentencing guidelines range would have been reduced. Pet. App. 10-11. But the district court found that "without the application of Section 401 to remove the mandatory minimum of life imprisonment, the reduction of the base offense level and corresponding guideline range under Drugs Minus Two is a moot point." Pet. App. 11. The district court concluded its analysis refusing to consider the recent sentencing changes by recognizing that the sentence is "perhaps draconian," but resolving that compassionate release is not an appropriate vehicle to fix it. *Id.*

IV. This case is an ideal vehicle.

The issue presented here is a recurring one that needs this Court's intervention. In a footnote, the government suggests the Court should deny review as a matter of inertia, citing numerous cases where the Court has denied certiorari on a similar question. But this case is different from the denied petitions.

First, it directly raises the statutory interpretation question of whether Congress intended to limit district courts' discretion in determining what constitutes "extraordinary and compelling reasons" for a sentence reduction to the Sentencing Commission's policy statements *without* the interference of particularized considerations with 18 U.S.C. § 924. *See*, *e.g.*, Petition for a Writ of Certiorari at 14, *Sutton* v. *United States*, No. 21-6010 (Oct. 14, 2021) ("this Court's answer to the question presented could have far reaching consequences for those sentenced for multiple § 924(c) convictions").

Second, it (as the government effectively concedes) does not suffer from the vehicle problems that doomed virtually all prior petitions. *Compare* BIO at 13, *Fraction* v. *United States*, No. 22-5859 (Oct. 11, 2022) (recognizing that "the Court [may be] inclined to consider the question presented" but arguing that "nevertheless. . . this case would be a poor vehicle in which to do so"), *with* BIO (advancing no vehicle argument). The absence of such a vehicle objection from the United States to a petition with this recurring, important question presented is rare. *See, e.g.*, BIO at 3, *Thacker* v. *United States*, 142 S. Ct. 1363 (2022) (No. 21-877); BIO at 3, *Chantharath* v. *United States*, 142 S. Ct. 1212 (2022) (No. 21-6397); BIO at 3, *Sutton* v. *United States*, 142 S. Ct. 903 (2022) (No. 21-6010); BIO at 12, *Jarvis* v. *United States*, 142 S. Ct. 760 (2022) (No. 21-568); BIO at 13, *Gashe* v. *United States*, 142 S. Ct. 753 (2022) (No. 20-8284). Tovar's sentencing judge would not have sentenced him to life in prison in the first instance without the mandatory sentencing requirement, and the district

court should be allowed to consider the subsequent change *not* to apply a mandatory life sentence to cases like his.

CONCLUSION

For the foregoing reasons, the petition should be granted, the judgment below should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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