No.

In the

Supreme Court of the United States

DAVID E. MCCALL, JR.

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a district court may consider the disparity in a sentence when the applicable sentencing law has changed, when the disparity is of a degree which reflects an extraordinary and compelling reason for a reduction in sentence under 18 U.SC. §3582(c)(1)(A).

PARTIES TO THE PROCEEDINGS

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

RELATED PROCEEDINGS

United States v. McCall, No. 21-3400, 29 F.4th 816 (6th Cir.)(order granting petition for rehearing en banc and prior panel opinion vacated, issued April 1, 2022.)

United States v. McCall, No. 21-3400, 20 F.4th 1108 (6th Cir.)(opinion vacating the denial of the motion for compassionate release, issued December 17, 2021)

United States v. McCall, No. 1:13-CR-0345-41-CAB (ND OH)(order denying motion for compassionate release, issued April 15, 2021)

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PETITION FOR WRIT OF CERTIORARI

Petitioner David E. McCall, Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case. This case represents a clear divide within the courts of appeals as to the interpretation and application of 18 U.S.C. § 3582(c)(1)(A)'s provision of extraordinary and compelling reasons to modify a sentence which a prisoner identifies as an unusually long, disparate sentence. The Sixth Circuit's 9 – 7 *en banc* decision provides a categorical ban on any consideration of a disparate sentence identifies as unusually long due to non-retroactive legislative or judicial changes to the laws which affected the sentence when imposed, notwithstanding the clear explanation of the duty of district courts to consider any relevant material when faced with a modification motion. *Concepcion v. United States*, __ U.S. __, 142 S.Ct. 2389, 2400 (2022). This prohibition constitute a re-writing of section 3582(c)(1)(A), a re-writing of the colloquially-named compassionate release statute that was also sanctioned by the Courts of Appeals in the Third, Seventh, Eighth, Eleventh, and District of Columbia Circuits have also held that non-retroactive changes to sentencing law cannot serve as the basis for modification of a sentence under 18 U.S.C. § 3582(c)(1)(A)'s extraordinary and compelling rubric.

Decisions in the circuit courts which support Petitioner's assertion that section 3582(c)(1)(A)'s language is intentionally broad enough to permit a defendant to assert a comparative analysis of the sentence imposed and the sentence which would have been applicable had the subsequent changes to the law been made retroactive, view

the phrase "extraordinary and compelling" as being bound only by the statute's codified prohibition on rehabilitation serving as the reason for re-sentencing. Therefore, the appeals courts of the First, Second, Fourth, Ninth and Tenth Circuits have held no blanket prohibition, of modification of what may be considered "extraordinary and compelling" is appropriate, including consideration of what a defendant's sentence would be had the legislative and judicial changes been made applicable to all, finding support for its inclusivity through the legislative history and the plain language of the statute.

The federal circuit courts are plainly divided and each Court is steadfast in the belief that their reasoning is correct. As a consequence, defendants are being treated differently in their prisoner-raised motions under 18 U.S.C. §3582(c)(1)(A), depending upon where within the United States their original sentence was imposed. Without this court's intervention, the lack of a consistent and coherent interpretation of the phrase "extraordinary and compelling" and its application to sentence modification motions under 18 U.S.C. §3582(c)(1)(A) will continue to produce inconsistent and incompatible interpretation of clear statutory language, with clear implications as to how a district court exercises its discretion depending upon the location of the court. This case squarely presents these important and recurring questions and is an ideal vehicle for resolving the split of authority. For these reasons, the petition should be granted.

OPINION BELOW

The *en banc* opinion of the Sixth Circuit Court of Appeals in *United States v. McCall*, was decided December 22, 2022 and is attached at Petitioner Appendix 1a - 39a. The opinion was published with the citation *United States v. David E. McCall*, Jr., 56 F.4th 1048 (6th Cir.2022).

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on December 22, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Questions Presented implicates United States Code sections 18 U.S.C. §3553(a) and 18 U.S.C. § 3582(c)(1)(A).

18 U.S.C. § 3582. **Imposition of a sentence of imprisonment**

(c) **Modification of an imposed term of imprisonment**.--The court may not modify a term of imprisonment once it has been imposed except that—

> (1) in any case--
>
> (A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--
>
> (i) extraordinary and compelling reasons warrant such a reduction; or
>
> (ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person

or the community, as provided under section 3142(g);

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

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure;

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18 U.S.C. §3553(a)(1-7) – Imposition of a sentence.

(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; or

(B) . . . ;

(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.[1]

(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 OF THE CASE

1. 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). In the Senate Report accompanying the 1984 Act, which included the landmark sentencing reform provisions contained in the Sentencing Reform Act, the Senate Committee stated, in relevant part:

> 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. Those 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 defender was convicted have been later amended to provide a shorter term of imprisonment . . . . The Bill, as reported, provides . . . in proposed 18 U.S.C. 3583(c) for court determination, subject to consideration of sentencing commission standards, of the question whether there is justification for reducing a term of imprisonment in situations such as those described.

S. Rep. No. 98-225, 55-56 (1983) (emphasis added); From its inception, Congress intended 18 U.S.C. §3582 to provide a window where "changed circumstances" regarding the length of a term of imprisonment, medical conditions, and even changes in the yet-to-be developed Sentencing Guidelines, may be addressed. This was the goal of section 3582, notwithstanding Congress's keen awareness of post-conviction statutory remedies, likely because of the fact that some changes in circumstances may not involve those of constitutional magnitude, or involve changes designated to apply

retroactively. The 1984 statute placed the authority to determine whether extraordinary and compelling circumstances have caused an otherwise valid sentence to be "unusually long" into the hands of the Bureau of Prisons, eliminating the Parole Commission's review of all sentences and installing a narrowed scope of reasons to ameliorate a sentence.

Unfortunately, the Bureau of Prisons displayed over 30 years, a complete lack of desire or ability to utilize the authorities granted for review of prisoners who exhibited extraordinary and compelling reasons for modifications of their lawfully-imposed sentences. Despite the Sentencing Commission's amendments to Section 1B1.13 of the Sentencing Guidelines and its commentary to assist the Bureau of Prisons officials in determining whether extraordinary and compelling circumstances were present for a particular prisoner, the Bureau of Prisons failed to utilize the provision, and many prisoners and their families suffered needlessly waiting for the Bureau of Prisons to utilize its authority to motion the district courts for compassionate release. See, DEP'T OF JUSTICE, OFFICE 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).

With the passage of the First Step Act of 2018, Pub. L. 115-391, 132 Stat. 5194, Congress amended 18 U.S.C. §3582(c)(1)(A) to provide defendants with the opportunity to move their sentencing court for compassionate release, after requesting

relief from the warden of their Bureau of Prisons holding facility. See, First Step Act, Pub. L. 115-391, Section 603(b), "Increasing the Use and Transparency of Compassionate Release." Section 603(b) did not amend or limit the criteria for extraordinary and compelling reasons, leaving intact the criteria and the exception that rehabilitation standing alone is insufficient to gain relief from a sentence. The amended statute provided an avenue for prisoners to present their own motions for compassionate release, thus providing a release for the bottleneck created by the Bureau of Prisons' inaction.

2. In 2013, David McCall and 59 other defendants were the subjects of a 196-Count Superseding Indictment alleging in Count One a Conspiracy to Possess with Intent to Distribute and Distribution of Heroin, Possession and Distribution of Heroin in Count Six, and two counts of using a Communication Facility to Facilitate Drug Trafficking in Counts 117 and 122. On December 9, 2014 David McCall entered into a written plea agreement to the Conspiracy to Possess with Intent to Distribute, and Distribution of Heroin in Count One, with the government agreeing to dismiss the remaining counts for which he was charged. The plea agreement included an agreement between the parties that McCall's offense level before acceptance of responsibility was 24, based upon his personal involvement in distributing and possessing between 400 kilograms but less than 400 kilograms of marijuana (converted drug amounts from heroin and cocaine). The parties also agreed that if Mr. McCall was deemed a Career Offender, his base offense level under U.S.S.G. §4B1.1(b) would be Level 34.

The Final Presentence report found that David McCall had a total of five (5) prior convictions which qualified as either controlled substance offenses or crimes of violence under U.S.S.G. §4B1.2, so the PSR reported that Mr. McCall was a career offender. With an Offense Level of 34 pursuant to U.S.S.G. §4B1.1 and after a three-level adjustment for acceptance of responsibility, his total offense level was 31 and criminal history category was VI, yielding a guidelines range of 188 - 235 months in prison. Without the career-offender enhancement, Mr. McCall's total offense level would have been 21, yielding a guidelines range of 77 - 96 months in prison at Criminal History Category VI.

On November 13, 2020, David McCall submitted a pro se Motion for Sentence Reduction under 18 U.S.C. §3582(c)(1)(A), stating that the district court had the "power to make its own determination of what constitutes Extraordinary and Compelling Reasons that would warrant a reduction of sentence." The pro se pleading then reflected on the prior offenses identified in the Presentence Report as qualifying priors under §4B1.2 of the Sentencing Guidelines, stating that none of his prior offenses, nor his current drug trafficking conspiracy conviction qualified as predicate offenses for career offender.

After counsel was appointed, a Supplement to the Motion for Compassionate Release was filed, which provided factual background of the offense and provided that the disparate sentence that McCall was serving, amounted to extraordinary and compelling circumstances which warranted relief. Counsel submitted that had McCall been sentenced in 2021, the career offender enhancement would not apply, and his

Guidelines range would be 77 – 96 months as opposed to the 188 – 235 month range that was used at sentencing.

McCall had pled guilty to participating in a drug trafficking conspiracy, which at the time of McCall's sentencing hearing in 2015, triggered the application of the career offender provision as a controlled substance offense. Section 4B1.2(b) defines a "controlled substance offense" as

> "an offense under federal or state law … that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance … or the possession of a controlled substance … with intent to manufacture, import, export, distribute, or dispense."

U.S.S.G. §4B1.2(b). The definition under §4B1.2(b) of "controlled substance offense" does not include any inchoate offense definition; however, the commentary in the Application Notes provided that the definition for a controlled substance offense a could be satisfied through convictions for the incomplete versions of those crimes, such as attempts and conspiracies.

In *United States v. Havis*, 927 F.3d 382 (6th Cir.2019), the Sixth Circuit upended the Sentencing Commission's inclusion of inchoate offenses as career offender qualifiers and predicates, stating that Congress had not been given the opportunity to consider or approve of the inchoate offense modifications to the definitions of 'crime of violence' or 'controlled substance' offenses. *Havis*, 927 F.3d at 386-87. Pursuant to *Havis*, then, McCall's 21 U.S.C. §846 conspiracy conviction would not have served as a qualifying conviction requiring application of the career offender penalties in Chapter Four. This change was recognized in *United States v. Cordero*, where the Sixth Circuit applied its reasoning in *Havis* specifically to conspiracy convictions:

> [W]e have acknowledged that, in light of *Havis*, conspiracy to distribute controlled substances is not a "controlled substances offense" under § 4B1.2(b). See, e.g., *United States v. Stephens*, 812 F. App'x 356, 357 (6th Cir. 2020) (mem.) (per curiam) (conspiracy to distribute cocaine); Butler, 812 F. App'x at 314-15.

United States v. Cordero, 973 F.3d 603, 626 (6th Cir. 2020), reh'g denied (Nov. 3, 2020). Counsel also noted in the Supplement that prior opinions had rejected *Havis*-based arguments for re-sentencing, finding that a misapplication of an advisory sentencing guidelines claim is not cognizable under 28 U.S.C. §2255, citing *Bullard v. United States*, 937 F.3d 654, 660-661 (6th Cir.2019).

The United States responded to the Motion for Compassionate Release in its opposition pleading, which detailed Mr. McCall's prior criminal history and the reasons why he was a danger to the public. The response in opposition also identified the *Havis* disparity argument as McCall's "disagreement with his sentence," which was not able to be addressed because "benefit[s] from a reduced penalty from previously sentenced defendants is 'the general practice in federal sentencing,'" citing *United States v. Blewett*, 746 F.3d 647 (6th Cir.2013) and *Dorsey v. United States*, 567 U.S. 260 (2012).

United States District Court Judge Christopher Boyko denied McCall's Motion on April 15, 2021 in a form Order which included the included the following paragraph:

> The Court does not find that an extraordinary and compelling reason supports Defendant's request for a reduction in sentence. While Defendant mentions the COVID-19 pandemic, he cites no health concern that puts him at risk in light of the pandemic. And the mere existence of COVID-19 is not enough to warrant a sentence reduction. Neither are the changes to sentencing policy. The Sixth Circuit's decision in *Havis* is not retroactive, nor would is support a claim on collateral relief. The Court is unwilling to sidestep normal post-conviction requirements by allowing section 3582(c)(1)(A) to serve that purpose. Rather, the impact of *Havis* (if any) would be on the Court's analysis of the section 3553(a) factors, which the Court declines to reach in the absence of extraordinary and compelling

> reasons. That leaves defendant's rehabilitation alone as his last hope. But Congress has squarely foreclosed that argument. See, 28 U.S.C. 994(t). Accordingly, Defendant's Motion is Denied.

The original panel opinion in *United States v. McCall*, 20 F.4th 1108 (6th Cir.) determined that the district court was required to consider the sentencing disparity argument, along with other factors presented by McCall, to determine whether compassionate release was warranted. The 2-1 panel majority found that a district court may consider a non-retroactive change in the law as one of several factors forming extraordinary and compelling circumstances under 18 U.S.C. §3582(c)(1)(A). *McCall*, 20 F.4th at 1116. Both the majority opinion and the dissent recognized that the Sixth Circuit's jurisprudence in the compassionate release context reflected an intra-circuit split which had become "intractable," referencing a growing list of opinions within the circuit which reflected different interpretations of the scope of the phrase "extraordinary and compelling" and sentencing disparity arguments based upon non-retroactive changes in the law. *McCall*, 20 F.4th at 1116 (J. Kethledge, dissent). This panel decision was vacated April 1, 2022 when the majority of the Judges of the Sixth Circuit voted for rehearing en banc after the United States petitioned the appeals court to hear the case anew. *United States v. McCall*, 29 F.4th 816 (6th Cir.2022).

On December 22, 2022, the Sixth Circuit issued its en banc decision, determining that "[n]onretroactive legal developments do not factor into the extraordinary and compelling analysis. Full stop." *United States v. McCall*, 56 F.4th 1048, 1066 (6th Cir.2022), Pet. App. 24a. Of the 16 judges of the en banc Court, the nine-judge majority determined that the principled path for challenging a sentence was

in post-conviction proceedings under 28 U.S.C. §2255. Writing for the nine-member majority, Judge Nalbandian provided that a defendant who attempts to raise a sentencing disparity argument based upon non-retroactive changes in law under section 3582(c)(1)(A)'s extraordinary and compelling rubric will be rejected, as such challenges are both improper under the compassionate release statute, and are otherwise non-retroactive, and thus unable to be presented in a post conviction motion under 28 U.S.C. §2255.

> True, McCall's case involves a nonretroactive judicial decision, rather than a nonretroactive statute. But we see no reason to take a different approach. So a "contrary conclusion" would allow defendants to avoid "the principal path ... Congress established for federal prisoners to challenge their sentences." [ ] That path, found in 28 U.S.C. § 2255, "embodie[s] ... [a] specific statutory scheme authorizing post-conviction relief ...." [ ] And that scheme places strict limits on post-conviction claims.
>
> Those limits would prove fatal to McCall for two reasons. He first attacked his conviction under § 2255 in 2016. This attack proved unsuccessful, so he would need express authorization to bring a "second or successive" petition. *See* 28 U.S.C. § 2244(b). But this he could not get. Congress permits such a motion only if it invokes a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court" or includes "newly discovered evidence." 28 U.S.C.§ 2255(h)(1)–(2). McCall presents no new "evidence" and "no new rule of constitutional law," making any second petition dead on arrival. But even without these "second or successive" limits, *id.* § 2244(b)(1), McCall could not obtain post-conviction relief. The Supreme Court has long held that "newly recognized rules of criminal procedure do not normally apply in collateral review." *Ramos v. Louisiana*, —— U.S. ——, 140 S. Ct. 1390, 1407, 206 L.Ed.2d 583 (2020) (citing *Teague*, 489 U.S. at 311–12, 109 S.Ct. 1060). And we have similarly explained that a misapplication of an advisory guidelines range, including a *Havis* error, does not present a "cognizable" claim under § 2255. *See Bullard v. United States*, 937 F.3d 654, 659, 661 (6th Cir. 2019).
>
> McCall cannot avoid these restrictions on "post-conviction relief" by "resorting to a request for compassionate release instead." *Crandall*, 25 F.4th at 586. We assume Congress knew of its "specific statutory scheme authorizing post-conviction relief" when it adopted the compassionate-release statute in 1984 and amended it in 2018. *Thacker*, 4 F.4th at 574. And we likewise "assume" Congress was "aware of relevant judicial precedent" limiting the retroactive application of new rules of criminal procedure when it set the extraordinary and compelling

> reasons threshold. *Guerrero-Lasprilla v. Barr*, —— U.S. ——, 140 S. Ct. 1062, 1072, 206 L.Ed.2d 271 (2020) (quoting *Merck & Co. v. Reynolds*, 559 U.S. 633, 648, 130 S.Ct. 1784, 176 L.Ed.2d 582 (2010)). So if Congress intended the compassionate-release statute to act as an exception to this post-conviction framework, "it would have made 'that intent specific.' " *McKinnie*, 24 F.4th at 588 (quoting *Hunter*, 12 F.4th at 565); *see also Banister v. Davis*, —— U.S. ——, 140 S. Ct. 1698, 1707, 207 L.Ed.2d 58 (2020). Yet we can find no such intent in the phrase "extraordinary and compelling reasons." This phrase "does not remotely suggest that Congress intended to effect the monumental change of giving district courts the discretion to treat non-retroactive precedent as a basis to alter a final judgment (and release a prisoner)." *Hunter*, 12 F.4th at 566.

McCall, 56 F.4th at1057–58. Pet. App. 12a-13a.

The majority decision looked to a dictionary definition of both "extraordinary" and "compelling," to determine whether section 3582(c)(1)(A) permitted district courts discretion to determine what information it could use to find extraordinary and compelling reasons to grant relief. In support of its edit that non-retroactive sentencing law changes can never be considered by the district court in the compassionate release context, the McCall opinion provided:

> With no statutory definition of "extraordinary and compelling reasons" to guide us, *Elias*, 984 F.3d at 518–20, we interpret the phrase "in accord with the ordinary public meaning of its terms at the time of its enactment," *Bostock v. Clayton Cnty.*, —— U.S. ——, 140 S. Ct. 1731, 1738, 207 L.Ed.2d 218 (2020); *see also Tanzin v. Tanvir*, —— U.S. ——, 141 S. Ct. 486, 491, 208 L.Ed.2d 295 (2020) ("Without a statutory definition, we turn to the phrase's plain meaning at the time of enactment."). And to do so, we rewind the clock to the time of the Sentencing Reform Act's adoption, here 1984. At that time, most understood "extraordinary" to mean "most unusual," "far from common," and "having little or no precedent." *Extraordinary, Webster's Third New International Dictionary* 807 (1971). "Compelling," for its part, referred to "forcing, impelling, driving." *Id.* at 463.
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> . . .
>
> Two background principles of federal sentencing law help to provide an answer. The first is finality. "[E]ssential to the operation of our criminal justice system," finality gives criminal law its "deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality op.). Recognizing the importance of this principle, Congress gave it statutory weight. Because a

sentence of imprisonment "constitutes a final judgment," federal law generally prohibits a district court from "modify[ing]" it "once it has been imposed." 18 U.S.C. § 3582(b)–(c); *see also Dillon v. United States*, 560 U.S. 817, 824, 130 S.Ct. 2683, 177 L.Ed.2d 271 (2010). The second is nonretroactivity. Federal sentencing law presumes that changes in sentencing law are not retroactive. *McKinnie*, 24 F.4th at 587. Drawing from these two principles, the Supreme Court has explained that the "ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced." *Dorsey v. United States*, 567 U.S. 260, 280, 132 S.Ct. 2321, 183 L.Ed.2d 250 (2012).

Framed against this background, the text of the compassionate-release statute gives way to a basic inference: What is "ordinary" and routine cannot also be extraordinary and compelling. [ ] After all, prospective changes in federal sentencing law are far from an extraordinary event. *See United States v. Crandall*, 25 F.4th 582, 586 (8th Cir. 2022). And unless Congress expressly says so, those changes do not apply to "defendants already sentenced." *Dorsey*, 567 U.S. at 280, 132 S.Ct. 2321. Likewise, new caselaw often gives fresh meaning to statutes or the Sentencing Guidelines. But the Supreme Court has repeatedly reiterated that judicial decisions announcing new rules of criminal procedure ordinarily do not provide retroactive relief on collateral review. *See Edwards v. Vannoy*, —— U.S. ——, 141 S. Ct. 1547, 1555, 209 L.Ed.2d 651 (2021). That new statutes and caselaw apply only to "defendants not yet sentenced" is the expected outcome in our legal system. *Dorsey*, 567 U.S. at 280, 132 S.Ct. 2321. And what is expected cannot be extraordinary.

What's more, we find little compelling about the duration of a lawfully imposed sentence. This is because such a sentence represents "the exact penalt[y] that Congress prescribed and that a district court imposed for [a] particular violation[ ] of a statute." *United States v. Thacker*, 4 F.4th 569, 574 (7th Cir. 2021), *cert. denied*, —— U.S. ——, 142 S. Ct. 1363, 212 L.Ed.2d 323 (2022). That a district court might impose a different sentence than one of its predecessors hardly seems the kind of "forceful, impelling, [or] driving" reason that could justify compassionate release. *See Compelling*, *Webster's Third New International Dictionary* 463 (1971); . . .

Viewed in this light, the phrase "extraordinary and compelling reasons" comes into sharper focus. What is ordinary—the nonretroactivity of judicial precedent announcing a new rule of criminal procedure like *Havis*—is not extraordinary. And what is routine—a criminal defendant like McCall serving the duration of a lawfully imposed sentence—is not compelling.

McCall, 56 F.4th at 1055, 1056., Pet. App. 9a – 11a.

The majority opinion rejected the assertion by McCall that the reasoning in *Concepcion v. United States* counseled against wholesale exclusion of disparity

arguments in compassionate release motions, failing to address the provision in Concepcion which provided that district courts may find non-retroactive sentencing Guideline amendments "germane when deciding whether to modify a sentence at all, and if so, to what extent." *Concepcion*, 142 S.Ct. at 2400. The McCall majority instead determined that *Concepcion* addressed a different section of the First Step Act, stating that the consideration of "all relevant information" would only come into play after the extraordinary and compelling reasons were identified as sufficient – after which a district court was free to consider other information, including non-retroactive sentencing law changes. *McCall*, 56 F.4th at 1061-1062, Pet. App. 18a - 19a.

Two dissenting opinions to the *McCall* majority represented that the majority opinion misapplied *Concepcion*, one of which provided that prior to *Concepcion*, she was in concert with the majority opinion, but could no longer adhere to that position while applying the scope and spirit of *Concepcion*. *McCall*, 56 F.4th at 1074-1075, App. 38a-39a. (Gibbons, Dissent). In the dissenting opinion which was joined by five Circuit Judges, Judge Moore, who authored the vacated panel opinion, provided that district court judges were tasked with providing the dimensions for what was extraordinary and compelling, just as they are ordinarily tasked with making sentencing decisions. The dissent provided that allowing a district court to make these decisions would not mean that in every instance such disparity arguments based upon non-retroactive sentencing law changes would be found extraordinary and compelling: but the statute provides the district court the latitude to make that determination without the necessity of being told what it can and cannot consider using parameters located no where in the statutory

text as passed by Congress. *McCall*, 56 F.4th at 1069 – 1071, App. 29a – 32a. (Moore, Dissent). The dissent provides:

> There is an even more fundamental problem with the majority's textual analysis: it writes into § 3582(c)(1)(A) what Congress declined to include. "Congress has 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." *Chen*, 48 F.4th at 1098. The majority purports to read § 3582(c)(1)(A) to impose a third limitation: nonretroactive changes in law, whether alone or in combination with other factors, cannot be extraordinary and compelling reasons for compassionate release. The problem, of course, is that Congress has had more than three decades to impose such a limitation, but never has. Instead, Congress adopted a broad and ambiguous phrase and left it to different institutions—first the Sentencing Commission and BOP, and now the district courts—to sort out what the phrase means in practice. Our circuit has long declined to add restrictions to Congress's chosen text. See, e.g., *Gen. Med., P.C. v. Azar*, 963 F.3d 516, 521 (6th Cir. 2020) (stating that courts "should not add language that Congress has not included"). Today, the majority does exactly that.

McCall, 56 F.4th at 1071–72, Pet. App. 32a – 33a.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's en banc decision in *United States v. McCall,* solidifies an intractable circuit split based upon differing statutory interpretations of 18 U.S.C. §3852(c)(1)(A), which requires resolution. The federal courts of appeals are firmly divided over the interpretation of the language of 18 U.S.C. §3582(c)(1)(A), how to interpret the phrase "extraordinary and compelling," and whether motions under section 3582(c)(1)(A) are challenges to finality and validity of a sentence, or are discretionary proceedings which may ameliorate what has evolved into an unusually long sentence. This case also presents a significant and recurring question, and is an ideal vehicle for which this Court may settle this issue of statutory interpretation, and

the application of *Concepcion v. United States* to review of motions under 18 U.S.C. §3582(c)(1)(A). This Court should therefore use this case to resolve the conflict in the circuit courts, a conflict which will likely not be resolved through the Sentencing Commission's proposed amendments to US.S.G. §1B1.13 and its commentary.

1. *The Question Presented has Divided a Majority of Courts of Appeals and Only This Court Can Mend the Divide*

Nine of the federal circuit courts that have addressed the question presented, and four of those nine Circuits support Petitioner's position and decline to read limitations in 18 U.S.C. §3582(c)(1)(A) or circumscribe a district court's consideration of extraordinary and compelling reasons that have not been placed there through the legislative process. The circuit courts have acknowledged the differing analysis, and serves as additional support for the Court to resolve these percolating issues of statutory interpretation, and Judge Moore writing in dissent in *McCall* provided:

> Congress has otherwise eschewed providing a rigid definition of the reasons that may be "extraordinary and compelling" under § 3582(c)(1)(A), allowing the district courts to resolve in the first instance whether a change in law, or any other relevant fact, constitutes an extraordinary and compelling reason for a sentence reduction in the context of an imprisoned person's unique circumstances. Given this historical context, we should join the First, Fourth, Ninth, and Tenth Circuits in declining to read additional limitations into § 3582(c)(1)(A). See *United States v. Ruvalcaba*, 26 F.4th 14, 25–28 (1st Cir. 2022); *United States v. McCoy*, 981 F.3d 271, 286 (4th Cir. 2020); [*United States* v.] *Chen*, 48 F.4th at 1098–1101; *United States v. McGee*, 992 F.3d 1035, 1047–48 (10th Cir. 2021); see also *Concepcion*, 142 S. Ct. at 2402 (cautioning against "[d]rawing meaning from silence" in the sentencing context (quoting Kimbrough v. United States, 552 U.S. 85, 103, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007)).

Pet. App. 30a. The dissent further acknowledged the divide and the intractable split in the circuits:

> The majority's decision puts us in conflict with these courts and further entrenches the circuit split on this issue. See *United States v. Andrews*, 12 F.4th 255, 260–62 (3d Cir. 2021) (adopting the majority's position); *United States v. Thacker*, 4 F.4th 569, 573–75 (7th Cir. 2021) (same); U*nited States v. Crandall*, 25 F.4th 582, 585–86 (8th Cir. 2022) (same); [*United States v.*] *Jenkins*, 50 F.4th at 1197–1200 (same). Unless and until the Supreme Court takes up the issue, McCall and those like him who are within these jurisdictions will be prevented from having district courts consider the totality of their circumstances when deciding whether to modify their sentences.

McCall, 56 F.4th at 1070, Pet. App. 30a. This Court's resolution is now warranted to provide clarity and focus to these differing statutory interpretations.

A. The Third, Sixth, Seventh, Eighth, and District of Columbia Circuits have prohibited district courts from considering non-retroactive changes in sentencing law when exercising its discretion in Section 3582(c)(1)(A) motions

Five courts of appeals have determined that non-retroactive changes to sentencing laws that illuminate the disparity in a defendant's sentence "do not create and extraordinary or compelling circumstance." *United States v. Andrews*, 12 F.4th 255, 260 (3d Cir.2021). The *Andrews* panel found that the "duration of a lawfully imposed sentence does not create and extraordinary or compelling" reason, and when one considers the "length of a statutorily mandated sentence as a reason for modi[fication]" such consideration would interfere with legislative enactments, which is within the purview of Congress. *Andrews*, 12 4th at 261 (citations omitted). The Third Circuit opinion also found that non-retroactive changes are also not available for consideration as extraordinary or compelling under section 3582(c)(1)(A), citing the oft-quoted provision that "in federal sentencing the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced." *Id*, citing *Dorsey v. United States*, 567 U.S. 260, 280

(2012).

In *United States v. Thacker*, the defendant was serving a 33 year sentence imposed for two armed robberies in 2002, having received "stacked" consecutive sentences for the two 18 U.S.C. §924(c) violations of seven and 25 years, respectively. Referencing the First Step Act's clarification of the stacking of penalties under 18 U.S.C. §924(c), Thacker argued that his 32 year sentence for the use of firearms during the two robberies was extraordinarily long, given the proper application of the penalties under Section 924(c) as clarified in the First Step Act would reflect a 14 year consecutive sentence. The Seventh Circuit affirmed the district court's rejection of Mr. Thacker's compassionate release request, finding that the First Step Act's changes were prospective and thus inapplicable to those sentenced prior to the clarifying legislation. *Thacker*, 4 F.4th 569, 572-574. The Thacker Court, in lock-step with the majority in McCall, found that a prisoner cannot circumvent post-conviction avenues of relief through motions under 18 U.S.C. §3582(c)(1)(A):

> [T]he discretionary authority conferred by § 3582(c)(1)(A) only goes so far. It 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. To conclude otherwise would allow a federal prisoner to invoke the more general § 3582(c) to upend the clear and precise limitation Congress imposed on the effective date of the First Step Act's amendment to § 924(c). See *United States v. Jarvis*, 999 F.3d 442, 443–44 (6th Cir. 2021), cert. denied, 142 U.S. 760 (Jan. 10, 2022). Put another way, there is nothing "extraordinary" about leaving untouched the exact penalties that Congress prescribed and that a district court imposed for particular violations of a statute. . . .
>
> In the end, our conclusion is limited. We hold only that the discretionary sentencing reduction authority conferred by § 3582(c)(1)(A) does not permit—without a district court finding some independent "extraordinary or compelling" reason—the reduction of sentences lawfully imposed before the effective date of the First Step Act's amendment to § 924(c). Nothing about our holding precludes

> district courts, upon exercising the discretion conferred by § 3582(c)(1)(A) and determining that a sentence reduction is warranted, from considering the First Step Act's amendment to § 924(c) in determining the length of the warranted reduction.

Thacker, 4 F.4th at 574, 575, cert. denied, 142 S.Ct. 1363 (Mar. 21, 2022).

The Eighth Circuit's decision in *United States v. Crandall*, 25 F.4th 582 decided in February of 2022 follows a similar path of reasoning as the Third, Fifth, and Sixth Circuits, finding that non-retroactive changes promulgated through the passage of the First Step Act were no extraordinary and compelling reasons for a sentence reduction, notwithstanding the fact that the defendant in *Crandall* was serving a 25 year sentence for stacked Section 924(c) offenses, which after the clarification provided in the First Step Act would have equaled a ten year prison term. It is noted in *Crandall* that the which were clarified in the FSA were "new," as opposed to a clarification of the statutory penalties which had, prior to *Deal v. United States*, 508 U.S. 139 (1993), reflected in some circuits the interpretation "clarified" by Congress in the FSA 2018. See, *Crandall*, 25 F.4th at 584-586.

The District of Columbia Circuit decision in United States v. Jenkins addressed the extraordinary and compelling reasons rubric from the point of view of an individual whose Guidelines had changed based upon circuit case law rulings, and where the statutory mandatory penalties under 18 U.S.C §924(c) had also been amended. The appeals court, in accord with *McCall*, provided that extraordinary and compelling reasons:

> "must be " 'most unusual,' 'far from common,' and 'having little or no precedent.' " *United States v. Hunter*, 12 F.4th 555, 562 (6th Cir. 2021) (quoting Webster's Third New International Dictionary: Unabridged 807 (1971)). And a

> "compelling" reason must be "both powerful and convincing." *United States v. Canales-Ramos*, 19 F.4th 561, 567 (1st Cir. 2021) (citing Webster's Third, supra, at 462). Applying these requirements, we agree with the district court that Jenkins' three asserted grounds are neither extraordinary nor compelling, whether considered in isolation or in combination with other factors.

Jenkins, 50 F.4th at 1197–98. The *Jenkins* decision reflected the DC Circuit's position that changes in sentencing law, whether judicial or legislative, that are not retroactively applicable, are not available to defendants seeking compassionate release, as those changes are neither extraordinary nor compelling, and would otherwise upset the rules of post-conviction, interfere with finality and reliability, and would subvert the will of Congress when the challenged penalties were established.

B. The First, Fourth, Ninth, and Tenth Circuits have held that disparity arguments reflected through the comparison of sentences which would be markedly different if currently imposed may serve as extraordinary and compelling reasons under 18 U.S.C. § 3582(c)(1)(A)

The circuit courts which have permitted defendants to assert changes in sentencing laws as an extraordinary and compelling reasons for the district court's consideration in a motion for compassionate release, have uniformly determined that there is no textual basis in the statute to limit a district court's discretion as to what it may consider, outside of the limitations regarding rehabilitation as the sole basis for relief. In *United States v. Ruvalcaba*, Judge Selya, writing for the unanimous panel, stated:

> "Nowhere has Congress expressly prohibited district courts from considering non-retroactive changes in sentencing law like those in section 401 of the FSA. Such a prohibition cannot be deduced from section 3582(c)(1)(A)'s requirement that a court consider the section 3553(a) factors when granting a sentence reduction. No part of this requirement suggests that a district court is precluded from considering issues relevant to those sentencing factors at the separate step of determining whether an extraordinary and compelling reason exists. Were this the case, there

> would have been no reason for Congress to caution that rehabilitation — a relevant consideration in the section 3553(a) inquiry — could not constitute an extraordinary and compelling reason."
>
> . . . The provision describing the effect of the FSA's relevant amendments limits the application of those amendments to "apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." See FSA § 401(c), 132 Stat. at 5221. Neither this provision nor any other provision in the FSA indicates 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 passage of the FSA. See *McGee*, 992 F.3d at 1047.

Ruvolcaba, 26 F.4th at 25.

Thus, in *United States v. McCoy, et al.*, a decision which consolidated the appeals of the United States brought after defendants were afforded relief under Section 3582(c)(1)(A) relief from their stacked 18 U.S.C. §924(c) sentences in the district courts, the Fourth Circuit panel provided:

> In sum, we find that the district courts permissibly treated 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. We emphasize, as did the district courts, that these judgments were the product of individualized assessments of each defendant's sentence. And we note that in granting compassionate release, the district courts relied not only on the defendants' § 924(c) sentences but on full consideration of the defendants' individual circumstances.

McCoy, 981 F.3d at 286.

In *McCoy*, the appeals court addressed the primary argument concerning lack of retroactivity of the FSA. In its decision affirming the grants of compassionate release, the *McCoy* Court provided:

> "The government's primary argument in response is that by taking into account the First Step Act's elimination of § 924(c) sentence-stacking, the district courts impermissibly gave that provision retroactive effect, contrary to Congress's direction. [ ] We disagree. The fact that Congress chose 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 under § 3582(c)(1)(A)(i). As multiple district courts have explained, there is a significant difference between automatic vacatur and resentencing of an entire class of sentences – with its "avalanche of applications and inevitable resentencings," [ ]. Indeed, 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 redution.
>
> The government points to § 404(b) of the First Step Act, which expressly permits retroactive sentence reductions for certain crack cocaine offenses at the discretion of district court judges, see First Step Act § 404(b), 132 Stat. at 5222, as evidence that Congress did not intend to allow for case-by-case consideration of § 403's elimination of sentence-stacking under § 3582(c)(1)(A)(i). But those are significantly different regimes, and the comparison is inapt. Sentence reductions under § 404(b) may ultimately be discretionary, but the starting point is that the entire class of defendants is eligible, and relief is common. Under § 3582(c)(1)(A)(i), by contrast, only those defendants who can meet the heightened standard of "extraordinary and compelling reasons" may obtain relief. Again, it was not unreasonable for Congress to decide that it did not want sentence reductions based on § 403 of the First Step Act to be as widely available as relief under § 404 – and thus to limit those reductions to truly extraordinary and compelling cases."

McCoy, 981 F.3d at 286–87 (some citations omitted). Accord, *United States v. McGee*, 992 F.3d 1035, 1047-1048 (10th Cir.2021), where the court held:

> We find the Fourth Circuit's analysis persuasive and conclude that it applies equally to the situation presented here. The plain text of § 401(c) of the First Step Act makes clear that Congress chose not to afford relief to all defendants who, prior to the First Step Act, were sentenced to mandatory life imprisonment under § 841(b)(1)(A). But nothing in § 401(c) or any other part of the First Step Act indicates that Congress intended to prohibit district courts, on an individualized, case-by-case basis, from granting sentence reductions under § 3582(c)(1)(A)(i) to some of those defendants. Indeed, as the Fourth Circuit noted in McCoy, Congress's purpose in enacting § 3582(c)(1)(A) was to provide a narrow avenue for relief "when there is not a specific statute that already affords relief but 'extraordinary and compelling reasons' nevertheless justify a [sentence] reduction." Id. at 287 (emphasis in original). Thus, the possibility of a district court finding the existence of "extraordinary and compelling reasons" based, in part, on a defendant's pre-First Step Act mandatory life sentence under § 841(b)(1)(A) does not, in our view, necessarily usurp Congressional power.

Id.

> Section 3582(c)(1)(A) motions do not challenge the legality of a sentence, nor do these

motions seek to vacate a sentence as invalid. There is no implication that a defendant would be held in custody under an illegal sentence if the district court exercised its discretion to deny the section 3582(c)(1)(A) motion.

The importance of a statutory amendment or judicial decision having retroactive effect rests in how that decision or amendment is presented by a defendant. If, as in habeas, a defendant seeks to apply the amendment or new judicial ruling to invalidate a sentence or a conviction, the statutory change's retroactive effect is paramount if that defendant's conviction has already become final. For a defendant seeking review under 18 U.S.C. §3582(c)(1)(A), no such invalidation challenge is mounted: the legislative amendment or judicial decision is used to illustrate the disparity in the sentence being served versus what could have been, had the amendment or decision been applicable to the defendant at the time of sentencing. By presenting a Section 3582(c)(1)(A) motion, a defendant does not seek a decision holding his sentence invalid: it is a request to the sentencing court to consider the extraordinary differences in the sentences, his individual circumstances, and consider the sentencing factors under 18 U.S.C. §3553(a), to make the determination whether taken as a whole, the sentence imposed should be altered to ameliorate what has been revealed as an "unusually long" sentence.

Petitioner submits that Congress understood the impact that the amendment to 18 U.S.C. §3582(c)(1)(A) would have once defendants were able to file their own motions, as opposed to relying upon the Bureau of Prisons to present a motion for resentencing. The legislation sought to rectify the lack of use of the compassionate release statute by the Bureau of Prisons as the "safety valve," despite being urged by Congress, the Sentencing Commission, and prison advocacy groups to use the power to request resentencing for

individuals who were elderly, terminally ill, or other situations that made continued imprisonment harmful or cruel, notwithstanding the legality of the sentence. See, *United States v. Brooker*, 976 F.3d 228, 231 (2d Cir.2020) (citing U.S. Dep't of Just. Office of the Inspector General, The Federal Bureau of Prisons' Compassionate Release Program 1 (2013).

The amendment permitting defendant-filed motions after their initial request was rejected by the warden of their institution would inevitably lead to motions filed which brought forth challenges to sentences that would fail the exceptional and compelling reasons criteria for myriad reasons. However, it is evident that Congress was aware that motions under 18 U.S.C. §3582(c)(1)(A) were not in pari materia with 28 U.S.C. §2255 or other habeas corpus provisions, given that all motions brought to the district court under section 3582(c)(1)(A) were either brought or filtered through the Bureau of Prisons officials. The importance of this point is based upon the Supreme Court's decision in *Ex parte Hull,* 312 U.S. 546 (1941), where the Supreme Court soundly rejected a prison's procedure which filtered and regulated a prisoner's legal challenges to be presented to the courts. The E*x parte Hull* Court provided:

> The regulation is invalid. The considerations that prompted its formulation are not without merit, but the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine.

Id. at 549.

Therefore, since the 1941 *Ex parte Hull* decision, Congress and the courts have been aware that any post-conviction pleading such as a writ of habeas corpus was not subject to filter or review by prison authorities. In comparison with the procedures provided for in

Section 3582(c)(1)(A) which provides a jurisdictional requisite of a critical intrusion of prison officials in the presentation of compassionate release motions by necessitating a warden's response prior to filing a motion under 18 U.S.C. §3582(c)(1)(A). This accepted "interloper" between the defendant and the court clearly differentiates section 3582(c)(1)(A) motions from habeas corpus proceedings, providing no basis for analogizing the two distinct and unrelated provisions.

2. This case is an Ideal Vehicle for Answering the Question Presented and Resolving the Conflict.

Petitioner states that his case is an ideal opportunity to correct and clarify the meaning and application of 18 U.S.C. §3582(c)(1)(A) and the discretion afforded district courts to determine whether there are extraordinary and compelling reasons to modify an otherwise lawful sentence. This case is perfectly poised to address the issue in light of its history, as most of the appeals courts have weighed in on their positions as to the consideration of non-retroactive sentencing law changes as an extraordinary and compelling reason for relief from an unusually long sentence. In addition, the Sixth Circuit decision in this case was an en banc decision, which reflected the intractable intra-circuit divide, and also firmly drew the line in the sand between the circuit courts.

The frequency of recurrence also lends this case as a prime vehicle to correct the faulty interpretations of the statute. There are a multitude of defendants who were sentenced within the district courts in circuits which provide an opportunity for a defendant to present facts and circumstances that show they are serving under an

unusually long sentence. However, there are those similarly sentenced individuals whose district courts are placed in circuit courts such as Petitioner in the Sixth Circuit, whose meaningful access to the compassionate release statute is markedly different than their fellow cellmates from the four circuits which permit a district court to exercise its discretion and consider all information presented. See, *Concepcion*, 142 S.Ct. 2398-2399. Therefore, Petitioner submits that this case is the perfect vehicle for resolving the circuit split and the split in statutory interpretation.

3. *The Sixth Circuit's Decision is Incorrect*

There is nothing in the First Step Act or § 3582(c)(1)(A) that precludes a district court from finding that a nonretroactive change in law is an "extraordinary and compelling reason" for a sentence reduction under the appropriate circumstances, and the *McCall* majority opinion holding otherwise is plainly incorrect. Congress has not included a rigid definition of the reasons that may be "extraordinary and compelling" under § 3582(c)(1)(A), which allows the district courts to resolve in the first instance whether a change in law, or any other relevant fact, constitutes an extraordinary and compelling reason for a sentence reduction in the context of a defendant's unique circumstances. By taking this grant of discretion and making consideration of non-retroactive sentencing changes off limits for district court judges, the decision in McCall is a re-writing of the statute by a judicial body, a display of legislating from the bench which is impermissible. For these reasons, the McCall decision requires correction.

Petitioner submits that the *McCall* decision is also incorrect in its reliance on post conviction procedural rules which the majority found would be circumvented if a defendant were permitted to raise non-retroactive sentencing law changes in a motion under Section 3682(c)(1)(A). Petitioner submits that whether post conviction relief is available is a red herring: post conviction relief and compassionate release serve entirely different purposes and are governed by entirely different procedural and substantive rules. When a court grants a habeas petition, it deems the sentence invalid. See *Daniels v. United States*, 532 U.S. 374, 379 (2001): a grant of compassionate release does not invalidate the relevant sentence; rather, it recognizes that a holistic consideration of the defendant's circumstances entitles them to early release—a remedy that Congress specifically codified in § 3582(c)(1). *Ruvalcaba*, 26 F.4th at 27; *McCoy*, 981 F.3d at 287; *United States v. Maumau*, 993 F.3d 821, 837 (10th Cir. 2021). Motions filed under Section 3582(c)(1)(A) are not subject to the retroactivity rules applicable in collateral proceedings. See, *McCall*, 56 F.4th at 1072-1073 (Moore, Dissent), Pet. App. 32a.

4. Sentencing Commission Proposed Amendment – Section 1B1.13

Many courts of appeals have referenced the fact that the Sentencing Commission was without a quorum at the time of the passage of the First Step Act of 2018, and many of the changes made by that piece of legislation, along with significant case law changes throughout the circuit courts remained unaddressed by the Commission . With a full complement of commissioners, the Commission has released Proposed Amendments to the Sentencing Guidelines which address the deficiencies in U.S.S.G.

§1B1.13 and its commentary. Specifically, the proposed amendment to §1B1.13 provides in relevant part, the following:

(3) FAMILY CIRCUMSTANCES OF THE DEFENDANT.—

(A) {The death or incapacitation of the caregiver of the defendant's minor child or minor childrenthe defendant's child who is 18 years of age or older and incapable of self-care because of a mental or physical disability or a medical condition.}**

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

(C) The incapacitation of the defendant's parent when the defendant would be the only available caregiver for the parent.

[(D) The defendant presents circumstances similar to those listed in paragraphs (3)(A) through (3)(C) involving any other immediate family member or an individual whose relationship with the defendant is similar in kind to that of an immediate family member.]

[(4) VICTIM OF ASSAULT.—The defendant was a victim of sexual assault or physical abuse resulting in serious bodily injury committed by a correctional officer or other employee or contractor of the Bureau of Prisons while in custody.]

[(5) CHANGES IN LAW.—The defendant is serving a sentence that is inequitable in light of changes in the law.]

[Option 1:

(6) OTHER CIRCUMSTANCES.—The defendant presents any other circumstance or a combination of circumstances similar in nature and consequence to any of the circumstances described in paragraphs (1) through [(3)][(4)][(5)].]

[Option 2:

(6) OTHER CIRCUMSTANCES.—As a result of changes in the defendant's circumstances [or intervening events that occurred after the defendant's sentence was imposed], it would be inequitable to continue the defendant's imprisonment or require the defendant to serve the full length of the sentence.]

[Option 3:

(6) OTHER CIRCUMSTANCES.—The defendant presents an extraordinary and compelling reason other than, or in combination with, the circumstances described in paragraphs (1) through [(3)][(4)][(5)].]

(c) {REHABILITATION OF THE DEFENDANT.—Pursuant to 28 U.S.C. § 994(t), rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason for purposes of this policy statement.}

Pet. App. 40a.

Petitioner submits that the proposed inclusion of changes in law, along with he options 1 – 3 included in the Proposed Section 1B1.13, has garnered significant responses from members of Congress, the judiciary, and criminal law practitioners for the United States and for defendants. See, United States Sentencing Commission, March 2023 Sample of Public Comment Received on Proposed Amendments, 88 FR 7180, at https://www.ussc.gov/policymaking/public-comment/public-comment-march-14-2023#comp (last visited March 22, 2023). Given the fact that the Commission has proposed amendments which are directly oppositional to the position of the Sixth, Third, Fifth, Seventh, and District of Columbia Circuits, it is unlikely that whichever version appears in the final submission to Congress, there will be consensus as to its application, and likely litigation concerning the applicability of whichever version is utilized. It is also not evident that any version will be approved by Congress, as many congressional opinions have been submitted in advocacy for and against the Proposed Amendment.

Given the fact that any version of the proposed Guideline amendment will not settle the circuit division, and indeed will ultimately result in an increase in litigation in this arena, Petitioner submits that case is a perfect vehicle to settle the circuit divide, and forestall the inevitable challenges to the application of changes in sentencing law

to prove disparity in sentencing which rises to the level of an exceptional and compelling reason for compassionate release.

CONCLUSION

The Court should grant this petition for a writ of certiorari

Respectfully submitted,

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APPENDIX A

United States v. David E. McCall, Jr.
Sixth Circuit Court of Appeals Case No. 21-3400

Opinion filed December 22, 2022

United States Sentencing Commission

Proposed Amendments to U.S.S.G. §1B1.13