No. __

IN THE

Supreme Court of the United States

LOUIS A. WILSON, ALSO KNOWN AS SPUDS,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 18 U.S.C. § 3582(c)(1)(A), a district court may reduce a prisoner's term of imprisonment if "extraordinary and compelling reasons warrant a reduction." The Circuits have been deeply divided over whether non-retroactive changes in the law can qualify as extraordinary and compelling reasons, such as if the prisoner's sentence would have been shorter under the law as changed than originally imposed. They also are split over whether a prisoner seeking a sentence reduction based on changes in the law must proceed exclusively through habeas, as well as over whether *Concepcion v. United States*, 597 U.S. 481 (2021), favorably impacts a prisoner's ability to pursue relief under § 3582(c)(1)(A).

Adding further to the confusion, the U.S. Sentencing Commission recently issued a policy statement (now in effect) approving of district courts considering changes in the law when determining if extraordinary and compelling reasons exist under § 3582(c)(1)(A), but it did not address habeas's exclusivity. And one Circuit has already held that its prior precedent rejecting changes in the law as grounds for sentence reduction under § 3582(c)(1)(A) survives the Commission's contrary statement. Finally, the Government previously has indicated that a Commission policy statement *against* consideration of changes in the law under § 3582(c)(1)(A) might obviate the need for certiorari; however, the Commission has now adopted the opposite position.

The Question Presented is: Under 18 U.S.C. § 3582(c)(1)(A), can non-retroactive changes in the law constitute "extraordinary and compelling reasons" authorizing a district court to reduce a prisoner's sentence?

LIST OF RELATED PROCEEDINGS

United States v. Wilson, No. 96-cr-00319, U.S. District Court for the District of Columbia. Judgment entered Sept. 25, 1997. Amended Judgment entered November 23, 2010.

United States v. Wilson, Nos. 97-3076, 97-3077, & 97-3129, U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered November 20, 1998.

United States v. Wilson, No. 05-3186, U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered March 2, 2007.

United States v. Wilson, No. 11-3014, U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered February 2, 2012.

United States v. Wilson, No. 19-3091, U.S. Court of Appeals for the District of Columbia Circuit. Appeal dismissed June 11, 2020.

United States v. Wilson, No. 21-3074, U.S. Court of Appeals for the District of Columbia Circuit. Judgment entered July 21, 2023.

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The opinion of the U.S. Court of Appeals for the District of Columbia is reported at 77 F.4th 837 (D.C. Cir. 2023) and reproduced in Petitioners' Appendix ("Pet. App.") at 1a-10a. The two relevant opinions of the U.S. District Court for the District of Columbia are unreported. The first appears at 2021 U.S. Dist. LEXIS 222428 (D.D.C. Aug. 6, 2021) and is reproduced at Pet. App. 11a-27a; the second appears at 2021 U.S. Dist. LEXIS 222430 (D.D.C. Sept. 28, 2021) and is reproduced at Pet. App. 28a-32a.

STATEMENT OF JURISDICTION

The D.C. Circuit entered its judgment on July 21, 2023. On October 6, 2023, the Chief Justice extended Petitioner's time for filing a Petition for Certiorari (*see* No. 23A299) to November 20, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THE CASE

Relevant statutory provisions are set forth in the Petitioner's Appendix.

STATEMENT OF THE CASE

A. Sometimes referred to as "compassionate release," 18 U.S.C. § 3582(c)(1)(A) establishes a regime for the reduction of a federal prisoner's previously imposed sentence. The statute provides that, "upon motion," a district court:

> may reduce the term of the imprisonment . . . , after considering the factors set forth in [18 U.S.C.] section 3553(a) to the extent they are applicable, if it finds that . . . *extraordinary and compelling reasons warrant*

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

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

In effect, § 3582(c)(1)(A) institutes "a three-step inquiry" to determine if a reduction should occur: (1) a district court must find that "'extraordinary and compelling' reasons warrant the reduction"; (2) "[c]ourts must confirm that any sentence reduction 'is consistent with applicable policy statements issued by the Sentencing Commission'"; and (3) the district court must be "persuade[d] . . . to grant the motion after the court considers the § 3553(a) factors." *United States v. McCall*, 56 F.4th 1048, 1054 (6th Cir. 2022) (*en banc*) (quoting § 3582(c)(1)(A); other internal quotation marks and citation omitted), *cert. denied*, 143 S. Ct. 2506 (2023). The Courts of Appeals have often characterized the first inquiry – *i.e.*, whether there are extraordinary and compelling reasons for the reduction – as a "threshold" issue. *Id.* at 1062; *accord United States v. Rodriguez-Mendez*, 65 F.4th 1000, 1004 (8th Cir. 2023); *United States v. Mangarella*, 57 F.4th 197, 200 (4th Cir. 2023); *United States v. King*, 40 F.4th 594, 596 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 1784 (2023).[1]

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[1] The § 3553(a) factors comprise seven considerations courts are to utilize when imposing a sentence: (1) "the nature and circumstances of the offense and the history and characteristics of the defendant"; (2) the need for the sentence to reflect the offense's "seriousness," to promote "deterrence," to protect the public from "further crimes of the defendant," and to rehabilitate the defendant "in the most effective manner"; (3) "the kinds of sentences available"; (4) relevant sentencing ranges established by the Sentencing Commission; (5) pertinent policy statements of the Sentencing Commission; (6) "the need to

The motion referenced in § 3582(c)(1)(A) may be filed by the Director of the Bureau of Prisons ("BOP") on a prisoner's behalf; or the prisoner may file a motion directly with the district court, "after the defendant [*i.e.*, prisoner] has fully exhausted all administrative rights to appeal a failure of the [BOP] to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of a request by the warden of the defendant's facility." 18 U.S.C. § 3582(c)(1)(A). The allowance for direct prisoner motions to district courts is a recent addition to § 3582(c)(1)(A), coming as part of the First Step Act of 2018, Pub. L. No. 115-391, § 603(b)(1), 132 Stat. 5194, 4239.

B. As noted, one of § 3582(c)(1)(A)'s prerequisites is that a district court reduce a sentence only if "consistent" with the Sentencing Commission's policy statements. 18 U.S.C. § 3582(c)(1)(A); *see generally* 28 U.S.C. § 994(t) ("the Commission . . . 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"). But the Commission "lacked a quorum of voting members" for most of the time since the First Step Act permitted prisoners to file motions for sentence reductions. *Guerrant v. United States*, 142 S. Ct. 640, 641 (2022) (stmt. of Sotomayor, J., respecting denial of cert.). As a result, the Courts of Appeals generally viewed there to be no Commission policy statement applicable in connection with "defendant-filed motions for compassionate release."

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avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar crimes"; and (7) the need for restitution for victims of the offense. 18 U.S.C. § 3553(a)(1)-(7).

United States v. Long, 997 F.3d 342, 355 (D.C. Cir. 2021) (listing seven other Circuits holding similarly); *but see United States v. Bryant*, 996 F.3d 1243, 1247 (11th Cir. 2021).

In August 2022, the Sentencing Commission regained a quorum. *See* U.S. Sentencing Comm'n, *News Release: Acting Chair Judge Charles Breyer, Incoming Chair Judge Carlton W. Reeves Applaud Senate Confirmation of New Commissioners* (Aug. 5, 2022), https://www.ussc.gov/about/news/press-releases/august-5-2022. In May 2023, the Commission promulgated a new policy statement taking into account the First Step Act's changes to § 3582(c)(1)(A). *See Amendments to the Sentencing Guidelines, Policy Statements, Official Commentary, and Statutory Index*, 88 Fed. Reg. 28,254 (May 3, 2023).

For present purposes, a notable aspect of the Commission's new policy statement concerns a reduction in sentence due to changes in the law. On this score, the Commission states:

> If a defendant received an unusually long sentence and has served at least 10 years of the term of imprisonment, *a change in the law* (other than an amendment to the Guidelines Manual that has not been made retroactive) *may be considered in determining whether the defendant presents an extraordinary and compelling reason*, but only where such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed, and after full consideration of the defendant's individualized circumstances.

18 U.S.C. app. § 1B1.13(b)(6) (Nov. 1, 2023) (emphasis added); *see id.* § 1B1.13(c) (stating that, aside from circumstances outlined above, "a change in law" may be considered only "for purposes of determining the extent of [a] . . . reduction" after "a defendant otherwise establishes that extraordinary and compelling reasons warrant a sentence reduction under this policy statement").

When issuing its new policy statement, the Commission prescribed an effective date of November 1, 2023, unless Congress took action to nullify the promulgation in the meantime. *See* 88 Fed. Reg. at 28,254. No Congressional action having occurred on the subject, the policy statement, in fact, became effective on November 1, 2023.

C. Petitioner Louis A. Wilson has been serving a life sentence plus an additional five-year sentence, since his conviction in 1997 for killing a federal witness. *See* Pet. App. 12a-13a. In September 2020, Wilson submitted a request for sentence reduction under § 3582(c)(1)(A) with the warden of his facility, F.C.I. Petersburg. *See* Def.'s Emer. Mot. to Reduce Sentence under the First Step Act for Compassionate Release at Ex. C (Apr. 7, 2021) (D.D.C. Doc. 386-2) ["Def.'s Mot."]. The warden denied his request shortly thereafter. *Id.* at Ex. E. Wilson then filed an emergency motion for sentence reduction under § 3582(c)(1)(A) in April 2021 in the U.S. District Court for the District of Columbia. *See* Def.'s Mot. at 1; *see also* Pet. App. 11a.

In his motion, Wilson, proceeding at that time *pro se*, contended that he should be released presently due to COVID-19 being rampant in prisons; "medical conditions" he is suffering, such as "hypertension[, the] early stages of kidney disease,"

and obesity, that make him "especially vulnerable to COVID-19"; his "age" (he is in his mid-60s); his exemplary citizenship as a prisoner, mentorship of other prisoners, and strong prison work record; and his "length of time served." Pet. App. 12a, 17a n.4.

With respect to the last reason, Wilson asserted that trial courts currently are sentencing defendants – for crimes similar to the one for which he was convicted – to prison terms in total that are less than the time he had already served, *see* Def.'s Mot. at 21-24, and that defendants regularly are being released in similar circumstances after serving less time than he has served. *See id.* Also as part of his length-of-time-served argument, Wilson contended that the law had changed since the imposition of his original sentence, so that "if he were to be tried on the same charges today, as a result of new law[,] Wilson could be sentenced to less time than he has already served in prison." Def.'s Resp. to Gov't's Reply to Def.'s Mot. to Reduce Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) at 11 (July 28, 2021) (D.D.C. Doc. 393). Specifically, as the D.C. Circuit later summarized it, Wilson asserted, with respect to the change in law, that

> if *United States v. Booker*, 543 U.S. 220 (2005), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), were issued prior to his sentence, he would have received twenty-five years instead of life imprisonment because the district court considered additional facts during sentencing not proven to a jury.

Pet. App. 4a-5a.

In August 2021, the district court denied Wilson's motion because, in its view, "the severity of his

crime, the need for the sentence imposed, and the risk to the public outweigh[ed] th[e] factors that weigh in Mr. Wilson's favor." *Id.* at 25a-26a. As to Wilson's argument that his length of time served supported a reduction in sentence, the district court held that this factor "does not in of itself constitute an extraordinary and compelling circumstance" under § 3582(c)(1)(A). *Id.* at 18a. It did, however, purport to consider length of time served "in connection with consideration of the Section 3553(a) factors," *id.*, but there appeared to view it as relevant principally when a prisoner has already served "almost all" of his sentence. *Id.* at 22a-23a (internal quotation marks and citation omitted).[2]

D. Wilson timely appealed the district court's denial of his motion for sentence reduction. While his appeal was pending, the D.C. Circuit decided

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[2] In both the district court and later on appeal, the Government purported to assert lack of exhaustion of administrative remedies, because Wilson raised his change-in-law argument in his court motion for sentence reduction but not in his request to the warden for relief. The district court noted the Government's assertion without deciding it, and the Court of Appeals did the same, with both then addressing the merits. *See* Pet. App. 9a, 17a n.4. Indeed, the Government asked the district court to decide the merits of any "'unexhausted claims'" in "'the interest of efficiency.'" *Id.* at 17a (quoting Gov't Opp'n to Mot. For Sentence Reduction at 12 (D.D.C. Doc. 388)). There is a split in the Circuits over whether issue exhaustion applies to prisoner-filed court motions under § 3582(c)(1)(A). *Compare United States v. Ferguson*, 55 F.4th 262, 268-69 (4th Cir. 2022) (holding that prisoner need not raise all issues in request to warden), *pet. for cert. filed*, No. 22-1216 (docketed June 16, 2023) *with United States v. Williams*, 987 F.3d 700, 703-04 (7th Cir. 2021) (mandating "issue exhaustion" with warden before prisoner "move[s] the district court for his release"); *United States v. MacLloyd*, No. 21-1834, 2022 U.S. App. LEXIS 21334, *6 (6th Cir. Aug. 2, 2022) (same).

United States v. Jenkins, 50 F.4th 1185, 1192 (D.C. Cir. 2022). In *Jenkins*, a divided panel found that neither a subsequently passed statute nor a later-in-time judicial decision may constitute an extraordinary and compelling reason for sentence reduction under § 3582(c)(1)(A). *See* 50 F.4th at 1192.

The *Jenkins* majority first predicated its outcome on a definitional understanding of the phrase "extraordinary and compelling." As *Jenkins* put it, "there is nothing remotely extraordinary about statutes applying only prospectively." *Id.* Next, the *Jenkins* majority said "[s]eparation-of-powers considerations reinforce this analysis." *Id.* at 1198. "We would usurp . . . quintessentially legislative judgments if we used compassionate release as a vehicle for applying . . . amendment[s] retroactively," when Congress prescribed in the new law "nonretroactiv[ity]." *Id.* at 1199. And *Jenkins* deemed its holding consistent with *Concepcion v. United States*, 597 U.S. 481 (2022), which the D.C. Circuit conceded recognizes the discretion of district courts to "consider 'intervening changes in the law'" in determining whether to "reduce sentences for certain offenses involving crack cocaine" under "section 404 of the First Step Act." *Jenkins*, 50 F.4th at 1200 (quoting *Concepcion*, 597 U.S. at 500). According to *Jenkins*, *Concepcion* accepts that a district court's discretion can be "limited by statute or the Constitution," and Congress supposedly did just that in § 3582(c)(1)(A) "in authorizing a reduced term of imprisonment only for extraordinary and compelling reasons." *Id.*

Alternatively, the *Jenkins* majority held that "[t]he habeas-channeling rule of *Preiser* [*v. Rodriguez*, 411 U.S. 475 (1973)] independently forecloses using compassionate release to correct sentencing

errors," which the D.C. Circuit said "include[s] errors made clear through the retroactive application of intervening precedent." *Jenkins*, 50 F.4th at 1202. In such circumstances, "[t]he writ of habeas corpus – including [28 U.S.C.] section 2255, the habeas substitute for federal prisoners – traditionally 'has been accepted as the specific instrument to obtain release from [unlawful] confinement.'" *Id.* (quoting *Preiser*, 411 U.S. at 486).

E. With *Jenkins* now as governing precedent, the D.C. Circuit, in July 2023, affirmed the district court's denial of Wilson's motion for a sentence reduction. The Court of Appeals concluded in short-order that "per *United States v. Jenkins*, 50 F.4th 1185, 1192, 1198 (D.C. Cir. 2022), Wilson's change in law arguments cannot constitute extraordinary and compelling reasons, whether alone or in combination with other factors." Pet. App. 3a. The D.C. Circuit added that it did "not decide whether Wilson's contentions would constitute extraordinary and compelling reasons under the not-yet-effective [Sentencing Commission's new] guidelines." *Id.* at 10a.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DEEPLY SPLIT ON THE PROPER CONSTRUCTION AND APPLICATION OF § 3582(c)(1)(A)

The Court should grant the Petition because the Courts of Appeals currently are severely split on the construction and application of § 3582(c)(1)(A). The divide among the Courts of Appeals is entrenched beyond the basic question of whether non-retroactive changes in the law may be considered in the extraordinary-and-compelling-reasons analysis under

§ 3582(c)(1)(A); they are in conflict too as to whether change-in-law arguments must be presented under the federal habeas statute, 28 U.S.C. § 2255, to the exclusion of § 3582(c)(1)(A).

A. Since enactment of the First Step Act, a deep divide has developed among the Courts of Appeals on the issue of whether non-retroactive changes in the law properly may be considered when determining if extraordinary and compelling reasons exist under § 3582(c)(1)(A). While some Courts of Appeals recognize non-retroactive changes in the law as a valid factor in deciding whether, in a prisoner's individualized circumstances, extraordinary and compelling reasons exist for purposes of granting a sentence reduction, other Courts of Appeals (including the D.C. Circuit below) have categorically rejected consideration of non-retroactive changes in law.

The First, Second, Fourth, Ninth, and Tenth Circuits have held that non-retroactive changes in the law may be considered under the extraordinary-and-compelling-reasons calculus. *See United States v. Ruvalcaba*, 26 F.4th 14, 28 (1st Cir. 2022) (a district court may "determine on a case-by-case basis whether . . . changes in law predicated on a defendant's particular circumstances comprise an extraordinary and compelling reason and, thus, satisfy the standard for compassionate release under section 3582(c)(1)(A)(i)"); *United States v. McCoy*, 981 F.3d 271, 286 (4th Cir. 2020) ("[W]e 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."); *United States v. Chen*, 48 F.4th 1092,

1098 (9th Cir. 2022) ("[D]istrict courts may consider non-retroactive changes in sentencing law, in combination with other factors particular to the individual defendant, when analyzing extraordinary and compelling reasons for purposes of § 3582(c)(1)(A)."); *United States v. McGee*, 992 F.3d 1035, 1048 (10th Cir. 2021) ("[T]he fact a defendant is serving a pre-First Step Act mandatory life sentence imposed under § 841(b)(1)(A) cannot, standing alone, serve as a basis for the sentence reduction under § 3582(c)(1)(A)(i)," but "the combination of such a sentence and a defendant's unique circumstances [may] constitute 'extraordinary and compelling reasons.'").[3]

These Courts of Appeals have recognized that there is "enough play in the joints" of § 3582(c)(1)(A) to allow for non-retroactive changes in law to be considered when determining whether extraordinary and compelling reasons exist. *Ruvalcaba*, 26 F.4th at 24. They point to the fact that there is only one statutory bar on what may constitute extraordinary and compelling reasons: in 28 U.S.C. § 994(t), Congress explicitly stated that "[r]ehabilitation of the

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[3] Although the Second Circuit has not, in so many words, held that changes in the law can constitute extraordinary and compelling reasons, it has more broadly ruled that "the First Step Act freed district courts to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release." *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020). District courts within the Second Circuit have read *Brooker* as a green light to consider changes in the law when determining if extraordinary and compelling reasons exist. *E.g.*, *United States v. Monteleone*, No. 92-CR-351, 2023 WL 2857559, at *2-4 (E.D.N.Y. Apr. 10, 2023); *United States v. Watts*, No. 92-CR-767, 2023 WL 35029, at *7-9 (E.D.N.Y. Jan. 4, 2023); *United States v. Russo*, 643 F. Supp. 3d 325, 333-34 (E.D.N.Y. 2022).

defendant alone shall not be considered an extraordinary and compelling reason." *Id.* at 25; *accord Chen*, 48 F.4th at 1098. Given that such an explicit exclusion exists, these Circuits have chosen not to infer that Congress also wished to exclude other considerations from the extraordinary-and-compelling-reasons analysis – namely, non-retroactive changes in the law – in the absence of such a similarly explicit statement. *See Ruvalcaba*, 26 F.4th at 26; *Chen*, 48 F.4th at 1098; *McGee*, 992 F.3d at 1047.

On the other side of the split, the Third, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits have held that non-retroactive changes in the law may not constitute extraordinary and compelling reasons. *See United States v. Andrews,* 12 F.4th 255, 261 (3d Cir. 2021) ("[W]e will not construe Congress's nonretroactivity directive as simultaneously creating an extraordinary and compelling reason for early release."), *cert. denied*, 142 S. Ct. 1446 (2022); *United States v. McMaryion,* No. 21-50450, 2023 WL 4118015, at *2 (5th Cir. June 22, 2023) ("[A] prisoner may not leverage non-retroactive changes in criminal law to support a compassionate release motion, because such changes are neither extraordinary nor compelling."); *United States v. McCall*, 56 F.4th 1048, 1065-66 (6th Cir. 2022) (*en banc*), *cert. denied*, 143 S. Ct. 2506 (2023) ("Nonretroactive legal developments, considered alone or together with other factors, cannot amount to an 'extraordinary and compelling reason' for a sentence reduction."); *United States v. Thacker*, 4 F.4th 569, 571 (7th Cir. 2021) ("Given Congress's express decision to make the First Step Act's change to § 924(c) apply only prospectively, we hold that the amendment, whether considered alone or in connection with other facts

and circumstances, cannot constitute an 'extraordinary and compelling' reason to authorize a sentencing reduction."), *cert. denied*, 142 S. Ct. 1363 (2022); *United States v. Crandall*, 25 F.4th 582, 586 (8th Cir.) ("[A] non-retroactive change in 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 under § 3582(c)(1)(A)."), *cert. denied*, 142 S. Ct. 2781 (2022); *Jenkins*, 50 F.4th at 1207 ("[The district court] correctly determined . . . arguments about the intervening changes in sentencing law were legally irrelevant to the compassionate-release determination.").

These decisions are based largely on the belief that the non-retroactivity of a change in law, by definition, prevents the change from qualifying as an extraordinary and compelling reason. *See, e.g.*, *Andrews*, 12 F.4th at 261; *Thacker*, 4 F.4th at 573-74; *Crandall*, 25 F.4th at 586; *Jenkins*, 50 F.4th at 1198-99. As the Sixth Circuit explained, "What is ordinary – the nonretroactivity of judicial precedent announcing a new rule of criminal procedure . . . – is not extraordinary. And what is routine – a criminal defendant . . . serving the duration of a lawfully imposed sentence – is not compelling." *McCall*, 56 F.4th at 1056. Circuits on this side of the split suggest that consideration of such non-retroactive changes in the law would "upend" prospective limitations imposed by Congress. *Thacker*, 4 F.4th at 574.[4]

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[4] The only Circuit not mentioned in the above description of the Circuit division – the Eleventh Circuit – has limited the circumstances that can rise to the level of extraordinary and compelling reasons for a sentence reduction to the grounds set

B. The Circuits are also badly fractured over whether the federal habeas remedy under 28 U.S.C. § 2255 additionally and independently forecloses prisoners from seeking a sentence reduction under § 3582(c)(1)(A) based on non-retroactive changes in the law. As alluded to earlier, *see supra* p. 8, the notion that habeas may override other statutory options for a prisoner to reduce his sentence – sometimes referenced as § 2255's "habeas-channeling" rule – derives from *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

On one side of the Circuit divide, the First, Fourth, and Ninth Circuits have rejected the proposition that a prisoner must rely on habeas to the exclusion of § 3582(c)(1)(A) in order to seek a sentence reduction based on changes in the law. *See United States v. Trenkler*, 47 F.4th 42, 49 (1st Cir. 2022) ("Accordingly, the government's contention that Trenkler's motion for compassionate release fails at the threshold question of whether it is a habeas petition in disguise is not persuasive and, in any event, it is now foreclosed by *Ruvalcaba*."); *United States v. Ferguson*, 55 F.4th 262, 271 (4th Cir. 2023) (indicating habeas would not be exclusive if "defendants . . . argued that a change in the sentencing law that occurred after their sentencings (but did not apply retroactively) merited a reduction in their sentences to conform to that change"), *pet. for cert. filed*, No. 22-1216 (docketed June 16, 2023); *Chen*, 48

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forth in the Sentencing Commission's pre-First Step Act policy statement, which did *not* include changes in the law. *See United States v. Bryant*, 996 F.3d 1243, 1247-48 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 583 (2021). It therefore has so far aligned with the Third, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits, albeit based on different reasoning.

F.4th at 1101 (Ninth Circuit rejecting the "Government['s] argu[ment] that 28 U.S.C. § 2255 provides a mechanism to obtain post-conviction relief based on changes in the law and that a defendant should not be able to bypass it through compassionate release."); *United States v. Roper*, 72 F.4th 1097, 1102 (9th Cir. 2023) (holding that "considering decisional law in the extraordinary and compelling reasons inquiry does not circumvent habeas") (heading formatting removed).

Chen concisely explains these Circuits' reasoning for rejecting application of the habeas-channeling rule in the § 3582(c)(1)(A) context:

> Section 2255 grants a prisoner in custody the right at any time to bring a motion to vacate, set aside or correct the sentence upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States or that the sentence was in excess of the maximum authorized by law. The Government argues that defendants should not be allowed to move for a sentence reduction under Section 3582(c)(1)(A) because Section 2255 already provides a mechanism to challenge a sentence based on nonretroactive changes in sentencing law. This argument fails to persuade because Congress has provided a mechanism in § 3582(c)(1) that allows defendants to seek modifications even if their sentences were not imposed in violation of the Constitution or federal law. By not restricting the district courts' ability to consider non-retroactive changes in sentencing law as an extraordinary and compelling reason under

> § 3582(c)(1)(A), Congress itself has left that possibility open.

Chen, 48 F.4th at 1101 (cleaned up).

In contrast, each of Circuits to have held that changes in the law cannot constitute extraordinary and compelling reasons under § 3582(c)(1)(A) – *i.e.*, the Third, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits – have found the habeas-channeling rule "independently forecloses using compassionate release" to reduce a sentence based on a change in the law. *Jenkins*, 50 F.4th at 1202; *accord United States v. Rodriguez*, No. 23-1646, 2023 U.S. App. LEXIS 15290, at *3-4 (3d Cir. June 20, 2023); *McCall*, 56 F.4th at 1057 (6th Cir.); *United States v. Brock*, 39 F.4th 462, 466 (7th Cir. 2022); *Thacker*, 4 F.4th at 574 (7th Cir.); *Crandall*, 25 F.4th at 586 (8th Cir.); *see also United States v. Escajeda*, 58 F.4th 184, 187-88 (5th Cir. 2023) (holding that "a prisoner cannot use § 3582(c) to challenge the legality or the duration of his sentence"; if a prisoner's "claims would have been cognizable under § 2255, they are not cognizable under § 3582(c)").[5]

The *Jenkins* reasoning discussed earlier (*see supra* pp. 8-9) is illustrative of these Circuits' decisions. Or as the Sixth Circuit explained when it rejected a prisoner's argument that a change in

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[5] In a brief unpublished decision, the Tenth Circuit said habeas is exclusive to § 3582(c)(1)(A) if the prisoner maintains "post-sentencing developments show that his sentence was erroneous"; but it also found habeas would not be the appropriate remedy if the prisoner asserts he "would have been sentenced differently" due to Congress having "later made the relevant sentencing provisions more lenient." *United States v. Robinson*, No. 21-7065, 2023 U.S. App. LEXIS 22921, at *6 (10th Cir. Aug. 30, 2023).

decisional law should be considered in determining whether extraordinary and compelling reasons exist under § 3582(c)(1)(A), "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 . . . .'" *McCall*, 56 F.4th at 1057 (quoting *Thacker*, 4 F.4th at 574). The Sixth Circuit added: "arguing that an intervening change to sentencing law provides an extraordinary and compelling reason for early release necessarily implicates the validity of the relevant sentence," and rather than utilize § 3582(c)(1)(A) to make such an argument, "habeas is the appropriate place to bring challenges to the lawfulness of a sentence." *Id.* at 1058.

C. As it currently stands, then, three Circuits (the First, Fourth, and Ninth) have held that non-retroactive changes in the law may qualify as extraordinary and compelling reasons for sentence reduction under § 3582(c)(1)(A), and, further, have rejected habeas as the exclusive remedy in such situations. Six Circuits (the Third, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits) have determined that changes in the law cannot constitute extraordinary and compelling reasons under § 3582(c)(1)(A) *and* that the habeas-channeling rule precludes prisoners from resorting to § 3582(c)(1)(A) to seek sentence reductions based on changes in the law. In other words, the Circuits are badly fractured on the proper construction and application of § 3582(c)(1)(A) when a prisoner asserts that non-retroactive changes in the law warrant a sentence reduction – exactly the

sort of division that justifies this Court's intervention.

II. THE CIRCUIT SPLIT IS POISED TO ENDURE NOTWITHSTANDING THE SENTENCING COMMISSION'S NEW POLICY STATEMENT

To be sure, the Sentencing Commission recently issued a new policy statement, in effect as of November 1, 2023, providing that courts may take into account non-retroactive changes in the law in certain situations in determining if extraordinary and compelling reasons warrant a sentence reduction under § 3582(c)(1)(A). *See supra* p. 4-5. But the new policy statement is unlikely to resolve the relevant Circuit split. And even if it does, it will take years to achieve uniformity, with prisoners in the meantime facing disparate outcomes depending on the Circuit in which they litigate.

A. Despite the Sentencing Commission now having stated that courts may consider non-retroactive changes in the law under § 3582(c)(1)(A), a divide seemingly will, at a minimum, remain among the Circuits on whether habeas trumps § 3582(c)(1)(A) in situations where changes in the law are proffered as a basis for sentence reduction. That conclusion follows necessarily from the fact that the Commission addressed solely the Circuit conflict over what constitutes extraordinary and compelling reasons.

To recap, in its recent policy statement, the Sentencing Commission declared that if the prisoner "received an unusually long sentence and has served at least 10 years" of it, "a change in the law . . . may be considered in determining whether the defendant

presents an extraordinary and compelling reason . . . where such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed" and "after full consideration of the defendant's individualized circumstances." 18 U.S.C. app. § 1B1.13(b)(6). In adopting that viewpoint, the Commission said it was "respond[ing] to [the] circuit split concerning when, if ever, non-retroactive changes in law may be considered as extraordinary and compelling reasons within the meaning of section 3582(c)(1)(A)." 88 Fed. Reg. 28,254, 28,258 (May 3, 2023). The Commission expressly "agree[d] with the circuits that authorize a district court to consider non-retroactive changes in the law as extraordinary and compelling circumstances warranting a sentence reduction." *Id.* But it "adopt[ed] a tailored approach that narrowly limits that principle in multiple ways" – namely, by requiring that the prisoner have received an unusually long sentence of which he has already served ten years and that a significant disparity exists between the original sentence "and the sentence likely to be imposed at the time the motion is filed." *Id.*[6]

The Commission, however, nowhere addressed the separate ground concerning the habeas-channeling rule on which the Circuits are in conflict. That

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[6] Wilson satisfies these conditions. He received a life sentence plus five years for a crime that he maintains today would, under current law, have triggered only a maximum of twenty-five years. *See supra* p. 6. Given that he was in his late thirties when convicted (*see* Def.'s Mot. at 2, Ex. A) and considering current life expectancies, his sentence could amount to fifty years or much longer (should he live into his nineties, for instance). He also has served more than ten years of his sentence at this point (in reality, twenty-six years as of 2023).

is, whereas the Commission may have sought to resolve the split concerning statutory construction of the term "extraordinary and compelling reasons" in § 3582(c)(1)(A), it did not purport (assuming it even had authority to do so) to wade into the separate controversy over whether a prisoner must use the habeas remedy to the exclusion of § 3582(c)(1)(A) if the prisoner raises changes in the law among the extraordinary and compelling reasons for sentence reduction. Again, the Circuits requiring the use of habeas have characterized it as an "independent[]" ground for denying § 3582(c)(1)(A) motions predicated on changes in the law. *United States v. Jenkins*, 50 F.4th 1185, 1202 (D.C. Cir. 2022).

The upshot is that at least three Circuits – the First, Fourth, and Ninth – can be expected to continue authorizing sentence reductions based on changes in the law, if the prisoner meets the new policy statement's conditions (*i.e.*, unusually long sentence, ten years served, and gross disparity between original and current sentences); and they had already rejected application of the habeas-channeling rule in these circumstances. On the other hand, precedent in six other Circuits – the Third, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits – sanctions denying § 3582(c)(1)(A) motions in the same situations under the habeas-channeling rule, even assuming they chose to follow the Commission's new policy statement in construing "extraordinary and compelling reasons." And three other Circuits – the Second, Tenth, Eleventh – might reach varying conclusions one way or the other, since the applicability of the habeas-channeling rule remains open or opaque (for example, in the Tenth Circuit, *see supra* p. 16 n.5) in those jurisdictions.

B. The Circuits are also primed to continue to be divided on the basic question of whether changes in the law can be considered extraordinary and compelling reasons under § 3582(c)(1)(A), notwithstanding the Commission's new policy statement. Importantly, the Eighth Circuit already has held that the new policy statement does not interrupt its *Crandall* decision, which is its leading case on rejecting consideration of changes in the law when determining § 3582(c)(1)(A) motions.

The *Crandall*-reinforcing ruling from the Eighth Circuit came in April 2023 in *United States v. Rodriguez-Mendez*, 65 F.4th 1000 (8th Cir. 2023). In *Rodriguez-Mendez*, after setting out verbatim the relevant portions of the Commission's new policy statement concerning consideration of changes in the law, the Eighth Circuit said: "It thus appears that the Commission proposes to adopt (or to express more clearly) that nonretroactive changes in sentencing law may not establish *eligibility* for a § 3582(c)(1)(A) sentence reduction, as we held in *Crandall*, but may be considered in exercising a court's discretion whether to grant compassionate release relief to an *eligible* defendant. . . ." 65 F.4th at 1004 (second and third emphases added).

Essentially, the Eighth Circuit read § 3582(c)(1)(A) as leaving it to the courts in the first instance to determine a prisoner's eligibility for compassionate release based on whether extraordinary and compelling reasons exist, and changes in the law are off limits in that eligibility inquiry due to *Crandall*. Only if the prisoner qualifies on *other* grounds would a district court then be permitted to consider changes in the law in the next steps of its inquiry. That holding arguably jibes with the Circuits (on

both sides of the relevant conflict) characterizing as a "threshold" condition whether there are extraordinary and compelling reasons for a sentence reduction (*see supra* p. 2); indeed, *Rodriguez-Mendez* expressly described the extraordinary-and-compelling-reasons inquiry as a "threshold" matter (65 F.4th at 1004), before a district court gets to the second and third parts of the § 3582(c)(1)(A) analysis involving, respectively, confirmation that "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission" and in accord with "the factors set forth in § 3553(a)." 18 U.S.C. § 3582(c)(1)(A); *see supra* p. 2.

Hence, not only do the Circuits appear destined to remain divided over whether habeas overtakes § 3582(c)(1)(A) when a prisoner asserts changes in the law as a basis for sentence reduction, *Rodriguez-Mendez* indicates their split on what constitutes "extraordinary and compelling reasons" outlasts the Commission's new policy statement too. Certainly, the First, Second, Fourth, Ninth, and Tenth Circuits would have no reason to revisit their earlier holdings that changes in the law deserve consideration when determining extraordinary and compelling reasons (at least under the conditions identified by the Commission). But already the Eighth Circuit has revealed that its opposite view as to what may constitute extraordinary and compelling reasons survives.

C. This is not to say that a Circuit split *must* persist in light of the Commission's new policy statement. One can posit very good reasons why the relevant Circuits should revisit their prior holdings of habeas's exclusivity in the face of the new policy statement. For one thing, Congress instructed that the Commission "should" delineate circumstances

qualifying as extraordinary and compelling reasons under § 3582(c)(1)(A); Congress's intent is subverted where the Commission lists valid reasons that a court then holds cannot be proffered under § 3582(c)(1)(A) and instead channels to litigation under a different statutory scheme. 28 U.S.C. § 994(t). Yet, a variant of this logic should have led these Circuits to have rejected the use of habeas in the first place, since Congress's intent equally can be said to have been subverted by sending a prisoner to habeas despite an express, specific vehicle for sentence reduction provided in § 3582(c)(1)(A). Though all of the Circuits *should* now reject the exclusivity of habeas, it is not likely, or even promising, that all of the pro-habeas Circuits will, especially when it requires rejection of prior Circuit precedent without directly contrary authority from this Court.

Moreover, the *Rodriguez-Mendez* reasoning may not (and should not) hold sway in every Circuit to have ruled that changes in the law cannot constitute extraordinary and compelling reasons. With the Commission, which is charged by Congress with delineating extraordinary and compelling reasons, *see id.*, having determined that changes in the law qualify in certain circumstances, the case is strong that these Circuits should rescind their contrary view. Still, the precise language in § 3582(c)(1)(A) is that a court "may" reduce a sentence if it finds extraordinary and compelling reasons warrant the reduction "*and* that such *a reduction* is consistent with applicable policy statements issued by the Sentencing Commission." (Emphasis added.) Where a Circuit determines as a threshold matter that a prisoner is foreclosed from relying on changes in the law as extraordinary and compelling reasons and denies a

sentence reduction on that basis, there would be – so the argument would go – no necessity even to consult the policy statement, as no reduction is in play to "confirm" against the policy statement. *United States v. McCall*, 56 F.4th 1048, 1054 (6th Cir.) (*en banc*), *cert. denied*, 143 S. Ct. 2506 (2022).

In any event, even if the Commission's new policy statement causes a sea change in the law both on habeas's exclusivity and on whether changes in the law can constitute extraordinary and compelling reasons, it, doubtless, would take many years for these case-law modifications to transpire, including potentially via *en banc* proceedings. In the meantime, prisoners will be subject to disparate outcomes under § 3582(c)(1)(A) depending on their location. The question of § 3582(c)(1)(A)'s proper interpretation and application has already waited several years for this Court's intervention. With the Commission now having set forth a new, effective policy statement, the Court should not delay its review for a new round of Circuit adjudication fated to continue the jurisprudential disarray.

III. THE GOVERNMENT'S PRIOR RESPONSES TO SIMILAR PETITIONS INDICATE THAT THE TIME IS RIPE FOR CERTIORARI

Variants of the Question Presented have reached this Court previously for consideration, and the Government's response to those petitions supports certiorari in this case.

Previously, the Government has acknowledged the Circuit split on whether changes in the law can constitute extraordinary and compelling reasons, but it has successfully asserted that the Court

should deny certiorari because the Sentencing Commission "could . . . promulgate a new policy statement, binding on district courts in considering prisoner-filed sentence-reduction motions[] that *rules out* . . . prospective amendments to the law as a possible basis for finding 'extraordinary and compelling reasons' for a Section 3582(c)(1)(A) sentence reduction." Br. of the U.S. in Opp'n to Pet. for Cert. at 20, *Tomes v. United States*, No. 21-5104 (U.S.) (filed Nov. 29, 2021) (emphasis added) ["*Tomes* Opp."]. Were the Commission to adopt that position, and the Court in the meantime has granted certiorari and held in favor of changes in the law qualifying as extraordinary and compelling reasons, the Commission's new policy statement would "deprive [the] decision [of] this Court . . . of any practical significance." *Id.* at 21. According to the Government, the Court, consequently, should await an applicable Commission policy statement, to see if the Commission "*forecloses* reliance on prospective amendments to the law in finding 'extraordinary and compelling reasons.'" *Id.* at 22 (emphasis added).[7]

Of course, the Commission has now spoken, and it adopted *the opposite* position to the one the Government suggested would obviate the need for certiorari: that is, the Commission stated that changes

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[7] The Government filed substantially the same response in numerous other similar cases. *See, e.g.*, *Gashe v. United States*, No. 20-8284 (pet. for cert. filed Apr. 19, 2021); *Corona v. United States*, No. 21-5671 (pet. for cert. filed Sept. 2, 2021); *Watford v. United States*, No. 21-551 (pet. for cert. filed Oct. 12, 2021); *Sutton v. United States*, No. 21-6010 (pet. for cert. filed Oct. 14, 2021); *Jarvis v. United States*, No. 21-568 (pet. for cert. filed Oct. 15, 2021); *Tingle v. United States*, No. 21-6068 (pet. for cert. filed Oct. 15, 2021); *Chantharath v. United States*, No. 21-6397 (pet. for cert. filed Nov. 19, 2021).

in the law *can* constitute extraordinary and compelling reasons under certain circumstances. No more would a decision by this Court in favor of a prisoner such as Wilson pose a risk of becoming superfluous based on Commission action, given that the Commission has opted against rejecting consideration of changes in the law.

Conspicuously, in its responses, the Government never indicated that a Commission policy statement favorable to consideration of changes in the law would make the Court's intervention unnecessary. Presumably, it made no such statement because it does not believe the Commission had the authority to adopt a position favoring changes in the law as a factor under § 3582(c)(1)(A). To that end, in its responses, the Government said that "the Commission could not describe 'extraordinary and compelling reasons' to include consideration of a factor that, as a statutory matter, may not constitute such a reason." *Tomes* Opp. at 23. And it then speculated that, "[i]n the event the Commission were to desire to permit reductions" for changes in the law "as a policy matter" but "view that course to be foreclosed as a statutory matter," the Commission could request "further congressional, and possibly judicial, action." *Id.* at 24.

What this portends, reading between the lines, is that the Government may believe that Congress's or a court's decision to make a new legal provision or rule prospective *prohibits* the Commission from adopting the position that it now has (in its new policy statement). Assuming that is a correct reading of the Government's perspective, another dispute is about to erupt regarding the already multi-faceted Circuit split besetting § 3582(c)(1)(A): is the

Commission's new policy statement invalid, so that the confused state of the law prior to the new policy statement's issuance remains in place? Respectfully, the Court should get involved now to forestall a stratagem to thwart district courts from considering as extraordinary and compelling reasons the changes in the law that the Commission has now endorsed, or at least to preempt the inevitable disagreement on the topic that could ensue in the lower courts. *See United States v. Jenkins*, 50 F.4th 1185, 1198 (2022) (citing "[s]eparation-of-powers considerations" for holding that non-retroactive changes in the law cannot qualify as extraordinary and compelling reasons).[8]

Ultimately, whatever the Government thinks of the Commission's new policy statement, the Government has staked out ground that denial of certiorari should be contingent on the Commission adopting a statement "determin[ing], as an exercise of its policy discretion, *to exclude* prospective amendments to sentencing law as a basis for finding that 'extraordinary and compelling reasons' exist under Section 3582(c)(1)(A)." *Tomes* Opp. at 21 (emphasis added). Inescapably, that contingency now will not occur. To

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[8] Ominously, in a very recent response to a petition raising the issue of whether sentencing errors at the time of the original sentencing can be considered in the mix under § 3582(c)(1)(A), the Government was willing to say only that the Commission's new policy statement "*purports* to allow a district court to consider a statutory amendment" as an extraordinary and compelling reason, perhaps signaling that the Government questions the Commission's authority to have adopted the policy statement it has. Br. of U.S. in Opp'n to Pet. for Cert. at 19, *Ferguson v. United States*, No. 22-1216 (filed Nov. 1, 2023) (emphasis added). In the same response, the Government extols the exclusivity of habeas over § 3582(c)(1)(A).

resolve the current Circuit conflicts that likely will endure, and more generally to clarify the law applicable under § 3582(c)(1)(A), the Court should grant Wilson's Petition.

IV. THE D.C. CIRCUIT'S DECISION CONTRAVENES *CONCEPCION*

The D.C. Circuit's decision below – considered just on its own merits – warrants the Court's review, because it conflicts with one of this Court's precedents: *Concepcion v. United States*, 597 U.S. 481 (2022). On top of that, the Courts of Appeals are split on *Concepcion*'s relevance for § 3582(c)(1)(A).

In *Concepcion*, this Court held that "[i]t is only when Congress or the Constitution limits the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, that a district court's discretion to consider information is restrained." 597 U.S. at 486-87. While *Concepcion* did not specifically address sentence reductions under § 3582(c)(1)(A), it dealt with the similar issue of whether district courts may consider "intervening changes of law . . . or changes of fact" when applying a First Step Act provision that "authorizes district courts to reduce the prison sentences of defendants convicted of certain offenses involving crack cocaine." *Id*. at 486. This Court held unequivocally that "they may." *Id*. at 486.

Of significance, however, *Concepcion*'s directives were not limited to this specific First Step Act provision. The Court wrote: "Federal courts historically have exercised . . . broad discretion to consider all relevant information at an initial sentencing hearing, consistent with their responsibility to sentence the whole person before them. That discretion also

carries forward to later proceedings that may modify an original sentence." *Id.* at 491. This Court explicitly stated that "[s]uch discretion is bounded *only* when Congress or the Constitution expressly limits the type of information a district court may consider in modifying a sentence." *Id.* (emphasis added).

As noted earlier, in the context of § 3582(c)(1)(A), Congress provided only one express statutory limitation: "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." 28 U.S.C. § 994(t); *see supra* pp. 11-12. If Congress intended to prevent non-retroactive changes in law from being considered an extraordinary and compelling reason, it would have done so in "'express terms.'" *Concepcion*, 597 U.S. at 497 (quoting *Kimbrough v. United States*, 552 U.S. 85, 103 (2007)). Therefore, without such an express statement, there is no basis to suggest that non-retroactive changes in law may not be considered by a court conducting the extraordinary-and-compelling-reasons analysis under § 3582(c)(1)(A). Nonetheless, the D.C. Circuit, below, based on its *Jenkins* precedent, barred district courts from considering them.

In *Concepcion*, this Court further explained, "a district court must generally consider the parties' nonfrivolous arguments before it," when faced with a motion for sentence reduction. *Id.* at 501. The district court does not necessarily need to be persuaded by such arguments, but it does – as emphasized by this Court – need to consider them. *See id.* at 502. As long as the argument is nonfrivolous – as Wilson's change-in-law argument is in this case – *Concepcion* required the D.C. Circuit to address it (contrary to what the D.C. Circuit actually did).

The D.C. Circuit in Wilson's case did not heed *Concepcion*, because *Jenkins* had found *Concepcion* limited to its facts, as other Circuits that reject consideration of changes in the law under § 3582(c)(1)(A) have likewise found. *See United States v. Jenkins*, 50 F.4th 1185, 1200 (D.C. Cir. 2022).[9] Alternatively, the Circuits on the other side of the underlying split have deemed *Concepcion* to favor the outcome they have reached.[10] *Concepcion* – by its own terms, and its dissent's – rested on a "tradition[al]," "broad" discretion in the district courts on sentencing, making illegitimate *Jenkins* determination to circumscribe narrowly the decision. *Concepcion*, 597 U.S. at 491; *see id.* at 505 (Kavanaugh, J., dissenting). The error on *Concepcion*'s scope infected the D.C. Circuit's decision below; it has infected the decisions of those Circuits that have rejected changes in the law as extraordinary and compelling reasons; and it will continue to taint the jurisprudence of those Circuits (including the D.C. Circuit) if they persist with their position in the face of the Commission's contrary view.

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[9] *Accord United States v. Hammonds*, No. 22-2406, 2023 WL 4198041, at *1-2 (3d Cir. June 27, 2023); *United States v. McCall*, 56 F.4th 1048, 1061-62 (6th Cir. 2022) (*en banc*), *cert. denied*, 143 S. Ct. 2506 (2023); *United States v. King*, 40 F.4th 594, 595-96 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 1784 (2023); *United States v. Rodriguez-Mendez*, 65 F.4th 1000, 1001 (2023).

[10] *See United States v. Brice*, No. 21-6776, 2022 WL 3715086, at *2 (4th Cir. Aug. 29, 2022); *United States v. Chen*, 48 F.4th 1092, 1099 (9th Cir. 2022); *United States v. Arriola-Perez*, No. 21-8072, 2022 WL 2388418, at *2 (10th Cir. July 1, 2022).

V. WILSON'S CASE IS AN IDEAL VEHICLE FOR CLARIFYING § 3582(c)(1)(A)

Finally, Wilson's case is an ideal vehicle for the Court to adjudicate the contours of § 3582(c)(1)(A). The D.C. Circuit affirmed the denial of his motion for sentence reduction solely on the grounds that his change-in-law arguments were barred from consideration; he asserts circumstances that allow for consideration of changes in the law even under the Commission's new policy statement, *see supra* p. 19 n.6; and the D.C. Circuit is a jurisdiction in which (under *Jenkins*) habeas prevails over § 3582(c)(1)(A) and *Concepcion* has limited scope. Moreover, Wilson's case involves not just the legal scheme for compassionate release pre-dating the Commission's new policy statement, but also the new era, because he brought his motion when there was no applicable Commission policy statement, but his case had not been (and still has not been) finally resolved in the judicial system by the effective date (November 1, 2023) of the new policy statement. *Cf.* Pet. App. 10a (D.C. Circuit in Wilson's case not reaching issue of application of new policy statement, since *at that time* it was not yet effective).

Accordingly, "live" in Wilson's case are all of the matters on which the Circuits have been, and are likely to remain, split: can changes in the law constitute extraordinary and compelling circumstances? does the Commission's new policy statement require that changes in the law be considered extraordinary and compelling reasons in the Circuits previously rejecting consideration of them? must a prisoner in Wilson's circumstances resort to habeas rather than § 3582(c)(1)(A)? does *Concepcion* recognize a broad discretion in the district courts to

consider changes in the law when determining sentence-reduction motions under § 3582(c)(1)(A)?

Wilson also is a worthy movant for sentence reduction. He suffers from serious health problems; he is high-risk with respect to COVID-19; he is advancing in age; he is a model citizen within his prison and a positive mentor to other prisoners; he has an impressive prison work history; the victim's next of kin support his release, *see* Pet. App. 22a n.7; and sentencing practices and the law have changed so that he has already served the prison term similarly situated defendants would today face, yet he still has potentially decades to serve (due to his life sentence).

* * *

Wilson and the rest of the prisoner population deserve a clear, uniform set of rules and requirements to govern the compassionate release that Congress so generously provided in § 3582(c)(1)(A). At this point, only this Court can provide it. After many years of disarray among the Courts of Appeals on the relevant issues, and more years of confusion impending notwithstanding the Commission's new policy statement, the time has come for the Court to intervene. The Petition should be granted.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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