No. 23-5951

IN THE SUPREME COURT OF THE UNITED STATES

RODNEY L. LOVE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in finding that "extraordinary and compelling reasons" did not support reducing petitioner's preexisting sentence under 18 U.S.C. 3582(c)(1)(A), where his motion centered on statutory sentencing amendments to 18 U.S.C. 924(c) and 21 U.S.C. 841(b)(1)(A) that specifically do not apply to preexisting sentences.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (M.D. Tenn.):

Love v. United States, No. 06-cv-683 (Dec. 8, 2006)

United States v. Love, No. 02-cr-32 (Jan. 17, 2023)

United States Court of Appeals (6th Cir.):

United States v. Love, No. 04-5272 (Feb. 3, 2005)

Love v. United States, No. 09-6066 (Dec. 3, 2010)

In re Love, No. 11-5026 (July 27, 2011)

United States v. Love, No. 12-5174 (Sept. 24, 2012)

United States v. Love, No. 23-5066 (Aug. 9, 2023)

Supreme Court of the United States:

Love v. United States, No. 04-10033 (June 6, 2005)

Love v. United States, No. 12-7272 (Jan. 7, 2013)

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 2-4[1]) is not published in the Federal Reporter but is available at 2023 U.S. App. LEXIS 20735. The order of the district court (Pet. App. 5-6) is not published in the Federal Supplement but is available at 2023 U.S. Dist. LEXIS 7573.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2023. The petition for a writ of certiorari was filed on November

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[1] The appendix to the petition for a writ of certiorari is not consecutively paginated. This brief refers to the appendix as if it were consecutively paginated.

1, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted on two counts of possessing Dilaudid with intent to distribute within 1000 feet of a school, in violation of 21 U.S.C. 841(a)(1) and 860 (2000); one count of possessing Dilaudid with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) (2000); three counts of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c) (2000); and three counts of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2) (2000). 02-cr-32 Docket entry No. 75 (Jan. 29, 2004); see Presentence Investigation Report (PSR) 1-2, ¶ 71. The district court sentenced petitioner to a term of imprisonment of life plus 55 years, to be followed by 15 years of supervised release. 02-cr-32 Docket entry No. 75; see Pet. App. 3. The court of appeals affirmed, Pet. App. 3, and this Court denied a petition for a writ of certiorari, 545 U.S. 1110.

After petitioner unsuccessfully sought postconviction and other relief, the President commuted petitioner's total term of imprisonment to 322 months. 02-cr-32 D. Ct. Doc. 117, at 6 (Jan. 17, 2017). In 2020, petitioner moved for a sentence reduction under 18 U.S.C. 3582(c)(1)(A). 02-cr-32 D. Ct. Doc. 129 (Jan. 16, 2020); 02-cr-32 D. Ct. Doc. 141 (May 5, 2020); 02-cr-32 D. Ct.

Doc. 147 (July 9, 2020). The district court denied the motion, Pet. App. 5-6, and the court of appeals affirmed, id. at 2-4.

1. a. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987 (18 U.S.C. 3551 et seq.), "overhaul[ed] federal sentencing practices." Tapia v. United States, 564 U.S. 319, 325 (2011). To make prison terms more determinate, Congress "established the Sentencing Commission and authorized it to promulgate Sentencing Guidelines and to issue policy statements." Dillon v. United States, 560 U.S. 817, 820 (2010); see 28 U.S.C. 991, 994(a).

Congress also abolished the practice of federal parole, specifying that a "court may not modify a term of imprisonment once it has been imposed" except in certain enumerated circumstances. 18 U.S.C. 3582(c); see Tapia, 564 U.S. at 325. One of those circumstances is set forth in 18 U.S.C. 3582(c)(1)(A). As originally enacted in the Sentencing Reform Act, Section 3582(c)(1)(A) stated:

> the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment, after considering the factors set forth in [18 U.S.C.] 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Sentencing Reform Act § 212(a)(2), 98 Stat. 1998-1999. Congress made clear that "[r]ehabilitation of the defendant alone shall not

be considered an extraordinary and compelling reason." 28 U.S.C. 994(t); see Sentencing Reform Act § 217(a), 98 Stat. 2023.

Congress also directed the Sentencing Commission to promulgate "general policy statements regarding * * * the appropriate use of * * * the sentence modification provisions set forth in [Section] 3582(c)." 28 U.S.C. 994(a)(2)(C); see Sentencing Reform Act § 217(a), 98 Stat. 2019. Congress instructed "[t]he Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, [to] describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." 28 U.S.C. 994(t); see Sentencing Reform Act § 217(a), 98 Stat. 2023.

The Commission did not promulgate an applicable policy statement until 2006, when it issued Sentencing Guidelines § 1B1.13. See Sentencing Guidelines App. C, Amend. 683 (Nov. 1, 2006). As amended in 2016, the commentary to Section 1B1.13 described four categories of reasons that should be considered extraordinary and compelling: "Medical Condition of the Defendant," "Age of the Defendant," "Family Circumstances," and "Other Reasons." Sentencing Guidelines § 1B1.13, comment. (n.1(A)-(D)) (2016) (emphases omitted); see Sentencing Guidelines App. C Supp., Amend. 799 (Nov. 1, 2016). The fourth category -- "Other Reasons" -- encompassed any reason determined by the Bureau

of Prisons (BOP) director to be "extraordinary and compelling" "other than, or in combination with," the reasons described in the other three categories. Sentencing Guidelines § 1B1.13, comment. (n.1(D)) (2016) (emphasis omitted).

b. In the First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5239, Congress amended Section 3582(c)(1)(A) to allow defendants, as well as the BOP itself, to file motions for a reduced sentence. As amended, Section 3582(c)(1)(A) now states:

> 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 * * * , after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that * * * extraordinary and compelling reasons warrant such a reduction * * * and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

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

The First Step Act additionally amended the penalties for violations of 18 U.S.C. 924(c). § 403(a), 132 Stat. 5221-5222. Before the First Step Act, Section 924(c) prescribed a minimum consecutive sentence of 20 years of imprisonment -- later revised to 25 years, see Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469 -- in the case of a "second or subsequent conviction" under Section 924(c), including when that second or

subsequent conviction was obtained in the same proceeding as the defendant's first conviction under Section 924(c). 18 U.S.C. 924(c)(1) (Supp. IV 1992); see Deal v. United States, 508 U.S. 129, 132-137 (1993). In the First Step Act, Congress amended Section 924(c) to provide for a minimum consecutive sentence of 25 years of imprisonment only in the case of a "violation of [Section 924(c)] that occurs after a prior conviction under [Section 924(c)] has become final." § 403(a), 132 Stat. 5222. Congress specified that the amendment "shall apply to any offense that was committed before the date of enactment of [the First Step Act], if a sentence for the offense has not been imposed as of such date of enactment." § 403(b), 132 Stat. 5222.

The First Step Act also amended the penalties for certain drug offenses. § 401, 132 Stat. 5220-5221. Before the First Step Act, 21 U.S.C. 841(b)(1)(A) (2000) prescribed a mandatory term of life imprisonment for a violation of 21 U.S.C. 860 (2000) committed "after two or more prior convictions for a felony drug offense has become final." Section 401(a) of the First Step Act amended the statute to provide for a minimum sentence of 25 years of imprisonment for a violation of Section 860 committed "after 2 or more prior convictions for a serious drug felony or serious violent felony has become final." § 401(a)(2)(A)(ii), 132 Stat. 5220; see § 401(a)(1), 132 Stat. 5220 (21 U.S.C. 802(57)) (defining "serious drug felony"). As with the amendment to the penalties for violating Section 924(c), Congress specified that the drug-offense

amendment "shall 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." First Step Act § 401(c), 132 Stat. 5221.

c. After the First Step Act's enactment, the Sixth Circuit determined that the 2016 version of Sentencing Guidelines § 1B1.13, including its description of what should be considered "extraordinary and compelling" reasons, was not applicable to Section 3582(c)(1)(A) motions filed by defendants. See United States v. Jones, 980 F.3d 1098, 1108-1111 (2020).

2. Between November 2001 and February 2002, officers from the Metropolitan Nashville Police Department encountered petitioner with illegal narcotics and a firearm on three separate occasions. PSR ¶¶ 5-10. In November 2001, officers found petitioner in a vehicle with a handgun, 84 Dilaudid pills, and more than $2700 in cash. PSR ¶¶ 6-7. In January 2002, officers arrested petitioner following a hit-and-run incident; they seized a loaded handgun, 243 Dilaudid pills, and more than $800 in cash. PSR ¶ 8. And in February 2002, after petitioner agreed to supply Dilaudid pills to an undercover officer, officers arrested him within 1000 feet of a middle school and found a loaded firearm, 316 Dilaudid pills, and more than $2600 in cash in his vehicle. PSR ¶ 10. Petitioner admitted to the police that he had been selling Dilaudid pills and that he "regularly" carried a firearm. PSR ¶ 11.

A federal grand jury in the Middle District of Tennessee charged petitioner with two counts of possessing Dilaudid with intent to distribute within 1000 feet of a school, in violation of 21 U.S.C. 841(a)(1) and 860 (2000); one count of possessing Dilaudid with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) (2000); three counts of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c) (2000); and three counts of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2) (2000). See Pet. App. 2; PSR 1-2, ¶ 71. The government filed a notice under 21 U.S.C. 851 of its intent to seek enhanced penalties because petitioner had two prior convictions for a "felony drug offense." 21 U.S.C. 841(b)(1)(A) and (C) (2000); see Pet. App. 2. Following a trial, a jury found petitioner guilty on all counts. Pet. App. 3.

The district court sentenced petitioner to a mandatory term of life imprisonment on each of the school-zone drug-distribution counts, 360 months of imprisonment on the other drug-distribution count, and 120 months of imprisonment on each of the felon-in-possession counts, all to be served concurrently. 02-cr-32 Docket entry No. 75; see PSR ¶ 71. The court also sentenced petitioner to five years of imprisonment on the first Section 924(c) count and 25 years of imprisonment on each of the two remaining Section 924(c) counts, to be served consecutively to each other and to the sentences on the other counts. 02-cr-32 Docket entry No. 75. And

the court sentenced petitioner to 15 years of supervised release upon release from imprisonment. Ibid. The court of appeals affirmed, Pet. App. 3, and this Court denied a petition for a writ of certiorari, 545 U.S. 1110.

3. In 2006, petitioner moved under 28 U.S.C. 2255 to vacate his sentence. 06-cv-683 D. Ct. Doc. 1 (July 11, 2006). The district court denied the motion and declined to issue a certificate of appealability (COA). 06-cv-683 D. Ct. Doc. 12 (Dec. 8, 2006). In 2009, the district court denied petitioner's motion under Federal Rule of Civil Procedure 60(b) to reopen his Section 2255 proceedings, 06-cv-683 D. Ct. Doc. 23 (Aug. 20, 2009), and the court of appeals denied a COA, 09-6066 C.A. Order (Dec. 3, 2010). The court of appeals subsequently denied petitioner leave to file a second-or-successive Section 2255 motion. 11-5026 C.A. Order (July 27, 2011).

In 2010, petitioner filed a motion under Federal Rule of Civil Procedure 60(b)(4) for relief from judgment. 02-cr-32 D. Ct. Doc. 92 (Dec. 14, 2010). In 2011, petitioner filed two motions for a sentence reduction under 18 U.S.C. 3582(c)(2). 02-cr-32 D. Ct. Doc. 93 (July 11, 2011); 02-cr-32 D. Ct. Doc. 95 (July 20, 2011). The district court denied all three motions, 02-cr-32 D. Ct. Doc. 104 (Jan. 31, 2012), and the court of appeals affirmed, 12-5174 C.A. Order (Sept. 24, 2012). This Court denied a petition for a writ of certiorari. 568 U.S. 1107.

In January 2017, the President commuted petitioner's total term of imprisonment to 322 months, while "leaving intact and in effect the 15-year term of supervised release." 02-cr-32 D. Ct. Doc. 117, at 6. In 2018, the district court denied petitioner's motion for a sentence reduction based on Amendment 782 to the Sentencing Guidelines. 02-cr-32 D. Ct. Doc. 121 (Jan. 25, 2018).

4. In January 2020, petitioner filed a pro se motion for a sentence reduction under Section 3582(c)(1)(A). 02-cr-32 D. Ct. Doc. 129; 02-cr-32 D. Ct. Doc. 141. After the district court appointed counsel to represent petitioner, 02-cr-32 D. Ct. Doc. 143 (May 14, 2020), petitioner filed a supplemental Section 3582(c)(1)(A) motion, 02-cr-32 D. Ct. Doc. 147. In that motion, petitioner argued that if he had been sentenced after the enactment of the First Step Act, he would not have received a statutory-minimum 25-year consecutive sentence on his second and third Section 924(c) convictions or a mandatory life sentence on each of his school-zone drug-distribution convictions. 02-cr-32 D. Ct. Doc. 147, at 8-9. Petitioner asserted that those "change[s]" in the law "combine[d] to form an extraordinary and compelling reason to reduce" his total term of imprisonment to 262 months. Id. at 8 (emphasis omitted); see id. at 1.

The district court denied petitioner's motion for a Section 3582(c)(1)(A) sentence reduction. Pet. App. 5-6. Relying on circuit precedent, the court explained that "non-retroactive changes in the law do not create an 'extraordinary and compelling'

reason for a sentence reduction." Id. at 5 (citing United States v. McCall, 56 F.4th 1048 (6th Cir. 2022) (en banc), cert. denied, 143 S. Ct. 2506 (2023)). The court also determined that even if petitioner "had presented extraordinary and compelling circumstances," it was "unlikely" to "grant his motion because the 18 U.S.C. § 3553(a) sentencing factors do not support his release." Ibid. The court described petitioner's "offenses of conviction" as "serious" and as "creat[ing] a danger to the public and to [petitioner]." Id. at 5-6. The court additionally observed that petitioner had "committed the instant offenses only eight months after completing his parole for previous drug trafficking offenses." Id. at 6. And the court emphasized the "need for punishment, general and specific deterrence, as well as respect for the law." Ibid.

5. The court of appeals affirmed in an unpublished opinion. Pet. App. 2-4. The court noted that petitioner had "concede[d]" that circuit precedent "foreclose[d] his argument that non-retroactive changes in federal sentencing law can create 'extraordinary and compelling' circumstances" warranting a sentence reduction. Id. at 4; see id. at 3 (citing McCall, 56 F.4th at 1065-1066).

ARGUMENT

Petitioner contends (Pet. 11) that the First Step Act's amendments to 18 U.S.C. 924(c) and 21 U.S.C. 841(b)(1)(A), which are not applicable to preexisting sentences like his, can

nevertheless serve as "extraordinary and compelling reasons" for a sentence reduction under Section 3582(c)(1)(A). That contention lacks merit. And although courts of appeals have reached different conclusions on the issue, this Court's review would be premature because the Sentencing Commission recently issued an amended policy statement that purports to address the issue, and because the courts of appeals have yet to consider the validity of that amendment. Furthermore, this case would be a poor vehicle for further review, both because petitioner likely would not be entitled to a sentence reduction even if the question presented were resolved in his favor, and because this case would likely be moot before the Court would issue a decision on the merits. This Court has repeatedly and recently denied petitions for writs of certiorari that presented similar issues.[2] The same result is warranted here.

1. Petitioner contends (Pet. 11) that Congress's decision not to extend the First Step Act's amendments to Sections 924(c)

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[2] See, e.g., Thompson v. United States, 143 S. Ct. 2615 (2023) (No. 22-6448); Eye v. United States, 143 S. Ct. 1784 (2023) (No. 22-6096); Tovar v. United States, 143 S. Ct. 1784 (2023) (No. 22-5958); Thacker v. United States, 142 S. Ct. 1363 (2022) (No. 21-877); Chantharath v. United States, 142 S. Ct. 1212 (2022) (No. 21-6397); Williams v. United States, 142 S. Ct. 1207 (2022) (No. 21-767); Tingle v. United States, 142 S. Ct. 1132 (2022) (No. 21-6068); Sutton v. United States, 142 S. Ct. 903 (2022) (No. 21-6010); Corona v. United States, 142 S. Ct. 864 (2022) (No. 21-5671); Tomes v. United States, 142 S. Ct. 780 (2022) (No. 21-5104); Jarvis v. United States, 142 S. Ct. 760 (2022) (No. 21-568); Watford v. United States, 142 S. Ct. 760 (2022) (No. 21-551); Gashe v. United States, 142 S. Ct. 753 (2022) (No. 20-8284).

and 841(b)(1)(A) to convicted defendants like him can constitute an "extraordinary and compelling" reason for a sentence reduction under Section 3582(c)(1)(A). The court of appeals correctly rejected that contention. Pet. App. 3-4.

In the First Step Act, Congress amended Section 924(c) to provide for an enhanced minimum consecutive sentence for a second or subsequent Section 924(c) conviction only in the case of a "violation of [Section 924(c)] that occurs after a prior conviction under [Section 924(c)] has become final." § 403(a), 132 Stat. 5222; see pp. 5-6, supra. Congress also amended Section 841(b)(1)(A) by changing the minimum penalty for recidivists and the types of prior convictions that render a defendant eligible for that minimum penalty. First Step Act § 401(a)(2)(A), 132 Stat. 5220; see pp. 6-7, supra.

Congress made the deliberate choice, however, not to make those amendments applicable to defendants who had been sentenced before the enactment of the First Step Act, expressly specifying that the changes would apply only "if a sentence for the offense has not been imposed as of such date of enactment." First Step Act §§ 401(c), 403(b), 132 Stat. 5221-5222. In so doing, Congress adhered to "the ordinary practice" in "federal sentencing" of "apply[ing] new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced." Dorsey v. United States, 567 U.S. 260, 280 (2012); cf. 1 U.S.C. 109 (general nonretroactivity provision).

Given Congress's deliberate choice not to make the First Step Act's changes to Sections 924(c) and 841(b)(1)(A) applicable to defendants who had already been sentenced, "there is nothing 'extraordinary' about" the fact that petitioner's sentences under those provisions reflect the statutory penalties that existed at the time he was sentenced. United States v. Thacker, 4 F.4th 569, 574 (7th Cir. 2021), cert. denied, 142 S. Ct. 1363 (2022). Those sentences were "not only permissible but statutorily required at the time." United States v. Maumau, 993 F.3d 821, 838 (10th Cir. 2021) (Tymkovich, C.J., concurring). And when Congress enacted the First Step Act, it specifically declined to disturb sentences under Sections 924(c) and 841(b)(1)(A) like petitioner's, even as it made other (prior) statutory changes applicable to defendants previously sentenced. See § 404(b), 132 Stat. 5222 (adopting a specific mechanism for retroactively applying certain changes in the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372).

Any disparity between petitioner's sentences and the sentences a defendant would receive today is therefore the product of deliberate congressional design -- namely, Congress's decision not to make the First Step Act's changes to Sections 924(c) and 841(b)(1)(A) applicable to defendants who had already been sentenced. As this Court has recognized, such "disparities, reflecting a line-drawing effort, will exist whenever Congress enacts a new law changing sentences (unless Congress intends

reopening sentencing proceedings concluded prior to a new law's effective date)." Dorsey, 567 U.S. at 280. And treating Congress's express adherence to "ordinary practice" in federal sentencing, ibid., "as simultaneously creating an extraordinary and compelling reason for early release" would contravene various canons of construction, United States v. Andrews, 12 F.4th 255, 261 (3d Cir. 2021), cert. denied, 142 S. Ct. 1446 (2022).

When interpreting statutes, this Court generally seeks "to 'fit, if possible, all parts' into a 'harmonious whole.'" Andrews, 12 F.4th at 261 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)). But nothing is harmonious about treating the ordinary operation of one set of provisions (Sections 401 and 403) as an "extraordinary" circumstance under another provision (Section 3582(c)(1)(A)) -- especially when Congress addressed them all in the same statute (the First Step Act) without any suggestion that the new defendant-filed Section 3582(c)(1)(A) motions would constitute an end-around to its solely prospective application of Section 401's and Section 403's amendments. In addition, "[i]t is a commonplace of statutory construction that the specific governs the general." RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012) (citation omitted). And treating the ordinary operation of Sections 401 and 403 as an extraordinary circumstance under Section 3582(c)(1)(A) would allow the more general provision (Section 3582(c)(1)(A)) to "thwart" the more specific ones (Sections 401 and 403). United States v.

Jarvis, 999 F.3d 442, 444 (6th Cir. 2021), cert. denied, 142 S. Ct. 760 (2022). Nothing suggests that "the same Congress that specifically decided to make these sentencing reductions non-retroactive in 2018 somehow mean[t] to use a general sentencing statute from 1984 to unscramble that approach," ibid., simply by allowing defendant-filed Section 3582(c)(1)(A) motions.

The First Step Act's prospective amendments accordingly cannot serve as an "extraordinary and compelling" reason for reducing a preexisting sentence under Section 3582(c)(1)(A), either by themselves or as part of a package of factors. Whether considered alone or in combination with other circumstances, the possibility that a previously sentenced defendant might receive a lower sentence if he were sentenced today is still the ordinary, express, and expected result of Congress's deliberate decision not to make the First Step Act's changes to Sections 924(c) and 841(b)(1)(A) applicable to previously sentenced defendants. See Jarvis, 999 F.3d at 444 (explaining that the First Step Act's prospective change to sentencing law is a "legally impermissible ground" for finding an "extraordinary and compelling reason," even when it is "combined with" other considerations).

Petitioner contends that Congress "list[ed] only one reason that cannot, standing alone, constitute an 'extraordinary and compelling' reason for a sentence reduction: the fact of rehabilitation." Pet. 11 (quoting 28 U.S.C. 994(t)). He further contends that "the 'express exception' of rehabilitation in the

statute 'implies there are no other' exceptions." Ibid. (citation omitted). But that contention disregards the express textual requirement that the reason for a reduction be both "extraordinary and compelling." 18 U.S.C. 3582(c)(1)(A)(i). And for the reasons just explained, the First Step Act's prospective amendments to Sections 924(c) and 841(b)(1)(A) do not constitute a reason that is either extraordinary or compelling.

2. Petitioner contends (Pet. 9) that the courts of appeals are divided on whether the First Step Act's prospective amendments to Section 924(c) and 841(a)(1)(B) can serve as an extraordinary and compelling reason for a sentence reduction under Section 3582(c)(1)(A). But because a recent amendment to Sentencing Guidelines § 1B1.13 purports to address that issue, and because the courts of appeals have yet to consider the validity of that amendment, any review by this Court would be premature.

a. In accord with the decision below, the Third, Seventh, Eighth, and D.C. Circuits have recognized that nonretroactive changes in the law, "whether considered alone or in connection with other facts and circumstances, cannot constitute an 'extraordinary and compelling' reason to authorize a sentencing reduction." Thacker, 4 F.4th at 571 (7th Cir.); see Andrews, 12 F. 4th at 261 (3d Cir.); United States v. Crandall, 25 F.4th 582, 585-586 (8th Cir.), cert. denied, 142 S. Ct. 2781 (2022); United States v. Jenkins, 50 F.4th 1185, 1198-1200 (D.C. Cir. 2022).

The First, Fourth, Ninth, and Tenth Circuits have taken the view that nonretroactive changes in the law can form part of an "individualized assessment[]" of whether "'extraordinary and compelling reasons'" exist in a particular defendant's case. United States v. McCoy, 981 F.3d 271, 286 (4th Cir. 2020); see United States v. Ruvalcaba, 26 F.4th 14, 28 (1st Cir. 2022); United States v. Chen, 48 F.4th 1092, 1097-1098 (9th Cir. 2022); United States v. McGee, 992 F.3d 1035, 1047-1048 (10th Cir. 2021). Those circuits have held, however, that "the mere fact" that a defendant might receive a lower sentence if the defendant were sentenced today "'cannot, standing alone, serve as the basis for a sentence reduction.'" Ruvalcaba, 26 F.4th at 28 (citation omitted); see McCoy, 981 F.3d at 287; Chen, 48 F.4th at 1100; McGee, 992 F.3d at 1048.

b. This Court's review is not warranted at this time because the Sentencing Commission recently promulgated an amendment to Sentencing Guidelines § 1B1.13 that purports to address the circuit disagreement. See 88 Fed. Reg. 28,254, 28,258 (May 3, 2023) (explaining that the amendment purports to "respond to a circuit split concerning when, if ever, non-retroactive changes in law may be considered as extraordinary and compelling reasons"). In addition to making Section 1B1.13 applicable to defendant-filed motions, id. at 28,256, the amendment revised Section 1B1.13 to specify that "a change in the law * * * may be considered" in certain circumstances "in determining whether the defendant

presents an extraordinary and compelling reason," id. at 28,255. That provision purports to allow a district court, in determining whether an extraordinary and compelling reason exists, to consider a change in the law effectuated by a statutory amendment like the First Step Act's changes to Sections 924(c) and 841(a)(1)(B).

The Sentencing Commission's amendment to Section 1B1.13 took effect on November 1, 2023, see 88 Fed. Reg. at 28,254 -- after the court of appeals' decision in this case, see Pet. App. 2-4. Accordingly, neither the district court nor the court of appeals in this case considered the amended policy statement or its validity. Other courts of appeals have likewise yet to address the validity of the amended policy statement and whether it reflects a permissible construction of the statutory phrase "extraordinary and compelling reasons." 18 U.S.C. 3582(c)(1)(A)(i).

There is no sound reason for this Court to consider the question presented in a case that predates the amended policy statement and any relevant circuit consideration of that policy statement. Going forward, the issue here -- whether a district court may consider the First Step Act's prospective amendments to Sections 924(c) and 841(b)(1)(A) in determining whether a defendant has presented an extraordinary and compelling reason for a sentence reduction -- will be intertwined with the issue of the validity of Section 1B1.13's new change-in-law provision. See 18 U.S.C. 3582(c)(1)(A) (requiring that a sentence reduction be

"consistent with applicable policy statements"). And because the courts of appeals have yet to address the validity of that new provision, this Court's review of the question presented would be premature. See Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012) (declining to review a claim "without the benefit of thorough lower court opinions to guide [the Court's] analysis of the merits").[3]

3. In any event, this case would be a poor vehicle to address the question presented.

First, any sentence reduction under Section 3582(c)(1)(A) must be supported not only by "extraordinary and compelling reasons," but also by "the factors set forth in [18 U.S.C.] 3553(a) to the extent that they are applicable." 18 U.S.C. 3582(c)(1)(A). In denying petitioner's Section 3582(c)(1)(A) motion, the district court determined that the Section 3553(a) factors "do not support his release." Pet. App. 5. As the court explained, petitioner had already "received a Presidential commutation of his life sentence to 322 months," ibid.;[4] his "offenses of conviction" were

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[3] Petitioner suggests (Pet. 10 n.3) that he would "appear to qualify" for a sentence reduction under the amended policy statement. Nothing in Section 3582(c)(1)(A) or the Sentencing Guidelines precludes petitioner from filing a new Section 3582(c)(1)(A) motion in the district court, seeking a sentence reduction under the amended policy statement.

[4] The prior commutation in itself makes this an atypical case that could potentially affect the operation of the statutory scheme. Cf. United States v. Surratt, 855 F.3d 218, 219 (4th Cir. 2017) (en banc) (Wilkinson, J., concurring) (finding defendant's collateral attack on sentence moot where he was "no longer serving a judicially imposed sentence, but a presidentially commuted one"), cert. denied, 583 U.S. 1040 (2017).

"serious" and "create[d] a danger to the public and to [himself]," id. at 5-6; and petitioner "committed the instant offenses only eight months after completing his parole for previous drug trafficking offenses," id. at 6. The court therefore viewed petitioner's 322-month term of imprisonment as necessary to provide "punishment," afford "general and specific deterrence," and promote "respect for the law." Ibid. As a result, even if petitioner could demonstrate extraordinary and compelling reasons for a sentence reduction, it is "unlikely" that the district court "would grant his motion." Id. at 5.

Second, petitioner is scheduled to complete his 322-month term of imprisonment on December 20, 2024. See 02-cr-32 D. Ct. Doc. 147, at 5; BOP, U.S. Dep't of Justice, Find an Inmate, www.bop.gov/inmateloc (No. 17313-075). After petitioner completes his term of imprisonment, he will be required to begin serving a 15-year term of supervised release, which the presidential commutation left in place. See 02-cr-32 Docket entry No. 75; 02-cr-32 D. Ct. Doc. 117, at 6. But in moving for a Section 3582(c)(1)(A) sentence reduction, petitioner did not seek a reduction in his term of supervised release. Instead, petitioner sought only a reduction in his term of imprisonment, to a total of 262 months. 02-cr-32 D. Ct. Doc. 147, at 1. Petitioner will have no concrete stake in reducing a term of imprisonment that he has already completed. See, e.g., Already, LLC v. Nike, Inc., 568 U.S. 85, 90-91 (2013) (explaining that "an 'actual controversy'

must exist * * * through 'all stages' of [a] litigation" in order for the dispute to be fit for adjudication by an Article III court) (citation omitted); United States v. Stevens, 997 F.3d 1307, 1310 n.1 (11th Cir. 2021) ("A challenge to an imposed term of imprisonment is moot once that term has expired.") (citing United States v. Juvenile Male, 564 U.S. 932, 936 (2011) (per curiam)); cf. Br. in Opp. at 7-16, Herndon v. Upton, 142 S. Ct. 82 (2021) (No. 20-1556) (discussing circuits' approaches to collateral attacks on expired prison terms under 28 U.S.C. 2241); Mem. in Opp. at 4 & n.4, Ward v. United States, 140 S. Ct. 2626 (2020) (No. 19-6818). Thus, even if this Court were to grant certiorari, this case would likely become moot before the Court would issue a decision on the merits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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