No.

In the Supreme Court of the United States

THOMAS BRYANT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 1B1.13 of the United States Sentencing Guidelines is an "applicable" policy statement that binds a district court in considering a defendant-filed motion for compassionate release under 18 U.S.C. 3582(c)(1)(A), as amended by the First Step Act of 2018.

RELATED PROCEEDINGS

United States District Court (S.D. Ga.):

Bryant v. *United States*, Crim. No. 97-182 (Oct. 3, 2019)

United States Court of Appeals (11th Cir.):

Bryant v. *United States*, No. 19-14267 (May 7, 2021)

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Petitioner Thomas Bryant, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-57a) is reported at 996 F.3d 1243. The opinion of the district court (App., *infra*, 58a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, and the United States Sentencing Guidelines are reproduced in an appendix to this petition.

STATEMENT

This case presents a question of surpassing legal and practical importance concerning the changes made by the First Step Act of 2018 to the compassionate-release provision in the federal Criminal Code, 18 U.S.C. 3582 (c)(1)(A). The First Step Act amended that provision to eliminate the requirement that the Bureau of Prisons (BOP) file a motion in order for a court to grant a sentence reduction on compassionate-release grounds. As amended, the compassionate-release provision now allows a district court to grant a sentence reduction and order immediate release upon motion of a federal prisoner if the court finds both that the defendant's circumstances are "extraordinary and compelling" and that the sentence reduction is "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582 (c)(1)(A).

In 2007, long before Congress enacted the First Step Act, the United States Sentencing Commission promulgated a policy statement that applies only to motions filed by the Director of the BOP. See U.S.S.G. § 1B1.13 appl. nn.1-5. The question presented here is whether the 2007 statement is an "applicable" policy statement that binds a district court when deciding whether to grant a defendant-filed motion for a sentence reduction under the compassionate-release provision.

Until the decision below, all seven of the courts of appeals to have addressed the question presented agreed

that the 2007 policy statement is not "applicable" to defendant-filed motions for purposes of the First Step Act. Those courts reasoned both that the policy statement, by its very terms, applies only to motions filed by the BOP Director and that the Sentencing Commission was not contemplating defendant-filed motions in 2007.

While acknowledging that overwhelming consensus, the court of appeals nevertheless charted its own course, holding in the decision below that district courts are bound by the 2007 policy statement when adjudicating defendant-filed motions for compassionate release. In reaching that result, the court created harsh disparities in the availability of sentence reductions, preventing district courts in the Eleventh Circuit from granting relief on numerous bases, including those relating to the threat of COVID-19 for vulnerable prisoners.

Review is urgently needed to resolve the conflict created by the court of appeals. The decision below has grave and immediate consequences for many federal prisoners. Nine courts of appeals have now addressed the question presented, and there is no reason to wait for the issue to percolate any further. Nor should the Court wait for the Sentencing Commission to issue a new policy statement concerning defendant-filed motions. The question presented here raises a matter of *statutory* interpretation—whether the Commission's existing policy statement is "applicable" to defendant-filed motions. In addition, the Commission has been without a quorum since January 2019; it is unlikely to have a quorum anytime soon, and even once constituted, it may not issue a new policy statement for many years. The petition for a writ of certiorari should thus be granted.

A. Background

1. The provision of the Criminal Code permitting district courts to grant sentence reductions on compassionate-release grounds was first enacted as part of the Comprehensive Crime Control Act of 1984. That provision, codified at 18 U.S.C. 3582(c)(1)(A), carves out exceptions to the ordinary rule that a sentence is final once imposed. One of the exceptions permits district courts to reduce a sentence whenever "extraordinary and compelling reasons warrant such a reduction." 18 U.S.C. 3582(c)(1)(A)(i).

As originally enacted, the compassionate-release provision conditioned the reduction of a sentence on the filing of a motion for reduction by the BOP Director; absent such a motion, a sentencing court had no authority to modify a defendant's sentence for extraordinary and compelling reasons, even in cases in which the court might otherwise disagree with the BOP's determination. See 18 U.S.C. 3582(c)(1)(A) (1988). The provision did not define what constituted an "extraordinary and compelling" reason for a sentence reduction. The Senate Report, however, described the provision as containing "safety valves for modification of sentences," which would permit "later review of sentences in particularly compelling situations," such as the reduction "of an unusually long sentence." S. Rep. No. 225, 98th Cong., 1st Sess. 55-56, 121 (1983). The compassionate-release provision thus "provides a mechanism for relief" when a post-sentencing development "produces unfairness to the defendant." *Setser* v. *United States*, 566 U.S. 231, 243 (2012).

The law creating the compassionate-release provision required the Sentencing Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction." 28 U.S.C. 994(t). The statute also required any sentence reduction to be "consistent

with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(1)(A). Congress provided only one limitation on the potential considerations for a sentence reduction: "[r]ehabilitation of the defendant *alone* shall not be considered an extraordinary and compelling reason." 28 U.S.C. 994(t) (emphasis added).

2. For two decades, the Sentencing Commission failed to identify extraordinary and compelling reasons warranting sentence reductions, leaving the BOP to fill the void and determine when resentencing was appropriate on compassionate-release grounds. The Commission finally acted in 2007, promulgating a policy statement declaring that extraordinary and compelling reasons include medical conditions, age, family circumstances, and "[o]ther [r]easons [as] determined by the Director of the Bureau of Prisons." U.S.S.G. § 1B1.13 appl. n.1. After the release of two reports by the Department of Justice's Office of the Inspector General (OIG) finding that the BOP had rarely filed motions for compassionate release even when prisoners met the Commission's objective criteria, the Commission amended its policy statement, expanding the qualifying conditions and encouraging the BOP to file motions for compassionate release whenever prisoners were found to meet the criteria. See *id.* § 1B1.13 appl. n.4.

Although the Commission encouraged the BOP to file more compassionate-release motions, the program remained dysfunctional, in large part because of the requirement that the BOP initiate any requests for sentence reductions by motion. The OIG found that the BOP had failed to set consistent criteria, inform prisoners about compassionate release, and track compassionate-release requests. See Dep't of Justice, Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program* i-iii (Apr. 2013) (OIG Report). As a result of those problems and others, the OIG concluded that

the "BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered." *Id.* at 11.

3. Congress heard and responded to the complaints. In December 2018, Congress passed the First Step Act, which amended the compassionate-release provision. See Pub. L. No. 115-391, § 603, 132 Stat. 5194 (2018). Under the First Step Act, a court can resentence a defendant "upon motion of the defendant" if certain administrative prerequisites have been met, instead of depending upon the BOP Director to move for release. 18 U.S.C. 3582 (c)(1)(A). Once a defendant has properly filed a motion, a court may resentence the defendant if the court finds the reduction is warranted by "extraordinary and compelling reasons" and is "consistent with applicable policy statements issued by the Sentencing Commission." *Ibid.* The First Step Act thus allows a district court to order a sentence reduction in response to a defendant-filed motion, even when the BOP disagrees or simply fails to act.

4. In January 2019—just one month after the First Step Act became law—the Sentencing Commission lost the quorum required for it to act. See 28 U.S.C. 995(d); U.S. Sentencing Commission, *2019 Annual Report* 3 <tinyurl.com/2019usscreport>. The Commission thus has not amended its 2007 policy statement, which contemplates that only the BOP could move for a sentence reduction. See *United States* v. *Brooker*, 976 F.3d 228, 234 (2d Cir. 2020); *United States* v. *Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020). At the same time, however, a district court's reduction must be consistent with "applicable" policy statements of the Commission. That has left a question for district courts in ruling on defendant-filed motions under the First Step Act: does a district court have independent discretion to determine what constitutes an

"extraordinary and compelling" reason for a sentence reduction? Or does the 2007 policy statement's enumeration of criteria for determining what is an "extraordinary and compelling" reason bind a district court when ruling on a motion filed by a defendant, rather than the BOP?

B. Facts And Procedural History

1. Petitioner was a police officer in Savannah, Georgia. In 1994, the Federal Bureau of Investigation began receiving complaints of police corruption in Savannah. See PSR ¶ 4. The FBI consequently conducted a reverse sting operation by directing a cooperating witness to approach petitioner about providing police protection to escort couriers transporting cocaine in and out of Savannah. Along with other Savannah police officers, petitioner escorted what he thought were drug couriers possessing shipments of cocaine. The couriers were instead undercover FBI agents, and no cocaine was actually distributed. For two years, petitioner sold small amounts of cocaine and provided protection for the cooperating witness. Petitioner also sold firearms to a convicted felon. App., *infra*, 4a.

Petitioner was charged with and convicted by a jury of conspiring to distribute cocaine, possessing cocaine with intent to distribute, receiving stolen firearms, selling firearms to a drug addict, and using or carrying a firearm during a drug-trafficking crime. In 1998, petitioner was sentenced to life plus 25 years of imprisonment. His conviction and sentence were affirmed on appeal, see *United States* v. *Bryant*, 196 F.3d 1262 (11th Cir. 1999), and this Court denied certiorari, see 531 U.S. 857 (2000).

2. In 2015, petitioner filed a motion for resentencing, invoking a new, retroactively applicable amendment to the Sentencing Guidelines. The district court resentenced petitioner to 24 years, 4 months for the drug and firearms

offenses plus a consecutive 25 years for using or carrying a firearm during a drug-trafficking crime, for a total of nearly 50 years of imprisonment. The considerable time petitioner has already spent in prison—more than 22 years—constitutes less than half of his sentence.

3. In 2019, petitioner filed an administrative request with the warden of his prison, arguing that he had extraordinary and compelling reasons for a sentence reduction on compassionate-release grounds. D. Ct. Dkt. 259-1, at 3. The BOP never responded to that request. Petitioner then filed a motion for compassionate release in district court, arguing that three grounds, in combination, constituted extraordinary and compelling reasons for a sentence reduction. D. Ct. Dkt. 259.

First, petitioner argued that, had he been sentenced after the First Step Act was enacted, he would not have faced a consecutive 20 years of imprisonment for a "second or subsequent" offense under 18 U.S.C. 924(c) (using or carrying a firearm during a drug-trafficking crime) because the First Step Act had removed the previously applicable sentence-stacking provision for multiple Section 924(c) charges. D. Ct. Dkt. 259, at 3.

Second, petitioner argued that his long sentence was partially the result of a penalty for refusing the government's plea offer and exercising his constitutional right to a jury trial. D. Ct. Dkt. 259, at 3. Petitioner noted that his co-defendants who had accepted plea deals were all released from prison by 2008. *Id*. at 6. Only petitioner and his co-defendant who went to trial remain incarcerated for the offenses a dozen years later; petitioner still has more than a quarter-century to serve.

Third, petitioner argued that he has a documented record of rehabilitation. D. Ct. Dkt. 259, at 4-5. Although petitioner is serving a nearly 50-year sentence, he has been a model federal prisoner. He has served nearly 22

years in federal custody, and during that time, he has completed over 19 years of educational courses. *Id.* at 4. He has also worked in UNICOR Prison Industries for over 15 years, earning experience as a quality-assurance inspector, payroll clerk, machine operator, and material handler. *Ibid.* Petitioner has not spent his time solely on self-improvement; he has also taught other prisoners music theory and creative writing through Adult Continuing Education classes. *Ibid.* Petitioner's request for a sentence reduction was supported by his family, his pastor, and several BOP staff. See, *e.g.*, *id.* at 24 (letter of support from pastor stating that petitioner will have opportunities to be involved in music ministry upon release).

The government opposed petitioner's motion for compassionate release. It argued that the 2007 policy statement was an "applicable" policy statement under the compassionate-release provision and thus limited the district court's consideration of "other reasons" for a sentence reduction to those determined by the BOP. The government in turn argued that the reasons that petitioner presented in his motion did not satisfy the criteria in the 2007 policy statement or the BOP's program statements describing extraordinary and compelling reasons for a sentence reduction.

The district court denied petitioner's motion for compassionate release in a one-page order, stating that the motion was denied "for the reasons stated in the Government's response in opposition." App., *infra*, 58a.

4. The court of appeals affirmed in a divided decision. App., *infra*, 1a-57a.

a. At the outset, the majority expressly acknowledged that seven other courts of appeals had held that the policy statement in Section 1B1.13 of the Sentencing Guidelines is not an applicable policy statement for de-

fendant-filed motions under the First Step Act. App., *infra*, 12a. But rather than looking to the text of Section 1B1.13 to determine whether the policy statement is "applicable" to defendant-filed motions, the majority turned to dictionary definitions of "applicable." *Id.* at 13a.

The majority recognized that the plain terms of the Sentencing Commission's policy statement are expressly directed at BOP-filed motions. App., *infra*, 27a. Yet the majority reasoned that those portions of the policy statement are mere "prefatory" clauses that have no operative effect. *Ibid.* (citation omitted). While acknowledging that there was "no such thing" as a defendant-filed motion when the Commission promulgated Section 1B1.13 in 2007, the majority concluded that the policy statement applies to defendant-filed motions created by the First Step Act and constrains the grounds on which a district court can grant relief. *Id.* at 29a.

b. Judge Martin dissented. App., *infra*, 39a-57a. She faulted the majority for its decision to "strike (or ignore) language from the policy statement"—namely, the language limiting the 2007 policy statement to motions filed by the BOP. *Id.* at 39a. In her view, the practical result of the majority's approach was to "reinstate[] the exact problem the First Step Act was intended to remedy: compassionate release decisions had been left under the control of a government agency that showed no interest in properly administering it." *Ibid.*

REASONS FOR GRANTING THE PETITION

It is difficult to overstate the legal and practical importance of this case. In the decision below, the court of appeals created a seven-to-one—now eight-to-one—conflict among the courts of appeals on the question whether district courts are bound by Section 1B1.13 of the Sentencing Guidelines when deciding defendant-filed motions

under the First Step Act. Compassionate-release motions are available to every defendant serving a federal custodial sentence, but under the decision below, defendants in Florida, Georgia, and Alabama will be denied relief even when a district court concludes that reasons for granting relief are extraordinary and compelling.

In enacting the First Step Act, Congress expressly denied the BOP Director the role that the decision below ascribes to the Sentencing Commission's 2007 policy statement: that a district court has no authority to grant a sentence reduction for extraordinary and compelling reasons unless the BOP has already determined that such reasons warrant a reduction. Before the First Step Act, a defendant was eligible for compassionate release only if the BOP Director found a defendant's grounds for compassionate release to be extraordinary and compelling—and the Director then filed a motion for release on the defendant's behalf. But the BOP Director rarely filed such motions, and few people in federal prison received compassionate release, effectively negating any meaningful post-sentencing safety valve.

For that reason, Congress removed the BOP Director's ability unilaterally to decide when a defendant's circumstances are sufficiently compelling to trigger the authority for a sentence reduction on compassionate-release grounds. Now, a court may consider a sentence reduction as long as the defendant files a motion. And after the First Step Act, a court may grant compassionate release even if the BOP Director disagrees that a defendant's grounds are extraordinary and compelling. That statutory history, combined with the textual changes to the compassionate-release provision, evidences Congress's intent for courts to assume the role that the BOP previ-

ously held as adjudicator of compassionate-release requests and to grant relief on the full array of grounds reasonably encompassed by the statutory text.

The practical result of the court of appeals' decision is to countermand Congress's efforts to grant district courts the authority to determine when sentence reductions on compassionate-release grounds are warranted. A decision of such magnitude cannot stand—especially during a pandemic, when district courts are making life and death decisions regarding the release of medically vulnerable individuals in federal prison. Only the Court can resolve the conflict over this question of statutory interpretation. And the Court should not wait for the Sentencing Commission to act because, for both political and practical reasons, the Commission is unlikely to have a quorum anytime soon. And even if it did, the Commission might take several amendment cycles to enact a new policy statement. The Court should therefore grant review to resolve the conflict over this question of exceptional importance.

A. The Decision Below Creates A Conflict Among The Courts of Appeals

The court of appeals' decision conflicts with the decisions of every other circuit to decide the question whether Section 1B1.13 of the Sentencing Guidelines is applicable to defendant-filed motions under the First Step Act. The Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia Circuits have all held that the answer is no. See *United States* v. *Brooker*, 976 F.3d 228, 235 (2d Cir. 2020); *United States* v. *McCoy*, 981 F.3d 271, 282 (4th Cir. 2020); *United States* v. *Shkambi*, 993 F.3d 388, 392-393 (5th Cir. 2021); *United States* v. *Jones*, 980 F.3d 1098, 1109-1111 (6th Cir. 2020); *United States* v. *Gunn*, 980 F.3d 1178, 1180-1181 (7th Cir. 2020); *United States* v. *Aruda*, 993 F.3d 797, 802 (9th Cir. 2021); *United States* v. *McGee*,

992 F.3d 1035, 1050 (10th Cir. 2021); *United States* v. *Long*, No. 20-3064, ___ F.3d ___, 2021 WL 1972245, at *8-*9 (D.C. Cir. May 18, 2021). The Eleventh Circuit expressly acknowledged that it was creating a lopsided circuit conflict but nevertheless charted its own course. App., *infra*, 27a.

The circuit conflict shows no sign of abating. In fact, the D.C. Circuit issued its opinion after the court of appeals below issued its decision in this case. Joining the majority of other courts of appeals, the D.C. Circuit held that the inapplicability of Section 1B1.13 is "plain on its face" because, "[b]y its terms, the policy statement applies only to motions for compassionate release filed by the Bureau of Prisons, not by defendants." *Long*, 2021 WL 1972245, at *8. Writing for the court, Judge Millett expressly disagreed with the reasoning of the court of appeals in the decision below and faulted it for relying on dictionary definitions of "applicable" while ignoring the express terms of the policy statement. See *id.* at *11. The D.C. Circuit further rejected the court of appeals' conclusion that parts of the policy statement were mere "prefatory" language: "To dismiss [those] words as inert preface is to ignore a direct textual instruction and central statutory feature of the compassionate release scheme prior to the First Step Act." *Ibid.* As the D.C. Circuit noted, Section 1B1.13 "does not reflect any policy statement or policy judgment by the Sentencing Commission about how compassionate release decisions should be made under the First Step Act, in which a Congress dissatisfied with the stinginess of compassionate release grants deliberately broadened its availability." *Ibid.*

In short, until the decision below, federal circuits across the country had uniformly held that Section 1B1.13 is not an applicable policy statement for defendant-filed

motions under the First Step Act. The decision below created a conflict that calls for this Court's intervention.

B. The Decision Below Is Incorrect

The court of appeals' decision is manifestly incorrect. In holding that a Sentencing Commission policy statement relevant only to BOP-filed motions applies to defendant-filed motions only made permissible by a subsequent statutory amendment, the decision below disregards the text of the policy statement and the reasons why Congress enacted the First Step Act in the first place.

1. To begin with, the court of appeals engaged in a flawed, superficially textualist inquiry by focusing on dictionary definitions of the word "applicable" and then asking the wrong question. See App., *infra*, 13a. For instance, reasoning that "applicable" means "capable of being applied," the court concluded that, simply because *some* of the "substantive standards" within the policy statement could be applied by a district court, the policy statement was therefore "applicable." *Id.* at 13a-14a. But the salient question here is whether the policy statement *itself* is applicable to defendant-filed motions that the Sentencing Commission never contemplated.

As the D.C. Circuit explained, "[i]t plainly is not." *Long*, 2021 WL 1972245, at *12. In 2007, consistent with prevailing law at the time, the Commission conditioned sentence reductions under the compassionate-release provision on the BOP's filing of a motion. The Commission's policy statement makes that clear: the first line of Section 1B1.13 states that, "[u]pon motion of the Director of the Federal Bureau of Prisons," a court may grant relief. The application notes to Section 1B1.13 state that a court can grant relief "*only* upon motion by the Director of the Bureau of Prisons." U.S.S.G. § 1B1.13 appl. n.4 (emphasis added). The policy statement does not address

defendant-filed motions at all, and it in fact emphasized that it did not confer any rights upon defendants. As Judge Martin explained in her dissent, "the majority's dictionary-based theory about when a policy statement may be 'applicable' flies in the face of the statement's plain text that tells us when it is actually 'applicable.'" App., *infra*, 47a-48a. Put differently, only by "tak[ing] an eraser to the words that say the opposite" could the majority hold that the policy statement applied to defendant-filed motions. *Long*, 2021 WL 1972245, at *12.

The court of appeals sidestepped the plain language of the policy statement by concluding that the language referring to motions by the BOP Director was merely "prefatory" and had no "operative function." App., *infra*, 28a. But the policy statement's language requiring the BOP to file a motion was in fact operative language that implemented Congress's command as it existed at the time the policy statement was issued. "To dismiss these words as inert preface is to ignore a direct textual instruction and central statutory feature of the compassionate release scheme prior to the First Step Act." *Long*, 2021 WL 1972245, at *11.

To be sure, the Sentencing Commission has authority to promulgate a new policy statement, and it could use that authority to limit a court's discretion in ruling on defendant-filed motions. See 28 U.S.C. 994(t). But unless and until it does so, there is no policy statement that applies to such motions. See *Gunn*, 980 F.3d at 1180. Under the compassionate-release provision, a court may provide a sentence reduction as long as it is "consistent with" "applicable"—not all—policy statements. As Judge Easterbrook has explained, "[a]ny decision is 'consistent with' a nonexistent policy statement"; "'[c]onsistent with' differs from 'authorized by.'" *Ibid.*

2. In holding that the 2007 policy statement is "applicable" to defendant-filed motions, the court of appeals also subverted congressional intent. The court recognized that, at the time the Sentencing Commission promulgated the policy statement, defendant-filed motions did not exist; only the BOP could seek a sentence reduction on compassionate-release grounds. App., *infra*, 29a. But from that accurate statement of fact, the court of appeals drew the incorrect conclusion that it "makes very little sense to say that the policy statement distinguishes between a BOP-filed motion and some other kind of motion that did not exist when the policy statement was adopted." *Ibid.* In the majority's view, the First Step Act merely effectuated a "procedural" change. See *id.* at 2a-3a.

To characterize the addition of defendant-filed motions to the compassionate-release provision as a mere "procedural" change ignores the entire thrust of Congress's amendments to the compassionate-release provision. As the Department of Justice's Office of Inspector General concluded, the BOP had failed as the gatekeeper of the federal compassionate-release program. Congress responded by empowering courts to determine when a defendant has presented extraordinary and compelling circumstances, even when BOP disagrees. In light of Congress's intent to divest BOP of full control over the compassionate-release process and to promote the role of the courts in that process, it makes "very little sense," App., *infra*, 29a, to interpret the First Step Act effectively to revoke a district court's authority to determine when a defendant's circumstances warrant relief.

C. The Question Presented Is Exceptionally Important And Warrants Immediate Review

The question presented in this case is one of substantial legal and practical importance, and immediate review

is warranted to ensure that federal prisoners across the Nation can properly invoke the First Step Act as Congress envisioned. The Court need not and should not wait for the Sentencing Commission to promulgate a new policy statement.

1. The question presented is exceptionally important. Any defendant serving a custodial federal sentence can file a motion for a sentence reduction under the compassionate-release provision. In terms of sheer numbers alone, district courts within the Eleventh Circuit represent a sizable proportion of the total defendants sentenced each year. See U.S. Sentencing Commission, *2020 Annual Report and Sourcebook of Federal Sentencing Statistics* tbl. 1 <tinyurl.com/2020reportandsourcebook> (stating that, in 2020, 4,970 out of 64,565 defendants were sentenced by district courts within the Eleventh Circuit); see also U.S. Sentencing Commission, *First Step Act of 2018 Resentencing Provisions Retroactivity Data Report* tbl. 3 (2021) <tinyurl.com/firststepactretro> (showing that 14% of sentence reductions granted under the First Step Act were within the Eleventh Circuit).

By holding that the Sentencing Commission's 2007 policy statement is applicable to all motions under the compassionate-release provision, the decision below binds all federal district courts within the Eleventh Circuit in deciding such motions. The practical result is that the policy statement prevents courts from granting relief to those with unusually long sentences and other circumstances warranting release, such as in petitioner's case. See, *e.g.*, *United States* v. *Maumau*, Crim. No. 08-758, 2020 WL 806121, at *5 (D. Utah Feb. 18, 2020) (determining that the defendant's "age, the length of sentence imposed, and the fact that he would not receive the same sentence if the crime occurred today all represent ex-

traordinary and compelling grounds" supporting a sentence reduction), aff'd, 993 F.3d 821 (10th Cir. 2021); *United States* v. *Clausen*, Crim. No. 00-291, 2020 WL 4260795, at *7 (E.D. Pa. July 24, 2020) (determining that the stacking of charges under Section 924(c) resulting in a 213-year sentence, in addition to other factors, constituted extraordinary and compelling circumstances supporting a sentence reduction).

The decision below also prohibits courts from granting relief in a substantial number of cases related to the COVID-19 pandemic. Because the "other reasons" provision of Section 1B1.13 is limited to cases in which the BOP finds a defendant's circumstances extraordinary and compelling, the decision below prevents district courts from providing relief to medically vulnerable individuals in the federal prison system absent a motion from the BOP Director. As a practical matter, that means no relief is available to those individuals at all: in the first three months of the pandemic, the BOP approved only 11 of the 10,940 compassionate-release requests it received. See Keri Blakinger & Joseph Neff, *Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent Were Denied*, The Marshall Project (Oct. 7, 2020) <tinyurl.com/pandemicreleasemotions>.

In the last year, however, several district courts granted relief to such individuals after finding that Section 1B1.13 was not an applicable policy statement for defendant-filed motions. See, *e.g.*, *United States* v. *Jackson*, Crim. No. 02-30020, 2020 WL 2735724, at *3 (W.D. Va. May 26, 2020) (determining that the defendant's "underlying medical conditions, when paired with the COVID-19 pandemic," meet the "other reasons" criteria set forth in the Sentencing Guidelines); *United States* v. *Resnick*, 451 F. Supp. 3d 262, 269-270 (S.D.N.Y. 2020) (determining that the defendant's "high susceptibility to COVID-19"

satisfied the "other reasons" criteria); see also *United States* v. *Beck*, 425 F. Supp. 3d 573, 579-582 (M.D.N.C. 2019) (determining that the BOP's gross mismanagement of medical care for the defendant's breast cancer satisfied the "other reasons" criteria and that Section 1B1.13 was not applicable to defendant-filed motions). The decision below will prohibit the federal judiciary from granting such relief to many medically vulnerable prisoners sentenced in States within the Eleventh Circuit. Such a disparity, with potentially life-altering consequences, warrants immediate action.

2. This question presented is not a Sentencing Guidelines issue that warrants resolution by the Commission under *Braxton* v. *United States*, 500 U.S. 344 (1991). This Court has primarily applied *Braxton* to deny review in cases involving interpretive conflicts arising from the Sentencing Guidelines. See, *e.g., Longoria* v. *United States*, 141 S. Ct. 978 (2021) (statement of Sotomayor, J., joined by Gorsuch, J., respecting the denial of certiorari); *cf. Buford* v. *United States*, 532 U.S. 59, 66 (2001) (stating that "Congress intended [the] Sentencing Commission to play [a] primary role in resolving conflicts over interpretation of [the] Guidelines"). That approach is consistent with *Braxton*'s reasoning, which emphasized that the Sentencing Commission's statutory duty to "periodically * * * review and revise" the Guidelines entitled the Commission to a first pass at resolving interpretive conflicts over its own Guidelines. 28 U.S.C. 994(o). Because the question presented here deals with the interpretation of a statute—a question that the Sentencing Commission cannot decide—*Braxton* is no bar to review.

In addition, for both political and practical reasons, the Court should not wait for the Commission to promulgate a new policy statement. The Sentencing Commission has been without a quorum since January 2019—just one

month after the First Step Act became law. See *Brooker*, 976 F.3d at 234; *Gunn*, 980 F.3d at 1180. And it will likely remain without a quorum for the considerable future, in light of the Executive and Legislative Branches' prioritization of judicial nominations rather than the nominations of Sentencing Commissioners. For example, President Trump nominated Commissioners while his party held the Senate, but none received a hearing before the Senate Judiciary Committee. See Douglas Berman, *Reviving the U.S. Sentencing Commission*, Crime and Justice News (Feb. 24, 2021) <tinyurl.com/revivingussc>. "Remarkably, the agency Congress created to advance sound 'sentencing policies and practices' * * * now needs six new confirmed members to get back to full strength and at least three new commissioners to be somewhat functional." *Ibid.*

The political dynamic has not changed with a new Administration and Senate. Thus far, President Biden has nominated three slates of judicial nominees but not a single Sentencing Commissioner. See White House, *President Biden Announces Third Slate of Judicial Nominees* (May 12, 2021) <tinyurl.com/thirdslate>.

Even if the Sentencing Commission were replenished sufficiently to reach a quorum by the end of this year, there is no certainty that the Commission would proceed to create a new policy statement within the next amendment cycle. In 1984, Congress instructed the Commission to create a policy statement for the compassionate-release program, but the Commission failed to do so until 2006, with the policy statement taking effect in 2007. See *Jones*, 980 F.3d at 1104. Absent action from this Court, a similar delay could occur here, leaving federal prisoners in the Eleventh Circuit to languish for decades without the relief Congress intended to provide to them through the First Step Act.

Even if the Commission did promulgate a new policy statement, moreover, it would need to consider and propose an amendment as part of its annual priorities. It would also need to seek input from a variety of stakeholders, given the importance of a policy statement implementing a monumental, bipartisan piece of legislation such as the First Step Act. The Commission would need to hold public hearings and receive written testimony, confer with key leaders in Congress to gauge their receptiveness to any amendments, and engage in an extensive research and drafting process involving Commission staff and the Commissioners, who only meet monthly. The amendment cycle would take an entire year and any amendment would then be sent to Congress, which would have 180 days to decide whether to modify or disapprove it. See U.S. Sentencing Commission, *Federal Sentencing: The Basics* 35 (Sept. 2020). Even in a best-case scenario, therefore, it would be at least two years before a new policy statement takes effect. When facing similar landmark criminal-justice reform, it took the Commission four years just to reduce the penalties for federal drug offenses by two levels. See, *e.g.*, Chief Judge Patti B. Saris, Chair, U.S. Sentencing Commission, Remarks for the Public Meeting of the U.S. Sentencing Commission (Apr. 10, 2014) <tinyurl.com/april2014usscremarks>.

In short, this Court's intervention is sorely needed to resolve the acknowledged conflict on an important question of statutory interpretation. As a result of the decision below, there will be intolerable disparities for individuals seeking compassionate release across the Nation. The Court should grant certiorari in this case and reverse the court of appeals' deeply flawed decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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