No. 21-___

IN THE

Supreme Court of the United States

JASON JARVIS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Jeffrey B. Lazarus
FEDERAL PUBLIC
DEFENDER'S OFFICE
DISTRICT OF NORTHERN
OHIO
1660 W. 2nd Street, Ste. 750
Cleveland, OH 44113

Michael R. Dreeben
Counsel of Record
Kendall Turner
O'MELVENY & MYERS LLP
1625 I St. NW
Washington, DC 20006
(202) 383-5400
mdreeben@omm.com

Bruce Pettig
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036

QUESTION PRESENTED

Whether non-retroactive changes in federal law can serve as "extraordinary and compelling reasons" warranting a sentence reduction under 18 U.S.C. § 3582(c)(1)(A).

RELATED PROCEEDINGS

United States v. Jarvis, No. 1:94-cr-68-CAB-4 (N.D. Ohio)

United States v. Jarvis, No. 94-4278 (6th Cir.)

United States v. Jarvis, No. 20-3912 (6th Cir.)

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RELATED PROCEEDINGS....................................... ii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION.. 1

RELEVANT STATUTORY PROVISIONS 1

INTRODUCTION 1

STATEMENT... 2

A. Statutory Framework 2

B. The Current Controversy 7

REASONS FOR GRANTING THE PETITION....... 11

A. The Courts of Appeals Are Intractably Divided on the Question Presented............... 11

B. The Decision Below Implicates Vitally Important Interests 15

C. This Case Provides An Excellent Vehicle To Address The Question Presented 20

D. The Decision Below Is Incorrect 22

CONCLUSION... 27

TABLE OF CONTENTS
(continued)

Page

APPENDIX A
Sixth Circuit Opinion
(July 3, 2021).. 1a

APPENDIX B
District Court Opinion
(Aug. 14, 2020) 23a

APPENDIX C
Sixth Circuit Order Denying Rehearing
(Sept. 8, 2021) 33a

APPENDIX D
Selected Statutory Provisions 34a

TABLE OF AUTHORITIES

Page(s)

Cases

Deal v. United States,
508 U.S. 129 (1993) 5

Dean v. United States,
137 S. Ct. 1170 (2017) 24

Dillon v. United States,
560 U.S. 817 (2010) 2

Dorsey v. United States,
567 U.S. 260 (2012) 6

Florida v. Bostick,
501 U.S. 429 (1991) 22

Holland v. Florida,
560 U.S. 631 (2010) 22

Jennings v. Rodriguez,
138 S. Ct. 830 (2018) 24

Kimbrough v. United States,
552 U.S. 85 (2007) 24

Rosemond v. United States,
572 U.S. 65 (2014) 7

United States v. Adeyemi,
470 F. Supp. 3d 489 (E.D. Pa. 2020).................... 19

United States v. Andrews,
12 F.4th 255 (3d Cir. 2021) 13, 14, 15

United States v. Andrews,
480 F. Supp. 3d 669 (E.D. Pa. 2020),
aff'd, 12 F.4th 255 (3d Cir. 2021)......................... 19

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Angelos,
345 F. Supp. 2d 1227 (D. Utah 2004),
aff'd, 433 F.3d 738 (10th Cir. 2006) 16

United States v. Berry,
2021 WL 4310598 (M.D.N.C. Sept.
22, 2021) 19

United States v. Brooker,
976 F.3d 228 (2d Cir. 2020) 25

United States v. Bryant,
996 F.3d 1243 (11th Cir. 2021),
petition for cert. pending, No. 20-1732
(docketed June 15, 2021) 23

United States v. Foreman,
2021 WL 2143819 (N.D. Okla. May
26, 2021) 18

United States v. Gashe,
2020 WL 6276140 (N.D. Iowa Oct. 26,
2020), *aff'd*, 2021 WL 2450585 (8th
Cir. Jan. 19, 2021), *petition for cert.*
pending, No. 20-8284 (docketed June
14, 2021) 11, 19

United States v. Gunn,
980 F.3d 1178 (7th Cir. 2020) 25

United States v. Jones,
980 F.3d 1098 (6th Cir. 2020) 23

United States v. LaBonte,
520 U.S. 751 (1997) 23

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Long,
997 F.3d 342 (D.C. Cir. 2021) 23

United States v. McCoy,
981 F.3d 271 (4th Cir. 2020) 12, 13, 19, 26

United States v. McGee,
992 F.3d 1035 (10th Cir. 2021) 12, 13, 15

United States v. Owens,
996 F.3d 755 (6th Cir. 2021) 10

United States v. Rucker,
2021 WL 4061615 (D. Kan. Sept. 7, 2021)... 19

United States v. Savoy,
2020 WL 6733683 (M.D.N.C. Nov. 13, 2020)... 19

United States v. Scott,
508 F. Supp. 3d 314 (N.D. Ind. 2020), *aff'd*, Order, Dkt. No. 32, No. 20-3535 (7th Cir. Sept. 22, 2021) 19

United States v. Thacker,
4 F.4th 569 (7th Cir. 2021)............................. 13, 14

United States v. Tomes,
990 F.3d 500 (6th Cir. 2021) 9, 21

United States v. Waite,
12 F.4th 204 (2d Cir. 2021) 15

Watford v. United States,
No. 21-551 (docketed Oct. 12, 2021) 11

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

1 U.S.C. § 109 6

18 U.S.C. § 371 7

18 U.S.C. § 924(c) 5, 7, 17

18 U.S.C. § 924(c)(1) 7

18 U.S.C. § 924(c)(1)(D) 15

18 U.S.C. § 2113 7

18 U.S.C. § 3553(a) 3

18 U.S.C. § 3582(c)(1) 23

18 U.S.C. § 3582(c)(1)(A) 1, 3, 5, 20

18 U.S.C. § 3582(c)(1)(B) 2

28 U.S.C. § 994(t) 3, 23

First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5149 .... *passim*

Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 3

U.S.S.G., App'x C, Amendment 799 4

U.S.S.G. § 1B1.13 .... 3, 23

Other Authorities

164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) 5

TABLE OF AUTHORITIES
(continued)

Page(s)

Office of the Inspector General, U.S. Dep't of Justice, *The Federal Bureau of Prisons' Compassionate Release Program* (Apr. 2013), https://oig.justice.gov/reports/2013/e1306.pdf. 4, 17

S. Rep. No. 225, 98th Cong., 2d Sess. 121 (1983) 25

U.S. Sentencing Comm'n, *2018 Annual Report and Sourcebook of Federal Sentencing Statistics* (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report-and-Sourcebook.pdf.......... 18

U.S. Sentencing Comm'n, *Compassionate Release Data Report* (Sept. 2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210928-Compassionate-Release.pdf.......... 20

TABLE OF AUTHORITIES
(continued)

Page(s)

U.S. Sentencing Comm'n, *The First Step Act of 2018, One Year of Implementation* 6-8 (Aug. 2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf 6

U.S. Sentencing Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Oct. 2011) 16, 17

PETITION FOR A WRIT OF CERTIORARI

Petitioner Jason Jarvis respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion denying rehearing is unpublished but available at Pet. App. 33a. That court's panel opinion (Pet. App. 1a-22a) is published at 999 F.3d 442. The district court's opinion and order (Pet. App. 23a-32a) is available at 2020 WL 4726455.

JURISDICTION

The court of appeals denied a petition for rehearing on September 8, 2021. Pet. App. 33a. This petition is being filed within 90 days of that denial. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant provisions of Sections 3553 and 3582 and of Title 18 of the U.S. Code are set forth in the appendix.

INTRODUCTION

In 2018, Congress gave federal prisoners the opportunity to seek compassionate release from their sentences for "extraordinary and compelling reasons." 18 U.S.C. § 3582(c)(1)(A). Congress also amended two especially harsh sentencing provisions, making those changes applicable to pending cases without providing for retroactive application. The interplay between those provisions has divided the circuits. Some courts of appeals have held that on a case-by-

case basis, the new sentencing provisions may be considered in resolving a motion for compassionate release. Other courts of appeals have interpreted the non-retroactive character of the sentencing changes as precluding district courts from considering them in motions for compassionate release.

In this case, the Sixth Circuit held that a non-retroactive change in federal sentencing law cannot be part of the "extraordinary and compelling reasons" justifying a sentence reduction. In the Sixth Circuit's view, no matter how great the variance between the prisoner's sentence and current federal provisions, and regardless of Congress's decision not to enact a categorical bar against relying on changes in law in a compassionate-release motion, courts cannot consider that factor. The Sixth Circuit thus precluded petitioner from asking the district court to exercise discretion to reduce his sentence based in part on the sentence's gross disproportion to current federal law.

The Sixth Circuit acknowledged that its decision created a circuit conflict, but it read its precedent as requiring that result. Because the conflict in the circuits has widespread importance to the administration of federal criminal justice, and because the court of appeals' decision is incorrect, this Court should grant certiorari and reverse.

STATEMENT

A. Statutory Framework

1. Criminal sentences are generally final once imposed. *See Dillon v. United States*, 560 U.S. 817, 824 (2010); 18 U.S.C. § 3582(b). One exception to this rule of finality is set forth in what is colloquially known as the "compassionate release" statute, 18

U.S.C. § 3582(c)(1)(A), enacted as part of the Sentencing Reform Act of 1984. *See* Pub. L. No. 98-473, tit. 2, ch. 2, 98 Stat. 1837, 1987 (1984).

As relevant here, that Act provides that a district court may reduce a prisoner's sentence "after considering the factors set forth in [18 U.S.C. § 3553(a)] to the extent that they are appliable, if it finds that" (i) "extraordinary and compelling reasons warrant such a reduction" or (ii) the defendant has reached a certain age, has served a certain amount of time, and has been deemed not to be "a danger to the safety of any other person or the community" by the Director of the Bureau of Prisons. 18 U.S.C. § 3582(c)(1)(A). Congress provided that any sentence reduction be "consistent with applicable policy statements issued by the Sentencing Commission." *Id.* As originally enacted, only the Director of the Bureau of Prisons could file a motion under this provision. *See* 18 U.S.C. § 3582(c)(1)(A) (1988).

The Act did not define what "extraordinary and compelling reasons" warrant a sentence reduction. Instead, it instructed the Sentencing Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction." 28 U.S.C. § 994(t). Congress's sole limitation on this instruction was the following: "Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." *Id.*

In 2007, the Sentencing Commission issued a policy statement saying 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, cmt. (n.1).

2. Despite the policy statement, the compassionate-release process was rarely utilized by the Bureau of Prisons. As the Department of Justice stated in a 2013 report on the process's functioning between 2006 and 2011: "[T]he existing BOP compassionate release program has been poorly managed and implemented inconsistently, likely resulting in eligible inmates not being considered for release and in terminally ill inmates dying before their requests were decided."[1]

In 2016, the Commission responded to this report, as well as "Bureau of Prisons data documenting lengthy review of compassionate release applications and low approval rates." U.S.S.G., App'x C, Amendment 799. It "held a public hearing on compassionate release and received testimony from witnesses and experts about the need to broaden the criteria for eligibility," among other issues. *Id.* Following that hearing, the Commission broadened the list of factors that qualify as "extraordinary and compelling reasons" warranting compassionate release under Section 3852. *Id.* It specifically noted that these amendments were designed to "encourage[] the Director of the Bureau of Prisons to file a motion for compassionate release" more frequently. *Id.*

3. In 2018, Congress intervened. It enacted the First Step Act, *see* Pub. L. No. 115-391, 132 Stat. 5194, one purpose of which was to "increas[e] the use

---

[1] Office of the Inspector General, U.S. Dep't of Justice, *The Federal Bureau of Prisons' Compassionate Release Program* i (Apr. 2013), https://oig.justice.gov/reports/2013/e1306.pdf.

and transparency of compassionate release," *id.* at 5239, § 603(b) (capitalization omitted); *see also* 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Ben Cardin) ("The bill expands compassionate release under the Second Chance Act and expedites compassionate release applications."). This change removed the bottleneck inherent in the original version of Section 3582, under which only the Director of the Bureau of Prisons could seek the compassionate release of a prisoner. Under the First Step Act, prisoners can file their own motions, as long as certain administrative prerequisites have been met and the court finds that the reduction is warranted by "extraordinary and compelling reasons." 18 U.S.C. § 3582(c)(1)(A).

4. The First Step Act also addressed two particularly severe provisions of federal sentencing law for drug and firearms offenses. First, federal law had long provided for consecutive sentencing for multiple violations of 18 U.S.C. § 924(c)—which prohibits using, carrying, or possessing a firearm in connection with certain federal felonies—even if the Section 924(c) convictions were entered in a single proceeding. *See Deal v. United States*, 508 U.S. 129 (1993). Because a recidivist Section 924(c) conviction carries a mandatory sentence of 25 years' imprisonment and must be served consecutively to any other sentence, multiple Section 924(c) convictions in a single prosecution could readily escalate to produce a life or near-life sentence. These "stacked" Section 924(c) sentences often greatly exceed the Sentencing Guidelines' recommendation for the offense conduct. The First Step Act altered that regime by providing that the recidivist

provisions for a "second or subsequent" Section 924(c) offense applied only "after a prior conviction under [Section 924(c)] has become final." *See* First Step Act, 132 Stat. 5221-5222, § 403(a).

Second, the First Step Act narrowed the type of prior offenses that trigger increased penalties for federal drug offenses and expanded the scope of covered offenses; it also reduced the length of some of the enhanced penalties. *See* First Step Act, 132 Stat. 5220, § 401.[2]

Congress made each of those changes applicable to pending cases:

> **Applicability to Pending Cases**—This section, and the amendments made by this section, 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, 132 Stat. 5221, 5222, §§ 401(c), 403(b). Because Congress made no provision for applying these changes to final sentences, federal law provides that the prior penalties for such offenders remain unchanged. *See Dorsey v. United States*, 567 U.S. 260 (2012) (clarifying that under 1 U.S.C. § 109, prior penalties remain in force absent an express statement or fair implication that more lenient changes apply to pre-Act offenders).

---

[2] The Sentencing Commission described these changes in *The First Step Act of 2018, One Year of Implementation* 6-8 (Aug. 2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf.

B. The Current Controversy

1. In 1994, a federal grand jury indicted petitioner on 12 counts relating to certain bank robberies. After a trial, a jury found him guilty on four counts of armed bank robbery, one count of conspiracy to commit armed bank robbery, and five counts of using a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. §§ 2113, 371, 924(c). *See* Pet. App. 2a, 23a.

In sentencing petitioner, the district court determined that he was subject to a five-year mandatory minimum prison term for his first firearm conviction. Because each of the other four firearm convictions qualified as repeat offenses, the court determined that he was subject to a mandatory minimum of twenty years for each offense, to be imposed consecutively. *See* Pet. App. 2a; 18 U.S.C. § 924(c)(1) (1994). The court sentenced petitioner to 85 years on his Section 924(c) firearm offenses and 11 years on his other convictions, for a total sentence of 96 years. Pet. App. 2a, 23a.

In 2014, this Court held in *Rosemond v. United States*, 572 U.S. 65 (2014), that the government must prove that the defendant had "advance knowledge" that a firearm would be used in a crime to establish liability for aiding and abetting a Section 924(c) offense. *Id.* at 78. Following that decision, petitioner moved under Federal Rule of Civil Procedure 60(b) to have three of his Section 924(c) convictions vacated for insufficient proof of his advance knowledge. Pet. App. 2a-3a, 23a-24a. In 2017, petitioner and the government entered a joint resentencing agreement, pursuant to which petitioner would be resentenced to 40 years total: five for his first Section 924(c)

conviction, 20 for his second, and 15 for his bank robbery and conspiracy convictions, all to be served consecutively. *See* Dkt. No. 547. The district court accepted the recommendation of the parties and imposed that 40-year sentence. Dkt. No. 551.

2. On May 29, 2020, petitioner filed a motion for compassionate release under Section 3582(c)(1)(A). *See* Dkt. No. 574. He argued that multiple "extraordinary and compelling reasons" warranted a reduction of his sentence, including the COVID-19 pandemic and the heightened risk of infection at his facility, the sentencing factors in Section 3553(a), and the fact that he could not receive the same sentence today in light of the First Step Act. *Id.* at 22-27. Today, the mandatory minimum for his second Section 924(c) conviction would be five years—not 20 as it was at the time of his sentencing. *See* Pet. App. 3a. Petitioner detailed that he was twenty years old at the time of sentencing, had no prior adult convictions, and has already served 26 years of imprisonment for his offenses. Dkt. No. 574, at 2-3.

3. On August 14, 2020, the district court denied the motion for compassionate release. Pet. App. 23a-32a.

The court acknowledged that, because of the First Step Act, petitioner would receive a significantly shorter sentence today than he did at the time of his sentencing. But it believed that the "disparity based on a change in sentencing law cannot serve as 'extraordinary and compelling reasons'" for compassionate release. Pet. App. 30a. In the district court's view, "inquiry under the compassionate release statute must be highly individualized, and not based on facts or changes in the law that affect

hundreds—if not thousands—of prisoners." *Id.* at 31a. The court then held that petitioner's medical condition, in combination with the heightened risks posed by COVID-19, did not warrant compassionate release, at least when considered independently of the sentencing disparity created by the First Step Act. *Id.* at 25a-30a.

4. a. The Sixth Circuit affirmed. It largely relied on its prior decision in *United States v. Tomes*, 990 F.3d 500 (6th Cir. 2021), which held that the parallel change to drug recidivist sentencing could not serve as an "extraordinary and compelling reason" under Section 3582(c)(1)(A)(i). *See* 990 F.3d at 505. As noted above, Section 401 of the First Step Act reduced the penalties for certain drug crimes and provided only for application to certain pending cases. *Tomes* held that, because Congress had not applied the more lenient sentences to past offenders, disparities between past and present sentencing ranges could not constitute "extraordinary and compelling reasons" warranting compassionate release. *Id.* The Sixth Circuit applied the rationale of *Tomes* to Section 403 of the First Step Act, concluding that the more lenient sentencing provisions found in current law were a "legally impermissible ground" for consideration in a compassionate-release motion. Pet. App. 4a-5a.

The Sixth Circuit expressly acknowledged that its decision parted ways with those of the Fourth and Tenth Circuits. Pet. App. 6a. The Sixth Circuit refused to join those circuits both because of *Tomes* and because it concluded that the statutory scheme "does not permit us to treat the First Step Act's non-retroactive amendments, whether by themselves or together with other factors, as 'extraordinary and

compelling' explanations for a sentencing reduction." *Id.* at 7a-8a.

b. Judge Clay dissented. In his view, circuit precedent and the purpose of the compassionate release statute dictated the conclusion that "a non-retroactive sentencing amendment can be considered along with other grounds for release." Pet. App. 18a-22a. He concluded that the reasoning in *Tomes* on which the majority relied was dicta. *Id.* at 11a-12a. He also disagreed with *Tomes*'s premise that permitting consideration of sentencing amendments would effect an "end run" around Section 401(c)'s non-retroactivity provision. Relying on the Fourth and Tenth Circuits, he found "nothing in § 401(c) or any other part of the First Step Act that indicates that Congress intended to prohibit district courts, on an individualized, case-by-case basis, from granting sentence reductions under § 3582(c)(1)(A)(i) to some defendants who would be eligible for a lower sentence under current law." *Id.* at 14a; *see also id.* at 18a-22a.[3]

---

[3] The majority and dissent also disagreed about the impact of *United States v. Owens*, 996 F.3d 755 (6th Cir. 2021), decided less than a month before. The *Owens* panel held that the sentencing disparity created by Section 401 may be considered, in combination with other factors, for purposes of compassionate release. *See id.* at 763-64. The majority discounted *Owens* as a misapplication of *Tomes*. Pet. App. 8a-9a. Although petitioner filed a petition for rehearing en banc asking the Sixth Circuit to reconcile its precedents in favor of *Owens*, the court of appeals denied rehearing en banc. *Id.* at 33a.

REASONS FOR GRANTING THE PETITION

The circuits are deeply divided on a question of exceptional importance to federal criminal justice: whether defendants serving decades more prison time than they would serve today because of fundamental changes in sentencing law can rely on those legal changes in motions for compassionate release. The court of appeals' categorical bar on such consideration parts ways with the decisions of other courts of appeals and creates unjustified geographical disparities. The impact is severe for hundreds, if not thousands, of prisoners serving lengthy sentences. This case is an ideal vehicle for resolving the split. Review is all the more warranted because the court of appeals is wrong. Congress's decision to make its more lenient recidivist-sentencing provisions prospectively applicable on a categorical basis says nothing about whether these disproportionate sentences can be an "extraordinary and compelling reason[]" for a reduced sentence on a case-by-case basis. This Court should grant review and reverse.[4]

A. The Courts of Appeals Are Intractably Divided on the Question Presented

This case implicates a clear and acknowledged circuit conflict on whether disparities between the sentence a defendant received and the sentence he would now receive under the First Step Act can be an

---

[4] Essentially the same question is presented in *Gashe v. United States*, 20-8284 (docketed Apr. 19, 2021), and *Watford v. United States*, No. 21-551 (docketed Oct. 12, 2021).

"extraordinary and compelling reason" to reduce a term of imprisonment.

1. The Fourth and Tenth Circuits have held that, in individual cases, the disparity between past and current sentencing rules can form an element of a compassionate-release motion. *See United States v. McCoy*, 981 F.3d 271, 285-87 (4th Cir. 2020); *United States v. McGee*, 992 F.3d 1035, 1045-48 (10th Cir. 2021).

In *McCoy*, the Fourth Circuit held that courts may "treat[] 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." *McCoy*, 981 F.3d at 286. As that court explained: "[D]istinct features of the defendants' § 924(c) sentences" made the First Step Act's changes relevant "in applying the 'extraordinary and compelling reasons' standard. First is the sheer and unusual length of the sentences." *Id.* at 285. And second is "the 'gross disparity' between those sentences and the sentences Congress now believes to be an appropriate penalty for the defendants' conduct." *Id.* Together, these factors "can constitute an 'extraordinary and compelling' reason for relief under § 3582(c)(1)(A)," together with "full consideration of the defendants' individual circumstances." *Id.* at 285-86. Because the defendants in *McCoy* were not only subject to significant sentencing disparities but also were relatively young at the time of their offenses, had already served a substantial portion of their sentences, and "had established excellent institutional records and taken substantial steps

toward rehabilitation," the Fourth Circuit affirmed the district court's grant of compassionate release. *Id.* at 286.

Addressing an identical issue in the context of a Section 841(b)(1)(A) sentence for a drug crime, the Tenth Circuit embraced the Fourth Circuit's reasoning in *McCoy* and largely rejected the Sixth Circuit's reasoning in *Tomes*. *See McGee*, 992 F.3d at 1045-48. The Tenth Circuit found "the Fourth Circuit's analysis persuasive" because "nothing in" any "part of the First Step Act indicates that Congress intended to prohibit district courts, on an individualized, case-by-case basis, from granting sentence reductions under § 3582(c)(1)(A)(i) to *some*" defendants. *Id.* at 1047. The Tenth Circuit, however, cautioned, "that the fact a defendant is serving a pre-First Step Act mandatory life sentence imposed under § 841(b)(1)(A) cannot, standing alone, serve as the basis for a sentence reduction under § 3582(c)(1)(A)(i)." *Id.* at 1048. "Instead, . . . it can only be the combination of such a sentence and a defendant's unique circumstances that constitute 'extraordinary and compelling reasons.'" *Id.* Because the district court had "misunderstood the extent of its authority" under the compassionate release statute, the Tenth Circuit reversed its decision and remanded for further consideration of the defendant's motion. *Id.* at 1051.

2. The Third, Sixth, and Seventh Circuits have reached the opposite conclusion. *See United States v. Andrews*, 12 F.4th 255, 261-62 (3d Cir. 2021); *United States v. Thacker*, 4 F.4th 569, 571, 575-76 (7th Cir. 2021); Pet. App. 4a-5a.

According to those courts, the First Step Act's "nonretroactive sentencing reductions are not extraordinary and compelling reasons for purposes of § 3582(c)(1)(A)." *Andrews*, 12 F.4th at 262; *see Thacker*, 4 F.4th at 571; Pet. App. 4a-5a. Those courts have held as much regardless of whether the First Step Act's amendments are "considered alone or in connection with other facts and circumstances." *Thacker*, 4 F.4th at 571; *accord* Pet. App. 4a-5a. In these courts' view, permitting case-by-case consideration of sentencing disparities created by the First Step Act for purposes of compassionate release is "at odds" with Congress's decision to forgo making the amendments categorically retroactive for all prisoners. *Thacker*, 4 F.4th at 574; *accord Andrews*, 12 F.4th at 261-62; Pet. App. 4a-5a.

The conflict cannot be resolved without this Court's review. The Sixth Circuit was aware of the conflicting precedents from the Fourth and Tenth Circuits and expressly declined to follow them; it then denied a petition for rehearing en banc seeking to address the conflict. *See* Pet. App. 6a, 33a. Similarly, the Third and Seventh Circuits have recognized that "courts have come to principled and sometimes different conclusions as to whether the change to § 924(c) can constitute an extraordinary and compelling reason for compassionate release." *Thacker*, 4 F.4th at 575; *see Andrews*, 12 F.4th at 261-62 (recognizing disagreement). Only this Court's intervention can ensure consistency in application of this important facet of sentencing law.

B. The Decision Below Implicates Vitally Important Interests

The question presented affects up to hundreds of years of sentencing time for potentially thousands of federal prisoners who may have strong cases for compassionate release.

1. For prisoners serving severe mandatory sentences under Section 924(c) and Section 841(b)(1)(A), the stakes could not be higher. Some prisoners sentenced to stacked Section 924(c) convictions are serving sentences hundreds of years long, and hundreds of years longer than they would be serving if they were sentenced today. *See Andrews*, 12 F.4th at 257 (312-year sentence); *United States v. Waite*, 12 F.4th 204, 207 (2d Cir. 2021) (115-year sentence). Prisoners sentenced under the previous Section 841(b)(1)(A) fare no better: many have received mandatory life sentences for circumstances that now warrant a 20-year penalty. *See, e.g.*, *McGee*, 992 F.3d at 1037.

This problem is particularly acute for individuals who have been convicted of multiple Section 924(c) offenses. Because the sentence for each Section 924(c) offense must be served consecutively with any other term of imprisonment, including any other Section 924(c) offenses, *see* 18 U.S.C. § 924(c)(1)(D), it can result in exceptionally long prison sentences. A defendant simultaneously convicted of three Section 924(c) offenses, for example, would serve a mandatory minimum term of 55 years of imprisonment. For a young, otherwise-first-offender, this can yield an “unjust, cruel, and even irrational” sentence—far in excess of what the United States Sentencing Commission would recommend for the

underlying conduct. *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006). The sentence may also be "far in excess of the sentence imposed for such serious crimes as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape." 345 F. Supp. 2d at 1230. "It exceeds what recidivist criminals will likely serve under the federal 'three strikes' provision." *Id.*

Cognizant of these harsh and often grossly disproportionate sentencing consequences, judges, policymakers, and prosecutors have urged reduced sentences for individuals who commit multiple Section 924(c) offenses. The district judge who imposed sentence in *Angelos* "call[ed] on Congress to modify § 924(c) so that its harsh provisions for 25-year multiple sentences apply only to true recidivist drug offenders—those who have been sent to prison and failed to learn their lesson." 345 F. Supp. 2d at 1231. The Judicial Conference has called sentence stacking "draconian" and repeatedly urged Congress to make it a "true recidivist statute, if not rescind[] it all together." U.S. Sentencing Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 360-61 (Oct. 2011). The Sentencing Commission has likewise characterized stacked Section 924(c) sentences as "excessively severe and disproportionate to the offense committed" and recommended legislation that would permit imposing them concurrently. *Id.* at 359-60, 368. And the Department of Justice itself, recognizing that stacked Section 924(c) sentences can be excessive, has allowed prosecutors to forgo charging multiple violations of Section 924(c) since

2003. *See id.* at 361; *see also* Justice Manual § 9-27.310 (Feb. 2018) (Principles of Federal Prosecution setting forth policy to "ordinarily charge at least one 18 U.S.C. § 924(c) count along with the underlying predicate" but permitting, not requiring, "multiple § 924(c) offenses").

Petitioner is a prime example of the severity of stacked Section 924(c) offenses and the injustice of barring consideration of the First Step Act's changes when considering a petition for compassionate release. At the time of his 1993 offenses, petitioner was nineteen years old and had no prior adult convictions. Petitioner is serving a 25-year sentence for Section 924(c) offenses that would carry a ten-year term if he were sentenced today. Had he been sentenced within the Fourth or Tenth Circuits, the district court could have considered that disparity in determining his eligibility for a reduced sentence. But he was sentenced in the Sixth Circuit, where consideration of this circumstance is prohibited—notwithstanding Congress's adoption of a sentencing policy that recognizes the unjustified harshness of stacked Section 924(c) charges like petitioner's. The result is that many incarcerated individuals in the Third, Sixth, and Seventh Circuits are subject to a dramatically more restrictive compassionate release standard than those in the Fourth and Tenth Circuits.

2. The significance of the conflict is magnified by the number of defendants potentially affected by it. Section 924(c) and Section 841(b) are very common sentencing provisions, invoked in scores of

prosecutions each year.[5] Even without precise data, which the Sentencing Commission has not yet made public, it is readily apparent that the issue in this case will have a large impact. For example, in fiscal year 2018 alone, 148 defendants convicted under Section 924(c) were sentenced to a mandatory minimum term of over 120 months—longer than the sentence for a single Section 924(c) offense.[6] And in the same year, 410 defendants convicted of drug trafficking offenses received mandatory minimum sentences of 20 years or life.[7] It is likely that many of these defendants—and many more sentenced in the preceding years—are serving such long sentences thanks to those parts of Sections 924(c) and 841(b)(1)(A) that were modified by the First Step Act.

A significant number of these prisoners have already filed compassionate release motions. "District courts across the country have" heard and often "grant[ed] § 3582(c)(1)(A) relief based on 'stacking' of § 924(c) convictions." *United States v. Foreman*, 2021 WL 2143819, at *5 (N.D. Okla. May

---

[5] *See, e.g.*, U.S. Sentencing Comm'n, *2018 Annual Report and Sourcebook of Federal Sentencing Statistics* 147 fig.F-3 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report-and-Sourcebook.pdf (2,564 offenders convicted under Section 924(c) in fiscal year 2018); *id.* at 120 tbl.D-12 (1,007 notices of enhanced penalty under Section 851 filed, and not withdrawn, in fiscal year 2018).

[6] *Id.* at 147 fig.F3.

[7] *Id.* at 122 fig.D2.

26, 2021) (citing cases).[8] Other courts have denied these motions based on irreconcilable reasoning.[9] Yet others have declined to rule, awaiting resolution of "conflicts between and among the Courts of Appeals on the scope of a § 3582(c)(1)(A) motion." *United States v. Berry*, 2021 WL 4310598, at *5 (M.D.N.C. Sept. 22, 2021). More petitions for compassionate

---

[8] *See, e.g.*, *McCoy*, 981 F.3d at 285 ("[M]ultiple district courts have concluded that the severity of a § 924(c) sentence, combined with the enormous disparity between that sentence and the sentence a defendant would receive today, can constitute an 'extraordinary and compelling' reason for relief under § 3682(a)(1)(A)." (citing cases)); *United States v. Adeyemi*, 470 F. Supp. 3d 489, 519 & n.239 (E.D. Pa. 2020) (citing "numerous cases compassionately releasing defendants originally sentenced under the now-defunct section 924(c) stacking provision"); *United States v. Rucker*, 2021 WL 4061615, at *3 (D. Kan. Sept. 7, 2021) (granting compassionate release based in part on a sentence disparity created by the First Step Act's elimination of the stacking requirement for violations of Section 924(c)).

[9] *See, e.g.*, *United States v. Scott*, 508 F. Supp. 3d 314, 319 (N.D. Ind. 2020) ("This court is not persuaded that the sentencing disparities created by § 403 amount to an extraordinary and compelling reason justifying compassionate release. Congress expressly declined to make § 403's sentencing changes retroactive, despite making other sentencing amendments in the First Step Act retroactive."), *aff'd*, Order, Dkt. No. 32, No. 20-3535 (7th Cir. Sept. 22, 2021); *United States v. Savoy*, 2020 WL 6733683, at *5 (M.D.N.C. Nov. 13, 2020) (similar); *United States v. Andrews*, 480 F. Supp. 3d 669, 682 (E.D. Pa. 2020) (similar), *aff'd*, 12 F.4th 255 (3d Cir. 2021); *United States v. Gashe*, 2020 WL 6276140, at *3 (N.D. Iowa Oct. 26, 2020) (similar), *aff'd*, 2021 WL 2450585 (8th Cir. Jan. 19, 2021), *petition for cert. pending*, No. 20-8284 (docketed June 14, 2021).

release based in part or in whole on the First Step Act's changes are likely to be filed in the future.[10] Incarcerated individuals' ability to secure compassionate relief based on those changes should not depend, as it does now, solely on the jurisdiction in which they happen to have been prosecuted. Only this Court's intervention can restore uniform standards for all who seek reduced sentences on the basis of "extraordinary and compelling reasons."

C. This Case Provides An Excellent Vehicle To Address The Question Presented

This case affords a perfect vehicle for resolving the question presented. The issue was preserved throughout the trial court and appellate proceedings, was thoroughly considered by the court below, and is outcome-determinative here.

1. Petitioner preserved his claim throughout the proceedings below. After exhausting his administrative remedies, *see* Pet. App. 24a, he filed a motion in the district court for compassionate release, specifically arguing that the court "has the power to consider" the First Step Act's changes to Section 924(c) "in determining whether a sentence reduction is warranted under 18 U.S.C. § 3582(c)(1)(A)." *See* Dkt. No. 574, at 25-26.

---

[10] *See generally* U.S. Sentencing Comm'n, *Compassionate Release Data Report* (Sept. 2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210928-Compassionate-Release.pdf.

The government advanced the contrary argument in response. It argued, among other things, that "Congress decided not to extend the benefit of Section 403 of the First Step Act to defendants like [petitioner], and it did not authorize use of Section 3582(c)(1)(A) to accomplish the same result." *See* Dkt. No. 578 at 21-27.

Denying the motion, the district court squarely addressed these arguments. It concluded—based on its own "thorough[] research[] and analy[sis]" and interpretation of Section 403—"that a disparity based on a change in sentencing law cannot serve as 'extraordinary and compelling reasons' under § 3582(c)(1)(A)." Pet. App. 30a-31a; *see also id.* 10a ("The district court . . . concluded that it lacked the authority to reduce [petitioner's] sentence[] based on a non-retroactive change in the law—not because of the Sentencing Commission's policy statement but because of the relevant statutory texts.").

The Sixth Circuit likewise directly passed on the same question below. The panel majority relied on the circuit's earlier decision in *United States v. Tomes*, 990 F.3d 500 (6th Cir. 2021), which it construed as holding that Section 401's nonretroactive change to Section 841(b)(1)(A) could never be an "extraordinary and compelling reason." *See* Pet. App. 4a-10a. It concluded that *Tomes* "applies with identical force here" and thus that Section 403's nonretroactive amendment to § 924(c) likewise could not serve as an "extraordinary and compelling reason." *Id.* at 4a-5a.

In dissent, Judge Clay fully aired the contrary view, arguing that the relevant part of *Tomes* was dicta. He would have followed the Fourth and Tenth

Circuits in holding that "a district court can consider a sentencing disparity created by a non-retroactive sentencing amendment as an extraordinary and compelling reason for release in combination with other factors." Pet. App. 22a.

2. Resolving the question presented in petitioner's favor would entitle him to fresh consideration of his motion, with the ability to cite the First Step Act's changes to Section 924(c) in arguing that he has shown "extraordinary and compelling reasons" warranting relief. In denying petitioner's motion for compassionate release, the district court considered his *other* proffered "extraordinary and compelling reasons" and concluded that, on balance, "the combination of [his] hypertension and COVID-19 are not enough to justify compassionate release." Pet. App. 30a. But the court excluded from this analysis any consideration of the First Step Act's alteration of Section 924(c), holding that the change could not as a matter of law contribute to a showing of extraordinary and compelling reasons. *Id.* at 30a. The district court should be required to consider petitioner's severe sentence in conjunction with petitioner's other serious circumstances in the first instance and exercise its discretion under correct legal standards. *See, e.g.*, *Holland v. Florida*, 560 U.S. 631, 653-54 (2010) (remanding to allow lower courts to apply the correct legal standard in the first instance); *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (same).

D. The Decision Below Is Incorrect

Review is particularly warranted here because the Sixth Circuit's categorical ruling is wrong. By concluding that district courts can never consider the

disparity between a prisoner's stacked Section 924(c) sentence and the sentence he would receive today—no matter how many decades that disparity may be—the court created a restriction that Congress did not, and thereby undermined the reforms in the First Step Act.

1. The text of the compassionate-release statute does not preclude consideration of the First Step Act's amendment to Section 924(c). The applicable statute provides that a district court "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; *or*" certain other conditions are met, "*and* that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."[11] 18 U.S.C. § 3582(c)(1) (emphasis added). Congress itself imposed only one limitation on the district court's discretion: "Rehabilitation of the defendant

---

[11] The Sixth Circuit has correctly ruled that the Sentencing Commission has not promulgated an "applicable" policy statement for defendant-filed motions under Section 3582(1), *see United States v. Jones*, 980 F.3d 1098, 1109-11 (6th Cir. 2020), as have the majority of the courts of appeals that have addressed that issue, *see United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021) (collecting cases). *But see United States v. Bryant*, 996 F.3d 1243, 1247-66 (11th Cir. 2021), *petition for cert. pending*, No. 20-1732 (docketed June 15, 2021). But if the statute precludes consideration of non-retroactive changes in the law in evaluating "extraordinary and compelling reasons," the Commission could not alter that policy even if it did promulgate a policy statement for defendant-filed motions. *See United States v. LaBonte*, 520 U.S. 751, 757 (1997).

alone shall not be considered an extraordinary and compelling reason." 28 U.S.C. § 994(t); *see* U.S.S.G. § 1B1.13 (same). Nothing in the statutory text supports the conclusion that Congress intended to prohibit district courts, on an individualized, case-by-case basis, from granting sentence reductions under Section 3582(c)(1)(A)(i) to defendants who would be subject to much shorter sentences under non-retroactive changes in the law, such as those implemented by the First Step Act.

If anything, the principle that "[t]he expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)" supports the conclusion that the "express exception" in the statute "implies that there are no other" exceptions. *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (internal citation and quotation marks omitted). Congress provided that rehabilitation alone cannot constitute an "extraordinary and compelling reason[]" for compassionate release. Reading in *another* exception to the district court's discretion would contradict that statutory text. This Court has explained more than once that where "Congress has shown that it knows how to direct sentencing practices in express terms," "[d]rawing meaning from silence is particularly inappropriate." *Dean v. United States*, 137 S. Ct. 1170, 1177 (2017) (quoting *Kimbrough v. United States*, 552 U.S. 85, 103 (2007)).

2. The restriction the court of appeals read into the statute also contradicts the evolution of the compassionate-release provision. The amendments to the statute show that Congress sought to enhance the circumstances in which district courts could exercise

discretion in considering compassionate-release petitions.

The original compassionate release statute was intended to be a broad "safety valve," adaptable to cases "in which the defendant's circumstances are so changed . . . that it would inequitable to continue the confinement." S. Rep. No. 225, 98th Cong., 2d Sess. 121 (1983). In 2018, however, Congress determined that the "safety valve" had not functioned as intended under the Bureau of Prisons's stewardship; it accordingly sought to "increase[e] the use and transparency of compassionate release" by allowing prisoner-initiated motions (after administrative exhaustion). First Step Act, 132 Stat. 5239, § 603(b) (capitalization omitted). In doing so, Congress did not—as noted above—implement any additional limitations on the discretion of district courts in considering petitions for compassionate release. Thus, the First Step Act confirmed that district courts are "freed . . . to exercise their discretion in determining what are extraordinary circumstances." *United States v. Brooker*, 976 F.3d 228, 234 (2d Cir. 2020); *see also, e.g., United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020).

3. In reaching the opposite conclusion, the court below focused almost exclusively on the nonretroactivity language in Section 401(c) of the First Step Act. It concluded that "[p]ermitting defendants sentenced before the Act to benefit from § 401 . . . would render § 401(c) *useless*," and sanction an "end run around Congress's careful effort to limit the retroactivity of the First Step Act's reforms." Pet. App. 4a (emphasis added) (citations and internal quotation marks omitted).

This argument equates making a sentencing amendment retroactive for all defendants with permitting its consideration as part of an individualized compassionate release analysis. That equation is unfounded. "The fact that Congress chose not to make § [401] of the First Step Act categorically retroactive does not mean that courts may not consider that legislative change in conducting their individualized reviews of motions for compassionate release under § 3582(c)(1)(A)(i)." *McCoy*, 981 F.3d at 286. "[T]here is a significant difference between automatic vacatur and resentencing of an entire class of sentences—with its avalanche of applications and inevitable resentencings—and allowing for the provision of individual relief in the most grievous cases." *Id.* at 286-87 (citation and internal quotation marks omitted). In light of this difference, there is "nothing inconsistent about Congress's paired First Step Act judgments: that not all defendants convicted under § 924(c) should receive new sentences, but that the courts should be empowered to relieve some defendants of those sentences on a case-by-case basis." *Id.* at 287 (citations and internal quotation marks omitted).

The contrary rule of the court below imposes an atextual limitation on this power and "contravenes the purpose of compassionate release." Pet. App. 12a (dissenting opinion). It also leads to the counterintuitive result of excluding from the district court's calculus the reality that a defendant may be serving decades in prison under a flawed sentencing regime that all agree is bad policy. Even if that circumstance alone does not add up to an extraordinary and compelling factor that mandates

resentencing, a court should have discretion to weigh—in conjunction with other factors—the legislative branch's judgment that the crime of conviction is worthy of substantially lesser punishment than the defendant is serving.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Jeffrey B. Lazarus
FEDERAL PUBLIC
DEFENDER'S OFFICE
DISTRICT OF NORTHERN
OHIO
1660 W. 2nd Street, Ste. 750
Cleveland, OH 44113

Michael R. Dreeben
Counsel of Record
Kendall Turner
O'MELVENY & MYERS LLP
1625 I St. NW
Washington, DC 20006
(202) 383-5400
mdreeben@omm.com

Bruce Pettig
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036

October 15, 2021