No. 21-6010

In the Supreme Court of the United States

ROBERT D. SUTTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF FAMM AND NACDL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amicus FAMM is a national, nonprofit, nonpartisan organization whose primary mission is to promote fair and rational sentencing policies, and to challenge mandatory sentencing laws and the ensuing inflexible and excessive penalties. Founded in 1991 as Families Against Mandatory Minimums, FAMM currently has 75,000 members nationwide. FAMM pursues a broad mission of creating a more fair and effective justice system that respects American values of individual accountability and dignity while keeping communities safe. By mobilizing incarcerated persons and their families adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the general public and through selected *amicus* filings in important cases.

FAMM has long supported the elimination of "stacked" sentences under 18 U.S.C. § 924(c) and proper access to sentence modification (commonly called "compassionate release") under 18 U.S.C. § 3582(c)(1)(A)(i). Its advocacy efforts in Congress were rewarded most recently with the passage of the First Step Act of 2018. In recognition of the destructive toll mandatory minimums exact on FAMM's members

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in any part, and that no person or entity, other than *amici* and their counsel, made a monetary contribution to fund its preparation and submission. All parties have been timely notified of the filing of this brief and consented to its filing in accord with Supreme Court Rule 37.2.

in prison, their loved ones, and their communities, FAMM submits this brief in support of Petitioner and to ensure proper application of the First Step Act.

NACDL ("National Association of Criminal Defense Lawyers") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of many thousands of members, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL files numerous *amicus* briefs each year seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

INTRODUCTION & SUMMARY OF ARGUMENT

This case presents a pure question of federal statutory law on which there is a recognized, entrenched circuit split. As Petitioner explains, it therefore merits review. We address three points that further support granting *certiorari*.[2]

[2] As noted below, multiple other pending petitions address the same question presented here. *Amici* previously filed a brief in support of the Petition in *Watford v. United States*, No. 21-551 (U.S. Oct. 12, 2021). This brief presents substantially the same points as *Amici's* brief in *Watford*.

I. The question presented is extraordinarily important. Two recent cases clarify the real-world stakes of the issue and demonstrate a proper application of federal law. More systematic considerations—including the sheer number of people affected, the recognized injustice of sentence stacking under 18 U.S.C. § 924(c), and the prevalence of racial disparities in Section 924(c) sentences—confirm the question's importance. In addition, the issue warrants review because a decision here may clarify when non-retroactive changes in federal law can be considered in assessing grounds for compassionate release.

II. The decision below thwarts congressional intent. The best evidence of congressional purpose is the statutory text—and here, as we demonstrate, the textual analysis is conclusive. Statutory structure and the history of congressional action in this field further support the answer given by the plain text. Those same considerations, bolstered by empirical evidence and common sense, defeat any argument the government might raise concerning administrability and the risk of opening floodgates.

III. The question presented warrants resolution by this Court. The Court should not leave this issue to the United States Sentencing Commission or Congress. The Commission lacks a quorum and there is no reason to believe it will act on these issues in the foreseeable future; meanwhile, federal courts remain sharply divided on a pure question of federal statutory law implicating the fate of several thousand people. That state of affairs is intolerable. Further, several circuits treat the question as settled by the interaction

of related statutes, and so this issue may not be within the Commission's authority to resolve in any event. Although bills have been introduced in the House and Senate that would make fully retroactive the First Step Act's amendments to Section 924(c), those bills have not been introduced on the floor. As this Court's prior practice confirms, the mere pendency of that legislation offers no reason to deny review. Waiting for the Commission or Congress to resolve the question presented risks the judicial equivalent of waiting for Godot. Petitioner—and the many others serving sentences stacked under Section 924(c)—should not be left to languish indefinitely.

Signaling the importance of this issue, at least four petitions (including this one) presenting the same basic question have already been filed at the Court this Term. *See* Pet. for Writ of *Certiorari*, *Gashe v. United States*, No. 20-8284 (U.S. Apr. 19, 2021); Pet. for Writ of *Certiorari*, *Watford v. United States*, No. 21-551 (U.S. Oct. 12, 2021); Pet. for Writ of *Certiorari*, *Sutton v. United States*, No. 21-6010 (U.S. Oct. 14, 2021); Pet. for Writ of *Certiorari*, *Jarvis v. United States*, No. 21-568 (U.S. Oct. 15, 2021); *see also* Pet. for Writ of *Certiorari*, *Bryant v. United States*, No. 20-1732 (U.S. June 15, 2021) (presenting related question of whether courts are constrained by the Sentencing Commission's policy statement, U.S.S.G. § 1B1.13, in reviewing a defendant-filed compassionate release motion under § 3582(c)(1)(A)).

To prevent injustice and ensure uniformity in federal law, *amici* respectfully urge the Court to grant

one or more of the pending petitions and hold the remainder in abeyance.

ARGUMENT

I. The Question Presented Is Extraordinarily Important

The Petition asks this Court to address a question with life-altering implications for thousands of men and women—all of whom were sentenced under a regime that is now widely agreed to be unjust. We first discuss two cases that demonstrate the real-world stakes of the issue, while also illustrating the operation of these legal rules in practice. We then survey additional systemic considerations confirming the importance of the question presented. Finally, we explain how a decision here could more broadly clarify when non-retroactive changes to sentencing law may rank (alone or in combination with other factors) as "extraordinary and compelling reasons" under Section 3582(c)(1)(A), thus permitting individualized reconsideration of a person's sentence and potential early release.

A. Case Studies: Jamal Ezell and Adam Clausen

The legal issues in this case are abstract and technical. Their implications are anything but. Their resolution will determine whether thousands of people—many sentenced to *de facto* terms of life imprisonment—can now, years later, seek to persuade a federal judge that their individual circumstances (including the injustice of their original sentence) allow the

possibility of a second look. The stories of two FAMM members illustrate why the answer must be "yes." They also demonstrate that the government's contrary view would lead to manifest injustice.

First consider Jamal Ezell. When Jamal was 22 years old, he participated in several robberies. Because he was found guilty on six counts charged under Section 924(c)—the court concluded that it had no choice but to impose a sentence of 132 years' imprisonment for those counts. In so doing, the sentencing judge expressed regret about the "unduly harsh" punishment he was obliged to inflict: "[S]entencing Mr. Ezell to prison for longer than the remainder of his life is far in excess of what is required to accomplish all of the goals of sentencing." *United States v. Ezell*, 417 F. Supp. 2d 667, 671 (E.D. Pa. 2006), *aff'd*, 265 F. App'x 70 (3d Cir. 2008).

Despite having "no reason to believe that he would be released from prison during his lifetime," through his 18 years of confinement he completed over 700 hours of education and dozens of courses through Bureau of Prisons (BOP) programming, including anger management and victim empathy. *United States v. Ezell*, 518 F. Supp. 3d 851, 860 (E.D. Pa. 2021). He also received countless certificates and honors reflecting his rehabilitation. *See id.* At the age of 41, he posed no danger to society and no longer resembled the 22-year-old sentenced in 2006. *See id.*

Following passage of the First Step Act, Jamal moved for compassionate release based in part on the

substantial changes it wrought to Section 924(c) sentencing. The district court granted his petition. *See id.* at 853. In its opinion, the district court recognized that today Jamal would face only 30 years—not 132 years—in prison. *See id.* at 857. Finding that Jamal's original sentence was "indefensibly harsh," and accounting for "other factors related to [his] rehabilitation," the district court held that he had shown "extraordinary and compelling" circumstances opening the door to consideration of compassionate release. *See id.* at 856-57. Of course, that did not end the inquiry. Turning to the Section 3553(a) factors, the judge commended Jamal for his rehabilitation, found that he was no longer a danger to society, and granted him compassionate release. *See id.* at 859-861. The government did not appeal. Today, Jamal works in healthcare and supports his family.

Adam Clausen's story is similar. When Adam was 25 years old—a point at which he was homeless and afflicted by drug addiction—he engaged in a robbery spree over a 20-day stretch. Adam never discharged his firearm. Nevertheless, the district court was required to impose a sentence of 205 years' imprisonment for Adam's violations of Section 924(c). The prosecutor assigned to the case conceded the injustice of this punishment, stating that Adam's "off the charts" mandatory minimum left the sentencing court in a "regrettable" situation. *United States v. Clausen*, No. 00 Cr. 291-2, 2020 WL 4260795, at *8 (E.D. Pa. July 24, 2020).

Despite a scheduled release date of November 17, 2181, Adam demonstrated exemplary character

during his 20 years of incarceration. *Id.* at *1. He completed over a hundred BOP programs, created and facilitated BOP reentry programs, obtained a certification as a life coach, conducted presentations on criminal justice reform with academics and government officials, and taught educational courses to other prisoners. *Id.* at *2. From 2003 onwards, he incurred no disciplinary infractions. *Id.* at *8.

Following passage of the First Step Act, Adam sought compassionate release. In considering his application, the district court found that his "excessive sentence and his demonstrated rehabilitation . . . present extraordinary and compelling reasons" that opened the door for an individualized determination of whether Adam merited compassionate release. *Id.* at *7. In a follow-up proceeding, the district court undertook that separate analysis, concluding that Adam had "transformed himself while incarcerated and [had] channeled his abilities to improve the lives of other inmates." *United States v. Clausen*, No. 00 Cr. 291-2, 2020 WL 4601247, at *3 (E.D. Pa. Aug. 10, 2020). For this reason, the district court reduced Adam's sentence to time served plus three years of supervised release. *See id.* Here, too, the government declined to appeal. Today, Adam volunteers with Hope for Prisoners as a Reentry Specialist. He also cares for his infant son, Christian.

If the government's view were to prevail, individuals like Jamal and Adam would be denied relief. Indeed, under the law of the Third Circuit today (the circuit in which both of them were originally sentenced), Jamal and Adam would likely face the grim

fate of continued lifetime imprisonment. *See United States v. Andrews*, 12 F.4th 255, 261 (3d Cir. 2021). That would be profoundly unjust. It would serve no social or penological purpose. And it would reflect clear legal error: accounting for the results of Section 924(c) stacking as one factor (alone or among others) in identifying "extraordinary and compelling" reasons—and then making a separate, individualized determination of whether compassionate release is actually warranted under the Section 3553(a) factors—is different in kind from treating relevant provisions of the First Step Act as retroactive.

Jamal and Adam are individuals with hopes, talents, friends, and families. So, too, are the many other persons who might deserve a second look under a correct understanding of the law. This Court should correct the error below and resolve the split that already bedevils half of the circuits.

B. Stacked Section 924(c) Sentences Are Uniquely Responsible for Excessive Punishment and Contribute to Systemic Racial Disparities

From a systemic point of view, the question presented is important because it affects thousands of people—many of whom are still serving out draconian sentences that can be "excessively severe and disproportionate to the offense committed." *See* U.S. Sentencing Comm'n, *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 359 (2011).

In its most recent data, the Sentencing Commission estimates than more than 2,400 people are serving stacked Section 924(c) sentences, U.S. Sentencing Comm'n., *Estimate of the Impact of Selected Sections of S. 1014, The First Step Implementation Act of 2021* 1 (Oct. 2021) ("*Estimate of Impact of First Step Implementation Act*"). Many of these sentences are decades or centuries longer than those imposed today for identical criminal conduct, resulting in dramatic and disturbing disparities. *See, e.g.*, *Clausen*, 2020 WL 4260795, at *1 & n.3 (205-year sentence for stacked Section 924(c) violations); *United States v. Young*, 458 F. Supp. 3d 838, 848 (M.D. Tenn. 2020) ("[A]s a result of the First Step Act, if [the defendant] were sentenced now, he would be subject to a mandatory minimum sentence of 25 years, rather than 92."). For far too many federal inmates, that is the difference between the potential for light at the end of the tunnel and the prospect of dying in prison.

Holding that courts can never account for now-repudiated Section 924(c) stacking in compassionate release analysis—even as part of a holistic assessment of individual circumstances—would defy an established legal and political consensus that the imposition of such sentences can be "unjust, cruel, and even irrational." *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006); *see also, e.g.*, *United States v. McPherson*, 454 F. Supp. 3d 1049, 1053 (W.D. Wash. 2020) (granting release and decrying the length of the sentence already served, adding "it is extraordinary that a civilized society can allow this to happen to someone who, by all accounts, has long since learned his lesson").

By the same token, prohibiting consideration of stacked sentences entrenches sentencing outcomes riddled with stark racial disparities. Long before the First Step Act, the Sentencing Commission recognized that mandatory minimum penalties based on firearms were disproportionately imposed on Black defendants. *See* U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing* 90 (Nov. 2004) ("Notably, Blacks accounted for 48 percent of the offenders who appeared to qualify for a charge under 18 U.S.C. § 924(c) but represented 56 percent of those who were charged under the statute and 64 percent of those convicted under it."); *see also United States v. Holloway*, 68 F. Supp. 3d 310, 313 (E.D.N.Y. 2014) (recognizing that "Black defendants . . . have been disproportionately subjected to the 'stacking' of § 924(c) counts."). Not only were Black defendants convicted more often than any other racial group of firearms offenses carrying mandatory minimums, but Black defendants also received longer average sentences for Section 924(c) violations than any other racial group. *See* U.S. Sentencing Comm'n, *Mandatory Minimum Penalties for Firearm Offenses in the Federal Criminal Justice System* 6 (Mar. 2018). The racial disparities in harsh sentences can and should be abated under a proper view of the law.

Because the question presented affects thousands of federal prisoners—and because it implicates manifestly unjust sentences and the perpetuation of indefensible racial disparities—it is extraordinarily important and worthy of this Court's review.

C. Implications for Other Important Issues in Sentencing Law

Granting the Petition would also afford the Court an opportunity to clarify when judges may properly account for non-retroactive changes in sentencing law more generally in assessing whether the "extraordinary and compelling" reasons required for a second look are present.

Consider, for example, the 2018 First Step Act's amendments to the statutorily required mandatory minimums for third drug offenses. *See* Pub. L. No. 115-391, 132 Stat. 5194, § 401 (amending 21 U.S.C. § 841(b)(1)(A)). There, Congress reduced the mandatory sentence for such an offense from life in prison to 25 years. *See* 21 U.S.C. § 841(b)(1)(A). It also modified what constitutes a qualifying prior drug offense—the term no longer covers *any* prior drug felony, but is instead now limited to "serious" drug felonies, narrowly defined. *Id.* § 841(b). These changes have resulted in drastic differences based on whether people were sentenced before or after passage of the First Step Act. *See United States v. Hope*, No. 90 Cr. 6108, 2020 WL 2477523, at *1 (S.D. Fla. Apr. 10, 2020) (granting compassionate release to defendant who was serving a mandatory minimum life sentence for offense that now has a sentencing range of 262 to 327 months).

Lower courts have reached different holdings on whether the First Step Act's changes to Section 841 may (alone or in combination with other factors) constitute "extraordinary and compelling" reasons that

open the door to consideration of compassionate release. *See id.* (yes); *United States v. McGee*, 992 F.3d 1035, 1045-48 (10th Cir. 2021) (yes); *United States v. Tomes*, 990 F.3d 500, 505 (6th Cir. 2021) (no). Almost 700 people serving life sentences may be affected by this determination. *See Estimate of Impact of First Step Implementation Act* at 1. And multiple petitions presenting that question have been filed at the Court this term.[3]

Granting the Petition would afford an opportunity to clarify the important legal principles bearing on that question—and to address more generally the relevance of changes in sentencing law to compassionate release analysis. For this reason, too, the Petition presents an important question warranting *certiorari*.

II. The Decision Below Thwarts Congressional Intent

A review of the relevant statutory provisions confirms the error in the decision below and in the government's position. Moreover, to the extent the government asserts that Petitioner's position risks floodgates concerns, that argument is unfounded. This Court's intervention is needed to set the law aright.

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[3] *See, e.g.*, Pet. for Writ of *Certiorari*, *Tomes v. United States*, No. 21-5104 (U.S. July 7, 2021); Pet. for Writ of *Certiorari*, *Corona v. United States*, No. 21-5671 (U.S. Sept. 2, 2021); Pet. for Writ of *Certiorari*, *Tingle v. United States*, No. 21-6068 (U.S. Oct. 15, 2021).

A. Statutory Text, Structure, and Purpose Support Petitioner's Position

"[T]he best evidence of Congress's intent is the statutory text." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012). Here, the text is clear. Section 3582(c)(1)(A) authorizes a court to reduce a prison sentence after two principal showings (beyond exhaustion of remedies): first, that "extraordinary and compelling reasons" exist that may "warrant such a reduction"; and second, that a review of "the factors set forth in section 3553(a)" support that outcome. Congress has defined only one limit on what may count as an "extraordinary and compelling" reason: "rehabilitation of the defendant alone" does not suffice. 28 U.S.C. § 994(t). Congress included no other categorical limits on what may qualify—which is unsurprising, since one important purpose of the compassionate release statute is to allow courts to address circumstances that may not have been adequately considered (or that may not have existed) when a sentence was first imposed. *See Ezell*, 518 F. Supp. 3d at 858. Because Congress expressly allowed consideration of *any* "extraordinary and compelling" reason—and because it knew how to limit that definition but did not do so here—the First Step Act's amendments to Section 924(c) may in some cases qualify as "extraordinary and compelling" reasons. It really is that simple.

The structure of Section 3582(c)—which sets forth two different procedures for sentence reductions—bolsters that conclusion. Section 3582(c)(1) (the compassionate release provision) entrusts district courts with discretion in ascertaining "extraordinary

and compelling reasons." The Sentencing Commission may only advise on what "should" be considered in that analysis, 28 U.S.C. § 994(t), and courts need only ensure that reductions are "consistent with" the Commission's applicable policy statements, § 3582(c)(1)(A). In contrast, Section 3582(c)(2) establishes a sentence reduction procedure in which district courts have far less discretion—and where the Commission can mandate "in what circumstances and by what amount" sentences may be reduced. 28 U.S.C. § 994(u); *see also Dorsey v. United States*, 567 U.S. 260 (2012). These differences between (c)(1) and (c)(2) further show that Congress knew how to constrain district court discretion in sentencing reduction—and that it preferred a more expansive role for district courts under (c)(1). We should not lightly infer that Congress itself later confined that role by negative implication from statutory amendments that say nothing about what may constitute "extraordinary and compelling reasons."

The Third, Sixth, and Seventh Circuits have reached the opposite conclusion based on faulty logic. In their view, Congress impliedly limited Section 3582(c)(1)(A) when it amended Section 924(c) but made those changes only partially retroactive. On this view, Congress's decision not to make its amendments fully retroactive also precludes any consideration whatsoever of those amendments in compassionate release analysis.

That position rests on a false equivalency. As the Fourth Circuit held, "there 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." *United States v. McCoy*, 981 F.3d 271, 286–87 (4th Cir. 2020) (citation omitted). A congressional desire to preclude the former hardly implies a determination to preclude the latter, particularly where this would result in an atextual limit on Section 3582(c)(1)(A). *See id.* ("[W]e see 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.'" (citation omitted)).

The broader trajectory of Congress's work in this field bolsters this conclusion. Congress originally enacted the compassionate release statute to provide defendants with relief when their sentences of incarceration were "unusually long." *See* S. Rep. No. 98-225, at 55-56 (1983). But BOP frustrated that purpose by consistently declining to approve relief. *See* U.S. Dep't of Justice, *The Federal Bureau of Prisons' Compassionate Release Program*, at ii (Apr. 2013) (BOP "did not approve a single non-medical request" during 6-year period of review). Congress sought to remedy BOP's failure—and expand access to compassionate release—in the First Step Act, which allowed defendants to seek relief directly in district courts. *See* Pub. L. No. 115-391, 132 Stat. 5194, § 603(b); *United States v. Brooker*, 976 F.3d 228, 233 (2d Cir. 2020) ("Chief among [the Act's] changes was the removal of the BOP as the sole arbiter of compassionate release motions.").

In this respect, the First Step Act responds to a failure to provide compassionate release where it is warranted. So it is darkly ironic that several courts have promptly reprised that very same error—insisting that negative implications from penumbral emanations of the First Step Act's retroactivity clause somehow create implied, atextual restrictions on the plain language of Section 3582(c)(1)(A). There is absolutely nothing in the legislative record or the statutory text to support that claim. In stark contrast, both the record and text evince clear judgments that Section 924(c) stacking results in unjust sentences and that federal prisoners should have more opportunity to avail themselves of compassionate release in the considered discretion of federal district courts. Only in a world gone topsy-turvy does it make sense to view the First Step Act as precluding any consideration of Section 924(c) stacking in compassionate release analysis. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020) (warning against calls to "remodel, update, or detract from" statutory terms, which "risk amending statutes outside the legislative process").

B. Petitioner's Position Is Administrable

The position advocated by Petitioner poses no risk of administrative complications or floodgates concerns.

Starting with administrability, Petitioner's proposed test is straightforward and tracks settled law in this field. A federal prisoner who files a motion for compassionate release must first show "extraordinary

and compelling" reasons that open the door to consideration of such relief. On Petitioner's view, those reasons may include—either alone or, more commonly, in combination with other individual circumstances—the fact that Section 924(c) stacking rendered an individual's original sentence significantly higher than it would be under current law. Where a court finds that an individual has indeed made a showing of "extraordinary and compelling" reasons, it then turns to Section 3553(a)—a provision known well to every district court—and assesses what relief, if any, is warranted based on the individual's specific circumstances. This is a clear and easily administered standard; it also depends heavily on the individual history and circumstances of the movant.

Partly because this standard is familiar, there is no risk that Petitioner's position would pose floodgates concerns. Indeed, the Fourth and Tenth Circuits have both held that compassionate release motions may rest, in part, on a showing of Section 924(c) stacking—and there is no evidence that district courts in those circuits have since been strained as a result. This is consistent with the available data for Section 924(c) convictions. The Sentencing Commission estimates that approximately 2,400 people spread across the country are directly implicated by the question presented. *See Estimate of Impact of First Step Implementation Act* at 1. Even if every single one of them filed a motion for compassionate release, that would result in an average of merely 3.6 motions per district judge, likely filed over the course of one or two years. Resolving motions brought by even a large majority of those defendants would pose no great burden—and, in

any event, would reflect proper execution of the expanded judicial role in compassionate release provided by the First Step Act.

III. The Question Presented Warrants Judicial Resolution

It would be a mistake to reserve the issues raised here to either the Sentencing Commission or Congress.

The Sentencing Commission is charged with "promulgating general policy statements regarding . . . 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). The government might therefore argue that this Court should stay its hand and leave resolution of the question presented to the Sentencing Commission. *See, e.g.*, *Braxton v. United States*, 500 U.S. 344, 348-49 (1991).

That would not be the proper course. The Commission has not addressed the conditions that judges should consider to be "extraordinary and compelling" in defendant-filed compassionate release motions, or in motions invoking the First Step Act's landmark amendments. Nor is there a serious prospect that it will do so anytime soon. The Commission has lacked a quorum since 2019; President Biden has not yet announced any nominees; the Commission often spends years studying an issue before issuing guidance; and the Commission has a substantial backlog of unaddressed issues. *See* Brief For Rachel E. Barkow &

Brent E. Newton As *Amici Curiae* In Support of Petitioner, *Bryant v. United States* at 13-18, No. 20-1732 (U.S. July 15, 2021); *see also* Douglas Berman, *Any Guesses For When We Might Again Have A Fully Functioning US Sentencing Commission?*, Sentencing Law and Policy Blog (Feb. 15, 2021) ("[T]he US Sentencing Commission was only somewhat functional for a small portion of the last four years, and the USSC has not had complete set of commissioners firmly in place for the better part of a decade.").[4]

In the meantime, federal courts remain intractably split on this pure question of federal statutory law—an issue squarely within the competence and domain of the Judicial Branch. Federal prisoners sentenced in Kentucky and Illinois will receive different outcomes than identically situated federal prisoners sentenced in Virginia and Colorado, purely by virtue of geographic happenstance. Federal judges throughout the nation will continue reaching and deciding the question presented (and, it seems clear, will continue disagreeing over how to resolve it).

Congress passed the First Step Act to remedy a terrible wrong in the criminal justice system. Several circuits have erred in their interpretation of the law

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[4] Indeed, if it were true that the failure of Congress to make certain reforms fully retroactive meant that the same considerations could *never* be considered "extraordinary and compelling" under § 3582(c)(1)(A)—an interpretation of the relevant statutes erroneously embraced here by the Seventh Circuit—then the Commission may conclude that it lacks authority under 28 U.S.C. § 994(t) to recommend that compassionate release be considered in such cases.

and thus stymied its remedial purpose. So long as their error persists, hundreds or thousands of people like Jamal Ezell and Adam Clausen, sentenced under the old regime of Section 924(c) stacking will be denied their proper opportunity to seek compassionate release. This Court can and must intervene.

For similar reasons, the possibility of a proposed First Step Implementation Act offers no reason to decline review. *See* S. 1014, 117th Cong. (2021). This proposed bill would make the First Step Act's changes to Section 924(c)'s penalties fully retroactive. FAMM is hopeful that Congress will pass this bill and that the President will sign it. That said, although legislation has been introduced in both the House and the Senate, it has not been taken up on the floor. *See* S. 1014, 117th Cong. (introduced March 24, 2021); H.R. 3510, 117th Cong. (introduced May 25, 2021). The mere pendency of such proposed legislation is no reason to perpetuate an entrenched circuit split. *See, e.g.*, *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 614 (2016) (granting *certiorari* despite pending legislation in both the House and Senate, *see* Brief in Opposition at 29 (No. 16-341), 2016 WL 6873253); *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428 (2011) (granting *certiorari* despite government's argument that "two legislative proposals" would "greatly limit the prospective significance of the decision below," Brief for the Respondent in Opposition at 6 (No. 09-1036), 2010 WL 2173778); Reply Brief for the United States at 8, *United States v. Eurodif S.A.*, 555 U.S. 305 (2009) (No. 07-1059), 2008 WL 905193.

The pendency of the proposed First Step Implementation Act also does not support any view about how to interpret the statutory provisions at issue here. *See Sullivan v. Finkelstein*, 496 U.S. 617, 628 n.8 (1990) (noting "all the usual difficulties inherent in relying on subsequent legislative history"); *United States v. Price*, 361 U.S. 304, 313 (1960) ("The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."). And to the extent it may be relevant, the proposed legislation *undermines* rather than supports the government's position: calls to make the First Step Act's amendments to Section 924(c) fully retroactive suggest an understanding that courts have failed to honor and effectuate Congress's original purpose.

* * * * *

Every branch of government has recognized the profound injustice that resulted from the stacking of sentences imposed pursuant to Section 924(c). Congress finally remedied that wrong in the First Step Act. This Court should grant review to correct an egregious misunderstanding of Congress's handiwork—and to remove an unnatural limitation on compassionate release that has produced an intractable circuit split. In the alternative, this Court should hold the Petition in abeyance and grant one or more of the other pending petitions that present the same issue.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to grant the Petition.

Respectfully submitted,

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