No.

In the Supreme Court of the United States

WOLFGANG VON VADER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

18 U.S.C. § 3582(c)(1)(A) provides a "safety valve" through which courts may reduce a defendant's previously imposed sentence when "extraordinary and compelling reasons warrant such a reduction."

The question presented is:

Whether courts may consider changes in the law in assessing whether "extraordinary and compelling reasons" warrant a sentence reduction under section 3582(c)(1)(A).

RELATED PROCEEDINGS

Proceedings below:

United States v. *Von Vader*, No. 22-1798 (7th Cir. Jan. 24, 2023)

United States v. *Von Vader*, No. 99-cr-125 (W.D. Wis. May 25, 2000)

Wisconsin habeas proceedings:

Von Vader v. *United States*, No. 18-3726 (7th Cir. Sept. 5, 2019)

Von Vader v. *United States*, No. 17-cv-931 (W.D. Wis. Dec. 6, 2018)

Kansas proceeding:

United States v. *Von Vader*, No. 10-cr-20109 (D. Kan. May 29, 2012).

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PETITION FOR A WRIT OF CERTIORARI

This case presents a frequently recurring question on which the courts of appeal have openly and intractably divided: whether district courts may consider any changes in the law in assessing whether extraordinary and compelling reasons warrant a sentence reduction under section 3582(c)(1)(A).

Section 3582(c)(1)(A) came to be as Congress substantially curtailed federal courts' sentencing discretion by imposing mandatory sentencing guidelines and eliminating a parole system. Appreciating that this withdrawal of discretion might overlook "unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances," Congress included section 3582(c)(1)(A) as a crucial "safety valve." S. Rep. No. 98-225 at 121. It permits courts to reduce a sentence where an "extraordinary and compelling" reason warrants it.

Congress placed only two additional limits on this power—that "rehabilitation alone" is not enough and that any reduction must be "consistent" with Sentencing Commission policy statements. Section 3582(c)(1)(A) otherwise left district courts with discretion to do equity in "[t]he relatively small number of cases in which there may be justification for reducing a term of imprisonment." S. Rep. No. 98-225 at 55-56.

Petitioner Wolfgang Von Vader is serving a sentence that the district court agrees was unlawfully enhanced and for which he has already served five years longer than he should. Von Vader, however, was the victim of a massive institutional failure of a multi-agency task force. Unbeknownst to him, in the wake of the Court's decisions in *Johnson* v. *United States* and *Mathis* v. *United States*, the United States Sentencing Commission, the United States

Probation Office, and the Federal Defender—in conjunction with the district courts and the U.S. Attorney's Offices—collaborated to ensure that every person serving an unlawfully enhanced sentence received appointed counsel to file a petition for § 2255 relief, typically unopposed. Although the multi-agency effort helped everyone else, Von Vader was overlooked, and he alone remains inequitably imprisoned. "Extraordinary and compelling" describes his circumstances.

The court of appeals, however, held that the district court categorically could not consider these circumstances in determining whether "extraordinary and compelling reasons" warranted a sentence reduction. In its telling, "extraordinary and compelling reasons" for a sentence reduction are limited only to "new fact[s] about an inmate's health or family status, or an equivalent post-conviction development" and that any "legal contention" is categorically outside section 3582(c)(1)(A)'s scope. App., *infra*, at 4a.

The decision below further entrenches a well-known circuit split that the lower courts cannot resolve without this Court's intervention. Indeed, mere months after the decision below, another panel of the Seventh Circuit requested this Court's intervention. *United States* v. *Williams*, 65 F.4th 343, 348-349 (7th Cir. 2023). "The Supreme Court has not weighed in on this disagreement. There are serious arguments to be considered on both sides. * * * All we can say is that the issue is teed up, and either the Commission or the Court (we hope) will address it soon." *Id.* at 349. This case presents the Court with that opportunity. The petition for certiorari should be granted.

OPINIONS BELOW

The opinion of the court of appeals is reported at 58 F.4th 369 and is reproduced in the appendix at 1a-5a. The decision of the district court is unreported and reproduced in the appendix at 7a-12a.

JURISDICTION

The court of appeals entered its judgment on January 24, 2023, and denied a timely filed petition for rehearing on May 3, 2023. On July 6, 2023, Justice Barrett extended the time to file a petition for certiorari to September 29, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. § 3582(c)(1)(A) states:

> The court may not modify a term of imprisonment once it has been imposed except that—
>
> (1) in any case—
>
> (A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section

> 3553(a) to the extent that they are applicable, if it finds that—
>
> > (i) extraordinary and compelling reasons warrant such a reduction; * * *
>
> > and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

STATEMENT

A. Legal background

Through the Sentencing Reform Act of 1984, Pub. L. No. 98-473 § 211, 98 Stat. 1837, Congress abolished the federal parole system and substantially curtailed the sentencing discretion exercised by federal judges by implementing mandatory sentencing guidelines to be dictated by the new U.S. Sentencing Commission. See generally *United States* v. *Booker*, 543 U.S. 220, 233-234 (2005); *Concepcion* v. *United States*, 142 S. Ct. 3289, 2398-2399 (2022) (describing the long history of "wide sentencing discretion"). Congress also recognized the harsh results that could follow from a complete withdrawal of judicial discretion in sentencing—that "[t]here may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances." S. Rep. No. 98-225 at 55-56, 121. Congress therefore enacted three "safety valves" through which courts could modify sentences once imposed. *Ibid.*

Section 3582(c)(1)(A) is one of those safety valves.[1] It authorizes a court to reduce a sentence where it finds

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[1] As originally enacted, the other two safety valves were modifications "expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure" or reductions based on certain sentencing-guideline-range changes by the Sentencing Commission. Pub. L.

that "extraordinary and compelling reasons warrant such a reduction." Thus, in "cases of severe illness [or] cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence" or where "the defendant's circumstances are so changed * * * that it would be inequitable to continue the confinement" (S. Rep. No. 98-225 at 55-56, 121), Congress gave district courts the power to reduce a sentence.

This power came with two limits: a reduction could be granted only on motion by the Bureau of Prisons, and it could only be granted consistent with any applicable policy statement issued by the Sentencing Commission. Pub. L. No. 98-473, ch. II, subch. D, 98 Stat. at 1998; 18 U.S.C. § 3582(c)(1)(A). Congress then instructed the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction," with the sole limit that "[r]ehabilitation of the defendant alone" could not qualify as such a reason. 28 U.S.C. § 994(t).

But section 3582(c)(1)(A) did not become the safety valve that Congress intended. It took the Sentencing Commission 22 years to provide any elucidation of the standard and, even then, it mostly parroted the statutory text. See U.S.S.G. § 1B1.13 (2006). More problematic, the Bureau of Prisons, which had "absolute gatekeeping authority" (*United States* v. *Brooker*, 976 F.3d 228, 231-232 (2d Cir. 2020)), exercised it with troubling infrequence: only around 24 sentence-reduction requests per year over 2006 to 2011 were secured, despite BOP's responsibility for more than 218,000 federal offenders

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No. 98-473 ch. II, subch. D, 98 Stat. at 1998-1999 (enacting § 3582(c)).

across 132 facilities. See U.S. Dep't of Justice, Off. of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program* 1 (Apr. 2013), perma.cc/8G4X-MLST; see also Christi Thompson, *Old, Sick and Dying in Shackles*, The Marshall Project (Mar. 7, 2018), perma.cc/BTR3-KNNQ. That is, the BOP roughly allowed 24 per 218,000 equitable releases when the cancer mortality rate *alone* during the time was 158.3 per 100,000 (or 345.1 per 218,000). See National Cancer Institute, *Cancer Statistics* (Sept. 25, 2020), perma.cc/NS5Y-SEBX. See also Meg Anderson, *1 in 4 Inmate Deaths Happen in the Same Federal Prison. Why*?, NPR (Sept. 23, 2023), perma.cc/7TD8-Z4A8 ("According to NPR's analysis, more people in BOP custody died of cancer than any other cause from 2009 to 2020.").

The BOP's sparing invocation of section 3582(c)(1)(A)'s safety valve caught Congress's attention. And, through the First Step Act of 2018, Congress took action. In particular, in a section entitled "Increasing the Use and Transparency of Compassionate Release," Congress authorized federal inmates to file sentence-reduction motions with the court themselves after exhausting BOP administrative remedies. See Pub. L. No. 115-391 § 603(b), 132 Stat. 5194, 5239. These "material changes" were meant to "expand[] opportunities" for equitable sentence reductions "after a long history of poor implementation and rare use." *United States* v. *Ruvalcaba*, 26 F.4th 14, 22 (1st Cir. 2022).

Now, a court may grant a section 3582(c)(1)(A) sentence reduction "upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal" when "extraordinary and compelling reasons warrant such a reduction," and the reduction is

"consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A)[2]; see also Nathan James, Cong. Rsch. Serv., R45558, *The First Step Act of 2018: An Overview* 18 (Mar. 1, 2019). As it has been since section 3582(c)(1)(A)'s enactment, the sole substantive limit Congress placed on courts' broad discretion to find that "extraordinary and compelling reasons" warrant a sentence reduction is that "[r]ehabilitation of the defendant alone" does not qualify. 28 U.S.C. § 994(t).

"What Congress seems to have wanted, in fact occurred" (*Brooker*, 976 F.3d at 233): in the seven months following the change, 51 inmates secured relief, compared to 34 total for the entire preceding year. U.S. Dep't of Justice, *Department of Justice Announces the Release of 3,100 Inmates Under First Step Act, Publishes Risk and Needs Assessment System* (July 19, 2019), perma.cc/HU6G-LFFF. And federal courts are now adjudicating around 200-300 section 3582(c)(1)(A) motions on a monthly basis. See U.S. Sentencing Comm'n, *Compassionate Release Data Report: Fiscal Year 2023, 3rd Quarter* at tbl. 1 (Sept. 2023), perma.cc/MXE9-7DT4.

For its part, the Sentencing Commission lacked a quorum from the enactment of the First Step Act until August 2022, leaving courts discretion to assess whether "extraordinary and compelling reasons" warrant a

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[2] Any sentence reduction must also comport with 18 U.S.C. § 3553(a), which sets out the factors to be considered in imposing any sentence. See 18 U.S.C. § 3582(c)(1)(A). Courts have treated the "extraordinary and compelling reasons" inquiry as a threshold hurdle that an inmate must clear before the court may proceed to addressing the section 3553(a) to arrive at the reduced sentence. See, *e.g.*, *United States* v. *Thacker*, 4 F.4th 569, 576 (7th Cir. 2021).

reduction without an "applicable" policy statement with which to be "consistent." See 18 U.S.C. § 3582(c)(1)(A); *United States* v. *Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020); *Ruvalcaba*, 26 F.4th at 21-22.

While this case was pending before the court of appeals, the Sentencing Commission proposed and adopted new amendments to the Sentencing Guidelines. See C.A. Doc. 39 (U.S. Sentencing Comm'n, *Proposed Amendments to the Federal Sentencing Guidelines (Preliminary)* (Jan. 12, 2023)); U.S. Sentencing Comm'n, *Proposed Amendments to the Sentencing Guidelines* (Feb. 2, 2023), perma.cc/MMG3-7E24; C.A. Doc. 51 at Ex. 1 (U.S. Sentencing Comm'n, *Amendments to the Sentencing Guidelines (Preliminary*) (Apr. 5, 2023)), U.S. Sentencing Comm'n, *Amendments to the Sentencing Guidelines* (Apr. 27, 2023), perma.cc/8NP8-98D6; *Notice of Amendments to the Sentencing Guidelines*, 88 Fed. Reg. 28,254 (May 3, 2023). As part of those amendments, the Sentencing Commission expressed its view that courts may consider a "change in the law" in evaluating whether an "extraordinary and compelling reason" warrants a sentence reduction in certain individualized circumstances.[3] See 88 Fed. Reg. at 28,255 (amended U.S.S.G. § 1B1.13(b)(6)). These amendments, barring affirmative Congressional action (28 U.S.C. § 994(p)), take effect November 1, 2023.

[3] The amended guideline permits considering changes in the law when the defendant "received an unusually long sentence," "has already served at least 10 years," and there is "a gross disparity between the sentence being served and the sentence likely to be imposed." 88 Fed. Reg. at 28,255.

B. Factual background

1. Wolfgang Von Vader is serving a 390-month sentence for two non-violent drug offenses. C.A. App. 32-33, 39. For his conviction in the Western District of Wisconsin in 2000, Von Vader was sentenced as a career offender. See U.S.S.G. § 4B1.1 (Nov. 1, 1998). That career-offender enhancement meant that his applicable Guidelines range jumped from 151 to 188 months to 262 to 327 months. D. Ct. Doc. 44 at 9 ¶ 29; D. Ct. Doc. 48 at 3. Bound by that range (pre-*Booker*), the court imposed a 270-month sentence. Von Vader was later sentenced by the District of Kansas in 2012 to a consecutive 120-month sentence pursuant to an 11(c)(1)(C) plea agreement that likewise assumed he qualified as a career offender. C.A. App. 43.

2. Years later, this Court decided *Johnson* v. *United States* (576 U.S. 591 (2015)) and *Mathis* v. *United States* (579 U.S. 500 (2016)), which rendered Von Vader's career-offender enhancement unlawful, and retroactively so. See *Welch* v. *United States*, 578 U.S. 120, 130 (2016) (*Johnson* announced a substantive rule change that applies retroactively on collateral review); *Holt* v. *United States*, 843 F.3d 720, 721-722 (7th Cir. 2016) (*Mathis* applies retroactively on collateral review). As the district court observed, "Von Vader would not qualify as a career offender under § 4B1.1 if he were being sentenced today." C.A. App. 20.

The consequence of this legal change for Von Vader cannot be overstated: If he had received a top-of-the-Guidelines sentence in each case based on the correctly calculated range at the time (188 months and 33 months), and the sentences ran consecutively, he already would have overserved that sentence by five years—even longer,

if accounting for good time and other earned reductions. Nonetheless, Von Vader is not set to be released until May 18, 2027. Find an Inmate, Federal Bureau of Prisons, tinyurl.com/22dhvtuc (visited Sept. 27, 2023) (use "Find By Name" feature to search for "Wolfgang Von Vader").

3. In the wake of *Johnson* and *Mathis*, a multi-agency task force—the United States Sentencing Commission, the United States Probation Office, and the Federal Defender Services of Wisconsin, Inc.—worked together to identify defendants, like Von Vader, who were eligible for federal habeas relief. App., *infra*, at 4a-5a; D. Ct. Doc. 48 at 4. The Sentencing Commission compiled lists of defendants with career-offender status who may be eligible for relief and distributed those lists to the Federal Defender. App., *infra*, at 4a; D. Ct. Doc. 48 at 4. The Federal Defender then used those lists to identify defendants eligible for relief and coordinated with the U.S. Attorney's Offices to file uncontested or, where necessary, contested section 2255 motions. App., *infra*, at 4a; D. Ct. Doc. 48 at 4; C.A. Br. 5-6 nn.2-3. The same process played out again following *Mathis*.

Von Vader was neither aware of this multi-agency process nor that he had a meritorious habeas claim. And this multi-agency task force overlooked him. App., *infra*, at 4a. Despite qualifying for the same relief that similarly situated defendants secured through this multi-agency undertaking, Von Vader got none. He remained imprisoned while similarly situated inmates secured sentence reductions.

Von Vader eventually heard about *Johnson* from other inmates who were getting lawyers' help. C.A. App. 24-25. During the summer of 2016, Von Vader sent several letters to his sentencing counsel to ask whether

Johnson might apply to him, and his sister also tried to contact his sentencing counsel and the Federal Defender for assistance several times. C.A. App. 25. Von Vader heard nothing back until November 2017, when his sentencing counsel wrote back and said that he was no longer practicing federal law. C.A. App. 25.

Still unsure whether he was eligible for relief, Von Vader moved the district court to appoint counsel (it refused (D. Ct. Doc. 40, D. Ct. Doc. 42)) and thereafter filed a habeas petition pro se. No. 17-cv-931 (W.D. Wisc.). Although the habeas court agreed that Von Vader "would not qualify as a career offender under § 4B1.1 if he were being sentenced today," it held that his *pro se* petition was six months too late to raise a *Mathis*-based claim, and it refused to equitably toll section 2255(f)'s one-year limit. C.A. App. 20, 24-26. The district court therefore denied his substantively meritorious § 2255 petition and a certificate of appealability. C.A. App. 27-28. The court of appeals likewise denied a certificate of appealability on Von Vader's pro se request. C.A. App. 30.

C. Proceedings below

At the onset of the pandemic, Von Vader sought a sentence reduction under section 3582(c)(1)(A). He contended that the change in law vitiating his sentence, the multi-agency task force's failure to identify his meritorious habeas claim, his evidence of rehabilitation, and his health conditions that made him susceptible to severe COVID-19 collectively amounted to "extraordinary and compelling reasons" that warranted a sentence reduction. After exhausting his administrative remedies, Von Vader filed his motion with the district court. See D. Ct. Doc. 45, D. Ct. Doc. 48 at 7, D. Ct. Doc. 51 at 4, D. Ct. Doc. 53 at 2-3.

The district court denied Von Vader's motion, holding that, under Seventh Circuit precedent, section 3582(c)(1)(A) categorically cannot "provide a means to revisit sentencing errors for which Congress has already provided a specific path for relief." App., *infra*, at 11a.

The Seventh Circuit affirmed. The court reasoned that § 3582(c)(1)(A)'s "extraordinary and compelling reasons" are limited to "some new fact about an inmate's health or family status, or an equivalent post-conviction development, not a purely legal contention for which statutes specify other avenues of relief." App., *infra*, at 4a. And the panel deemed Von Vader's circumstance—being overlooked by institutional actors and therefore inequitably serving an unlawfully enhanced sentence—to be "a legal contest to a sentence [that] must be resolved by direct appeal or motion under §2255." App., *infra*, at 3a.

Although presented with the Sentencing Commission's announced views on what qualifies as "extraordinary and compelling" (see C.A. Doc. 39, C.A. Doc. 51), the court of appeals did not address those views in reaching its decision and further denied rehearing or rehearing en banc.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to resolve the division and disarray among the courts of appeals on the exceptionally important question of whether section 3582(c)(1)(A) permits courts to factor in changes in the law in determining whether "extraordinary and compelling reasons warrant" a sentence reduction.

I. THE CIRCUITS ARE SPLIT ON WHETHER CHANGES IN THE LAW CAN FACTOR INTO "EXTRAORDINARY AND COMPELLING REASONS" FOR A SENTENCE REDUCTION.

There is a well-recognized and irreconcilable circuit split over whether and to what extent district courts may consider changes in the law when evaluating whether "extraordinary and compelling reasons" exist that warrant a sentence reduction under section 3582(c)(1)(A).

Not only have the circuits divided on that question, they have split on reasoning too. Disagreements have spawned over whether section 3582(c)(1)(A) itself permits considering changes in the law as part of evaluating "extraordinary and compelling reasons" and over whether section 2255 and habeas-channeling principles independently limit the scope of section 3582(c)(1)(A). These divisions have become intractable: As Judge Wood has put it, "the issue is teed up" for this Court to address. *Williams*, 65 F.4th at 349.

A. The circuits are divided on whether section 3582(c)(1)(A) permits considering changes in the law.

The circuits have first divided on the question whether "extraordinary and compelling reasons" can ever include consideration of circumstances implicating a change in law. Five circuits hold that "extraordinary and compelling reasons" can include consideration of legal changes. Three circuits have articulated a hybrid approach that forecloses consideration of *nonretroactive* changes in the law. And two circuits, including the court of appeals below, hold that no changes in the law can ever be considered, full stop.

As the Seventh Circuit recently observed in an opinion authored by Judge Wood, the Seventh Circuit's view "does not appear to be shared by several of [its] sister circuits." *Williams*, 65 F.4th at 347. Other circuits have recognized this circuit disarray as well. See *United States* v. *Chen*, 48 F.4th 1092, 1096 (9th Cir. 2022) ("Other circuits are split concerning this issue."); *Ruvalcaba*, 26 F.4th at 24 (collecting cases) ("Several courts of appeals have addressed the issue" and "have come to [] different conclusion[s]"); *United States* v. *Crandall*, 25 F.4th 582, 585 (8th Cir. 2022) ("On the question whether the non-retroactive change in law regarding sentencing * * * can be extraordinary and compelling, there are conflicting decisions in the circuits.").

1. The first approach—embraced by the **First**, **Second**, **Fourth**, **Ninth**, and **Tenth Circuits**—permits district courts to consider changes in law when assessing whether "extraordinary and compelling reasons" warrant a sentence reduction.

In *Ruvalcaba*, the First Circuit squarely rejected any "categorical prohibition" on a district court's ability to consider "changes in sentencing law" when assessing whether "extraordinary and compelling reasons" warrant a reduction. 26 F.4th at 25. "[G]iven the language the Congress deliberately chose to employ," the court explained, "we see no textual support for concluding that such changes in the law may never constitute part of a basis for an extraordinary and compelling reason." *Id.* at 26. The court found no grounds for such a "categorical and unwritten exclusion in light of [Congress's] specific statutory exclusion regarding rehabilitation" and "the history and purpose" of section 3582(c)(1)(A)—to provide "a 'safety valve' with respect to situations in which a

defendant's circumstances had changed such that the length of continued incarceration no longer remained equitable." *Ibid.*

The Second, Fourth, Ninth, and Tenth Circuits have used similar reasoning to reject categorical prohibitions on district courts' consideration of legal changes as part of an "extraordinary and compelling" analysis. See *United States* v. *McCoy*, 981 F.3d 271, 285-286 (4th Cir. 2020) ("[C]ourts legitimately may consider, under the 'extraordinary and compelling reasons' inquiry, that defendants are serving sentences that Congress itself views as dramatically longer than necessary or fair"); *Chen*, 48 F.4th at 1098-1099 ("[D]istrict courts may consider non-retroactive changes in sentencing law, in combination with other factors particular to the individual defendant, when analyzing extraordinary and compelling reasons for purposes of § 3582(c)(1)(A). There is no textual basis for precluding district courts from considering non-retroactive changes in sentencing law when determining what is extraordinary and compelling."); *United States* v. *Maumau*, 993 F.3d 821, 837 (10th Cir. 2021) (courts may grant relief "based on [an] individualized review of all the circumstances," including a change in sentencing law); see also *Brooker*, 976 F.3d at 237-238 ("The only statutory limit on what a court may consider to be extraordinary and compelling is that '[r]ehabilitation ... *alone* shall not be considered an extraordinary and compelling reason.'"); *United States* v. *Campbell*, 2022 WL 199954, at *2 (2d Cir. Jan. 24, 2022) (remanding in light of *Brooker* for consideration of whether the "clear" "changes in sentencing law" "constitute[d] extraordinary and compelling reasons justifying a sentence reduction").

These circuits have recognized that "[i]t is only when Congress or the Constitution limits the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, that a district court's discretion to consider information is restrained." *Chen*, 48 F.4th at 1095 (quoting *Concepcion*, 142 S. Ct. at 2396). As such, "until the Sentencing Commission speaks, the only limitation on what can be considered an extraordinary and compelling reason to grant a prisoner-initiated motion is rehabilitation." *United States* v. *Trenkler*, 47 F.4th 42, 48 (1st Cir. 2022) (citing *Ruvalcaba*, 26 F.4th at 25, 26); see also *United States* v. *Roper*, 72 F.4th 1097, 1101-1102 (9th Cir. 2023). These circuits have thus rejected unwritten categorical restrictions on a court's discretion to consider legal changes when determining whether "extraordinary and compelling reasons" warrant a sentence reduction.

2. The **Third**, **Sixth** (in a 9-7 en banc opinion), and **Eighth Circuits** have articulated a categorical exclusion for *nonretroactive* changes in the law. They hold that a court "cannot consider nonretroactive changes in sentencing law either alone or in combination with other factors" to find "extraordinary and compelling" reasons that warrant a reduction. *United States* v. *McCall*, 56 F.4th 1048, 1055-1056 (6th Cir. 2022) (en banc), cert. den., 143 S. Ct. 2506 (2023); see also *Crandall*, 25 F.4th at 586 ("The compassionate release statute is not a freewheeling opportunity for resentencing based on *prospective* changes in sentencing policy or philosophy." (emphasis added)); *United States* v. *Rodriguez-Mendez*, 65 F.4th 1000, 1001 (8th Cir. 2023) (applying *Crandall*); *United States* v. *Andrews*, 12 F.4th 255, 261-262 (3d Cir. 2021) ("We will not construe Congress's nonretroactivity

directive as simultaneously creating an extraordinary and compelling reason for early release."), cert. den., 142 S. Ct. 1446 (2022).

3. A divided panel of the **D.C. Circuit** and now the **Seventh Circuit** in the decision below hold that legal changes can categorically never factor into an assessment of "extraordinary and compelling" reasons, no matter the change or effect on the equities of any inmate's individualized circumstances. See *United States* v. *Jenkins*, 50 F.4th 1185, 1200 (D.C. Cir. 2022) ("legal errors at sentencing—including those established by the retroactive application of intervening judicial decisions—cannot support a grant of compassionate release."), pet. for reh'g den., 2023 WL 3587789 (D.C. Cir. 2023). According to these circuits, any "[l]egal errors"—including their effect on any particular inmate's circumstances—can categorically never be "extraordinary nor compelling." *Jenkins*, 50 F.4th at 1200; App., *infra*, at 3a-4a.

B. The circuits are additionally divided on whether section 2255 limits section 3582(c)(1)(A)'s scope.

As courts struggled to justify categorical bars on section 3582(c)(1)(A)'s embracive text, a new split erupted on a second, but related, question of whether 28 U.S.C. § 2255 and "habeas channeling" principles independently limit a court's discretion to consider a change in the law as part of a section 3582(c)(1)(A) "extraordinary and compelling reasons" analysis.[4]

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[4] This question is presented in the pending petition for certiorari in *United States* v. *Ferguson*, No. 22-1216 (response requested Aug. 2, 2023). Were the Court to grant *Ferguson*, it should grant this petition with it.

1. The **First** and **Ninth Circuits** both hold that section 2255 does not independently bar section 3582(c)(1)(A) motions premised on changes in the law.

The First Circuit explained that "habeas and compassionate release are distinct vehicles for relief," and thus one does not preclude the other. *Trenkler*, 47 F.4th at 48. Instead, the two statutes are in harmony because "Section 2255 deals with the legality and validity of a conviction and provides a method for automatic vacatur," while "the compassionate release statute is addressed to the court's discretion as to whether to exercise leniency based on an individualized review of a defendant's circumstances." *Ibid.*

The Ninth Circuit has similarly reasoned that neither section 2255 nor "habeas channeling jurisprudence" precludes a sentence-reduction motion premised on a change in the law because a section 3582(c)(1)(A) motion is not seeking "to correct sentencing errors" but instead "seeks to invoke the sentencing judge's discretion to reduce his sentence" based on an "amalgamation of circumstances—including legal changes creating a sentencing disparity among similarly situated defendants—that he claims are extraordinary and compelling." *Roper*, 72 F.4th at 1102. Because "Congress has provided a mechanism in § 3582 (c)(1) that allows defendants to seek modifications even if their sentences were not imposed in violation of the Constitution or federal law" and did not "restrict[] the district courts' ability to consider non-retroactive changes in sentencing law," "Congress itself has left that possibility open." *Chen*, 48 F.4th at 1101.

2. By contrast, the **D.C. Circuit**, along with the **Fifth**, **Sixth**, **Seventh**, and **Eighth Circuits**, have reasoned that a sentence-reduction motion cannot advance any argument

that raises a legal issue and could theoretically underlay a section 2255 motion. These courts suggest that "[t]he habeas-channeling rule * * * independently forecloses using compassionate release to correct sentencing errors." *Jenkins*, 50 F.4th at 1202. Thus, according to these circuits, any argument that "would have been cognizable under § 2255 * * * [is] not cognizable under § 3582(c)." *United States* v. *Escajeda*, 58 F.4th 184, 188 (5th Cir. 2023); *McCall*, 56 F.4th at 1057 ("McCall cannot avoid these restrictions on post-conviction relief by resorting to a request for compassionate release instead." (internal quotation omitted)), cert. den., 143 S. Ct. 2506 (2023); *Crandall*, 25 F.4th at 586 (inmates cannot "avoid the restrictions of [section 2255] by resorting to a request for compassionate release instead."); App., *infra*, at 3a ("[A] legal contest to a sentence must be resolved by direct appeal or motion under § 2255, not by seeking compassionate release under § 3582.").

3. The **Fourth** and **Tenth Circuits** have forged a confused and inconsistent approach. As described above (at 14-16), these circuits have each held that courts may consider changes in the law as part of determining whether "extraordinary and compelling reasons" justify a sentence reduction. But each has also subsequently held that section 2255 forecloses arguments based on legal changes from being considered under section 3582(c)(1)(A). Compare *Ferguson*, 55 F.4th at 270 ("28 U.S.C. 2255 is the exclusive remedy for challenging a federal conviction or sentence." (alteration and internal quotation marks omitted)), with *McCoy*, 981 F.3d at 285-286 ("courts legitimately may consider, under the 'extraordinary and compelling reasons' inquiry, that defendants are serving sentences that Congress itself views as

dramatically longer than necessary or fair"); compare *United States* v. *Wesley*, 60 F.4th 1277, 1282 (10th Cir. 2023) ("[W]e disagree that § 3582 can be used to circumvent the procedural and substantive requirements of § 2255"), pet. for reh'g den., 78 F.4th 1221 (10th Cir. 2023), with *Maumau*, 993 F.3d at 837 (courts may grant section 3582(c)(1)(A) relief "based on [an] individualized review of all the circumstances," including a change in sentencing law). As Judge Rossman on the Tenth Circuit observed, "[w]e send mixed signals to district courts about the extent of their authority under the compassionate release statute—or whether their authority to hear certain claims to relief exists at all." *United States* v. *Wesley*, 78 F.4th 1221, 1225 (10th Cir. 2023) (Rossman, J., dissenting from the denial of rehearing en banc).

* * *

Nearly every circuit has voiced its views in precedential decisions on whether section 3582(c)(1)(A)'s "extraordinary and compelling reasons" standard permits courts to consider changes in the law in undertaking that analysis. They are intractably divided on the answer to that question and the reasons why. Given the frequency with which this question arises, and that most circuits have now staked out their position, this Court's intervention is imperative to resolve this persistent and acknowledged split on the question presented.

II. THIS CASE IS AN ATTRACTIVE VEHICLE FOR RESOLVING THIS RECURRING AND IMPORTANT QUESTION.

Not only does this case present an issue that has sharply divided the courts of appeal, it is also exceptionally important, frequently recurring, and cleanly presented here.

A. This case "undoubtedly involves an issue of exceptional public importance." *Wesley*, 78 F.4th at 1223 (Rossman, J., dissenting from the denial of rehearing en banc). Federal courts are adjudicating around 200-300 motions brought under section 3582(c)(1)(A) on a monthly basis. See U.S. Sentencing Comm'n, *Compassionate Release Data Report: Fiscal Year 2023, 3rd Quarter* at tbl. 1 (Sept. 2023), perma.cc/MXE9-7DT4.

For many granted motions, courts considered legal changes and errors and found the inmate's circumstances to be sufficiently extraordinary and compelling to warrant relief. Reasons like "mandatory minimum penalties/long sentence," "Career Offender issues," "Multiple 18 U.S.C. § 924(c) penalties," "21 U.S.C. § 851 enhanced drug penalties," "Conviction/sentencing errors," and "Mandatory nature of guideline at sentencing" each played a role in 6 to 35 decisions granting section 3582(c)(1)(A) motions since October 2022 (see U.S. Sentencing Comm'n, *Compassionate Release Data Report: Fiscal Year 2023, 3rd Quarter*, *supra*, at tbl. 10), and each played a role in 11 to 97 decisions granting section 3582(c)(1)(A) motions in 2022 (U.S. Sentencing Comm'n, *Compassionate Release Data Report: Fiscal Years 2020 to 2022* at tbl. 14 (Dec. 2022), perma.cc/7MJK-W2L6). In circuits that permit district courts to consider legal changes, inmates numbering in the low hundreds have benefitted from courts having the discretion that Congress envisioned to consider legal changes in assessing whether "extraordinary and compelling reasons" warrant a sentence reduction.

The Commission's data does not report the number of inmates, like Von Vader, who have been *denied* relief because of a district court's inability to consider whether a

legal change contributed to an "extraordinary and compelling reason[]" for a sentence reduction. For prisoners serving these inequitable sentences, the stakes are enormously high. A change in the law that could tip the balance in their individual circumstances could mean years off a prison sentence. Von Vader is a prime example—had the district court been able to consider the change in the law underlying his current circumstance, he would likely have been released nearly a year and a half ago when the district court decided his motion. Instead, he is facing several more years in prison.

Recognizing the stakes, courts are calling out for this Court's guidance on this exceptionally important issue. *Williams*, 65 F.4th at 348.

B. This case is also an attractive vehicle for resolving the question presented. Both the district court and the court of appeals grounded their decisions squarely on the question presented: Each held that the district court was foreclosed from considering whether the inequity of Von Vader's circumstances was an "extraordinary and compelling reason[]" for a sentence reduction because the inequity originated with a change in the law.

Had Von Vader's motion been brought in another circuit, like the First or Ninth, the district court would have had discretion to consider whether the massive institutional failure that resulted in Von Vader not securing release following *Mathis* like all similarly situated defendants was sufficiently "extraordinary and compelling" to warrant a sentence reduction. And it is quite likely a district court would have so found given the unusual travesty petitioner experienced. While at least 23 others secured crucial relief (see C.A. Br. at 5-6 n.2 (collecting

uncontested motions in Wisconsin district courts)), having one left behind is extraordinary, and the equities compelling.

III. THE DECISION BELOW IS WRONG.

The Seventh Circuit was wrong to hold that a district court is categorically foreclosed from considering a change in the law in assessing whether "extraordinary and compelling reasons" warrant a sentence reduction under section 3582(c)(1)(A). Neither the meaning of "extraordinary and compelling" nor section 2255 foreclosed Von Vader's motion seeking a sentence reduction, and the court of appeals was wrong to hold otherwise.

A. Section 3582(c)(1)(A) permits courts to consider changes in the law in assessing whether "extraordinary and compelling reasons" warrant a sentence reduction in individualized circumstances. No basis exists for implying a categorical bar on considering circumstances involving changes in the law.

1. Section 3582(c)(1)(A)'s text and structure bely any categorical bar on the factors a district court may consider. Section 3582(c)(1)(A) speaks only of "extraordinary and compelling reasons." At the time of enactment, "extraordinary" meant"[o]ut of the ordinary; exceeding the usual, average, or normal measure or degree; beyond or out of the common order or rule; not usual, regular, or of a customary kind; remarkable; uncommon; rare." *Extraordinary*, *Black's Law Dictionary* (5th ed. 1979). And "compelling" meant "necessitat[ing], either by physical or moral force" or "driv[ing] or urg[ing] * * * irresistibly." *Compel*, *Webster's New Universal Unabridged Dictionary* (Deluxe 2d ed. 1983). The court of appeals construed these terms to mean that only "new fact[s] about an inmate's health or family status, or an equivalent post-

conviction development" can qualify as "extraordinary and compelling" under section 3582(c)(1)(A). App., *infra*, at 4a. But that is divorced from the ordinary meaning of "extraordinary and compelling" reasons.

These are familiar standards for courts, and they are inherently discretion-laden and flexible. See, *e.g.*, *Winter* v. *Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) ("A preliminary injunction is an extraordinary remedy never awarded as of right."); *Holland* v. *Florida*, 560 U.S. 631, 652 (2010) ("although the circumstances of a case must be 'extraordinary' before equitable tolling can be applied, * * * such circumstances are not limited to those that satisfy [a rigid] test."); *Kentucky* v. *King*, 563 U.S. 452, 460 (2011) (the exigent-circumstances exception to the warrant requirement applies where "the needs of law enforcement [are] so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.").

Nothing in either word contemplates a categorical limit on what courts may find to be "extraordinary and compelling" and certainly not the limits the decision below created. Indeed, Congress placed only two limits on what courts could consider—they cannot rely on rehabilitation alone (28 U.S.C. § 994(t)), and relief must be "consistent" with "applicable" Sentencing Commission policy statements (18 U.S.C. § 3582(c)(1)(A)). Congress nowhere limited such reasons only to an inmate's "health" or "family status," though it easily could have.

The Seventh Circuit instead engrafted a third inflexible limitation "into a statute providing judges with sentencing discretion." *Jenkins*, 50 F.4th at 1214 (Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment). But "Congress is not shy about placing

such limits where it deems them appropriate." *Concepcion*, 142 S. Ct. at 2400.

Congress's imposition of two express limits—with no others—is proof positive that the court of appeals' third unwritten limit is wrong. After all, "[d]rawing meaning from silence is particularly inappropriate" in the sentencing context, "for Congress has shown that it knows how to direct sentencing practices in express terms." *Concepcion*, 142 S. Ct. at 2402 (quoting *Kimbrough* v. *United States*, 552 U.S. 85, 103 (2007)). "It is only when Congress or the Constitution limits the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, that a district court's discretion to consider information is restrained." *Id.* at 2396.

Congress did not further define or restrict what may be "extraordinary and compelling," leading ineluctably to the conclusion that no further limit on a court's discretion exists. The court of appeals' rigid rule that no circumstance involving a legal error could ever be extraordinary and compelling is irreconcilable with section 3582(c)(1)(A)'s text and structure. *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." (citation omitted)).

2. Section 3582(c)(1)(A)'s purpose also refutes the court of appeals' unwritten limit on what courts may consider. Section 3582(c)(1)(A) came to be as part of Congress's major overhaul of the federal sentencing system. Congress eliminated the historically broad discretion courts had in sentencing and replaced it with mandatory

sentencing guidelines. See *Booker*, 543 U.S. at 233-234. But Congress intentionally preserved some discretion—in its own words, a "safety valve"—for courts to reduce sentences when the equities demand. Pub. L. No. 98-473, ch. II, subch. D, 98 Stat. at 1998; S. Rep. No. 98-225 at 55-56, 121. Where a "severe illness" or "other extraordinary and compelling circumstances" attendant "an unusually long sentence" made it "inequitable to continue the confinement" (S. Rep. No. 98-225 at 55-56, 121), Congress provided district courts the power to reduce a sentence, so long as such a reduction was consistent with Sentencing Commission policy statements and did not rest on rehabilitation alone. See 18 U.S.C. § 3582(c)(1)(A); 28 U.S.C. § 994(t).

The categorical limitation that the decision below places on courts' discretion to assess whether "extraordinary and compelling reasons" warrant a reduction cannot be squared with the purpose of section 3582(c)(1)(A) when originally enacted nor with Congress's purpose in the First Step Act of "increasing" section 3582(c)(1)(A)'s use.

3. The court of appeals' categorical bar also cannot be squared with the interpretation of the Sentencing Commission—the agency charged with defining what "extraordinary and compelling reasons" warrant a sentence reduction. As part of its 2023 amendments, the Sentencing Commission expressed its view that courts may consider a "change in the law" in evaluating whether an "extraordinary and compelling reason" warrants a sentence reduction. See 88 Fed. Reg. at 28,254-28,255 (amended U.S.S.G. § 1B1.13(b)(6)). In view of the Sentencing Commission's central role in fleshing out "extraordinary and compelling reasons" (see 28 U.S.C. § 994(t)), the

Commission's adopted interpretation of this phrase—that it permits factoring in changes in the law—is further reason that the courts have wrongly divined a categorical preclusion barring changes in the law from consideration. Accord *Kimbrough*, 552 U.S. at 108; *Stinson* v. *United States*, 508 U.S. 36, 42-45 (1993).

The Sentencing Commission's change would also warrant granting the petition, vacating, and remanding to the court of appeals. Although we notified the court of appeals of the 2023 amendments in a Rule 28(j) letter before its decision, in a petition for rehearing, and in a motion for leave to file supplemental briefing before a rehearing decision, the court of appeals did not address the Sentencing Commission's views. See C.A. Doc. 39, C.A. Doc. 45, C.A. Doc. 51. This Court may grant, vacate, and remand "where an intervening factor has arisen that has a legal bearing upon the decision." *Stutson* v. *United States*, 516 U.S. 163, 191-192 (1996) (Scalia, J., dissenting); see also *Slekis* v. *Thomas*, 525 U.S. 1098 (1999) (granting, vacating, and remanding "for further consideration in light of the interpretive guidance issued by the Health Care Financing Administration."). Were the Court not to grant outright, it would be appropriate to grant the petition, vacate the decision below, and remand to the court of appeals for further consideration in light of the Sentencing Commission's interpretation.

B. The Seventh Circuit is also wrong to hold that section 2255 forecloses mention of a legal change when considering whether "extraordinary and compelling reasons" warrant a sentence reduction.

To start with, section 3582(c)(1)(A) itself includes no such limitation. Rather, sentence-reduction motions and habeas petitions "exist under two distinct statutory

schemes" and "are distinct vehicles for relief." *Trenkler*, 47 F.4th at 48. While section 2255 entitles an incarcerated person to relief, section 3582(c)(1)(A) empowers courts to grant discretionary relief in the rare instances where individualized circumstances justify it. See *Roper*, 72 F.4th at 1103.

And section 3582(c) itself confirms that Congress intended no such unwritten restriction. Another of the "safety valves" Congress included specifically authorizes courts to modify a term of imprisonment "to the extent otherwise expressly permitted by statute or by Rule 35." 18 U.S.C. § 3582(c)(1)(B). As its text suggests, the purpose of this safety valve was to "simply note[] the authority to modify a sentence if modification is permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure." S. Rep. No. 98-225 at 121. Of course, section 2255(a) is a statute that authorizes modifying a sentence in the circumstances to which it applies (and section 2241 authorizes writs of habeas corpus).

The notion that Congress intended to foreclose section 3582(c)(1)(A)'s equitable safety valve from factoring in circumstances that might also be relevant to relief under other statutes is impossible to square with Congress's clear intent that "extraordinary and compelling reasons" "*and*" "express[] permi[ssion] by statute" are *two separate* grounds for modifying an already imposed sentence "in any case." 18 U.S.C. § 3582(c)(1)(A), (B).

It also cannot be squared with this Court's precedent. The habeas-channeling rule originated with this Court's decision in *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), which addressed whether state prisoners could seek injunctions under 42 U.S.C. § 1983 to secure release from "unlawful" state confinement. The Court found "an

implicit exception from § 1983's otherwise broad scope for actions that lie 'within the core of habeas corpus.'" *Wilkinson* v. *Dotson*, 544 U.S. 74, 79 (2005). The reason for the rule was palpable. "This overlap created a conflict: The habeas statute requires the exhaustion of state remedies, but § 1983 does not, so authorizing overlapping § 1983 suits would practically nullify the habeas statute's exhaustion requirement." *Jenkins*, 50 F.4th at 1213 (Ginsburg, J.). Resolution of the conflict into the rule—an implied exception to § 1983's scope—was motivated in substantial part by important "considerations of federal-state comity." *Preiser*, 411 U.S. at 491-492.

Neither the rule nor the reasoning applies in the context of section 3582(c)(1)(A). "Reading an implicit habeas exception into 'a statute whose very purpose is to open up final judgments' * * * is a far cry from what the Supreme Court did in *Preiser*," and "[i]t also runs afoul of *Concepcion*'s clear admonition against reading a limitation into a statute providing judges with sentencing discretion." *Jenkins*, 50 F.4th at 1214 (Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment); cf. *Gonzalez* v. *Crosby*, 545 U.S. 524, 529 (2005) (the "virtues of finality * * * is unpersuasive in the interpretation of a provision whose whole purpose is to make an exception to finality").

At bottom, an inmate asking "the judge, in the exercise of her discretion, to consider the discrepancy between his sentence and a sentence he would receive were he resentenced under current law" is not upsetting the "sentence [as] 'invalid' or 'unlawful.' Rather, the prisoner concedes, at least for the purpose of his motion for compassionate release, that the sentence is currently valid and lawful, but nevertheless appeals to the equitable

discretion of the judge for a sentence modification." *Jenkins*, 50 F.4th at 1213 (Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment). To be sure, "a defendant-filed motion for sentence reduction and a habeas petition may each result in an inmate's early release from custody," but "the two require different showings and carry different implications about the defendant's original conviction and sentence." *Roper*, 72 F.4th at 1102. Neither is upset by the existence of the other. And Congress recognized as much—by approving alongside each other a court's power to modify a sentence *both* when "extraordinary and compelling reasons" warrant it *and* when a statute otherwise expressly permits.

CONCLUSION

The Court should grant the petition and decide the case on the merits or, alternatively, vacate, and remand for consideration of the U.S. Sentencing Commission's adopted amendment to U.S.S.G. § 1B1.13.

Respectfully submitted.

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