No.

In the Supreme Court of the United States

JERRY L. BROWN, PETITIONER,

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

NICOLE L. MASIELLO
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019

NATE NIEMAN
ATTORNEY AT LAW
329 18th Street
Rock Island, IL 61201

R. STANTON JONES
ANDREW T. TUTT
Counsel of Record
SEAN A. MIRSKI
DANA OR
MINJAE KIM
KATHRYN C. REED
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

QUESTION PRESENTED

This case presents a clear, recognized, and intractable circuit conflict regarding an important issue related to the implementation of the First Step Act of 2018. The First Step Act of 2018, for the first time, permitted prisoners to move for a sentence reduction under what is informally known as the "compassionate release" statute, 18 U.S.C. § 3582(c)(1)(A). The Act also made transformative reductions in the minimum statutory penalties for certain crimes. *See* First Step Act, 132 Stat. 5220, § 401.2. Relevant here, the Act reduced the mandatory minimum sentence for petitioner's crime of conviction from life without parole to 25 years.

To be eligible for a resentencing under § 3582(c)(1)(A), a prisoner must establish that "extraordinary and compelling reasons" warrant it. Petitioner sought resentencing on the basis of the First Step Act's non-retroactive change in the penalty for his crime. The trial court denied the motion, and the Seventh Circuit affirmed. The panel acknowledged the entrenched 4-6 circuit split, but declared itself bound by Seventh Circuit precedent dictating that non-retroactive changes in law categorically cannot be "extraordinary and compelling reasons" for a resentencing. That holding was outcome-determinative, and this case is a perfect vehicle for resolving the conflict over this important question.

This case is an especially appropriate vehicle to resolve this question because the law in six circuits—including the Seventh—conflicts with a Sentencing Commission Guideline, set to take effect on November 1, under which petitioner *is* eligible for resentencing.

The question presented is:

Whether non-retroactive changes in law can be "extraordinary and compelling reasons" warranting resentencing under 18 U.S.C. § 3582(c)(1)(A).

RELATED PROCEEDINGS

United States District Court (C.D. Ill.):

United States v. Brown, No. 4:12-cr-40031 (Aug. 4, 2022)

United States Court of Appeals (7th Cir.):

United States v. Brown, No. 22-2465 (Apr. 28, 2023)

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-5a) is unpublished but available at 2023 WL 3144553. The minute order of the district court denying compassionate release (App. 6a-7a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 2023. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 18 U.S.C. § 3582 and 21 U.S.C. § 841, are reproduced in the petition appendix, Pet. App. 8a-18a.

STATEMENT OF THE CASE

This case presents a square and indisputable conflict over a significant question involving the implementation of the First Step Act of 2018: whether non-retroactive changes in law can be among the "extraordinary and compelling reasons" warranting a sentence reduction under 18 U.S.C. § 3582(c)(1)(A).

In the proceedings below, the Seventh Circuit declared itself bound by a prior panel decision that held that non-retroactive changes in federal law cannot ever constitute an "extraordinary and compelling" reason for resentencing. In the earlier decision, *United States v. Thacker*, 4 F.4th 569 (7th Cir. 2021), the Seventh Circuit panel, after circulating the decision to the *en banc* court under Circuit Rule 40(e), expressly rejected the position of the Fourth and Tenth Circuits and adopted the contrary position of the Sixth and Eighth Circuits. The same issue resolved in *Thacker* was raised and resolved at each stage of this case and was dispositive below: the Seventh Circuit

affirmed the denial of petitioner's motion because the extraordinary disparity between the mandatory minimum for his crime when he committed it (LWOP) and the mandatory minimum for the same crime today (25 years), categorically cannot be an "extraordinary and compelling" reason sufficient to authorize resentencing. There are no conceivable obstacles to resolving this question in this Court.

This case readily satisfies all the traditional criteria for granting review. The conflict is clear, acknowledged, and entrenched. It has already been recognized by multiple courts and commentators.[1] Four circuits have explicitly held that changes in criminal penalties *can* constitute an "extraordinary and compelling" reason to reduce a criminal sentence, while six circuits have held the precise opposite. Further percolation is useless: the arguments have been thoroughly vetted on each side, and there is no realistic prospect that either side will relent. The remaining circuits are simply left to pick sides—while prisoners are left with vastly different access to compassionate release based on the fortuity of the venue where they happened to be criminally prosecuted.

The existing situation is intolerable. The question presented raises legal and practical issues of surpassing importance, and its correct disposition is critical to the nationwide administration of federal criminal justice. Prisoners should not be forced to serve decades more in

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[1] *E.g.*, 3 Fed. Prac. & Proc. Crim. § 638.2 & n.16 (5th ed.) (noting and describing the "circuit split"); Mary Price, *The United States Sentencing Commission, Compassionate Release, and Judicial Discretion: The 2022-2023 Amendment Cycle*, 35 Fed. Sent'g Rep. 175, 178 (2023) ("A complicated and multilayered circuit split has developed."); *Significant Federal Court Decisions*, 58 Crim. L. Bull. 885, 892-93 (2022) ("[T]he federal circuits are split concerning this issue."); Dawinder S. Sidhu, *Sentencing Guidelines Abstention*, 60 Am. Crim. L. Rev. 405, 438 (2023) (noting split).

federal prison on the basis of criminal penalties Congress has vastly reduced without even the opportunity to argue that those changes warrant a reduction in sentence. Prisoners in four circuits have the opportunity to have these disparities considered by the sentencing court in a compassionate release motion; yet in the Third, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits they are categorically foreclosed from even that minimal consideration. Because this case presents an optimal vehicle for resolving this important question of federal law, the petition should be granted.

1.a. Criminal sentences are generally final once imposed. *See Dillon v. United States*, 560 U.S. 817, 824 (2010); 18 U.S.C. § 3582(b). But under one exception to this rule, prisoners may move for a sentence reduction under what is informally known as the "compassionate release" statute, 18 U.S.C. § 3582(c)(1)(A), which was enacted as part of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. 2, ch. 2, 98 Stat. 1837, 1987 (1984).

As relevant here, the Act provides that a district court "may reduce [a prisoner's] 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." 18 U.S.C. § 3582(c)(1)(A). If the district court finds that "extraordinary and compelling reasons warrant" a sentence reduction, it must also find that "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Id.*

The Act does not define what constitutes an "extraordinary and compelling reason[]" warranting a sentencing reduction. Instead, Congress instructed the Sentencing Commission to "describe what should be considered extraordinary and compelling reasons." 28 U.S.C. § 994(t).

In the original Sentencing Reform Act, motions for "compassionate release" could be filed only by the Director of the Bureau of Prisons. § 3582(c)(1)(A); 98 Stat. at 1998-99. But the Bureau rarely used the process.[2]

In 2016, in an attempt to "encourage[] the Director of the Bureau of Prisons to file [motions] for compassionate release" more frequently, the Sentencing Commission expanded the list of factors that qualify as "extraordinary and compelling reasons" warranting compassionate release under § 3852. U.S. Sent'g Guidelines Manual app. C supp., amend. 799 (U.S. Sent'g Comm'n 2016).

b. Two years later, in 2018, Congress stepped in. It enacted the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018), one purpose of which was to "increas[e] the use and transparency of compassionate release," *id.* at 5239. Under the First Step Act, prisoners can file their own motions for compassionate release, as long as they meet certain administrative prerequisites. 18 U.S.C. § 3582(c)(1)(A).

The First Step Act was also intended to reduce unnecessarily long federal sentences. As relevant here, § 401 of the First Step Act changed the scope and severity of sentencing enhancements for repeat drug offenders.

The most commonly prosecuted drug offenses that carry mandatory minimum penalties are 21 U.S.C. §§ 841 and 960. Both provisions tie mandatory minimum penalties to the quantity and type of controlled substance involved. *See* 21 U.S.C. §§ 841(b), 960(b). Under § 851 of title 21 of the United States Code, these mandatory minimum penalties may be enhanced if a drug offender has a qualifying prior conviction or convictions. *Id.* § 851(d)(1).

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[2] *See* Off. of the Inspector Gen., U.S. Dep't of Just., *The Federal Bureau of Prisons' Compassionate Release Program* i, 34 (Apr. 2013), https://oig.justice.gov/reports/2013/e1306.pdf.

The First Step Act modified this regime in several ways. *First*, the Act both narrowed and expanded the type of prior offenses that trigger mandatory enhanced penalties. Pub. L. No. 115-391, § 401. *Second*, the Act reduced the length of some of the enhanced penalties. Specifically, before the First Step Act, offenders who otherwise qualified for the ten-year mandatory minimum penalty were subject to an enhanced mandatory minimum penalty of 20 years if they had one qualifying prior conviction, and a mandatory term of life imprisonment (LWOP) if they had two qualifying prior convictions. *See* 21 U.S.C. §§ 841(b)(1)(A), 960(b)(1)(A)-(H). The First Step Act reduced the 20-year mandatory minimum penalty for offenders with one prior qualifying offense to 15 years, and the life mandatory minimum penalty for offenders with two or more prior qualifying offenses to 25 years. Pub. L. No. 115-391, § 401.

Congress made each of these changes applicable to pending cases, *id.* § 401(c), but, as relevant here, did not make them retroactive.

c. Following the First Step Act, the Sentencing Commission has amended the policy statement at § 1B1.13 of the Sentencing Guidelines—which sets forth the Commission's views on "extraordinary and compelling reasons" warranting a sentence reduction—to add a new ground called "Unusually Long Sentence." 88 Fed. Reg. 28254, 28257 (May 3, 2023); *see also* Pet. App. 19a-20a (reproducing the Guideline Amendment in relevant part). This ground for compassionate release "permits non-retroactive changes in law … to be considered extraordinary and compelling reasons warranting a sentence reduction, but only in narrowly circumscribed circumstances." 88 Fed. Reg. at 28258. Specifically, (i) the defendant must be "serving an unusually long sentence"; (ii) the defendant must have "served at least ten years of the sentence"; and (iii) "an intervening change in the law

[must] ha[ve] produced a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed." *Id.* If these three requirements are met, the non-retroactive change in law "can qualify as an extraordinary and compelling reason after the court has fully considered the defendant's individualized circumstances." *Id.* The amendment is set to go into effect on November 1, 2023.[3]

2.a. Petitioner Jerry Brown was sentenced in 2014 after he was convicted of one count of conspiracy to distribute crack cocaine. *See* 21 U.S.C. §§ 841(a)(1), (b)(1)(A), 846; Pet. App. 2a. Because of his prior convictions for felony drug offenses, he faced a mandatory minimum sentence of life in prison under the then-operative provisions of § 841(b)(1)(A). *See* 21 U.S.C. § 841(b)(1)(A) (2012); Pet. App. 2a, 13a. The district court imposed that sentence, plus ten years of supervised release. Pet. App. 2a. As a result of his incarceration during the pendency of his trial and sentencing, petitioner has served more than 10 years toward his LWOP sentence. Pet. App. 21a-23a (BOP time-served sheet).

b. In 2022, petitioner brought a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A). Pet. App. 2a. Petitioner relied primarily on the amendment to § 841(b) enacted in the First Step Act of 2018 that non-retroactively reduced the statutory

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[3] Before the Commission promulgated its "unusually long sentence" Guideline, the Solicitor General took the position that the Sentencing Commission could preclude courts from considering non-retroactive changes in law. *See* Brief for the United States in Opposition at 17-18, *Jarvis v. United States* (No. 21-568). The Solicitor General has never taken a position on the separate question of whether the Sentencing Commission can promulgate a guideline requiring courts to permit consideration of non-retroactive changes in law, even in circuits that have held that such consideration is precluded.

minimum sentence for an offender in petitioner's position from life without parole to 25 years. *See* Pub. L. No. 115-391, § 401(a)(2)(A)(ii), 132 Stat. 5194, 5220 (2018); Pet. App. 2a. Petitioner argued that the non-retroactive change to § 841(b), in combination with his rehabilitative efforts in prison, was an extraordinary and compelling reason for a sentence reduction. Pet. App. 2a-3a.

c. The district court denied petitioner's motion. Pet. App. 3a. Applying controlling Seventh Circuit precedent in *United States v. Thacker*, 4 F.4th 569 (7th Cir. 2021), the court found that petitioner's claim failed because non-retroactive sentencing changes categorically cannot be extraordinary and compelling reasons for release under § 3582(c)(1)(A)(i). Pet. App. 6a-7a. The court then held that petitioner's motion failed because rehabilitation standing alone cannot be an extraordinary and compelling reason for release. Pet. App. 7a (citing *United States v. Peoples*, 41 F.4th 837, 842 (7th Cir. 2022)).

d. On appeal, petitioner maintained that non-retroactive changes in criminal penalties can be grounds for compassionate release under the First Step Act. Pet. App. 3a. In support, he urged the Seventh Circuit to reconsider *Thacker* in light of this Court's decision in *Concepcion v. United States*, 142 S. Ct. 2389 (2022), which held that "the First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence pursuant to the First Step Act." *Id.* at 2404; Pet. App. 3a. He also pointed to the division of authority between the circuits on the question and urged the Seventh Circuit to join the opposite side of the Circuit conflict. Pet. App. 3a.

The Seventh Circuit rejected petitioner's argument and affirmed. The court acknowledged the "4-3 circuit split" and recognized that "the Ninth Circuit's reasoning in *United States v. Chen*, 48 F.4th 1092 (9th Cir. 2022),"

and its "rationale" are "contrary to *Thacker*." Pet. App. 3a. The court recognized that the Seventh Circuit's *Thacker* decision also conflicts with "decisions of the First, Fourth, and Tenth Circuits" that have "adopt[ed] similar reasoning" to the Ninth. Pet. App. 4a. Nonetheless, the court noted that "[o]n the other side of the split, the Third and Eighth Circuits have ruled in alignment with *Thacker*." Pet. App. 4a.

The court concluded that the existence of the circuit conflict was not a sufficient basis to revisit *Thacker*. Pet. App. 4a. The court also concluded that this Court's decision in *Concepcion* did not undermine *Thacker*. Rather, quoting *United States v. King*, 40 F.4th 594 (7th Cir. 2022), the panel stated: "'[w]e take the Supreme Court at its word that *Concepcion* is about the matters that district judges may consider when they resentence defendants . . . [and not] the threshold question whether any given prisoner has established an "extraordinary and compelling" reason for release.'" Pet. App. 4a-5a (quoting *King*, 40 F.4th at 596).

The court "thus appl[ied] [its] precedent to [Petitioner's] appeal" and reiterated the Seventh Circuit's position that "[t]he non-retroactive sentencing changes enacted in the First Step Act . . . cannot establish an extraordinary and compelling [reason] for [petitioner's] release under § 3582(c)(1)(A)(i)." Pet. App. 5a.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CLEAR AND INTRACTABLE CONFLICT OVER A SIGNIFICANT QUESTION

The decision below "further entrenches the circuit split" over whether a non-retroactive change in law is categorically ineligible for consideration as an extraordinary and compelling reason for a sentence reduction under § 3582(c)(1)(A). *United States v. McCall*, 56 F.4th 1048, 1070 n.4 (6th Cir. 2022) (en banc) (Moore,

J., dissenting). That conflict is at once square and indisputable: the courts of appeals have repeatedly recognized the conflict, rejected each other's positions, and fractured into two firmly opposed factions.[4]

The stark division over this fundamental question of the circumstances under which relief is available under § 3582(c)(1)(A) is untenable. The conflict has been openly acknowledged by courts and commentators alike, and there is no chance it will resolve without this Court's intervention. *See, e.g.*, *supra* note 1. Parties face enormously disparate outcomes on requests for compassionate release under the First Step Act based only on where a suit is litigated. And now that the split has reached 6-4, with two sides firmly dug in on their respective rules, the hope of the split resolving itself has vanished. The conflict is mature and ready for this Court's review.

1.a. The decision below directly conflicts with settled law in the Ninth Circuit. In *United States v. Chen*, 48 F.4th 1092 (9th Cir. 2022), the Ninth Circuit confronted the identical question presented here, and adopted the opposite holding: "district courts may consider non-retroactive changes in sentencing law, in combination with other factors particular to the individual defendant,

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[4] *See United States v. Rodriguez-Mendez*, 65 F.4th 1000, 1002 (8th Cir. 2023) ("There is . . . a circuit split on the merits of whether a nonretroactive change in the law—whether by statute or by guidelines amendment—can constitute an extraordinary and compelling reason for § 3582(c)(1)(A) relief."); *United States v. Jenkins*, 50 F.4th 1185, 1198 (D.C. Cir. 2022) ("The circuits have split on whether courts may consider such intervening but expressly non-retroactive sentencing statutes."); *United States v. Chen*, 48 F.4th 1092, 1096 (9th Cir. 2022) ("Other circuits are split concerning this issue."); *United States v. Johnson*, No. 21-241-CR, 2022 WL 102075, at *1 (2d Cir. Jan. 11, 2022) ("an issue that has divided federal courts of appeals"); *United States v. Ruvalcaba*, 26 F.4th 14, 24-25 (1st Cir. 2022) ("Several courts of appeals have addressed the issue.").

when analyzing extraordinary and compelling reasons for purposes of § 3582(c)(1)(A)." *Id.* at 1098. In so holding, the Ninth Circuit "join[ed] the First, Fourth, and Tenth circuits" in concluding that "[t]here is no textual basis for precluding district courts from considering non-retroactive changes in sentencing law when determining what is extraordinary and compelling." *Id.*

In *Chen*, the defendant filed a motion for compassionate release, arguing that the First Step Act's changes to stacked-sentencing laws, which reduced the minimum sentence for a defendant in his position from 300 months to 60 months, constituted an extraordinary and compelling reason for reducing his sentence. *Id.* at 1094. The district court denied his motion on the grounds that Congress "expressly declined to make § 403(a) retroactive." *Id.*

The Ninth Circuit reversed. The court explained that "Congress has placed only two limitations directly on extraordinary and compelling reasons." *Id.* at 1098. First, a sentence reduction must be "consistent with applicable policy statements" issued by the U.S. Sentencing Commission. 18 U.S.C. § 3553(a). Second, "[r]ehabilitation . . . alone" cannot be extraordinary and compelling. 28 U.S.C. § 994(t). The Ninth Circuit found that "[n]either of these rules prohibit district courts from considering rehabilitation in combination with other factors." *Chen*, 48 F.4th at 1098. Because "Congress has never acted to wholly exclude the consideration of any one factor," the Ninth Circuit reasoned, "[t]o hold that district courts cannot consider non-retroactive changes in sentencing law would be to create a categorical bar against a particular factor, which Congress itself has not done." *Id.* And *any* "categorical bar" against the consideration of a particular factor, the court continued, "would seemingly contravene the original intent behind the compassionate release statute, which was created to provide the need for

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." *Id.* at 1098-99 (quotation marks omitted).

The Ninth Circuit further reasoned that the fact that Congress had chosen to make a sentencing change non-retroactive does not mean that the change cannot constitute an extraordinary and compelling reason under § 3582(c)(1)(A). The court recognized that "there is a significant difference between automatic vacatur and resentencing of an entire class of sentences and allowing for the provision of individual relief in the most grievous cases." *Id.* at 1100 (cleaned up). When a change in sentencing law is retroactive, the court explained, every defendant sentenced under the prior law is automatically eligible for resentencing. *Id.* "In contrast, allowing defendants to petition for compassionate release, based in part on the sentencing disparities created by [changes in federal law], does not automatically make every defendant [sentenced under the prior law] eligible for a sentence reduction; the petitioning defendant still must demonstrate that [the new] non-retroactive changes rise to the level of 'extraordinary and compelling' in his individualized circumstances." *Id.* Because petitioning for compassionate release does not automatically result in a reduced sentence, the court concluded, allowing courts to consider changes in federal law in the extraordinary-and-compelling analysis does not conflict with a provision's non-retroactivity.

The Ninth Circuit further considered and rejected the position of the Third and Seventh Circuits that district courts may not consider non-retroactive changes in federal law for purposes of § 3582(c)(1)(A) but may nevertheless consider those changes when determining what sentencing reduction to award under § 3553(a) once extraordinary and compelling circumstances have been

found. *See id.* at 1099-1100. The Ninth Circuit concluded that such a distinction was unsupported: "if Congress truly intended to bar district courts from considering [sentencing changes] in the compassionate release context by making the changes non-retroactive, then it is doubtful those changes should be considered at all, whether as extraordinary and compelling reasons or under § 3553(a)." *Id.* at 1099.

b. The Seventh Circuit's decision also squarely conflicts with established law in the Fourth Circuit. In *United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020), the defendants moved for reductions in their sentences under § 3582(c)(1)(A), arguing that the First Step Act's elimination of sentence-stacking for firearms violations under 18 U.S.C. § 924(c)—which decreased the minimum sentences for similarly situated defendants by decades—constituted extraordinary and compelling grounds for relief. *Id.* at 274. The district courts granted the reduction after considering the defendants' age at the time of the offense, lack of prior criminal history, time-served, and rehabilitative efforts. *Id.*

The Fourth Circuit affirmed. *Id.* The court held 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 § 3582(c)(1)(A)." *Id.* at 285. The court rejected the government's argument that, "by taking into account the First Step Act's elimination of § 924(c) sentence-stacking, the district courts impermissibly gave that provision retroactive effect, contrary to Congress's direction." *Id.* at 286. Like the Ninth Circuit, the Fourth Circuit explained that there is a "significant difference between automatic vacatur and resentencing of an entire class of sentences . . . and allowing for the provision of individual relief in the most grievous cases." *Id.* at 286-87. And the

Fourth Circuit further emphasized the "individualized assessments" that the district courts made as to each defendant's sentence, as well as the fact that "the district courts relied not only on the defendants' § 924(c) sentences but on full consideration of the defendants' individual circumstances." *Id.* at 286.

c. The First Circuit reached the same conclusion as the Ninth and Fourth Circuits in *United States v. Ruvalcabra*, 26 F.4th 14 (1st Cir. 2022). There, a defendant serving a life sentence moved for compassionate release under § 3582(c)(1)(A) on the basis that, "had he been sentenced after the enactment of the [First Step Act], he would have … been subject to a mandatory prison term of only fifteen years." *Id.* at 17. The district court denied his motion, finding that "the changes were prospective in effect and, therefore, any ensuing disparity could not be deemed extraordinary." *Id.* at 18.

Like the Ninth and Fourth Circuits, the First Circuit held that a district court may consider non-retroactive changes in sentencing law to determine whether an "extraordinary and compelling reason" for release exists, so long as such a determination is "grounded in a defendant's particular circumstances." *Id.* at 16. The court explained that "there is only one explicit limitation on what may comprise an extraordinary and compelling reason": rehabilitation alone cannot constitute an extraordinary and compelling reason for relief. *Id.* at 25. "Nowhere," the court continued, "has Congress expressly prohibited district courts from considering non-retroactive changes in sentencing law," and there is no support for such a categorical prohibition in the statutory text. *Id.* Like the Ninth Circuit, the First Circuit further found that permitting district courts to consider non-retroactive changes to sentencing law as part of the extraordinary-and-compelling analysis "fits seamlessly

with the history and purpose of the compassionate-release statute" and Congress's efforts to create 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." *Id.* at 26.

The First Circuit further rejected the argument that its holding "usurp[ed]" Congress's judgment in making certain sentencing changes non-retroactive. *Id.* at 26. The court explained that "Congress's judgment to prevent [automatic vacatur and resentencing of an entire class of sentences] is not sullied by a district court's determination, on a case-by-case basis, that a particular defendant has presented an extraordinary and compelling reason due to his idiosyncratic circumstances." *Id.* at 27. "As long as the individualized circumstances, taken in the aggregate, satisfy the 'extraordinary and compelling' standard," the First Circuit concluded, "granting relief would be consistent with Congress's judgment that a modification of a sentence legally imposed may be warranted when extraordinary and compelling reasons for taking that step exist." *Id.* at 27.

d. The Tenth Circuit's decision in *United States v. Maumau*, 993 F.3d 821 (10th Cir. 2021), aligns with that of the Ninth, Fourth, and First Circuits. There, as in *McCoy*, the defendant moved to reduce his sentence under § 3582(c)(1), arguing that "extraordinary and compelling reasons, including the First Step Act's elimination of § 924(c)'s stacking provision, justified a reduction." *Id.* at 824. The district court granted his motion, reducing his 55-year sentence to time served, plus three years of supervised release. *Id.*

The Tenth Circuit affirmed. *Id.* The Tenth Circuit explained that a district court considering a § 3582(c)(1) motion must follow a three-step test. *Id.* at 831. First, the court must determine whether extraordinary and

compelling reasons warrant a sentence reduction. *Id.* Second, the court must determine whether such a reduction is consistent with applicable Sentencing Commission policy statements. *Id.* Third, the court must "consider any applicable § 3553(a) factors and determine whether, in its discretion, the reduction authorized by steps one and two is warranted in whole or in part under the particular circumstances of the case." *Id.* (cleaned up). The Tenth Circuit further concluded that, in carrying out step one of this three-part test, district courts "possess the authority to determine for themselves what constitutes 'extraordinary and compelling reasons,' but that the discretion afforded to district courts in step one of the three-part statutory test is bounded by [step two]." *Id.* at 832. As such, the Tenth Circuit rejected the government's argument that § 3582(c)(1) "affords the Sentencing Commission with the exclusive authority to determine what constitutes 'extraordinary and compelling reasons.'" *Id.*; *see id.* at 832-34. Concluding that the district court possessed "the authority to determine for [itself] what constitutes 'extraordinary and compelling reasons,'" *id.* at 832, and that the Sentencing Commission had not yet issued a policy statement applicable to defendant-filed motions, the Tenth Circuit affirmed the district court's sentencing reduction, *id.* at 837.

Judge Tymkovich issued a concurrence "to note that [the court's] holding d[id] not give district courts carte blanche to retroactively apply [sentencing amendments] in every instance." *Id.* at 838 (Tymkovich, J., concurring). Because the district court had considered the defendant's "individualized circumstances"—including his "extraordinarily long sentence" when compared to "the significantly shorter sentences [his] co-defendants received for substantially similar conduct"—Judge Tymkovich found that the district court had "acted within

its broad discretion to find 'extraordinary and compelling' reasons for sentence reduction." *Id.* He cautioned, however, that "the imposition of a sentence that was not only permissible but statutorily required at the time is neither an extraordinary nor a compelling reason to now reduce that same sentence." *Id.*

2. Six circuits—the Third, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits—have expressly rejected the view of the First, Fourth, Ninth, and Tenth Circuits.

a. The leading case in the Seventh Circuit is *United States v. Thacker*, 4 F.4th 569 (7th Cir. 2021). In *Thacker*, the Seventh Circuit held that "[non-retroactive changes to sentencing law], whether considered alone or in connection with other facts and circumstances, cannot constitute an 'extraordinary and compelling' reason to authorize a sentencing reduction." *Id.* at 571. At sentencing, the defendant had faced a 32-year minimum sentence. *Id.* at 572. "Had [he] been sentenced after the First Step Act became law," however, "he would have faced a 14-year mandatory minimum." *Id.* The defendant thus moved for compassionate release under § 3582(c)(1)(A), arguing that the magnitude of the First Step Act's sentencing changes for a defendant in his circumstances, in combination with his individual health conditions amid the COVID-19 pandemic, constituted extraordinary and compelling reasons warranting his release. *See id.* The district court denied his motion. *Id.*

The Seventh Circuit affirmed, holding that non-retroactive sentencing changes cannot constitute "extraordinary and compelling" reasons for sentencing reductions under § 3582(c)(1)(A). *Id.* at 576. In so holding, the court emphasized that "there is nothing 'extraordinary' about leaving untouched the exact penalties that Congress prescribed and that a district court imposed for particular violations of a statute." *Id.* at 574. The court noted that, while Congress had made the

relevant anti-stacking amendment prospective only, it had made a "deliberate" choice in making other First Step Act sentencing amendments apply retroactively. *Id.* at 573. The Seventh Circuit reasoned that "[t]hese distinctions matter, and they are ones reserved for Congress to make." *Id.* The court thus concluded that "[t]he district court was right to see [the defendant's] motion, at least in part, as an attempted end-run around Congress's decision in the First Step Act to give only prospective effect to its [anti-stacking amendment]." *Id.* Permitting such an outcome, the court determined, would allow a prisoner "to upend the clear and precise limitation Congress imposed." *Id.* at 574.

The Seventh Circuit also expressed that it "harbor[ed] broader concerns with allowing § 3582(c)(1)(A) to serve as the authority for relief from mandatory minimum sentences prescribed by Congress." *Id.* If non-retroactive sentencing changes could establish "extraordinary and compelling" reasons for relief, the court reasoned, there was "nothing preventing the next inmate serving a mandatory minimum sentence under some other federal statute from requesting a sentencing reduction in the name of compassionate release on the basis that the prescribed sentence is too long, rests on a misguided view of the purposes of sentencing, reflects an outdated legislative choice by Congress, and the like." *Id.* The Seventh Circuit concluded that countenancing such requests would both "offend[] principles of separation of powers" and "create[] tension with the principal path and conditions Congress established for federal prisoners to challenge their sentences[—habeas relief]." *Id.*

In light of these considerations, the Seventh Circuit held that, while a district court may consider non-retroactive sentencing changes "as part of determining what sentencing reduction to award the prisoner," such

changes cannot constitute reasons warranting a sentencing reduction in the first instance. *Id.* at 576.

b. In *United States v. Jarvis*, 999 F.3d 442 (6th Cir. 2021), the Sixth Circuit applied the same rule that the Seventh Circuit follows: a non-retroactive statutory sentencing change cannot serve as an "extraordinary and compelling reason" under § 3582(c)(1)(A)(i).[5] *Id.* at 443. In *Jarvis*, a defendant who had already served 26 years of a 40-year sentence moved for compassionate release under § 3582(c)(1)(A)(i), arguing that the First Step Act had reduced the statutory minimum for a defendant in his position to 25 years. *Id.* The district court denied his motion, and the Sixth Circuit affirmed. *Id.* at 442.

Like the Seventh Circuit, the Sixth Circuit noted that Congress's decision not to make the subject sentencing change retroactive was "deliberate." *Id.* at 443. Permitting defendants sentenced before the sentencing amendment to benefit from the amendment, the court reasoned, would render that deliberate choice "useless": "If every defendant who received a longer sentence than the one he would receive today became eligible for compassionate release, the balance Congress struck would come to naught." *Id.* at 443-44. Like the Seventh Circuit, the Sixth Circuit thus declined to pursue an "end run around Congress's careful effort to limit the

[5] The following year, the Sixth Circuit granted en banc review to resolve an intra-circuit split over this issue. *See United States v. McCall*, 56 F.4th 1048, 1051 (2022) (en banc). Like the *Jarvis* panel, the en banc court held that "[n]onretroactive legal developments, considered alone or together with other factors, cannot amount to an 'extraordinary and compelling reason' for a sentence reduction." *Id.* at 1065-66. Judge Moore, joined by Judges Cole, Clay, White, Stranch, and Donald, dissented. *Id.* at 1066-74 (Moore, J., dissenting). Judge Gibbons also dissented. *Id.* 1074-76 (Gibbons, J., dissenting).

retroactivity of the First Step Act's reforms." *Id.* at 444 (quotation marks omitted).

Judge Clay dissented. *Id.* at 446 (Clay, J., dissenting). Judge Clay argued both that the majority had ignored binding circuit precedent, *see id.* at 447, and that the majority's reasoning "ignore[d] the individualized nature of compassionate release," *id.* at 450. Quoting the Fourth Circuit's reasoning in *McCoy*, Judge Clay emphasized the "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.* (quoting *McCoy*, 981 F.3d at 286-87). Judge Clay further argued that "the majority's fear of numerous defendants becoming eligible for compassionate release [wa]s unwarranted," in light of "the significant discretion a district court has in determining [both] whether there are extraordinary and compelling reasons for compassionate release[and] whether the § 3553(a) factors support release." *Id.* Judge Clay thus concluded that "[a]llowing for a nonretroactive amendment creating a sentencing disparity to be considered along with a defendant's unique circumstances in connection with a motion for compassionate release affords the proper deference to Congress's decision not to make the amendment retroactive." *Id.* at 451.

c. In *United States v. Jenkins*, 50 F.4th 1185 (D.C. Cir. 2022), the D.C. Circuit adopted the same rule that the Seventh and Sixth Circuits follow: non-retroactive changes in the law "may neither support nor contribute to a finding that extraordinary and compelling reasons warrant compassionate release." *Id.* at 1198. In *Jenkins*, the defendant moved for compassionate release under § 3582(c)(1)(A)(i), arguing that Congress's narrowing of § 924(c)'s stacked-sentencing provision in the First Step Act—in combination with two intervening D.C. Circuit

decisions under which he would have faced a lower minimum sentence, his deteriorating health conditions, and familial needs—constituted extraordinary and compelling reasons warranting release. *See id.* at 1194. The district court denied the motion, and the D.C. Circuit affirmed. *Id.* at 1194, 1207.

The D.C. Circuit held that, because "there is nothing remotely extraordinary about statutes applying only prospectively," *id.* at 1198, courts "should not tip the balance by allowing courts to question whether the original mandatory minimum sentence was simply too long, either in absolute terms or relative to the amendment," *id.* at 1200. The court explained that this conclusion was reinforced by separation-of-powers considerations. *Id.* at 1198-99. "When Congress enacted the original stacking provision," the court reasoned, "it deemed a 25-year minimum sentence to be appropriate for all second section 924(c) offenses." *Id.* at 1199. "And by making its ameliorative amendment expressly nonretroactive [in the First Step Act], Congress reaffirmed that the 25-year minimum remained appropriate for defendants already sentenced." *Id.* The D.C. Circuit thus concluded that it "would usurp these quintessentially legislative judgments if [it] used compassionate release as a vehicle for applying the amendment retroactively, to previously sentenced defendants who would not otherwise qualify for compassionate release." *Id.*

In so holding, the D.C. Circuit rejected the argument that non-retroactive changes in the law can constitute extraordinary and compelling reasons for a sentencing reduction when the original sentence was of a "sheer and unusual length" and there is a "gross disparity" between the original sentence and the new statutory minimum. *Id.* (quoting *McCoy*, 981 F.3d at 285-86). "Such reasoning," the court explained, "*always* runs headlong into

Congress's judgment that the unamended statute remains appropriate for previously sentenced defendants, which is why even courts on the *McCoy* side of the split recognize that a court may *never* grant compassionate release based solely on prospective sentencing changes." *Id.* "[I]f those considerations do not themselves warrant compassionate release," the court concluded, they cannot serve as additional reasons establishing extraordinary and compelling circumstances. *Id.* at 1200.

Judge Ginsburg wrote separately, arguing that he "would not adopt a rule that categorically precludes consideration of a non-retroactive change in the law" in a § 3582(c)(1)(A)(i) analysis. *Id.* at 1208 (Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment). "Central" to his disagreement with the majority's reasoning, he explained, was that the First Step Act provides no basis for such a categorical preclusion. *Id.* He reminded the majority of a "straightforward, textualist point": "Congress well knows how to preclude consideration of certain factors. That is exactly what it did when it stated that '[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.' But that is the only limit the Congress placed upon the term." *Id.* (quoting 28 U.S.C. § 994(t)). Judge Ginsburg further disagreed that non-retroactive sentencing changes could not be "extraordinary" simply because they were common, arguing that even an ordinary practice can be extraordinary and compelling in light of "the idiosyncratic circumstances of a particular defendant." *Id.*

d. The Seventh, Sixth, and D.C. Circuits' holdings align with the decisions of three other circuits, all of which have held that non-retroactive changes in federal law cannot be among the "extraordinary and compelling reasons" warranting a sentence reduction under § 3582(c)(1)(A). *See United States v. Andrews*, 12 F.4th

255, 262 (3d Cir. 2021) ("Congress's nonretroactive sentencing reductions are not extraordinary and compelling reasons for purposes of § 3582(c)(1)(A)."); *United States v. McMaryion*, 64 F.4th 257, 259 (5th Cir. 2023) ("[A] prisoner may not leverage non-retroactive changes in criminal law to support a compassionate release motion, because such changes are neither extraordinary nor compelling."), *withdrawn and substituted*, 2023 WL 4118015 (5th Cir. June 22, 2023); *United States v. Crandall*, 25 F.4th 582, 586 (8th Cir. 2022) ("[A] non-retroactive change in law, whether offered alone or in combination with other factors, cannot contribute to a finding of 'extraordinary and compelling reasons' for a reduction in sentence under § 3582(c)(1)(A).").

3. Numerous commentators have also recognized the sharp circuit conflict over this question. *See supra* note 1; Claire M. Griffin, *An Extraordinary and Compelling Case for Judicial Discretion: Nonretroactive Sentencing Changes and Compassionate Release*, 54 U. Tol. L. Rev. 237, 246-55 (2023); Michael T. Hamilton, *Opening the Safety Valve: A Second Look at Compassionate Release under the First Step Act*, 90 Fordham L. Rev. 1743, 1759-65 (2022); Olivia Williams, Note, *Taking the Second Step: Section 924(c) Sentencing Disparities as an Extraordinary and Compelling Reason for Compassionate Release*, 63 Wm. & Mary L. Rev. Online 27, 44-45 (2022); Jaden Lessnick, Case Note, *Uncompassionate Incarceration:* United States v. Thacker *and Its Impact on Nonretroactivity-Based Compassionate Release*, U. Chi. L. Rev. Online (May 12, 2022); Anthony Passela, *Stacking the Deck: How the Eighth Circuit's Decision in* United States v. Crandall *Threatens the First Step Act's Bipartisan Criminal Justice Reforms*, 68 Vill. L. Rev. 97, 102-03 (2023); *see also* Charles Doyle, Cong. Rsch. Serv., R47195, Federal

Compassionate Release After the First Step Act 4 & n.27 (2022).

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The conflict over whether a non-retroactive change in law is categorically ineligible for consideration as an extraordinary and compelling reason for a sentence reduction under § 3582(c)(1)(A) is square and intractable. It has generated a 6-4 circuit split. Deep division on the issue is reflected nationwide—every circuit other than the Second and Eleventh has weighed the arguments and chosen a side in a published opinion.[6] Neither bloc will change enough to resolve the split; to the contrary, any further changes are bound only to exacerbate confusion and conflict between and within the circuits. Until this Court intervenes, parties will continue to face disparate chances of successful appeals depending on the circuit. Review is urgently warranted.

II. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS REVIEW IN THIS CASE

1. The legal and practical importance of the question presented is undeniable. The circuit conflict has now reached ten circuits, with courts resolutely disagreeing over the proper rule. And the question presented affects thousands of federal prisoners who may have strong cases for compassionate release. The standard for winning a motion for resentencing under § 3582(c)(1)(A)(i) is a critically important issue affecting every federal prisoner in the country. It is essential that prisoners and courts

[6] And even the two nominally unaligned circuits have unpublished opinions on opposite sides of the conflict. *Compare United States v. Rose*, 837 F. App'x 72, 73-74 (2d Cir. 2021) (a district court "may look to . . . the mandatory minimums that the defendant would face if being sentenced for the first time under revised guidelines or statutes"), *with United States v. Williams*, No. 22-13150, 2023 WL 4234185, at *3-4 (11th Cir. June 28, 2023) (no, it may not).

know whether non-retroactive changes in law are categorically ineligible for consideration as reasons that could make a prisoner eligible for resentencing.

As it now stands, prisoners have different access to compassionate release based on nothing more than the fortuity of where their criminal case happened to be prosecuted. The circuit split is so entrenched that there is no hope of this issue resolving itself. Each side of the split has staked out its position, and the competing arguments have been thoroughly examined. The question is ripe for review.

a. The sheer number of decisions on this question confirms the issue's importance, and there is no genuine dispute that the issue arises constantly in courts of appeals nationwide. All but one of the twelve circuits with jurisdiction over criminal cases—with the notable exception being the First Circuit, which has held that district courts may consider non-retroactive changes in law when deciding compassionate release motions, *see* pp. 13-14, *supra*—have heard appeals raising this issue in the past twelve months.[7] Some circuits have decided this question repeatedly in that time period, highlighting the

[7] *See, e.g.*, *United States v. Smith Castillo,* Nos. 21-168-cr, 21-172-cr, 2022 WL 3581308, at *1 (2d Cir. Aug. 22, 2022); *United States v. Hammonds*, No. 22-2406, 2023 WL 4198041, at *1 (3d Cir. June 27, 2023); *United States v. Brice*, No. 21-6776, 2022 WL 3715086, at *1 (4th Cir. Aug. 29, 2022); *McMaryion*, 64 F.4th at 259-60; *United States v. Edmond*, No. 22-1443, 2023 WL 3736880, at *1 (6th Cir. May 31, 2023); *United States v. McIntosh*, No. 22-2326, 2023 WL 3409487, at *1 (7th Cir. May 12, 2023); *United States v. House*, No. 22-3129, 2023 WL 4241628, at *1 (8th Cir. June 29, 2023); *United States v. Roper*, No. 33-30021, 2023 WL 4360600, at *2 (9th Cir. July 6, 2023); *United States v. Arriola-Perez*, No. 21-8072, 2022 WL 2388418, at *1 (10th Cir. July 1, 2022); *Williams*, 2023 WL 4234185, at *1-2; *Jenkins*, 50 F.4th at 1192.

confusion sown by this circuit split.[8] And these numbers represent only motions for compassionate release that are appealed—as detailed below, district courts hear thousands of compassionate release motions every year. It is impossible to count how many defendants choose not to appeal, or choose not to move for compassionate release at all, because they are either confused by the incongruent legal rules or because binding circuit precedent tells them that a change in law cannot provide an extraordinary and compelling reason for a resentencing.

b. Review is also essential because the practical stakes are substantial. In its most recent semiannual report, the Sentencing Commission reported over 200 compassionate release decisions in each of the first three *months* of 2023, following over 4,500 compassionate release decisions in 2022.[9] The highest number of underlying crimes for which movants have sought compassionate release in 2023 are firearm and drug-trafficking offenses[10]—the very same crimes that, under prior statutory regimes, carried exorbitantly long mandatory minimum sentences and the very same movants that would benefit the most from compassionate release or resentencing today.

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[8] *See, e.g.*, *United States v. Ling*, No. 22-2464, 2023 WL 2674411, at *1 (7th Cir. Mar. 29, 2023); *United States v. Brown*, No. 22-2465, 2023 WL 3144553 (7th Cir. Apr. 28, 2023), at *1-2; *United States v. Gaskins*, No. 22-2518, 2023 WL 3299986, at *1 (7th Cir. May 8, 2023); *Hammonds*, 2023 WL 4198041, at *1; *United States v. Craft*, No. 22-2708, 2023 WL 3717545, at *1-2 (3d Cir. May 30, 2023).

[9] U.S. Sent'g Comm'n, *Compassionate Release Data Report: Fiscal Year 2023, 2nd Quarter (October 1, 2022, Through March 31, 2023)* tbl.1 (2023), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/202305-Compassionate-Release.pdf.

[10] *Id.* at tbls.8 & 9.

The Court's recent holding in *Jones v. Hendrix*, 143 S. Ct. 1857 (2023), heightens the practical stakes of clarifying the breadth of the "extraordinary and compelling reasons" doorway to compassionate release. If these words can encompass non-retroactive changes in law, then they certainly can also encompass *retroactive* changes in law, meaning that prisoners subject to conviction under misinterpreted criminal statutes could obtain a resentencing if the circumstances of the misinterpretation in law are sufficiently extraordinary and compelling (for instance, if the change in law means that the movant is actually innocent of the underlying crime). Especially in light of the Court's decision in *Jones*, the availability of compassionate release on the basis of changes in law has taken on new urgency.

c. This issue is frequently recurring, nationally important, and ripe for the Court's review. The Court's denial of earlier petitions for certiorari in cases raising similar questions is no basis to deny the present petition. The Court routinely grants petitions on questions on which it has denied previous petitions for certiorari. *See Wilkinson v. Garland*, -- S. Ct. -- (2023) (No. 22-666); *Dupree v. Younger*, 143 S. Ct. 645 (2023) (No. 22-210). The number of recent petitions raising the question presented establishes the issue's undeniable significance and that the legal issues are well-developed and ready for the Court's review. *See, e.g.*, *Jarvis v. United States* (No. 21-568); *Watford v. United States* (No. 21-551).

2.a. The Sentencing Commission's Guideline—which is set to take effect on November 1, 2023, and purports to permit district courts to consider "unusually long sentences" as potentially "extraordinary and compelling" reasons for sentencing reductions, *see* Pet. App. 19a; 88 Fed. Reg. 28254, 28257 (May 3, 2023)—makes this Court's review of the question presented especially warranted.

Petitioner indisputably qualifies for resentencing under the soon-to-take-effect Guideline. He has served 10 years toward his LWOP sentence. His present sentence is not just "unusually" harsh but extraordinarily so—"the second-harshest sentence available under [this Court's] precedents for *any* crime, and the most severe sanction available for a nonhomicide offense." *Graham v. Florida*, 560 U.S. 48, 92 (2010) (Roberts, C.J., concurring). And there is obviously a "gross disparity between the sentence being served" (LWOP) "and the sentence likely to be imposed at the time the motion is filed" (25 years). Pet. App. 19a.

Yet, the soon-to-take-effect Guideline is dead on arrival in the Seventh Circuit. The holding in *Thacker* is clear that, as a matter of statutory interpretation, the First Step Act categorically does not permit district courts to consider non-retroactive changes in law as "extraordinary and compelling" reasons for sentence reductions. *See* 4 F.4th at 574 ("[T]he discretion conferred by § 3582(c)(1)(A) does not include authority to reduce a mandatory minimum sentence on the basis that the length of the sentence itself constitutes an extraordinary and compelling circumstance warranting a sentencing reduction.").

Thus, the Guideline will do petitioner no good until this Court intervenes. If this petition is denied, petitioner will file an identical motion for compassionate release in November. The district court and Seventh Circuit will be required to deny the motion under the Seventh Circuit's holding that, as a statutory matter, non-retroactive changes in law categorically cannot constitute extraordinary and compelling reasons for resentencing. Petitioner will then return right back to this Court.

The Commission's Guidance is not just dead on arrival in the Seventh Circuit; it is also dead on arrival in the five other circuits on the long side of the split. The

Sixth, Eighth, and D.C. Circuits have all said that consideration of non-retroactive changes in law is "legally impermissible." *Jarvis*, 999 F.3d at 444; *Crandall*, 25 F.4th at 586; *Jenkins*, 50 F.4th at 1200. The D.C. Circuit has gone even further and explained that granting compassionate release on the basis of non-retroactive changes in law would usurp the "applicable statutory constraints." *Jenkins*, 50 F.4th at 1199. The Third Circuit was equally categorical that "nonretroactive changes to . . . mandatory minimums . . . cannot be a basis for compassionate release" because "[s]uch an interpretation would sow conflict within the statute." *Andrews*, 12 F.4th at 261. And the Fifth Circuit has held that permitting consideration of non-retroactive changes in a compassionate release motion would "usurp the legislative prerogative and use 18 U.S.C. § 3582(c)(1) to create retroactivity that Congress did not." *McMaryion*, 64 F.4th at 260; *see id.* at 259-60.

None of the courts on the long side of the split held that the particular circumstances of the particular prisoner making the motion mattered to their holdings. They instead held that, as a statutory matter, the "extraordinary and compelling reasons" contemplated by the statute cannot include non-retroactive changes in law. Only this Court can settle whether the Sentencing Commission or those six courts has the better reading of that statutory text.

b. Resolving the question presented in the coming Term, as the Guideline takes effect, will minimize the confusion and disparate treatment that will arise from the implementation of the Guideline nationwide. If the Court concludes that non-retroactive changes in law can be extraordinary and compelling reasons sufficient to justify resentencing, the Guideline will be indisputably valid in every circuit. If, in contrast, the Court concludes that non-retroactive changes in law categorically cannot be

extraordinary and compelling reasons sufficient to justify resentencing, the Guideline will be unambiguously *in*valid in every circuit. The Court should therefore take advantage of this opportunity to clarify the meaning of § 3582(c)(1)(A).

3. The reasons the United States has advanced for denying review of earlier petitions presenting this question are unpersuasive and, in any event, now inapplicable in light of the forthcoming Guideline.

The United States has previously argued that this issue is not important enough to warrant review because the Sentencing Commission can deprive a decision by this Court of "any practical significance." Brief for the United States in Opposition at 12, *Jarvis v. United States* (No. 21-568). Specifically, the United States has argued that the Commission can essentially override a decision of this Court by issuing guidance precluding consideration of non-retroactive changes in law as "extraordinary and compelling" reasons for resentencing. *Id.* at 17-20. That argument no longer holds. Rather than preclude consideration of non-retroactive changes in law, the Commission specifically *included* non-retroactive changes in law as a basis for resentencing. *See* Pet. App. 19a. As a consequence, the Guideline now sets up a direct conflict with the law in the six circuits that have interpreted "extraordinary and compelling reasons" to categorically *exclude* non-retroactive changes in law. *See* pp.16-22, *supra* (collecting cases).

The United States also previously argued that the Commission's adoption of an amendment precluding consideration of non-retroactive changes in law could obviate the need for this Court's review of the question presented entirely. Brief for the United States in Opposition at 17-20, *Jarvis v. United States* (No. 21-568); Brief for the United States in Opposition at 22-23, *Fraction v. United States* (No. 22-5859) (similar). But the

adoption of the forthcoming Guideline nullifies that argument as well. As the United States has previously stated, "the Commission could not describe 'extraordinary and compelling reasons' to include consideration of a factor that, as a statutory matter, may not constitute such a reason." Brief for the United States in Opposition at 20, *Jarvis v. United States* (No. 21-568). Again, six circuits have interpreted the words "extraordinary and compelling reasons" to categorically exclude non-retroactive changes in law. *See* pp. 16-22, *supra* (collecting cases). As a result, this Court will necessarily be called upon to determine whether the Commission or those six courts has interpreted the statute correctly.

The Sentencing Commission's forthcoming Guideline thus neither resolves this issue nor provides reason to deny the petition. It is now clear that this Court will be required to review this question at some point, and that, far from lacking "practical significance," this Court's decision on this issue will have enormous consequences for tens of thousands of federal prisoners nationwide.

4. There are no obstacles to review and determination of this case. Petitioner's motion for compassionate release was decided solely based on the question presented. The district court and the court of appeals ruled against petitioner because Seventh Circuit precedent dictated that a change in law does not constitute an extraordinary and compelling reason warranting a sentence reduction. *See* Pet. App. 3a-5a; 6a-7a. This clean presentation of a recurring, important, life-altering issue provides the ideal vehicle for review by this Court.

The Court should decide this important question in this case. Waiting would be futile because the Court will inevitably need to resolve the question presented, and to deny review now would only delay clarity, foster further

confusion, and result in additional disparate treatment for thousands of federal prisoners.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NICOLE L. MASIELLO
ARNOLD & PORTER
KAYE SCHOLER LLP
250 West 55th Street
New York, NY 10019

NATE NIEMAN
ATTORNEY AT LAW
329 18th Street
Rock Island, IL 61201

R. STANTON JONES
ANDREW T. TUTT
Counsel of Record
SEAN A. MIRSKI
DANA OR
MINJAE KIM
KATHRYN C. REED
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

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