No. 24-820

In the Supreme Court of the United States

DANIEL RUTHERFORD, PETITIONER,

v.

UNITED STATES OF AMERICA

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

BRIEF OF *AMICI CURIAE* FORMER FEDERAL JUDGES SUPPORTING PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes—Continued Page(s)

Legislative Materials

Other Authorities

INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae are 12 former Article III judges[2] who have devoted much of their professional lives to the criminal justice system and who maintain a continuing interest in restoring a system of justice that is fair both in practice and procedure. Collectively, they served decades in the federal judiciary. Based on their experience as Article III judges, *Amici* submit this brief to explain that giving effect to Congress's intent requires that the Court reverse the Third Circuit's decision.

Amici are:

Judge Jeremy D. Fogel (Ret.)—District Judge (1998-2014), Senior Judge (2014-2018) for the U.S. District Court for the Northern District of California.

Judge W. Royal Furgeson, Jr. (Ret.)—District Judge (1994-2008), Senior Judge (2008-2013) for the U.S. District Court for the Western District of Texas.

Judge Nancy M. Gertner (Ret.)—District Judge (1994-2011), Senior Judge (2011) for the U.S. District Court for the District of Massachusetts.

Judge Richard J. Holwell (Ret.)—District Judge (2003-2012) for the U.S. District Court for the Southern District of New York.

Judge Barbara S. Jones (Ret.)—District Judge (1995-2012), Senior Judge (2012-2013) for the U.S. District Court for the Southern District of New York.

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[1] No counsel for a party authored this brief in whole or in part. No person other than *amici* or its counsel made a monetary contribution to its preparation or submission. The parties were given timely notice of *amici's* intent to file this brief.

[2] The views in this brief are those of the *amici curiae* only and not necessarily of any institutions with which they are or have been affiliated.

Judge Alex Kozinski (Ret.)—Circuit Judge (1982-2017), Chief Judge (2007-2014) for the U.S. Court of Appeals for the Ninth Circuit.

Judge Stephen G. Larson (Ret.)—District Judge (2006-2009), Magistrate Judge (2000-2006) for the U.S. District Court for the Central District of California.

Judge Stephen M. Orlofsky (Ret.)—District Judge (1996-2003), Magistrate Judge (1976-1980) for the U.S. District Court for the District of New Jersey.

Judge Kevin H. Sharp (Resigned)—District Judge (2011-2017), Chief Judge (2014-2017) for the U.S. District Court for the Middle District of Tennessee.

Judge John D. Tinder (Ret.)—Circuit Judge (2007-2015), Senior Judge (2015) for the U.S. Court of Appeals for the Seventh Circuit; District Judge (1987-2007) for the U.S. District Court for the Southern District of Indiana.

Judge Thomas I. Vanaskie (Ret.)—Circuit Judge (2010-2018), Senior Judge (2018-2019) for the U.S. Court of Appeals for the Third Circuit; District Judge (1994-2010), Chief Judge (1999-2006) for the U.S. District Court for the Middle District of Pennsylvania.

Judge T. John Ward (Ret.)—District Judge (1999-2011) for the U.S. District Court for the Eastern District of Texas.

SUMMARY OF ARGUMENT

This case presents a question of critical importance to federal prisoners, their families, and the public: Whether nonretroactive changes in law can be among the factors district courts consider in deciding whether "extraordinary and compelling reasons" warrant a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i), also known as the compassionate release statute.

Compassionate release motions are some of the most frequently filed and important motions in federal courts

today. Since the First Step Act expanded access to compassionate release in 2018, tens of thousands of federal prisoners have seen material reductions in their criminal sentences. Other than whether innocence is relevant, the most important unresolved question in determining eligibility for compassionate release is whether nonretroactive changes in law may be considered.

Until recently, this was a difficult question. The circuits divided sharply over whether the First Step Act foreclosed such consideration. Enter the Sentencing Commission, which, in a 2023 policy statement, determined that nonretroactive changes in law *can* be among the factors considered in deciding whether extraordinary and compelling reasons warrant a sentence reduction under the compassionate release statute.

That should have settled the split and removed any doubt about how to adjudicate these motions. But the Third Circuit below held that the Commission's policy statement exceeded the Commission's statutory authority. The Third Circuit had previously held that the *best* reading of the statute precluded consideration of nonretroactive changes in law. But the court went even further, holding that the *only* permissible reading of the statute is that it precludes consideration of nonretroactive changes in law. On that basis, the Third Circuit held that the Commission lacks the power to do the very thing Congress gave it the power to do.

Amici submit this brief to explain why the Court should reverse the Third Circuit's decision and hold that nonretroactive changes in law can be considered in deciding whether "extraordinary and compelling reasons" warrant a sentence reduction under the compassionate release statute.

The Commission is the expert agency created by Congress to ensure that like crimes and like defendants

are treated alike. Invalidating the Commission's policy statement flatly undermines those policies: Depriving the Commission of this authority curtails its power to remedy grossly unjust sentencing disparities when warranted in individual cases, in direct contravention of Congress's aim in creating the Commission.

ARGUMENT

I. CONGRESS'S DESIGN FOR THE SENTENCING COMMISSION REQUIRES REVERSAL

The Court should reverse the Third Circuit's decision for a critically important reason: Nullifying the Sentencing Commission's authority in these circumstances fundamentally undermines Congress's aim for the Commission by depriving the Commission of its ability to eliminate sentencing disparities between identically situated criminal defendants.

Congress established the Sentencing Commission to address the inequities in sentencing attributable to the unfettered discretion that courts traditionally exercised in the sentencing realm. To ensure fairness in sentencing, Congress initially conferred total control over sentencing policy upon the Commission, including by empowering the Commission to promulgate Sentencing Guidelines from which courts typically could not deviate.[3] Congress also empowered the Commission with similarly expansive

[3] Congress allowed courts to depart from the guidelines and sentence outside the prescribed ranges when a particular case presents atypical features. In those cases, the court was required to specify reasons for departure. 18 U.S.C. § 3553(b)-(c). If the court sentenced within the guideline range, an appellate court could review the sentence only to determine whether the guidelines were correctly applied; but if the court departed from the guideline range, an appellate court could review the reasonableness of the departure. 18 U.S.C. § 3742.

interpretive authority to define the "extraordinary and compelling reasons" for compassionate release.

Congress's intent with this sentencing revolution was unmistakable: To empower the Commission to eliminate unwarranted, unjust, and unjustifiable disparities in sentences between similarly situated criminal defendants. Congress gave the Commission the tools to ensure its central role in sentencing. On the front end, criminal sentences would be bounded by Commission-promulgated mandatory guidelines. On the back end, sentences could be modified based on Commission-defined "extraordinary and compelling reasons" warranting release.

1. The Commission's creation marked a significant departure in the law of sentencing, designed to fundamentally transform how criminal sentences were meted out in the federal criminal justice system. Historically, Congress had afforded "almost unfettered discretion to the sentencing judge to determine what the sentence should be within [the statutory range]." *Mistretta v. United States*, 488 U.S. 361, 364 (1989); *see The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity, in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining,* U.S. Sent'g Comm'n at 31 (Dec. 1991) ("[C]ourts had virtually unfettered sentencing discretion, constrained only by the maximum or mandatory minimum set by statute.").

Congress found that disparities in sentences were rampant. Because each judge was "left to apply his own notions of the purposes of sentencing," the result was "an unjustifiably wide range of sentences to offenders . . . convicted of similar crimes." S. Rep. 98-225, at 38 (1983). This lack of uniformity in sentencing was further exacerbated by the parole system. *See Mistretta*, 488 U.S.

at 365-66; *see also* S. Rep. No. 97-307, at 956 (1981) ("[G]laring disparities . . . can be traced directly to the unfettered discretion the law confers on those judges and parole authorities [that implement] the sentence."); *see* Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985-1987*, 45 Hofstra L. Rev. 1167, 1171-74 (2017).

Starting in the 1970s, Congress attempted to address these problems, initially focusing on the role of the parole system in sentencing. *Mistretta*, 488 U.S. at 366. But those reforms failed to address the root of the problem: Judges' unfettered discretion in setting a sentence and parole authorities' discretion in granting parole. *See id.* These failures led Congress to recognize that simple patch-ups would not cut it. Newton & Sidhu, *supra*, at 1183.

Thus, in 1984, after a prolonged bipartisan effort spanning four different administrations, Congress enacted sweeping reforms to federal sentencing in the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987. Congress's aim was "to increase transparency, uniformity, and proportionality in sentencing" by, in large part, creating the United States Sentencing Commission. *Dorsey v. United States*, 567 U.S. 260, 265 (2012); *Peugh v. United States*, 569 U.S. 530, 535 (2013). Congress created the Commission as an "expert body" dedicated to crafting sentencing policies and practices based on the Commission's knowledge and expertise, *Mistretta*, 488 U.S. at 412, and it directed the Commission to promulgate guidelines to "provide certainty and fairness" in sentencing. 28 U.S.C. §§ 991(b)(1), 994(a), (f); *Rita v. United States*, 551 U.S. 338, 348 (2007). The Commission would have the power to promulgate guidelines for criminal sentences that would be *mandatory* on sentencing judges in most cases. Sentencing Reform Act § 212, 98 Stat. at 1989-90 (codified as amended at 18

U.S.C. § 3553(a)-(b)). The Commission would also have the power to define the parameters of compassionate release, by defining what would constitute "extraordinary and compelling reasons" for a sentence reduction. § 217, 98 Stat. at 2023 (codified as amended at 28 U.S.C. § 994(t)).

Congress also directed the Commission to continuously "review and revise" its guidelines as it gathered comments and data, and to issue "policy statements regarding application of the guidelines." 28 U.S.C. §§ 994(a)(2), (o).

The Commission's greatest advantage, and what distinguished it from individual judges, was its ability to gather and review sentencing data in service of its mandate of ensuring uniformity at the federal level. In promulgating the initial Sentencing Guidelines, the Commission examined data drawn from "some 40,000 convictions [and] a sample of 10,000 augmented presentence reports" "to determine which distinctions [were] important in present practice." *Federal Sentencing Guidelines Manual* 1.4, 1.12 (1988). The Commission then "accepted, modified, [and] rationalized" those distinctions to develop "relatively broad" categories of sentences that would make the Guidelines manageable while capturing substantial differences. *Id.* at 1.4.

2. Given the Commission's revolutionary nature and extraordinary powers, there have been multiple constitutional challenges to its composition and authority since its creation, most notably in *Mistretta v. United States*, 488 U.S. 361 (1989), and *United States v. Booker*, 543 U.S. 220 (2005). The Court upheld the constitutionality of the Commission, specifically its placement within the Judicial Branch and the powers granted to it by Congress. *Mistretta*, 488 U.S. at 370, 412. In upholding the Commission's legitimacy, the Court recognized and endorsed the Commission's difficult task

of ensuring consistency and uniformity in sentencing and fettering the discretion of sentencing judges through its promulgation of the Sentencing Guidelines. *See id.* at 366-70, 374-75.

About fifteen years later in *Booker*, the Court considered whether the mandatory Sentencing Guidelines violated the Sixth Amendment. 543 U.S. at 233-34 (2005). The Court held that they did, concluding that, "where judicial factfinding increases a defendant's applicable Sentencing Guidelines range, treating the Guidelines as mandatory . . . would violate the defendant's Sixth Amendment right to be tried by a jury and to have every element of an offense proved by the Government beyond a reasonable doubt." *Pepper v. United States*, 562 U.S. 476, 494 (2011); *see also Apprendi v. New Jersey*, 530 U.S. 466 (2000).

3. Although the Court was bound by the Sixth Amendment to sever the Guidelines' mandatory force, the Court has confirmed the Commission still had "some authority to bind the courts" post-*Booker* through policy statements. *Dillon v. United States*, 560 U.S. 817, 826, 830 (2010). The Court found that Congress gave the Commission a "substantial role" in "sentence-modification proceedings," so while the sentencing guidelines are no longer mandatory, sentence-reduction policy statements remain binding.[4] *Id.* at 826. Further, the Court has continued to recognize that, to the greatest extent possible, the Commission, rather than the court, should have a "central role in sentencing." *Molina-Martinez v. United States*, 578 U.S. 189, 191 (2016); *see Booker*, 543 U.S. at 264-65. Indeed, district courts remain

[4] The government conceded this point below. *See* Gov't Br. 25-26 n.5, *United States v. Rutherford*, No. 23-1904, (3d Cir. Filed Feb. 20, 2024), ECF No. 36 (citing *Dillon* and acknowledging that "the Commission's new policy statement . . . is binding" but asserting that § 1B1.13(b)(6) "exceed[s] statutory authority").

obligated to "begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007). As a result, the Guidelines—and the commentary that expounds them—exert a strong gravitational pull on sentences. *See Peugh*, 569 U.S. at 543-44.

Thus, notwithstanding that the Commission's original powers were pared back because of constitutional limitations, the consistent leitmotif of this Court's cases has been recognition that Congress's central purpose in creating the Commission was that it craft sentencing policy on a national level. *See, e.g.*, *Kimbrough v. United States*, 552 U.S. 85, 108-09 (2007) ("[T]he Commission fills an important institutional role: It has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.") (citation omitted); *Rita*, 551 U.S. at 349 ("The Guidelines as written reflect the fact that the Sentencing Commission examined tens of thousands of sentences and worked with the help of many others in the law enforcement community over a long period of time in an effort to fulfill [its] statutory mandate.").

4. The Commission's power to define "extraordinary and compelling reasons" for purposes of the compassionate release statute must be considered against this backdrop. Congress codified the compassionate release provision as part of the same statute that authorized the Commission to craft the Guidelines. The Commission's role in defining sentence-reduction via compassionate release was thus no less important a part of Congress's design than its role in setting sentencing ranges. *See* S. Rep. 98-225, at 121 (intending to create a "safety valve" for sentencing modifications when "extraordinary and compelling" reasons, as defined by the Commission, warranted such a reduction).

Rather than allowing the courts to determine what qualified as "extraordinary and compelling reasons" for sentence reduction under 18 U.S.C. § 3582(c)(1)(A), Congress delegated to the Commission the broad authority to issue policy statements "describ[ing] what should be considered extraordinary and compelling reasons, . . . including the criteria to be applied and a list of specific examples." 28 U.S.C. § 994(t); *see also* S. Rep. 98-225, at 55-56 (1983) (directing courts to consider "extraordinary and compelling" reasons subject to consideration of Sentencing Commission standards). Congress identified only one limitation for the Commission's authority: "Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." 28 U.S.C. § 994(t).

Congress's express delegation of this authority to the Commission is a reflection of Congress's understanding that the Commission is best situated to identify the "extraordinary and compelling reasons" warranting a possible sentence reduction because it "has the capacity courts lack to base its determinations on empirical data and national experience." *Kimbrough*, 552 U.S. at 109.[5]

Depriving the Commission of the authority to define the factors courts may consider in deciding

[5] The Commission's compassionate release policies—like all of its policies—are subject to congressional review. "[T]he Commission is fully accountable to Congress, [who] can revoke or amend any or all of the Guidelines as it sees fit." *Mistretta*, 488 U.S. at 393-94. While the Commission's proposed policy statements do not need to undergo the mandatory congressional review period that applies to its Guidelines amendments, the Commission often "include[s] amendments to policy statements and commentary in any submission of guideline amendments to Congress." U.S. Sent'g Comm'n, *Rules of Practice and Procedure* 4.1 (2016). Congress ultimately did not disapprove of the Commission's 2023 policy statement, so it went into effect on November 1, 2023. *See* 28 U.S.C. § 994(p).

"extraordinary and compelling reasons" would significantly curtail the Commission's power to remedy grossly unjust sentencing disparities when warranted in an individual case. Tying the Commission's hands in this realm would thus flatly contravene Congress's intent, eviscerating a central power Congress conferred on the Commission, both when Congress created it in 1984 and when it passed the First Step Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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