Nos. 24-820, 24-860

IN THE

Supreme Court of the United States

DANIEL RUTHERFORD,

Petitioner,

v.

UNITED STATES,

Respondent.

JOHNNIE MARKEL CARTER,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF PROFESSOR DOUGLAS BERMAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

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SUMMARY OF THE ARGUMENT

In the Sentencing Reform Act of 1984 and the First Step Act of 2018, Congress provided and then expanded district-court authority to reduce a prison

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[1] In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or his counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Professor Berman submits this brief in his individual capacity, not on behalf of the institution with which he is affiliated.

term "if it finds that extraordinary and compelling reasons warrant such a reduction … and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A). Congress tasked the United States Sentencing Commission with "promulgating general policy statements … [that] describe what should be considered extraordinary and compelling reasons for sentence reduction." 28 U.S.C. § 994(t).

In this way, Congress created an institutional structure for sentence-reduction policymaking and decisionmaking in keeping with the Sentencing Reform Act's approach to initial sentencing. In both settings, subject to statutory instructions, the Commission develops systemwide sentencing policy by promulgating and revising guidelines and policy statements. In both settings, district courts apply these guidelines and policy statements as they make sentencing decisions in individual cases (with their discretion further guided by constitutional limits and statutory instructions).

Congress in the Sentencing Reform Act also created a role for federal circuit courts to review, if a party appeals, a district court's individual sentencing decision. 18 U.S.C. § 3742. But "Congress did not intend, by establishing limited appellate review, to vest in appellate courts wide-ranging authority over district court sentencing decisions." *Koon v. United States*, 518 U.S. 81, 97 (1996). As this Court explained in *Koon*, "Congress did not grant federal courts authority to decide what sorts of sentencing

considerations are inappropriate in every circumstance," because "for the courts to conclude a factor must not be considered under any circumstances would be to transgress the policymaking authority vested in the Commission." *Id.* at 106–07.

In *Rutherford*, the Third Circuit transgressed the policymaking authority vested in the Commission by doing precisely what *Koon* explained was improper. In the face of a contrary policy statement promulgated by the Commission after it exercised its policymaking authority through a deliberative and transparent amendment process, the Third Circuit held that the First Step Act's nonretroactive changes of law can never be considered by a district court when assessing whether "extraordinary and compelling reasons" may warrant a discretionary sentence reduction. In other words, the Third Circuit essentially declared, contra *Koon*, that certain relevant sentencing factors "must not be considered under any circumstances." 518 U.S. at 106–07. Because circuit courts overstep their role within the Sentencing Reform Act when they declare "what sorts of sentencing considerations are inappropriate in every circumstance," *id.* at 106, this Court should reverse the decisions below.

ARGUMENT

I. Congress and the Sentencing Commission, Not the Courts of Appeals, Establish National Sentencing Policies.

A. The Sentencing Reform Act allocates policymaking authority to the Sentencing Commission and case-by-case decisionmaking authority to courts.

Seeking more consistent, proportionate, and transparent sentencing policymaking and outcomes, Congress enacted the Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 211–39, 98 Stat. 1837, 1987–2040, creating the United States Sentencing Commission. Congress created the Commission to "provide certainty and fairness in meeting the purposes of sentencing" while "avoiding unwarranted sentencing disparities." 28 U.S.C. § 991(b)(1)(B). Congress instructed the Commission to promulgate "guidelines for use of a sentencing court in determining the sentence to be imposed in a criminal case" as well as "general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation." *Id.* § 994(a)(2).[3] In addition, Congress mandated that the Commission "consult with authorities on, and

[3] This Court later made the guidelines "effectively advisory" to address Fifth and Sixth Amendment concerns with judicial fact-finding in a mandatory sentencing scheme. *United States v. Booker*, 543 U.S. 220, 245 (2005).

individual and institutional representatives of, various aspects of the Federal criminal justice system" as part of a regular process to "review and revise" the guidelines. *Id.* § 994(o).

Congress gave the Sentencing Commission detailed instructions for creating and revising the sentencing guidelines and policy statements. *See Mistretta v. United States*, 488 U.S. 361, 366–70 (1989). For example, Congress instructed the Commission to give "particular attention" in developing the guidelines "to providing certainty and fairness in sentencing and reducing unwarranted sentence disparities," 28 U.S.C. § 994(f), and to "take into account the nature and capacity of the penal, correctional, and other facilities and services available," *id.* § 994(g). Congress also instructed the Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense." *Id.* § 994(j). Importantly, Congress also preserved a long tradition of district-court sentencing discretion by providing that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661; *see Concepcion v. United States*, 597 U.S. 481, 491–92 (2022).

The Sentencing Reform Act also abolished parole while granting the district court authority to reduce a prison term "if it finds that extraordinary and compelling reasons warrant such a reduction … and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A). Congress again tasked the Sentencing Commission with establishing guiding sentencing policies in this context by mandating that the Commission "promulgat[e] general policy statements … [that] describe what should be considered extraordinary and compelling reasons for sentence reduction." 28 U.S.C. § 994(t). Congress also set out one substantive instruction by stating that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." *Id.*

In the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, Congress amended 18 U.S.C. § 3582(c)(1)(A) to allow prisoners to file motions for sentencing reductions directly with district courts, and it did so with the stated purpose of "Increasing the Use and Transparency of Compassionate Release." Pub. L. No. 115-391, § 603(b). The First Step Act also reduced the applicable mandatory minimum prison term for multiple convictions under 18 U.S.C. § 924(c), and made the change retroactive to any offender whose offense "was committed before the date of enactment of this Act" "if a sentence for the offense has not been imposed as of such date of enactment." Pub. L. No. 115-391, §§ 403(a)–(b).

The Sentencing Reform Act provided for appellate review of a district court's individual sentencing decision. 18 U.S.C. § 3742. Congress set forth certain limited grounds for review of a sentence, *id.* §§ 3742(a)–(c), and it called for the courts of appeals to conduct a "review of the record" and then affirm or vacate a sentence based on whether it found specific error in the district court's decisionmaking, *id.* §§ 3742(e)–(f). But this case-specific review process neither states nor suggests courts of appeals have any authority to rewrite or reformulate the guidelines and policy statements based on their own policy judgments, even if they might disagree with how the Commission has implemented its policymaking authority. For example, though the guidelines often recommend a sentence of imprisonment for first-time offenders, a circuit court could not claim the statutory mandate of 28 U.S.C. § 994(j) authorizes judicial rewriting of certain guidelines to reflect the court's policy views on how to better discharge the instructions Congress gave to the Commission. Similarly, even if defendants present evidence that certain guideline provisions operate to create worrisome disparities, circuit courts lack statutory authority to engage in wholesale guideline revisions to advance Congress's statutory instructions to the Commission regarding "reducing unwarranted sentence disparities." *See id.* § 994(f).

In short, the Sentencing Reform Act created a foundational institutional structure for the operation of the federal sentencing system: the Commission, guided by Congress' statutory instructions, develops

systemwide sentencing policy through promulgation and revision of guidelines and policy statements; district courts, working case-by-case, apply these guidelines and policy statements to aid them in exercising their discretion when imposing sentences on defendants in light of the unique facts and factors in each case.

B. Centuries of caselaw honor the distribution of policymaking and decisionmaking authority Congress set forth in the Sentencing Reform Act.

The institutional structure and roles for sentencing that Congress set out in the Sentencing Reform Act, with courts having discretion to consider individualized circumstances as they operationalize the broad policy goals set out by Congress, have deep roots. From the Founding onwards, this Court has explained that it is not the role of federal judges to expound criminal law with broad strokes based on jurists' own policy concerns. *See, e.g.*, *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). But it *is* the role of federal trial courts to consider all relevant facts and factors in each case when sentencing an individual defendant. *Concepcion*, 597 U.S. at 492; *see, e.g.*, *Lyon's Case*, 15 F. Cas. 1183, 1185 (C.C.D. Vt. 1798) (Paterson, Circuit Justice) (considering facts that "tended to mitigate the sentence which would otherwise have been imposed"). There are, of course, limits on what federal judges can

consider at sentencing. But the limits for a sentencing court are only those "set forth by Congress in a statute or by the Constitution," or by the Sentencing Commission upon Congress's instructions; they are not to be formulated by circuit courts. *Concepcion*, 597 U.S. at 494; *see Ex parte United States*, 242 U.S. 27, 42 (1916) (scope of judicial discretion subject to congressional control).[4]

This division of labor is not only consistent with longstanding criminal-justice traditions and norms, but it is also institutionally sound. Congress, through traditional legislation, is best "qualified … to weigh the costs and benefits of different approaches," "make the necessary policy judgment[s]," and write general nationwide rules. *Azar v. Allina Health Servs.*, 587 U.S. 566, 582–83 (2019). In this context, Congress sought to advance the goal of developing sound "sentencing policies and practices for the Federal criminal justice system," 28 U.S.C. § 991(b)(1), by creating a specialized body, the United States Sentencing Commission, in part because Congress recognized this task necessarily demands regularly assembling and repeatedly assessing information and insights from a wide array of system participants, stakeholders, and experts. *See Kimbrough v. United States*, 552 U.S. 85, 109 (2007) (noting that the Commission "has the capacity courts lack to base its

[4] Though *Koon* concerned initial sentencing, judicial sentence reduction has its own history. *E.g.*, *United States v. Benz*, 282 U.S. 304, 311 (1931). *Concepcion* cited *Koon* in its first sentence, making clear that these principles apply equally in the sentence-reduction context. *See* 597 U.S. at 486.

determinations on empirical data and national experience, guided by a professional staff with appropriate expertise" (quotation marks omitted)).

Courts, through case-by-case exercise of sentencing discretion, are best qualified to "take into account individual circumstances" that "cannot, by their very nature, be comprehensively listed and analyzed in advance." *Koon*, 518 U.S. at 92, 94. And within the judiciary, district courts, not courts of appeals, have "an institutional advantage" in making determinations about how best to apply general sentencing policies to the facts and factors of individual cases. *Id.* at 98; *see Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990) ("Familiar with the issues and litigants, the district court is better situated than the court of appeals to marshal the pertinent facts and apply [a] fact-dependent legal standard"); *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985) ("The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise"). *Cf. Esteras v. United States*, 145 S. Ct. 2031, 2048 (2025) (Alito, J., joined by Gorsuch, J., dissenting) ("Veteran trial judges often complain that their appellate colleagues live in a world of airy abstractions").

C. This Court has repeatedly enforced the institutional structure set forth in the Sentencing Reform Act.

Given these dynamics, it is no surprise that this Court has repeatedly reversed rulings by courts of appeals that invented restrictions on district courts'

sentencing discretion without a clear statutory or guideline basis.

1. In *Koon v. United States*, 518 U.S. 81 (1996), the Court explained that it is institutional error for circuit courts to use the "limited" appellate process to pronounce broad sentencing policies that are the purview of the Sentencing Commission. There, the Ninth Circuit had vacated a below-guideline sentence in part by holding that certain factors relied upon by the district court could never provide a basis for a downward departure. This Court reversed in relevant part. The Court explained that Congress, recognizing "the wisdom, even the necessity, of sentencing procedures that take into account individual circumstances," preserved in the Sentencing Reform Act broad district-court discretion to consider the array of "unique factors" that only they encounter in their "day-to-day experience in criminal sentencing." *Id.* at 92, 98. Congress, the Court wrote, "did not intend, by establishing limited appellate review, to vest in appellate courts wide-ranging authority over district court sentencing decisions." *Id.* at 97.

Critically, the Court in *Koon* not only addressed the deference courts of appeals must show to district-court sentencing decisions, but it also stressed the impropriety of circuit courts conducting the kind of policymaking reserved to the Sentencing Commission by declaring certain factors can never be considered as a basis for a below-guideline sentence. The Court explained: "for the courts to conclude a factor must not be considered under any circumstances would be to

transgress the policymaking authority vested in the Commission." *Id.* at 106–07. Any broad categorical claims about sentencing factors, "however persuasive as a matter of sentencing policy, should be directed to the Commission [because] Congress did not grant federal courts authority to decide what sorts of sentencing considerations are inappropriate in every circumstance." *Id.* at 106. *Koon* thus held that the district court was within its discretion to consider various factors as the basis for a departure because neither Congress nor the Commission had expressly deemed such factors out of bounds. *Id.* at 112.

2. *Koon* is no outlier; the Court has repeatedly reiterated its holding and principles. In *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), this Court again reversed the Ninth Circuit after it declared that a district court could not "rely on facts of which the defendant was acquitted" in increasing the defendant's sentence. *Id.* at 150. The Court explained that applicable sentencing statues provide no "basis for the courts to invent a blanket prohibition against considering certain types of evidence at sentencing." *Id.* at 152. Together, *Koon* and *Watts* demonstrate that the same principles countermand circuit-court efforts to preclude the consideration of relevant sentencing facts and factors that are either aggravating or mitigating.

More recent rulings reinforce these points. In *Pepper v. United States*, 562 U.S. 476 (2011), the Court once more reversed an appellate ruling wrongfully declaring certain relevant sentencing

factors off limits. This Court explained that the Eighth Circuit's "categorical bar" "prohibiting the District Court from considering any evidence of [the defendant's] postsentencing rehabilitation at resentencing conflicts with longstanding principles of federal sentencing law and contravenes Congress' directives." *Id.* at 491, 493. And most recently, in *Concepcion*, the Court reversed a First Circuit ruling which problematically precluded what a district judge could consider during certain sentence-modification proceedings. The Court explained that the "only limitations on a court's discretion to consider any relevant materials … in modifying [a defendant's] sentence are those set forth by Congress in a statute or by the Constitution." 597 U.S. at 494.

II. The Third Circuit Transgressed the Sentencing Commission's Policy Authority.

A. The Third Circuit's decision in *Rutherford*, which asserted "what sorts of sentencing considerations are inappropriate in every circumstance" as a possible basis for a sentencing reduction under 18 U.S.C. § 3582(c)(1)(A), represents precisely the type of ruling repudiated by this Court in *Koon* and related sentencing cases. In *Koon*, this Court rightly reversed a circuit ruling precluding certain considerations as a basis for a sentence reduction, explaining that Congress tasked only the Sentencing Commission, not the courts of appeals, to formulate and promulgate general sentencing policies. It should do so again.

1. The decision in *Rutherford* relied on a previous Third Circuit opinion, *United States v. Andrews*, 12 F.4th 255 (3d Cir. 2021). There, the Third Circuit ruled that the First Step Act's "nonretroactive changes" to the 18 U.S.C. § 924(c) mandatory minimum "cannot be a basis for compassionate release." *Id.* at 261. This decision was not compelled by the statutory text, which *Andrews* acknowledged to involve an "amorphous phrase." *Id.* at 260. Instead, the Third Circuit justified its approach as consistent with what Congress "mean[t]" to do. *See id.* at 261.

In 2022–23, in response to *Andrews* and an array of conflicting decisions in other circuits, the Sentencing Commission conducted a year-long process to amend its policy statement regarding sentence reductions, U.S.S.G. § 1B1.13. The Commission promulgated a revised policy statement that declared that most legal changes should ***not*** provide a basis for a reduction. U.S.S.G. § 1B1.13(c). But it carved out a narrow exception: a district court may consider legal change "in determining whether the defendant presents an extraordinary and compelling reason" if (1) "a defendant received an unusually long sentence," (2) the defendant "has served at least 10 years of the term of imprisonment," (3) the change in law "would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed," and (4) the district court has given "full consideration [to] the defendant's individualized circumstances." *Id.* § 1B1.13(b)(6).

This nuanced policy statement came after a thorough rulemaking process. The Commission, in response to its public notice of its priorities, "received well over eight thousand public comments" from judges, members of Congress, public defenders, executive-branch departments, probation officers, universities, and incarcerated individuals. Judge Carlton W. Reeves, *Remarks of Judge Carlton W. Reeves, Chair of the U.S. Sentencing Commission* 3 (Oct. 28, 2022).[5] After proposing a draft policy statement regarding sentence reductions, the Commission conducted a public hearing with live testimony from dozens of witnesses. The Commission refined its policy statement, drawing on public input as well as "empirical data and national experience, guided by a professional staff with appropriate expertise." *Kimbrough*, 552 U.S. at 109. After the Commission settled on a final amended policy statement for U.S.S.G. § 1B1.13, the Commission submitted its proposed amendment to Congress. *See* 28 U.S.C. § 994(p). The Commission's amended policy statement became effective after Congress made no effort to alter its terms in the six-month statutory review period.

2. Nonetheless, the Third Circuit in *Rutherford* held that the First Step Act's nonretroactive change to 18 U.S.C. § 924(c) "cannot be considered" as part of the extraordinary-and-compelling analysis, "on its own or with other factors." Pet. App. in 24-820, at 29a, 31a n.23. Though the Third Circuit in *Andrews* had

[5] Available at https://tinyurl.com/3uthd4ah.

acknowledged that the terms "extraordinary and compelling" are "amorphous" and "ambiguous," 12 F.4th at 260, and that Congress expressly delegated authority to the Commission to define that ambiguous phrase, 28 U.S.C. § 994(t), the Third Circuit in *Rutherford* refused to respect the Commission's promulgation of sentence-reduction rules, and instead decided to invent its own.

The Third Circuit ruling in *Rutherford* is not fairly described as statutory interpretation; rather, it amounts to a policy determination as to "what should be considered extraordinary and compelling reasons for sentence reduction." 28 U.S.C. § 994(t). The Third Circuit did not attend to the words Congress enacted in the text of the statute ("extraordinary" and "compelling"). Instead, the court made assumptions about "Congressional intent," and the "will of Congress." Pet. App. in 24-820, at 28a–29a. And it focused on policy consequences when it fretted that the Commission's policy guidance would "sow conflict." *Id.* at 29a.

B. What Congress intended in this context is spelled out in the text of 28 U.S.C. § 994(t), which tasked the Sentencing Commission with "promulgating general policy statements … [that] describe what should be considered extraordinary and compelling reasons for sentence reduction," and in 18 U.S.C. § 3582(c)(1)(A), in which Congress required sentence reductions to be "consistent with applicable policy statements issued by the Sentencing Commission." The Third Circuit's concerns about the

propriety of district-court consideration of the First Step Act's nonretroactive change to 18 U.S.C. § 924(c), "however persuasive as a matter of sentencing policy, should be directed to the Commission," *Koon*, 518 U.S. at 106, because Congress provided that the Commission, and only the Commission, develops general policies regarding the possible reasons for sentencing reductions. As this Court stressed before and should reiterate in this context, "Congress did not grant federal courts authority to decide what sorts of sentencing considerations are inappropriate in every circumstance." *Id.*

Policymaking by courts of appeals also frustrates Congress's intent to establish "nationally uniform, not simply local, sentencing policies" through delegation to the Sentencing Commission. *Pepper*, 562 U.S. at 513 (Breyer, J., concurring in the judgment).[6] Here, the Third Circuit determined that the legal changes to 18 U.S.C. § 924(c) in the First Step Act cannot be the basis for a sentencing reduction. Pet. App. in 24-820, at 29a. By contrast, the Fifth Circuit crafted a broader policy position that *any* "non-retroactive change in the law cannot constitute an extraordinary and compelling reason justifying sentence reduction." *United States v. Austin*, 125 F.4th 688, 693 (5th Cir. 2025). And the Sixth Circuit has concocted an *even*

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[6] *Cf. Wiggins v. United States*, 145 S. Ct. 2621, 2622 (2025) (statement of Sotomayor, J., joined by Barrett, J.) (noting the problems when circuit splits on sentencing issues mean similar defendants "who commit the same federal crime will be subject to significantly different sentencing ranges based solely on geography").

broader atextual rule that precludes not only all legal change as a basis for a reduction, but also all reductions "below the statutory minimum portion of that sentence." *United States v. Bricker*, 135 F.4th 427, 447 (6th Cir. 2025).

Dynamic policy arguments sounding in judicial efficiency and sentencing fairness can be developed for and against positions regarding whether and when a certain "change in the law" should or should not provide a possible basis for a sentencing reduction. But whether such changes should be categorically unavailable as reasons for a sentencing reduction is a decision that Congress tasked only the Commission to address. And, in accord with the instructions Congress set forth in 28 U.S.C. § 994(t), the Commission, though its deliberative rulemaking process, has promulgated a specific policy statement articulating rules and limits regarding whether and when a "change in the law" should and should not provide a possible "extraordinary and compelling reason" for a sentence reduction. *See* U.S.S.G. § 1B1.13(b)(6).[7] The courts of appeals are not tasked with policymaking on this matter, and the Third Circuit violated § 994(t)'s mandate that it is for the

[7] Since the enactment of the First Step Act, the Commission has been collecting, analyzing and publishing data on sentence reduction motions. *See* U.S. Sentencing Commission, *Compassionate Release Data Reports*, available at https://tinyurl.com/2awt4ya8. These data enable tracking and assessing how the Commission's policy statement functions in the courts and can assist the Commission and stakeholders in future policy discussions about whether and how the Commission's policy statements ought to be further amended.

Commission, and only the Commission, to "describe what should be considered extraordinary and compelling reasons for sentence reduction."

Of course, appellate courts can and must assess, when adjudicating any case-specific claims of sentencing error raised on appeal, whether a district court has made a clearly erroneous judgment in an individual case based on its particular facts. But it is not the job of appellate courts to make general sentencing policy and restrict district courts' sentencing discretion as a matter of law based on their own policy concerns, as the court of appeals did in this case. Therefore, just as it did in *Koon*—and again (and again) thereafter—this Court should reverse improper circuit-court sentencing policymaking and vindicate the essential and longstanding structural principles Congress set forth in the Sentencing Reform Act.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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