Nos. 24-820, 24-860

IN THE

Supreme Court of the United States

DANIEL RUTHERFORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

JOHNNIE MARKEL CARTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF *AMICUS CURIAE* NEW YORK COUNCIL OF DEFENSE LAWYERS ("NYCDL") IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of over 300 lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases in the federal courts of New York. NYCDL's mission includes protecting the rights of the accused guaranteed by the Constitution and federal law, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the fair administration of criminal justice. NYCDL offers the Court the perspective of practitioners who regularly defend some of the most complex and significant criminal cases in the trial courts in the country.

NYCDL has participated as *amicus curiae* in numerous Supreme Court proceedings.[2] In recent years, NYCDL has filed *amicus* briefs in support of petitioners who argued that the Court should limit the reach of the federal wire and mail fraud statutes. *See Ciminelli v. United States*, 598 U.S. 306 (2023) (invalidating right-to-control theory of wire and mail fraud,

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[1] Pursuant to Supreme Court Rule 37.6, no party or counsel for a party in this case authored this brief in whole or in part or made any monetary contribution to its preparation or submission.

[2] New York Council of Defense Lawyers has also filed an amicus brief in *Fernandez v. United States*, No. 24-556, addressing the related issue of whether it violates Title 18, United States Code, Section 3582(c)(1)(A) for a court to grant a sentence reduction motion in part based on circumstances that might also give rise to a motion for vacatur of a conviction or sentence under Title 28, United States Code, Section 2255. Brief of Amicus Curiae New York Council of Defense Lawyers, *Fernandez v. United States*, No. 24-556.

following government confession of error after certiorari was granted); *Percoco v. United States*, 598 U.S. 319 (2023) (jury instructions impermissibly allowed conviction on basis that a private person could owe a duty of honest services to the public). NYCDL has also filed amicus briefs in which the constitutional or statutory authority of district courts at sentencing was at issue. *See McIntosh v. United States*, 601 U.S. 330 (2024); *Rita v. United States*, 551 U.S. 338, 373 n.3 (2007) (Scalia, J., concurring, citing NYCDL brief); *United States v. Booker*, 543 U.S. 220, 266 (2005) (citing NYCDL brief).

NYCDL supports Petitioners Rutherford and Carter in their arguments that district courts deciding sentence reduction motions under Title 18, United States Code, Section 3582(c)(1)(A) ("Section 3582(c)(1)(A)"), may treat disparities created by the "stacking" of sentences imposed under Title 18, United States Code, Section 924(c) ("Section 924(c)") to be among "extraordinary and compelling reasons" in favor of granting the motion, irrespective of when sentencing occurs.

The issues in this case implicate NYCDL's core concern of vindicating the rights of the accused and opposing excessive sentencing in federal court. NYCDL is well-situated to describe the over-incarceration caused by Section 924(c), before it was amended in 2018, and to explain why preserving the discretion of district court judges to consider all reasons not expressly prohibited by Congress is the only rule consistent with this Court's post-*Booker* precedents. Also from our experience, NYCDL members can explain the damaging consequences that will flow from prohibiting

courts from considering the "extraordinary and compelling reasons" relating to disparities created by the amendment of Section 924(c). Such a construction would undermine the very purpose of the First Step Act, which was to combat excessively long sentences through case-by-case considerations.

SUMMARY OF THE ARGUMENT

This case arises out of efforts—by Congress, the United States Sentencing Commission ("Sentencing Commission"), and the courts—to address a notorious unfairness in the sentencings of a cabined category of defendants: those defendants sentenced for more than one Section 924(c) conviction in the same proceeding prior to the enactment of the First Step Act in December 2018. The Court's decision will determine whether some of the most harshly sentenced defendants in federal court—individuals who are often serving sentences in excess of 50 years despite having caused no death or serious injury—are entitled to sentence reductions following Congress' recognition that defendants sentenced after 2018 should not receive this level of punishment. Notably, the defendants whose sentence reduction motions are at issue here faced mandatory minimum sentences under Section 924(c), meaning that the district judge had no discretion to consider the usual sentencing factors set forth in 18 U.S.C. § 3553(a) ("Section 3553(a)") at the time of the original sentencing and thereby to select the punishment the judge deemed to fit the crime.

The rule adopted by the Third Circuit forbids district courts from considering disparities in sentencing resulting from Congress' determination that Section 403 of the First Step Act, which amended Section 924(c), would not be retroactively applied. Pub. L. No.

115-391, § 403(a)-(b), 132 Stat. at 5221-22 (2018) ("Section 403"). Under the Third Circuit's rule, a defendant sentenced for Section 924(c) offenses in 2019 in one case is not subject to the "stacking" of sentences, while one convicted of the identical offenses in 2017 may not even bring to the district court's attention this change in the law as any part of a case-specific argument that "extraordinary and compelling" reasons warrant a sentence reduction under Section 3582(c)(1)(A).

As Petitioners argue, the decisions below are inconsistent with the text of Section 3582(c)(1)(A) and with its stated legislative purpose of making early release more available for incarcerated defendants to receive.[3] It also cuts against this Court's prior recognition of district courts' discretion in sentencing matters, including sentence reduction motions. *See Concepcion v. United States*, 597 U.S. 481, 486 (2022). The reasoning behind the Third Circuit rule undermines Congress' decision to confer the authority to issue guidance on what constitutes "extraordinary and compelling reasons" on the Sentencing Commission. It also fails to respect the role of that Commission, which in 2023 promulgated U.S.S.G. § 1B1.13(b)(6) ("Section 1B1.13(b)(6)") (permitting district courts to consider changes in the law in determining whether a defendant has presented "extraordinary and compelling reasons" but only if other factors including an "unusually long sentence" are also present).

Also, the fact that "stacked" Section 924(c) sentences may be among more commonly cited reasons for granting sentencing reduction motions is not a valid

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[3] Br. for Pet. at 36-44, *Rutherford v. United States*, No. 24-820 (U.S. Sup. Ct. filed Aug. 8, 2025); Br. for Pet. at 46-52, *Carter v. United States*, No. 24-860 (U.S. Sup. Ct. filed Aug. 8, 2025).

justification for forbidding consideration of that reason in the cases of defendants sentenced before the First Step Act took effect, if they also meet the other requirements of Section 1B1.13(b)(6). Congress never prohibited district courts from granting the relief sought by Petitioners, and reading a prohibition into that silence will deny relief to a category of defendants that is defined and well known to include the defendants who historically were most clearly "over-incarcerated." Judges remain fully capable of considering the totality of the circumstances and determining the sentence appropriate for any given defendant in any given case.

The judgments below should be reversed.

ARGUMENT

I. PERMITTING DEFENDANTS, WHENEVER SENTENCED, TO RELY IN PART ON THE "STACKED" NATURE OF SECTION 924(C) SENTENCES ADDRESSES A GRAVE AND HISTORICAL INEQUITY

To understand the stakes of this appeal and why it is so important to a defined category of defendants, a review of the statutory background is crucial.

Section 924(c) is a statute that has led to some of the most punitive sentences imposed in federal court. Prior to December 2018, Section 924(c)(1)(A) provided that a defendant must receive a 25-year mandatory minimum sentence for each second or successive conviction for using or carrying a firearm in furtherance of a crime of violence or a drug trafficking offense. But courts thereafter disagreed about whether Section 924(c) required the Section 924(c) conviction to be final prior to the second and successive conviction,

in order for the 25-year mandatory terms to apply, or whether the first Section 924(c) conviction could occur in the same proceeding as the additional convictions. This Court concluded that the latter was the proper rule. *Deal v. United States*, 508 U.S. 129 (1993) (holding that five of six convictions for Section 924(c) counts in a single proceeding were "second or subsequent" convictions under Section 924(c), resulting in a mandatory term of 105 years' imprisonment).

This interpretation resulted in effective mandatory minimum life sentences being ordered in cases—including those of Petitioners Rutherford and Carter—due to the imposition of 25-year mandatory minimum sentences for the second and each successive conviction under Section 924(c). It was widely recognized by judges and commentators that "stacked" Section 924(c) sentences led to excessive punishment. *See*, *e.g.*, *United States v. Smith*, 756 F.3d 1179, 1181 (10th Cir. 2014) (Gorsuch, J.) (describing a sentence in a case with multiple Section 924(c) convictions as "certain to outlast the defendant's life and the lives of every person now walking the planet"); Hon. Paul Cassell, Statement on Behalf of Judicial Conf. of United States from U.S. District Judge Paul Cassell before House Judiciary Comm. Subcomm. on Crime, Terrorism, and Homeland Sec., 19 Fed. Sent. R. 344, 344 (2007) (describing Section 924(c) sentences as often "irrational," "unduly harsh," "cruel and unusual, unwise and unjust").

In the experience of the NYDCL membership, Section 924(c) was especially pernicious before Congress amended it to eliminate "stacking," because through the operation of prosecutorial discretion, it transferred an enormous amount of sentencing power

from the district judge to the prosecutor. The government alone decided whether to charge one or more than one Section 924(c) count, and the sentencing consequence was often stark. The second count, upon conviction, led to an additional consecutive 25 years of mandatory imprisonment, and a third count of conviction led to a total 50 years of mandatory imprisonment—regardless of how the judge might otherwise regard the traditional Section 3553(a) sentencing factors. Also, any additional term was required to be imposed consecutive to the sentence for the predicate crime of violence or drug offense for which the defendant was convicted and the mandatory five, seven or ten year-term on the first Section 924(c) conviction.

In addition to the power that Section 924(c) transferred to prosecutors, the Department of Justice's policies with respect to charging more than one Section 924(c) count changed in different administrations, resulting in further inequities. Some administrations stated that line prosecutors "*must* charge and pursue the most serious, readily provable offense," regardless of the other circumstances of the case.[4] Other admin-

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[4] Memorandum from John Ashcroft, Attorney General, to All Federal Prosecutors, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003) (emphasis added), *available at* https://www.justice.gov/archive/opa/pr/2003/September/03_ag_516.htm; *see also* Memorandum from Jefferson Beauregard Sessions III, Attorney General, to All Federal Prosecutors, Department Charging and Sentencing Policy (May 10, 2017), *available at* https://www.justice.gov/d9/press-releases/attachments/2017/05/11/ag_memo_on_department_charging_and_sentencing_policy_0.pdf; Memorandum from Pamela Bondi, Attor-

istrations stated that while prosecutors "*should* ordinarily charge" the most serious readily provable offense, charging decisions "must always be made" in the context of "an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the [f]ederal criminal code, and maximize the impact of [f]ederal resources on crime."[5]

Ambiguities inherent in fact patterns commonly occurring in Section 924(c) cases also contributed to disparities in charging decisions (and thus sentencing). Differing "individualized assessments" of whether it was "readily provable" that a gun was used in furtherance of a crime of violence or a drug crime might result in different charging decisions. For example, facts might "make the relationship of a gun to an offense ambiguous (for instance, when the gun is found in the defendant's car trunk)." Sonja B. Starr & M. Marit Rehavi, Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the

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ney General, to All Department Employees, General Policy Regarding Charging, Plea Negotiations, and Sentencing (Feb. 5, 2025), *available at* https://www.justice.gov/ag/media/1388541/dl.

[5] Memorandum from Eric H. Holder, Jr., Attorney General, to All Federal Prosecutors, Department Policy on Charging and Sentencing (May 19, 2010) (emphasis added) (citation omitted), *available at* https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf; Memorandum from Janet Reno, Memorandum to Holders of United States Attorneys' Manual, Title 9: Principles of Federal Prosecution, 6 Fed. Sent. R. 352 (1994) (issued on Oct. 12, 1993); *see also* Memorandum from Merrick B. Garland, Attorney General, to All Federal Prosecutors, General Department Policies on Charging, Pleas, and Sentencing (Dec. 16, 2022), *available at* https://www.justice.gov/d9/2022-12/attorney_general_memorandum_-_general_department_policies_regarding_charging_pleas_and_sentencing.pdf.

Effects of *Booker*, 123:2 Yale L.J. 1, 30-31 (Oct. 2013). Different prosecutors might likewise charge more or less aggressively in cases involving defendants who possessed more than one gun when arrested, *id.*, or multiple guns during the course of a single conspiracy. Decisions whether to "stack" charges were often less a matter of law and more a matter of policy and discretion exercised by the government.

Worse still, even where the quality of proof was not meaningfully distinguishable, prosecutors could (and did, in the experience of the NYCDL) include in original indictments, or add to superseding indictments, additional Section 924(c) counts, based on the aim of compelling a guilty plea or increasing the value to the defendant, at sentencing, of cooperating and obtaining a government letter recommending sentencing leniency. *See* U.S.S.G. § 5K1.1 (authorizing court to impose below-Guidelines sentence where government makes motion stating that defendant rendered "substantial assistance"). It was not uncommon that a defendant who promptly agreed to plead guilty would be held accountable only to an original indictment charging a single Section 924(c) count, even if additional counts could be charged, while a similarly-situated defendant might be charged with a second or third Section 924(c) count, if the prosecutor perceived "foot-dragging" in that defendant's agreement to plead guilty.

The sentencing consequences of prosecutors' decisions to "stack" Section 924(c) charges to increase the government's leverage were eye-popping. Those who promptly pleaded guilty might end up with sentences that were 25 or even 50 years less than those who went to trial and were convicted of the underlying offense

conduct and the one or more additional Section 924(c) counts. In other words, a defendant who decided to go to trial often faced a penalty at sentencing that was far greater than the traditional loss of a three-level reduction in offense level under the Guidelines for acceptance of responsibility. *See* U.S.S.G. § 3E1.1(a) and (b).

The "stacking" of Section 924(c) counts when convictions ensued, moreover, transferred the determination of the permissible sentence to the prosecutor, such that district courts were left powerless to impose the sentences that they believed to be fair. In addition to the public commentary and outcry, in the "stacked" Section 924(c) era, it was not infrequent for district judges to expressly comment at individual sentencings that they would have imposed a different sentence had their hands not been tied by the statute (and by implication, the charging decisions).

The watershed of the amendment to Section 924(c) effectuated by the First Step Act was to end this "stacking" practice and restore considerable discretion to the district court. *See* § 403(a)-(b), 132 Stat. 5221-22 (defendant convicted of a second or subsequent Section 924(c) offense is not subject to 25-year mandatory minimum sentence for that offense unless the prior Section 924(c) conviction has become final). Defendants no longer faced the types of stacking dilemmas they faced prior to the First Step Act taking effect. More importantly, sentencing authority was returned to the district judge, where it belongs and has traditionally resided.

After 2018, defendants sentenced prior to the First Step Act's enactment sought to reduce their sentences under Section 3582(c)(1)(A), arguing that even

if the First Step Act only applied to defendants who were yet to be sentenced, the fact that certain defendants were to serve a very long sentence based only on the fortuity of the date of their sentencing could be an extraordinary and compelling reason that justified a sentence reduction. In 2023, the year after the Sentencing Commission regained a quorum, it issued a policy statement, Section 1B1.13(b)(6), stating that it was permissible for district courts to consider changes in the law (like the amendment to Section 924(c)), so long as certain other conditions—including an "unusually long sentence" of which ten years had already been served—were met.

The impact of the decisions below was to ignore the decisions by Congress and the Sentencing Commission to recognize that eliminating the stacking of counts under Section 924(c)—and the consequences that flowed therefrom—was a legal and societal imperative. (App.26a-36a.) This Court should reverse.

II. SENTENCE REDUCTION MOTIONS THAT RAISE, IN PART, "STACKED" SECTION 924(C) SENTENCES ARE A LIMITED UNIVERSE OF CASES

In opposing certiorari in the *Carter* appeal, the government characterized Section 3582(c)(1)(A) as "frequently recurring" motions, citing as evidence the facts that "[i]ncarcerated defendants filed more than 3000 Section 3582(c)(1)(A)(i) motions in fiscal year 2024," and that "98 orders" granting such motions in the same year referenced Section 1B1.13(b)(6). Br. for the United States in Opp. to Pet. for Writ of Cert. at 18, *Carter v. United States*, No. 24-860.

This selective accounting disregards the fact that grants of sentencing relief based on a finding of

the existence of "extraordinary and compelling" circumstances are extremely rare as a general matter. Statistics demonstrate the point. In fiscal year 2022, 5,192 motions were filed, with just 631, or 12.1%, granted, and 4,561 denied, which means that just 0.4% of the 159,090 federal inmates were released early.[6] Then, in fiscal year 2023, 3,181 motions were filed, just 439, or 13.8%, granted, and only 0.28% of 158,424 federal inmates received a sentence reduction.[7] The grant of 98 sentence reduction motions which reference consideration of disparities created by changes in law, out of a pool of 155,000 inmates in Bureau of Prisons custody, is nothing like the potential future volume of such motions that the government seems to suggest.

In addition, defendants sentenced on the basis of "stacked" Section 924(c) convictions, before the enactment of the First Step Act, are a defined universe. Presumably many have already sought relief under Section 3582(c)(1)(A). The issue before this Court is uniformity in the consideration of such motions potentially available only to those sentenced before the First Step Act's enactment.

That uniformity should be Circuit to Circuit and before and after the First Step Act took effect. This Court should not make it even more difficult for district judges to grant sentence reductions to those subjected to "stacked" Section 924(c) sentences, whenever

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[6] U.S. Sent'g Comm'n, *Compassionate Release Data Report: Second Quarter, Fiscal Year 2025* (preliminary data, Apr. 18, 2025), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/FY25Q2-Compassionate-Release.pdf.

[7] *Id.*

the stacking was imposed. In addition to being a cabined class, defendants convicted of multiple Section 924(c) counts are the paradigmatic examples of the overincarceration the First Step Act decried and aimed to reduce: the most harshly punished defendants in the federal system, often serving terms in excess of 50 years, facing what amounts to a life term of imprisonment.

The First Step Act had as its stated legislative purpose to "Increase[] the Use and Transparency of Compassionate Release." First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5239. When the First Step Act was signed into law by President Donald Trump, he noted that the statute made "reasonable sentencing reforms" to undo "disproportionate and very unfair" aspects of federal criminal law.[8]

Reversal of the decisions below is also the only decision consistent with prior rulings by this Court, which left to district judges the task of determining whether in the totality of the circumstances "extraordinary and compelling" circumstances are presented. *See Concepcion v. United States*, 597 U.S. at 496 (holding that "[b]y its terms, [the First Step Act] does not prohibit district courts from considering *any* arguments in favor of, or against, sentence modification") (emphasis added); *id*. at 491 (describing the "'long' and 'durable' tradition that sentencing judges 'enjo[y] discretion in the sort of information they may consider' at an initial sentencing proceeding") (quoting *Dean v. United States,* 581 U. S. 62, 66 (2017)).

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[8] Remarks by President Trump on H.R. 5682, the FIRST STEP Act (Nov. 14, 2018), https://perma.cc/GU5M-MKWM.

The central principle is that district judges should retain the sentencing discretion Congress and this Court have traditionally left to them, for good reason. Those judges, who typically have presided over the lifetime of a given case, are best situated to determine whether "extraordinary and compelling reasons" to grant a sentencing reduction exist. The answer of "yes" to the Questions Presented is the only outcome that effectuates Congress' will, including its express delegation to the Sentencing Commission of the definition of "extraordinary and compelling" and its aim of meaningfully and equitably addressing overincarceration.

CONCLUSION

For the foregoing reasons, this Court should reverse the decisions below.

Dated: August 15, 2025

Respectfully submitted,

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