No. 22-___

IN THE

Supreme Court of the United States

DWAYNE FERGUSON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 28 U.S.C. § 2255 limits a district court's discretion to consider—among other circumstance-specific factors—legal errors in prior proceedings as "extraordinary and compelling reasons" warranting a sentence reduction under 18 U.S.C. § 3582(c)(1)(A) as amended by the First Step Act.

RELATED PROCEEDINGS

Eastern District of Virginia

United States v. Ferguson, No. 04-cr-13 (Feb. 19, 2005)[*]

United States v. Ferguson, No. 09-cv-700 (Sept. 15, 2010)

Northern District of West Virginia

Ferguson v. Entzell, No. 18-cv-98 (Sep. 27, 2021)

Fourth Circuit Court of Appeals

United States v. Ferguson, No. 05-4243 (Mar. 28, 2006)

United States v. Ferguson, No. 08-8319 (Jan. 20, 2009)

United States v. Ferguson, No. 11-6349 (May 24, 2011)

United States v. Ferguson, No. 21-6733 (Nov. 29, 2022)

Supreme Court of the United States

Ferguson v. United States, No. 06-5694 (Oct. 2, 2006)

Ferguson v. United States, No. 11-8508 (Feb. 27, 2012)

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[*] The Eastern District of Virginia entered the judgment in the underlying criminal case and ruled on numerous motions for post-conviction relief on this docket between 2005 and 2021, including the compassionate-release motion in this case.

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Petitioner Dwayne Ferguson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Fourth Circuit, Pet. App. 1a, is available at 55 F.4th 262. The opinion of the United States District Court for the Eastern District of Virginia, Pet. App. 20a, is available at 2021 WL 1701918. The Fourth Circuit's order denying rehearing en banc, Pet. App. 32a, is unpublished.

JURISDICTION

The Fourth Circuit entered judgment on November 29, 2022, Pet. App. 1a, and denied petitioner's timely petition for rehearing en banc on December 28, 2022, Pet. App. 32a. On February 23, 2023, the Chief Justice extended the time to file this petition for a writ of certiorari until May 26, 2023. *See* No. 22A760. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 3582(c)(1)(A) of Title 18 provides in relevant part:

(c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

> (A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—
>
> > (i) extraordinary and compelling reasons warrant such a reduction; …
>
> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]
>
> * * *

Other statutory provisions—28 U.S.C. §§ 994(t) and 2255—are reproduced at Pet. App. 33a-36a.

INTRODUCTION

Petitioner Dwayne Ferguson was incarcerated in 2004 at age 26 and is scheduled to be released in 2048 at age 71. His sentence includes a 30-year mandatory minimum for an offense that he was never convicted of and without which he would already be a free man. That offense was not pleaded in the indictment, not addressed in the jury instructions, and not found by the jury.

Over the years, Ferguson sought post-conviction relief but his claims were never reviewed on the merits. Then, in 2018, through the First Step Act, Congress expanded access to compassionate release by giving federal prisoners the opportunity, for the first time, to petition a district court for a sentence reduction based on "extraordinary and compelling reasons" that warrant a second look at their otherwise final sentences. 18 U.S.C. § 3582(c)(1)(A).

Ferguson moved for relief under the First Step Act in June 2020, during the height of the pandemic and after serving more than 16 years. He pointed to the circumstances under which his 30-year mandatory-minimum sentence was imposed; to the intervening legal developments that confirmed the sentence should never have been imposed; to his particular susceptibility to COVID-19; and to his rehabilitation in prison.

But the district court held it could not consider the legal error that resulted in Ferguson's 30-year mandatory-minimum sentence. In affirming, the Fourth Circuit acknowledged a square split in circuit authority and joined other courts of appeals in holding that the federal post-conviction-relief statute, 28 U.S.C. § 2255, categorically bars consideration of legal errors at trial and sentencing as support for an extraordinary-and-compelling finding under Section 3582(c)(1)(A).

As the First and Ninth Circuits have recognized, construing Section 2255 to tacitly restrict a district court's discretion in this way contravenes this Court's precedent, lacks a textual basis, and frustrates Congress's intent that courts fully and fairly consider

compassionate-release motions from deserving individuals like Ferguson. Currently, whether prisoners receive adequate evaluation of their compassionate-release motions depends on the circuit in which their sentencing court sits.

If the circuits' disagreement persists, the split will inflict great harm on people the First Step Act was intended to benefit and leave in place a rule that is inconsistent with the statutory text and this Court's precedent. The Court should therefore grant review and reverse.

STATEMENT OF THE CASE

I. Legal background

A. The First Step Act

In 2018, Congress passed the First Step Act to build on the existing compassionate-release statute. Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239-5241 (2018). The original statute was meant to provide sentencing relief for prisoners facing inequitable circumstances, including severe illness and "other extraordinary and compelling circumstances" that "justify a reduction of an unusually long sentence." Shon Hopwood, *Second Looks & Second Chances*, 41 Cardozo L. Rev. 83, 102 (2019) (quoting S. Rep No. 98-225, at 55-56 (1983)). But compassionate release was not functioning as intended because the Bureau of Prisons (BOP) Director was the only party authorized to initiate compassionate-release proceedings and had consistently failed to do so, even when individuals were clearly eligible. *See* Off. of the Inspector Gen., U.S. Dep't of Just., *The Federal Bureau of Prisons' Compassionate Release Program* 11 (2013). Congress

responded with the First Step Act, a "paradigm shift" that expanded compassionate release by authorizing prisoners to file their own motions for sentence reductions. *United States v. Jenkins*, 50 F.4th 1185, 1209 (D.C. Cir. 2022) (Ginsburg, J., concurring in part, dissenting in part).

Under amended Section 3582(c)(1)(A), district courts may reduce a defendant's term of imprisonment if (1) extraordinary-and-compelling reasons exist; (2) the reduction is "consistent with applicable policy statements issued by the Sentencing Commission"; and (3) the reduction is warranted under the 18 U.S.C. § 3553(a) factors used generally in federal sentencing. 18 U.S.C. § 3582(c)(1)(A). Congress's only other textual limitation is that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." 28 U.S.C. § 994(t) (cross-referencing Section 3582(c)(1)(A)).

Congress instructed the Sentencing Commission to promulgate policy statements describing what constitutes extraordinary-and-compelling reasons for a sentence reduction. 28 U.S.C. § 994(t). Under this instruction (and because its existing policy statement applies to only BOP-initiated motions), the Commission recently proposed amendments to its compassionate-release policy statement that will govern defendant-filed motions. *See* Notice of Amendments to the Sentencing Guidelines, 88 Fed. Reg. 28254 (May 3, 2023). The amendments will become effective on November 1, 2023, unless Congress legislates to the contrary. *See id.*

The amendments specify certain medical, age, family, and victim-status circumstances that always

qualify as extraordinary and compelling. U.S. Sent'g Guidelines Manual § 1B1.13(b)(1)-(4) (U.S. Sent'g Comm'n, Proposed Amendments 2023). They also give courts discretion to find extraordinary-and-compelling reasons based on any "circumstance or combination of circumstances" that are similar in gravity to the enumerated extraordinary-and-compelling reasons. *Id.* § 1B1.13(b)(5). A similar catchall category currently applies to BOP-initiated motions, U.S. Sent'g Guidelines Manual § 1B1.13 cmt. n.1(D) (U.S. Sent'g Comm'n 2021), but BOP has virtually never relied on it when pursuing compassionate release on behalf of defendants, Off. of the Inspector Gen., *supra*, at 72.

The amendments add "Unusually Long Sentence" as a new compassionate-release policy statement subsection. U.S. Sent'g Guidelines Manual § 1B1.13(b)(6) (U.S. Sent'g Comm'n, Proposed Amendments 2023). That subsection provides that a court "may" consider "a change in the law" in determining whether the defendant presents an extraordinary-and-compelling reason only if the defendant "received an unusually long sentence," has served at least 10 years, and the change in law produced "a gross disparity between the sentence being served and the sentence likely to be imposed at the time" the compassionate-release motion is filed. *Id.*

B. Section 2255

The relationship, if any, between 28 U.S.C. § 2255 and the First Step Act is at issue here. Section 2255 is a statutory substitute for the remedy of habeas corpus, *United States v. Hayman*, 342 U.S. 205, 217-19 (1952),

not a sentencing provision. Under that statute, a federal prisoner may move a court to vacate, set aside, or correct a conviction or sentence amenable to collateral attack. *See* 28 U.S.C. § 2255. Thus, both Section 2255 and Section 3582(c)(1)(A) sometimes lead to a prisoner's release, but only through Section 2255 may a prisoner obtain a court order vacating his conviction or sentence because it is invalid. The First Step Act and the compassionate-release statute more generally nowhere reference Section 2255. *See United States v. Wesley*, 60 F.4th 1277, 1286 (10th Cir. 2023). And the Sentencing Commission's proposed amendments neither mention Section 2255 nor suggest that any relationship exists between it and Section 3582. *See generally* Notice of Amendments to the Sentencing Guidelines, 88 Fed. Reg. 28254 (May 3, 2023). Lower courts disagree, however, about whether Section 2255 limits district courts' discretion when deciding motions for compassionate release. *See infra* 14-24.

II. Factual background

When the Government prosecuted Dwayne Ferguson for offenses related to a drug-trafficking operation in 2004, a jury convicted him of possessing a firearm in furtherance of a drug-trafficking crime under 18 U.S.C. § 924(c)(1)(A), which carries a five-year mandatory minimum. Fourth Circuit Joint Appendix (CA4JA) 148, 157. Several months later, however, Ferguson was sentenced as if he had been convicted of a different offense—possessing a firearm that was "equipped with a firearm silencer" in furtherance of a drug-trafficking crime under 18 U.S.C. § 924(c)(1)(B)(ii). CA4JA 34, 308, 364. That

offense carries a 30-year mandatory minimum which must run consecutively to any other term of imprisonment. 18 U.S.C. § 924(c)(1)(B)(ii). We now describe how this legal error occurred.

Trial. Relevant here, the indictment charged Ferguson with possessing firearms in furtherance of a drug-trafficking crime by listing the elements of 18 U.S.C. § 924(c)(1)(A). *See* CA4JA 148. Consistent with the indictment and the law, the Government advised Ferguson at arraignment that if he were convicted of the Section 924(c) charge he would face only "a five-year minimum." CA4JA 173, 175-76. [1] Ferguson's attorney also gave Ferguson no notice that he would face a 30-year mandatory minimum upon conviction. *See* CA4JA 180, 183. When Ferguson might have negotiated or accepted a plea bargain, his attorney advised him that it wouldn't make much difference whether he was convicted at trial or pleaded guilty. *Id.* So, while all but one of his co-defendants pleaded guilty and avoided the silencer mandatory-minimum, CA4JA 319-20, Ferguson went to trial, Pet. App. 3a.

Even by the end of the trial, Ferguson had no reason to believe a 30-year mandatory minimum was on the table. During closing argument, the Government did not suggest it had introduced any evidence to prove that Ferguson possessed a firearm

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[1] The Government made these comments when Ferguson was arraigned on a second superseding indictment. During Ferguson's arraignment on a third superseding indictment (the indictment under which he was convicted), the Government noted that "[n]one of the penalties changed" and "[n]o new offenses have been charged." CA4JA 171.

"equipped with" a silencer. CA4JA 164-166. Nor was the jury instructed to find these facts—in violation of the principles in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). *See* Jury Instruction Nos. 40-44. Instead, the court instructed the jury on only the essential elements of a Section 924(c)(1)(A) charge. The court defined "firearm," "drug trafficking crime," "to … possess," "in furtherance of," and "knowingly." *Id.* Nos. 41-45. The court properly instructed the jury that "firearm" is defined to include a "firearm silencer." *Id.* No. 41; *see* 18 U.S.C. § 921(a)(3). But the court did not instruct the jury that it had to determine whether Ferguson possessed a firearm "equipped with" a silencer, or explain what conduct would violate that provision. *See* Jury Instruction Nos. 40-45.[2]

Based on these instructions, the jury found that Ferguson possessed four firearms, one of which was a silencer. CA4JA 157; *see* § 921(a)(3). But the jury never found that any of the guns Ferguson possessed were "equipped with" the silencer, and it could not have found that because it was never instructed on

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[2] The Joint Appendix includes only excerpts of the jury instructions submitted by the United States to the trial court, CA4JA 159-60, which differ from the instructions actually relied on by the trial court, CA4JA 162. Undersigned counsel has obtained from Ferguson the jury instructions that the trial court proposed, and they are available here: https://perma.cc/5T48-9UX9. The trial transcript makes clear that these are the instructions, with slight revisions not relevant here, that the court ultimately relied on. *See* Trial Tr. 122:2-147:15, ECF 235-4, https://perma.cc/FQM4-94SQ. In any case, the Government has never argued that the jury was instructed on the elements of the silencer conviction. *See, e.g.*, U.S. CA4 Br. 32-33.

what "equipped with" means. *See* CA4JA 157; Jury Instruction Nos. 40-44.

Verdict. During trial, the court granted Ferguson's motion for judgment of acquittal on one count of conspiracy to possess firearms in furtherance of a drug-trafficking crime in violation of 18 U.S.C. § 924(o). CA4JA 6, 13 (ECF 77), 148. The Government also voluntarily dismissed one count of possessing or receiving an unregistered firearm silencer in violation of 26 U.S.C. § 5861(d). CA4JA 5, 13 (ECF 77), 147. The jury then found Ferguson guilty of five counts, including one Section 924(c)(1)(A) offense, but acquitted him of one other count, a second Section 924(c)(1)(A) offense. CA4JA 14, 154-57.

Sentencing. That Ferguson might somehow be subject to a 30-year mandatory minimum surfaced for the first time in a presentence report from the probation department. CA4JA 364. When that mandatory minimum was first mentioned at sentencing, the court seemed surprised, asking a "thirty-year minimum mandatory for what?" Sentencing Tr. 70:24-25, ECF 131.[3] The Government argued that the mandatory minimum was "based on the findings of the jury," *id.* at 70:19-23, even though the jury had never been instructed on the silencer element, which, again, was not pleaded in the indictment, and even though during closing arguments the Government itself had told the jury that it needed to find only that Ferguson possessed a

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[3] The sentencing transcript is available here: https://perma.cc/3AAN-7VBK.

firearm, period. CA4JA 164-166. Ferguson's attorney did not object, and the court imposed the 30-year mandatory minimum, resulting in a sentence of 63 years. *Id.* at 71-78.[4]

Appeal and post-conviction relief. The Fourth Circuit affirmed and Ferguson's conviction became final when this Court denied certiorari. *United States v. Ferguson*, 172 F. App'x 539 (4th Cir. 2006) (per curiam), *cert. denied*, 549 U.S. 962 (2006). Ferguson pursued post-conviction relief, including through a Section 2255 motion, in which he argued, among other things, that the procedures used to sentence him to the 30-year mandatory minimum violated the Fifth and Sixth Amendments. CA4JA 237; ECF 177 at 10, 11. The district court dismissed the motion as untimely, ECF 187, and the Fourth Circuit affirmed, *United States v. Ferguson*, 431 F. App'x 223 (4th Cir. 2011) (per curiam). Ferguson later filed a post-conviction motion under 28 U.S.C. § 2241 challenging the validity of the 30-year mandatory minimum; the reviewing court dismissed the motion, treating it as an impermissible second or successive Section 2255 motion. *Ferguson v. Entzell*, No. 18-cv-98, 2021 WL 4437500 (N.D. W. Va. July 2, 2021).

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[4] In 2016, Ferguson filed a motion to reduce his sentence under 18 U.S.C. § 3582(c)(2) based on changes to the drug-quantity tables in the Sentencing Guidelines. CA4JA 292. The district court granted the request and reduced his sentence to 622 months, or about 52 years. CA4JA 26 (ECF 205).

III. Procedural background

In 2020, after exhausting his administrative remedies, Ferguson moved for compassionate release under the First Step Act, 18 U.S.C. § 3582(c)(1)(A). Pet. App. 4a, 13a. He argued that a range of considerations supported a sentence modification, including legal errors in his underlying proceeding, CA4JA 97-109, his serious medical conditions, *id.* at 117-21, and the COVID-19 pandemic, *id.* at 116, 121-26. As to the legal errors, Ferguson pointed to facts demonstrating that the 30-year mandatory minimum was wrongfully imposed because the jury was not instructed to find that Ferguson possessed a firearm equipped with a silencer. *Id.* at 102-04. Ferguson argued that intervening caselaw confirmed that what had happened to him was unlawful. *Id.* at 96-99. He explained that, in 2013, this Court held that any fact that increases a defendant's mandatory minimum must be found beyond a reasonable doubt by the jury. *Id.*; *see Alleyne v. United States*, 570 U.S. 99, 103, 111-12 (2013); *see also United States v. O'Brien*, 560 U.S. 218, 235 (2010).

Ferguson described these inequities in the context of his exemplary rehabilitation and perfect prison disciplinary record. CA4JA 114. He also documented his release plan, which includes an employment offer upon release and extensive community support shown by 16 letters from community leaders, family members, and loved ones. CA4JA 201-23.

The district court denied Ferguson's motion. Pet. App. 20a. It held that Ferguson's arguments related to legal errors in past proceedings functioned to collaterally attack his conviction or sentence. *Id.* at

28a-30a. In the court's view, it lacked authority to review those arguments under Section 3582(c)(1)(A) because Section 2255 provides the exclusive remedy for addressing the validity of a federal prisoner's conviction or sentence. *Id.* at 30a-31a.

Noting a circuit split, Pet. App. 17a-18a, the Fourth Circuit affirmed. It held that Section 2255 categorically barred Ferguson from using his non-medical, non-rehabilitation arguments to obtain relief under Section 3582(c)(1)(A). *Id.* at 13a-15a, 19a. According to the court, those arguments transformed Ferguson's Section 3582(c)(1)(A) motion into an impermissible collateral attack on his conviction. *Id.* at 15a. That was so because, according to the Fourth Circuit, the district court would be required to "evaluate whether [Ferguson's] convictions … were valid," *id.* at 16a, and because granting relief would have the "practical effect of correcting a purportedly illegal sentence," *id.* at 19a.

The Fourth Circuit denied Ferguson's petition for rehearing en banc. *Id.* at 32a.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's decision deepens an intractable conflict in the circuits over whether Section 2255 restricts the arguments a district court may consider when evaluating whether extraordinary-and-compelling reasons exist under Section 3582(c)(1)(A). Within the circuits that use Section 2255 to restrict the information courts may consider under Section 3582(c)(1)(A), confusion abounds as to the scope of that restriction. Between the circuit split and the confusion within one side of

the split, prisoners seeking compassionate release are the victims of geographical happenstance.

The split needs this Court's attention because it emerges from a misunderstanding of the relationship, if any, between these two important federal statutes that permeates the federal judiciary and that the Sentencing Commission's proposed policy statement does not resolve.

The question presented is squarely raised by this case because it was the sole basis on which the Fourth Circuit affirmed the district court's denial of compassionate release. This Court should correct the atextual interpretation of Section 3582(c)(1)(A) that has taken hold in many circuits because it conflicts with this Court's precedents regarding the scope of collateral review and undermines district courts' sentencing discretion.

I. The circuits are intractably split, leading to arbitrary results based on geographical happenstance.

A. The courts of appeals are deeply divided.

1. Two circuits recognize that Section 2255 does not bar Section 3582's distinct relief. In the First and Ninth Circuits, Section 3582(c)(1)(A) does not "wholly exclude the consideration of any one factor." *United States v. Chen*, 48 F.4th 1092, 1098 (9th Cir. 2022); *accord United States v. Ruvalcaba*, 26 F.4th 14, 28 (1st Cir. 2022). Those courts have held that a "categorical bar against any particular factor" would be inconsistent with Section 3582(c)(1)(A)'s text and contrary to the "original intent behind the

compassionate release statute." *Chen,* 48 F.4th at 1098; *accord Ruvalcaba*, 26 F.4th at 26.

First Circuit. In *United States v. Trenkler*, 47 F.4th 42 (1st Cir. 2022), the First Circuit rejected the Government's argument that a Section 3582(c)(1)(A) motion raising an undisputed sentencing error, among other factors, was a "habeas petition in disguise" that "fail[ed] at the threshold." 47 F.4th at 49. Instead, the First Circuit held that the district court could consider, in evaluating whether extraordinary-and-compelling reasons existed, that by imposing a life sentence the sentencing judge had violated a federal statute which "required life sentences to be assigned by the jury." *Id.* at 45. In the First Circuit's view, Section 2255 has no bearing on Section 3582(c)(1)(A)'s scope because the two frameworks "are distinct vehicles of relief." *Id.* at 48. Section 2255 "deals with the legality and validity of a conviction and provides a method for automatic vacatur of sentences." *Id.* Compassionate release, on the other hand, grants leniency based on an individualized review of the defendant's various circumstances. *Id.* The First Circuit thus understands that compassionate release does not "recognize and correct … an illegal conviction or sentence." *Id.*

Ninth Circuit. The Ninth Circuit takes the same approach—district courts may consider "any extraordinary and compelling reason a defendant might raise." *Chen*, 48 F.4th at 1099, 1101. In articulating this approach, the court looked to this Court's decision in *Concepcion v. United States*, 142 S. Ct. 2389 (2022), which emphasized that "[i]t is only when Congress or the Constitution limits the scope of information that a district court may consider in

deciding whether, and to what extent, to modify a sentence, that a district court's discretion to consider information is restrained." *Chen*, 48 F.4th at 1095 (quoting *Concepcion*, 142 S. Ct. at 2396). And it rejected the Government's argument that Section 2255 silently imposes a congressional limitation by providing a "mechanism to challenge a sentence." *Id.* at 1101. In contrasting Section 3582(c)(1)(A) with Section 2255, the Ninth Circuit recognized that Section 3582(c)(1)(A) does not require a finding that the sentence was imposed in violation of the Constitution or federal law. *Id.*

2. The Second Circuit aligns most closely with the First and Ninth Circuits. The Second Circuit has not directly addressed the question presented in a precedential decision but aligns most closely with the First and Ninth Circuits. That court instructs "district courts to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them." *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020). Separately, the Second Circuit has determined that Section 2255 limits a district court's discretion at a later step: the balancing of the ordinary Section 3553(a) sentencing factors. *United States v. Amato*, 48 F.4th 61, 65 & n.3 (2d Cir. 2022). But *Amato* expressly did not upset *Brooker*'s holding, *id.* at 65, and district courts within the Second Circuit do, in fact, consider arguments that raise legal errors when evaluating extraordinary-and-compelling reasons, *see, e.g.*, *United States v. Russo,* Nos. 92-cr-351, 90-cr-1063, 2022 WL 17247005, at *6 (E.D.N.Y. Nov. 28, 2022); *United States v. Carlton*, No. 05-cr-796, 2022 WL 17104061, at *5-6 (S.D.N.Y. Nov. 22, 2022); *United States v. Jordan*, No. 07-cr-19, 2022 WL

17831356, at *5-6 (W.D.N.Y. Dec. 21, 2022); *United States v. Santos*, No. 01-cr-537, 2022 WL 4325520, *4-5 (E.D.N.Y. Sep. 19, 2022). *But see United States v. Jacques*, Nos. 20-3276, 21-1277, 2022 WL 894695, at *2 (2d Cir. Mar. 28, 2022) (non-precedential decision affirming denial of compassionate release based on a purported Section 2255 bar without addressing *Brooker* or *Amato*).

3. Nine circuits hold that Section 2255 bars consideration of legal errors under Section 3582. On the other side of the conflict, decisions in the Sixth and D.C. Circuits prompted a reflexive domino effect in the Third, Fourth, Fifth, Seventh, Eighth, Tenth and Eleventh circuits. These circuits construe Section 2255 as wordlessly restricting a district court's discretion under Section 3582(c)(1)(A). But they lack consensus on what, exactly, Section 2255 prohibits a district court from considering, resulting in confusion and inconsistencies around the country. *See infra* 22-24.

Sixth Circuit. In *United States v. Hunter*, 12 F.4th 555 (6th Cir. 2021), the Sixth Circuit held that Section 2255 limits a district court's discretion under Section 3582(c)(1)(A). Therefore, the court explained, district courts may not consider nonretroactive changes in law that would lessen a defendant's sentence if he were sentenced today when evaluating whether extraordinary-and-compelling reasons exist; rather, prisoners must raise those claims under Section 2255 alone. *Hunter*, 12 F.4th at 567-68. In *Hunter*, the change in law at issue emerged from *United States v. Booker*, 543 U.S. 220 (2005). *See* 12 F.4th at 566. The Sixth Circuit explained that "[i]f a claim demands immediate release or a shorter period

of detention, it attacks the very duration of … physical confinement, and thus lies at the core of habeas corpus." *Id.* at 567 (quotation marks and emphasis omitted) (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 79 (2005)). Treating the "habeas and compassionate release statutes" as inherently overlapping, the Sixth Circuit concluded that Section 2255 "takes priority" as the "more specific statute." *Id.* This conclusion was controversial within the en banc Sixth Circuit, which reaffirmed *Hunter* 9-to-7 over two dissents. *See United States v. McCall*, 56 F.4th 1048 (6th Cir. 2022) (en banc) (Moore, J., dissenting) (Gibbons, J., dissenting).

D.C. Circuit. Following the Sixth Circuit's lead, the D.C. Circuit held that a prisoner may not use "a generally worded statute to attack the lawfulness of his imprisonment, even if the terms of the statute literally apply." *United States v. Jenkins*, 50 F.4th 1185, 1202 (D.C. Cir. 2022). Section 2255, the court noted, is "the specific instrument for obtain[ing] release from" unlawful custody. *Id.*

The panel's conclusion prompted an extensive dissent from Judge Ginsburg. Although he concurred in the judgment because he agreed that the movant's reasons for relief were not extraordinary and compelling, he wrote separately to explain that the "habeas-channeling rule simply does not apply to claims … under the compassionate release statute." *Id.* at 1212 (Ginsburg, J., concurring in part, dissenting in part). In his view, "[r]eading an implicit habeas exception into 'a statute whose very purpose is to open up final judgments'" disregards this Court's "clear admonition" in *Concepcion* against reading such

limitations into sentencing statutes. *Id.* at 1214 (quoting *Concepcion*, 142 S. Ct. at 2398 n.3).

Third, Fifth, Eighth, and Eleventh Circuits. The Third, Fifth, Eighth and Eleventh Circuits adopt the same Section 2255 bar. The Third and Eleventh Circuits have reached the issue only in non-precedential decisions. *E.g., United States v. Morris*, No. 22-2204, 2022 WL 5422343, at *2 (3d Cir. Oct. 7, 2022); *United States v. Garcia*, No. 20-12868, 2021 WL 3029753, at *1 n.1 (11th Cir. July 19, 2021). The Fifth Circuit adopted the D.C. Circuit's reasoning. *See United States v. Escajeda*, 58 F.4th 184, 187 (5th Cir. 2023) (relying on *Jenkins* without addressing Judge Ginsburg's dissent). And, the Eighth Circuit, having earlier imposed the Section 2255 bar in a conclusory decision, *see United States v. Fine*, 982 F.3d 1117, 1118 (8th Cir. 2020), more recently adopted the Sixth Circuit's reasoning, *see United States v. Crandall*, 25 F.4th 582, 586 (8th Cir. 2022) (citing *Hunter*, 12 F.4th at 567).

Seventh Circuit. The Seventh Circuit, too, has held that Section 2255 restricts the arguments available under Section 3582(c)(1)(A). *United States v. Von Vader*, 58 F.4th 369, 371 (7th Cir. 2023). The Seventh Circuit's conclusory decisions fail to engage with either this Court's relevant precedents or the pertinent statutory text. *See United States v. Thacker*, 4 F.4th 569, 572 (7th Cir. 2021); *United States v. Martin*, 21 F.4th 944, 946 (7th Cir. 2021); *United States v. Brock*, 39 F.4th 462, 466 (7th Cir. 2022); *Von Vader*, 58 F.4th at 371. And the Seventh Circuit recognizes that its "view does not appear to be shared by several of [its] sister circuits." *See United States v. Williams*, 65 F.4th 343, 347 (7th Cir. 2023). Last

month, in applying its Section 2255 bar, the court highlighted the "serious arguments … on both sides" of the split. *Id.* at 348. It observed that this Court's decisions "have repeatedly rejected categorical rules in the sentencing context and emphasized the importance of preserving the sentencing judge's discretion." *Id.*

Fourth and Tenth Circuits. The Fourth and Tenth Circuits also hold that Section 2255 prohibits district courts from considering arguments in a compassionate-release motion that raise legal errors in earlier proceedings. *See* Pet. App. 13a-18a; *United States v. Wesley*, 60 F.4th 1277, 1284-86 (10th Cir. 2023). But, unlike other circuits, the Fourth and Tenth Circuits have had to try to reconcile their use of Section 2255 to narrow Section 3582 with earlier precedents holding that district courts have discretion to "consider *any* extraordinary and compelling reason for release that a defendant might raise." *United States v. McCoy*, 981 F.3d 271, 284 (4th Cir. 2020) (quoting *Brooker*, 976 F.3d at 230); *see United States v. Maumau*, 993 F.3d 821, 837 (10th Cir. 2021). The decisions in these circuits thus highlight that Section 2255, and not Section 3582's text or purpose, is the provision restricting the arguments that may be considered extraordinary and compelling on one side of the circuit split.

In the decision below, the Fourth Circuit "foreclosed" consideration of legal errors in earlier proceedings, even in combination with other factors, because Section 2255 "is the exclusive method of collaterally attacking a federal conviction or sentence." Pet. App. 15a. It concluded that the legal arguments raised by Ferguson "constitute[d]

quintessential collateral attacks on his convictions and sentence." *Id.* at 16a. On this basis, the court distinguished its prior precedent, which "empowered" district courts to consider "any extraordinary and compelling reason," including nonretroactive "change[s] in the sentencing law." *Id.* at 14a, 16a (quoting *McCoy*, 981 F.3d at 284). Ferguson's arguments are "clearly different in kind," according to the Fourth Circuit, because the district court would be "require[d]" "to evaluate whether [Ferguson's] convictions … were valid." *Id.* at 16a. But the Fourth Circuit did not explain why, exactly, that determination would be required to find extraordinary-and-compelling reasons warranting relief.

The Tenth Circuit had earlier held that the compassionate-release statute permits an "individualized review of *all* the circumstances of [the defendant's] case." *Maumau*, 993 F.3d at 837 (emphasis added). Rather than grappling with this holding, the Tenth Circuit stated only that the Section 2255 question "was not before" the court in *Maumau*. *Wesley*, 60 F.4th at 1283.

B. The circuits' disuniformity leads to unjust and arbitrary results.

1. Whether a movant has shown extraordinary-and-compelling reasons for relief based on the totality of their circumstances—including legal errors in their underlying proceedings—can depend on geographical happenstance. Consider Sid Edward Willis Jr. He was granted compassionate release after a district court in the Ninth Circuit considered, among other factors, that his "180-month mandatory minimum sentence

was never lawfully imposed," *United States v. Willis*, No. 12-cr-00292, 2023 WL 2625530, at *2-4, *6 (D. Or. Mar. 22, 2023).[5]

But if Willis had had the misfortune of bringing his motion in the Tenth Circuit, like Albert Martinez, *Martinez v. United States*, Nos. 22-cv-407, 18-cr-101, 2023 WL 2308261 (D.N.M. Mar. 1, 2023), things would have gone quite differently. There, the district court lacked authority to review Martinez's motion related to the lawfulness of his mandatory-minimum sentence. *Id.* at *2. Martinez (and Ferguson) are not alone. *See, e.g.*, *United States v. Alexander*, No. 11-cr-50018, 2022 WL 900213, at *4 (N.D. Ill. Mar. 28, 2022).[6]

2. The split detailed above understates the extent to which prisoners' compassionate-release motions receive inconsistent treatment across the country, leading to irreconcilable and unjust outcomes. That is so because no court has explained how to decide whether an extraordinary-and-compelling-reason argument constitutes a collateral attack. Instead, the

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[5] Relief is regularly being granted on similar bases in the First and Ninth Circuits. *See, e.g.*, *United States v. Lara*, No. 95-cr-75-09, 2023 WL 2305938, at *12 (D.R.I. Mar. 1, 2023); *United States v. Armendariz*, No. 11-cr-355, 2023 WL 1819160, at *2-3 (N.D. Cal. Feb. 8, 2023); *United States v. Adame*, No. 18-cr-391, 2022 WL 2167893, at *9-11 (D. Idaho Jan. 4, 2022).

[6] *See also United States v. Anderson*, No. 12-cr-809, 2023 WL 3076606, at *5 (D.S.C. Apr. 25, 2023); *United States v. Hinestroza*, No. 20-cr-280, 2023 WL 3058466, at *2 n.1 (M.D. Fla. Apr. 24, 2023); *United States v. Skeeters*, No. 05-cr-530, 2022 WL 16579312, at *3 (E.D. Pa. Nov. 1, 2022).

circuits relying on Section 2255 to limit Section 3582 take a we-know-it-when-we-see-it approach. Thus, even in circuits that hold that Section 2255 bars arguments resembling collateral attacks, confusion reigns. For instance, a district court in the Fourth Circuit recently held that Section 2255 prevented it from considering intervening caselaw that demonstrated a sentencing error because that argument "is exclusively within the province of § 2255." *United States v. Pate*, No. 17-cr-56, 2023 WL 362813, at *3 (M.D.N.C. Jan. 23, 2023) (quoting Pet. App. 19a). But the district court went on to consider the "disparity between the sentence he received and the sentence he would receive today" due to the "same purported change in the law" because that "is the kind of argument appropriate to consider in a motion for compassionate release." *Id.*

Because district courts lack guidance, identical arguments are being treated differently across circuits that apply the same purported Section 2255 bar. For example, a district court in the Fifth Circuit recently held Section 2255 was no bar to granting compassionate release based on a movant's argument that his Section 924(c) conviction could not be imposed today because an intervening decision from this Court, *United States v. Davis*, 139 S. Ct. 2319 (2019), had declared Section 924(c)(3)(B)'s residual clause unconstitutionally vague. *United States v. Solomon*, No. 14-cr-340, 2023 WL 2920945, at *4 (N.D. Tex. Apr. 11, 2023). The district court reasoned that such an argument constituted an extraordinary-and-compelling reason because the prisoner maintained only that his confinement was "unjust," not that it was "illegal" (even though in the Fifth Circuit *Davis*

applies retroactively on collateral review). *See id.* In contrast, a district court in the Seventh Circuit refused to consider the exact same argument because *Davis* concerned "the validity" of the prisoner's sentence and any collateral attack on his conviction or sentence must be brought under Section 2255. *United States v. Cureton*, No. 10-cr-30106, 2022 WL 993502, at *3 (S.D. Ill. Apr. 1, 2022).

* * *

Nearly all circuits have weighed in, some clearly and others in ways that have created confusion and are bound to create more. This Court's review is needed and needed now.

II. The question presented is important and recurring.

A. The question presented concerns tension between two federal laws—the post-conviction-relief statute and the compassionate-release statute. "It is this Court's responsibility to say what a statute means," *Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17, 21 (2012) (per curiam) (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994)), and it is critical for this Court to take up that responsibility when lower courts are divided over the interplay between two federal laws, *see Morton v. Mancari*, 417 U.S. 535, 551 (1974).

In a related but distinct context, the Government has argued that the Sentencing Commission's new guidance will deprive a decision of this Court of any practical significance. *See* Brief for the United States in Opposition at 12, *Jarvis v. United States*, 142 S. Ct. 760 (2022) (mem.) (No. 21-568). Petitions in cases like

Jarvis have presented questions stemming from a circuit split—different from the one at issue here—over the meaning of extraordinary-and-compelling reasons (rather than over Section 2255's relationship to Section 3582). *See, e.g.*, Petition for a Writ of Certiorari, *Jarvis v. United States*, 142 S. Ct. 760 (2022) (mem.) (No. 21-568). Because the Commission has authority to describe what constitute extraordinary-and-compelling reasons for a sentence reduction, its proposed amendments could resolve the split implicated by a case like *Jarvis*. But that is not true as to the split implicated by the Section 2255 bar that most circuits have read into Section 3582(c)(1)(A).

As explained above (at 5-6), the Commission's proposed guidance gives courts discretion to consider, as extraordinary and compelling, any circumstance or combination of circumstances similar in gravity to the reasons the guidance specifically lists. U.S. Sent'g Guidelines Manual § 1B1.13(b)(5) (U.S. Sent'g Comm'n, Proposed Amendments 2023). The guidance further specifies that district courts "may" consider, in determining whether extraordinary-and-compelling reasons exist, changes in law so long as the change creates a gross disparity between a prisoner's original sentence and the sentence he would receive today, and the prisoner has served at least 10 years of an unusually long sentence. *Id.* § 1B1.13(b)(6). But the Fourth Circuit and others like it have already held that a federal statute—Section 2255—independently bars consideration of legal errors from supporting relief under Section 3582(c)(1)(A)—regardless of what might otherwise qualify as extraordinary and compelling. *E.g.*, Pet. App. 15a; *United States v. Jenkins*, 50 F.4th 1185, 1200-02 (D.C. Cir. 2022).

Nothing about the Commission's proposed guidance—which neither prohibits courts from finding nor requires courts to find legal errors extraordinary and compelling—could upset those holdings. Therefore, until this Court clarifies the respective roles of Section 3582(c)(1)(A) and Section 2255, most circuits will continue to deny prisoners like Ferguson the opportunity to obtain the compassionate release to which they are entitled even if the guidance goes into effect in November 2023.

An example helps illustrate. In *United States v. Wesley*, 60 F.4th 1277 (10th Cir. 2023), the Tenth Circuit held that a movant was barred by Section 2255 from raising serious prosecutorial misconduct as an extraordinary-and-compelling reason warranting a sentence reduction under Section 3582(c)(1)(A). 60 F.4th at 1288-89. Wesley's argument could qualify as a grave circumstance under the proposed amendments, § 1B1.13(b)(5) (Proposed Amendments 2023), but the Tenth Circuit's precedent would still preclude a district court from considering the point based on the purported Section 2255 bar. *Supra* at 20.

B. The exceptional importance of the question presented is evidenced by the high volume of compassionate-release motions and the number of them that raise legal errors in a defendant's underlying proceedings. Between October 2019 and September 2022, district courts ruled on 27,789 compassionate-release motions. U.S. Sent'g Comm'n, *Compassionate Release Data Report* tbl.1 (2022). During fiscal year 2022, approximately 14.2% of the reasons given by sentencing courts for *granting* motions were related to arguments that might also be raised in a Section 2255 motion: "Career Offender

issues"; "Conviction/sentencing errors"; "Mandatory nature of guideline at sentencing"; "ACCA issues"; "Safety Valve disqualification"; and "Other mandatory minimum penalties/long sentence." *Id.* at tbl.14. This 14.2% figure understates the frequency with which the question presented arises because no data exists on how often district courts *deny* Section 3582 motions that raise arguments that the majority of circuits hold may not be pressed in a compassionate-release motion.

Given how often the question presented recurs, movants seeking compassionate release, the Government, and the judiciary need clear guidance as to what arguments district courts may consider when reviewing whether extraordinary-and-compelling reasons exist.

III. This case is an excellent vehicle for review.

This case cleanly presents an issue that has divided the circuit courts. Both the district court and the Fourth Circuit squarely ruled on the question presented, Pet App. 13a-19a, 28a-31a, and it was the sole basis for the Fourth Circuit's rejection of Ferguson's compassionate-release motion.

If this Court grants review and Ferguson loses, his request for compassionate release is at its end. But if Ferguson prevails here, as we maintain he should, remand would be necessary because the courts below never considered whether Ferguson is entitled to relief based on the combined weight of the arguments in his Section 3582(c)(1)(A) motion, including those that the Fourth Circuit held could not be considered. Although the district court concluded that the Section 3553(a) factors weighed against a sentence reduction (*without*

consideration of the arguments it considered barred by Section 2255), the Fourth Circuit did not pass on that ruling.

Even when the Sentencing Commission's new policy statement on Section 3582(c)(1)(A) goes into effect, Ferguson's case will remain an ideal vehicle for deciding the question presented. *See supra* at 25-26. The pending amendments simply mean that should this Court grant certiorari and reverse, Ferguson would also then need to demonstrate on remand that reducing his sentence would be consistent with the Commission's new guidance (which he could do). Ferguson is asking this Court to decide a distinct question—that is, whether Section 2255 independently limits a district court's discretion to award relief under Section 3582(c)(1)(A), even if Ferguson's case comes within the ambit of the Commission's policy statement. This Court can and should answer that question to enable comprehensive resolution of Ferguson's motion on remand and to provide guidance to movants, the Government, and the courts.

IV. The Fourth Circuit's decision is wrong.

The Fourth Circuit held that Section 2255 limits a district court's discretion to consider some of the information Ferguson presented in his Section 3582(c)(1)(A) motion. It did so because it believed Ferguson is collaterally attacking his conviction and sentence. The Fourth Circuit erred because that is not what Ferguson is doing.

A. Ferguson is not collaterally attacking his conviction or sentence.

The Fourth Circuit adopted the premise that Ferguson was collaterally attacking his conviction and sentence. But that court misapplied this Court's precedents in reaching that conclusion. Ferguson does not dispute that Section 2255 generally provides the exclusive mechanism through which a federal prisoner may collaterally challenge a conviction or sentence. *See* 28 U.S.C. § 2255(e). But that does not resolve whether Ferguson is collaterally attacking his conviction and sentence—in other words, whether he is intruding on the "core" of collateral relief to such an extent that Congress must have intended he proceed only under Section 2255. *Prieser v. Rodriguez*, 411 U.S. 475, 487-88, 500 (1973). He is not.

1. A prisoner functionally collaterally attacks his criminal judgment—and therefore must proceed by writ of habeas corpus or similar remedy—when he seeks a judicial determination that "necessarily impl[ies] the invalidity of his conviction or sentence." *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). In applying this rule, this Court has repeatedly "stress[ed] the importance of the term 'necessarily.'" *Nelson v. Campbell*, 541 U.S. 637, 647 (2004); *see also Nance v. Ward*, 142 S. Ct. 2214, 2222 (2022); *Spencer v. Kemna*, 523 U.S. 1, 17 (1998). In light of remedial doctrines, such as harmless error, that a legal error occurred during criminal proceedings does not require the conclusion that the resulting conviction was invalid. For that reason, this Court has indicated that *Heck* would not bar a civil lawsuit based on the admission at trial of evidence procured in an

unconstitutional search. 512 U.S. at 487 n.7. An award of damages in such a case would not equate to a finding that the conviction or sentence was unlawful, because an exception to the exclusionary rule could preclude that finding. *Id.*

A finding that Ferguson's reasons for a sentence modification are extraordinary and compelling would not necessarily imply the invalidity of his conviction or sentence. True, he has pointed to a legal error that occurred during his trial and sentencing: a fact that led to a mandatory minimum was not found by the jury. *See Alleyne v. United States*, 570 U.S. 99, 103 (2013). But he has also raised non-legal reasons why the court should grant relief, such as his susceptibility to COVID-19, his rehabilitation over the past two decades in prison, and the unfair circumstances surrounding the legal error. CA4JA 104-26. With all these factors in the mix, a court's holding that Ferguson has demonstrated extraordinary-and-compelling reasons warranting relief would not necessarily imply Ferguson has made out the elements of any constitutional defense to criminal liability. For example, a court might believe it was extraordinarily unfair (but not unconstitutional) that Ferguson's attorney failed to warn him that the silencer mandatory minimum would be on the table at trial—and conclude that, in light of his rehabilitation, Ferguson deserves to be resentenced.

Even if a court were to determine that a legal error, divorced from other non-legal reasons for relief, was on its own an extraordinary-and-compelling circumstance, that finding would still not necessarily imply that the prisoner is entitled to the remedy of vacatur. *See Heck*, 512 U.S. at 486-87. The finding

would therefore not trigger habeas channeling. *Id.* at 487 n.7. Under Section 3582(c)(1)(A), a prisoner appeals to a court's "equitable discretion." *See United States v. Jenkins*, 50 F.4th 1185, 1213 (D.C. Cir. 2022) (Ginsburg, J., concurring in part, dissenting in part). In granting compassionate release, a court makes no holding as to whether the alleged legal error entitles a prisoner to have his conviction or sentence vacated—the only holding is that extraordinary-and-compelling reasons warrant a sentence reduction. 18 U.S.C. § 3582(c)(1)(A). That decision to show mercy has no other necessary legal implication.

2. Some circuit courts addressing the question presented have noted that this Court has precluded state prisoners from using 42 U.S.C. § 1983 to seek immediate or speedier release from custody. *E.g.*, *Jenkins*, 50 F.4th at 1203; *see also United States v. Hunter*, 12 F.4th 555, 567 (6th Cir. 2021). The line of cases they cite is premised on the distinction that Section 1983 does not expressly authorize the remedy of release from custody, while the federal habeas statute does. *See, e.g.*, *Prieser*, 411 U.S. at 489; *see also Wilkinson v. Dotson*, 544 U.S. 74, 78-79 (2005).

That distinction is inapposite here. Unlike Section 1983, Section 3582(c)(1)(A) *does* expressly authorize sentence reductions, which sometimes result in release from custody. Congress could not have intended Section 2255 to preclude release under Section 3582(c)(1)(A) given that it granted prisoners the right to petition for compassionate release just five years ago, when Section 2255 was already on the books. As Judge Ginsburg explained, "[r]eading an implicit habeas exception into 'a statute whose very purpose is to open up final judgments' is a far cry from

what the Supreme Court did in *Prieser*." *Jenkins*, 50 F.4th at 1214 (Ginsburg, J., concurring in part, dissenting in part) (quoting *Concepcion v. United States*, 142 S. Ct. 2389, 2398 n.3 (2022)).

3. The Fourth Circuit, pointing to *Gonzalez v. Crosby*, 545 U.S. 524 (2005), mistakenly construed Ferguson's Section 3582(c)(1)(A) motion as a second or successive petition for collateral relief. Pet. App. 15a-16a. Other courts of appeals have made the same mistake. *See United States v. Escajeda*, 58 F.4th 184, 187 (5th Cir. 2023).

Gonzalez is no bar to Ferguson. In *Gonzalez*, this Court explained that motions seeking to reopen final habeas judgments under Federal Rule of Civil Procedure 60(b) should sometimes be treated as successive habeas petitions, which are allowed only in narrow circumstances. 545 U.S. at 531-32. That makes sense because the procedural relief provided by Rule 60(b)—the reopening of an otherwise final habeas case—gives prisoners a second chance to obtain the same substantive relief provided by habeas. *Id.* at 532. And it makes even more sense when one considers that Rule 60(b), by its express terms, is available only when it does not conflict with federal statutes. *Id.* at 529.

But the *Gonzalez* rule is inapplicable to cases, like this one, in which a prisoner seeks a substantive remedy provided by a separate federal statute. Ferguson is not attempting to use a procedural loophole to reopen a Section 2255 proceeding; he is seeking relief under Section 3582(c)(1)(A), which was amended by the First Step Act long after Section 2255's enactment. That Section 3582(c)(1)(A) provides

a distinct substantive remedy is underscored by the fact that, unlike under Section 2255, Ferguson's conviction will remain on the books regardless of what happens in this case. *See United States v. Wesley*, 60 F.4th 1277, 1286 (10th Cir. 2023).

B. The Fourth Circuit's decision conflicts with this Court's decision in *Concepcion*.

As this Court explained just last term, the information a district court may consider in sentence-modification proceedings is restricted only by express statutory or constitutional provisions. *Concepcion*, 142 S. Ct. at 2398, 2401 n.4, 2042 n.5. Congress has not expressly excluded the non-medical, non-rehabilitation arguments Ferguson raised in his compassionate-release motion. Yet the Fourth Circuit held that the district court was categorically barred from considering some of what Ferguson had to say.

Since the Founding Era, district courts have "exercise[d] a wide discretion" at sentencing. *Pepper v. United States*, 562 U.S. 476, 488 (2011) (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)). *Concepcion* held that the same "broad discretion to consider all relevant information"—unless the text says otherwise—applies with equal force to sentence-modification proceedings. 142 S. Ct. at 2398. Of particular note, changes in law may be relevant in deciding "whether to modify a sentence at all, and if so, to what extent." *Id.* at 2400; *see also id.* at 2404-05.

Here, as previously explained (at 5), the statutory framework limits a district court's discretion in only two express ways. First, district courts must adhere to "applicable policy statements" from the Sentencing Commission. § 3582(c)(1)(A). Second, in a separate

statute, Congress specified that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." 28 U.S.C. § 994(t). Beyond these two express limitations, Congress is silent. *See, e.g.*, *United States v. Chen*, 48 F.4th 1092, 1098 (9th Cir. 2022).

Nevertheless, the Fourth Circuit—following the lead of several other circuits—"manufacture[d] [its] own limits on a district court's discretion." *United States v. McCall*, 56 F.4th 1048, 1075 (6th Cir. 2022) (en banc) (Gibbons, J., dissenting). This approach "runs afoul of *Concepcion*'s clear admonition against reading a limitation into a statute providing judges with sentencing discretion." *Jenkins*, 50 F.4th at 1214 (Ginsburg, J., concurring in part, dissenting in part). "Drawing meaning from silence is particularly inappropriate here," where "Congress has shown that it knows how to direct sentencing practices in express terms." *Kimbrough v. United States*, 552 U.S. 85, 103 (2007). Thus, to expect Congress to have expressly authorized the arguments Ferguson raised in his petition "gets it backward." *Concepcion*, 142 S. Ct. at 2402 n.5.

Other courts to consider the question presented have suggested that the unfairness in sentencing outcomes reflected by, for example, a nonretroactive change in law, is ordinary, not extraordinary. *E.g.*, *McCall*, 56 F4th at 1055-56. But this retort overlooks that it is not the *category* of appropriate topics for consideration that must be extraordinary and compelling. Medical conditions and old age are also ordinary human experiences. Nevertheless, all courts agree those conditions can affect a particular person in an extraordinary-and-compelling way.

Legal unfairness is no different. Section 3582(c)(1)(A) is a safety valve providing for "individualized consideration of a defendant's circumstances." *United States v. Ruvalcaba*, 26 F.4th 14, 27 (1st Cir. 2022). The courts must review Section 3582(c)(1)(A) motions on a case-by-case-basis because everyone's circumstances are different and because any number of reasons may combine to support an extraordinary-and-compelling finding—even if no one reason would do so "standing alone." *United States v. Trenkler*, 47 F.4th 42, 50 (1st Cir. 2022). To be sure, a district court has discretion to hold that a particular defendant's circumstances are not extraordinary and compelling. *See, e.g.*, *Ruvalcaba*, 26 F.4th at 27-28. But that does not warrant a categorical rule prohibiting those courts from considering the kinds of arguments Ferguson raised.

* * *

If the district court had properly used its discretion to consider all of Ferguson's arguments, the outcome may well have been different. We no longer tolerate what happened during Ferguson's criminal proceedings. *See Alleyne*, 570 U.S. at 103. The jury never found that Ferguson possessed a firearm "equipped with" a silencer. Ferguson, however, received a 30-year sentence based on that fact—a sentence that neither his attorney nor the Government informed Ferguson was on the table before trial. And Ferguson has significantly rehabilitated himself over the past two decades in prison, CA4JA 191-99, during which time he has never received a disciplinary infraction, CA4JA 201. Sixteen people testified to his character, CA4JA 203-23, one of whom is prepared to hire him upon release, CA4A 223.

Put simply, Ferguson has demonstrated he is capable of being a free, law-abiding citizen—and he would already be one were he not serving a sentence for an offense for which he was never convicted.

This showing is sufficient to open the door to potential relief under Section 3582(c)(1)(A). But the Fourth Circuit never considered the totality of these circumstances. Instead, it held that arguments related to legal errors in prior proceedings are categorically excluded from consideration under Section 3582(c)(1)(A). That holding was neither compelled by Section 2255 nor consistent with the text of Section 3582(c)(1)(A). For these reasons, this Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

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May 2023