No. 22-1216

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Government concedes that the circuits are divided over whether 28 U.S.C. § 2255 limits a district court's discretion in reviewing 18 U.S.C. § 3582(c)(1)(A) motions. And because it cannot dispute that this issue is cleanly presented, unaffected by the Sentencing Commission's policy statement, and exceptionally important, it instead rewrites the question presented. The Government's effort to replace a question about the relationship (if any) between Section 3582(c)(1)(A) and Section 2255 with one about whether the district court abused its discretion should be rejected, and with it the Government's attempt to gloss over the intractable circuit split, its misguided argument about the import of the Sentencing Commission's amended policy statement, and its faulty merits analysis.

Ferguson is serving a 30-year sentence for something he was never convicted of. According to the Government, this serious injustice is "ordinary," BIO 12, thus lacking the gravity of other circumstances that courts and the Sentencing Commission recognize as extraordinary-and-compelling reasons for a sentence reduction. We disagree. But the salient point is that neither the Fourth Circuit nor the district court considered whether Ferguson's non-medical circumstances are extraordinary and compelling because they held that arguments related to legal errors are categorically excluded from consideration under Section 3582(c)(1)(A) by Section 2255. Until that issue is resolved, Ferguson and other deserving individuals seeking relief under the First Step Act will continue to be denied sentence reductions. This Court should grant review now.

ARGUMENT

I. The circuits are split.

A. The Government concedes that the circuits are split yet understates the severity of the conflict.

Conceding that the circuits are split, the Government asserts that the disagreement among the courts of appeals is not so serious as to warrant this Court's attention. *See* BIO 16-18. In fact, the conflict is intractable and has only deepened since Ferguson filed his petition.

1. The Government acknowledges that when the Fourth Circuit below held that Section 2255 categorically bars consideration of legal errors under Section 3582(c)(1)(A), it split with the First Circuit. BIO 16-17; Pet. 14-15. It disputes, however, that the Ninth Circuit agrees with the First Circuit and that the Second Circuit aligns most closely with this side of the split. *See* BIO 17. As we now explain, the Government's arguments about the Ninth and Second Circuits evade the reality that movants in these circuits can obtain relief based on the totality of their circumstances—including legal errors—unlike movants like Ferguson.

Since Ferguson filed his petition, the split's practical impact has deepened. The Ninth Circuit, in *United States v. Roper*, 72 F.4th 1097 (9th Cir. 2023), clearly distinguished between Section 2255 relief and compassionate release, explaining that while each remedy may "result in an inmate's early release from custody, the two require different showings and carry different implications about the defendant's original conviction and sentence." *Id.* at 1102. That court

squarely rejected the Government's assertion that consideration of intervening decisional law would circumvent Section 2255 and reiterated that granting compassionate release "does not imply that the original sentence was unlawful." *Id.* at 1102-03. *Roper* reaffirmed the Ninth Circuit's previous holding in *United States v. Chen*, 48 F.4th 1092 (9th Cir. 2022), that district courts may consider any extraordinary-and-compelling reason a defendant might raise, including circumstances that may also be raised through Section 2255 proceedings. *Chen*, 48 F.4th at 1099, 1101. The Government says that *Roper* and *Chen*'s rejection of the Section 2255 bar is dicta, but the practical effect is that district courts within the Ninth Circuit have broad discretion to consider—among other circumstance-specific factors—legal errors in prior proceedings as extraordinary-and-compelling reasons warranting a sentence reduction. *See, e.g.*, *United States v. Ortiz*, 2023 WL 1781565, at *5 n.4 (W.D. Wash. Feb. 6, 2023).

The Government conspicuously fails to address the district-court decisions within the Second Circuit that demonstrate that it aligns most closely with the First and Ninth Circuits. As the petition explains, district courts in that circuit regularly consider legal errors when determining whether extraordinary-and-compelling reasons exist. *See* Pet. 16-17. For instance, *United States v. Lopez*, 523 F. Supp. 3d 432 (S.D.N.Y. 2021), held that a significant sentencing error, among other factors, warranted a sentence reduction under Section 3582(c)(1)(A). *Id.* at 438-39.

2. The Government also ignores that courts adopting and reaffirming the purported Section 2255 bar have done so over weighty dissents. *See United*

States v. Wesley, 78 F.4th 1221, 1222-32 (10th Cir. 2023) (denial of reh'g en banc) (Rossman, J., dissenting); *United States v. Jenkins*, 50 F.4th 1185, 1207-15 (D.C. Cir. 2022) (Ginsburg, J., concurring in part, dissenting in part); *United States v. McCall*, 56 F.4th 1048, 1074-76 (6th Cir. 2022) (Gibbons, J., dissenting).

B. The Sentencing Commission's policy statement highlights that only this Court can resolve the circuit split.

The Sentencing Commission's amended policy statement has no impact on the divide over the relationship (if any) between Sections 3582 and 2255. *Compare* BIO 18*, with* Pet. 25-26. In determining whether extraordinary-and-compelling reasons exist, the policy statement gives courts discretion to consider, under certain circumstances, changes in law that create a gross disparity between a prisoner's original sentence and the sentence he would receive today. U.S. Sent'g Guidelines Manual § 1B1.13(b)(6) (U.S. Sent'g Comm'n 2023). It also allows courts to consider, as extraordinary and compelling, any circumstance or combination of circumstances similar in gravity to the other enumerated extraordinary-and-compelling reasons. *Id.* at § 1B1.13(b)(5). But nine circuits hold that Section 2255 bars consideration of legal errors under Section 3582(c)(1)(A) no matter what, including when a legal error is revealed by a change in law and when the error's gravity matches other recognized extraordinary-and-compelling reasons for a sentence reduction. *See* Pet. 14-21. Nothing about the Commission's guidance could possibly narrow these holdings.

Decisions issued since Ferguson filed his petition highlight this point. As Judges Tymkovich and Eid explained in denying en banc review in *United States v. Wesley*, 78 F.4th 1221 (10th Cir. 2023), the amended policy statement "contains not a word about errors in a conviction or sentence as a basis for compassionate release." *Id.* at 1222 (denial of reh'g en banc) (Tymkovich, J. and Eid, J., concurring) (citing the proposed policy statement later adopted on November 1, 2023). But courts applying a Section 2255 bar never analyze whether a sentence reduction is consistent with the Sentencing Commission's policy statement because they hold that "not all motions invoking § 3582(c)(1)(A) are actually governed by § 3582(c)(1)(A)." *Id.* In *United States v. Von Vader*, 58 F.4th 369, 371 (7th Cir. 2023), *cert. denied*, 2023 WL 7287218 (2023), for example, the Seventh Circuit was presented with "the Sentencing Commission's announced views on what qualifies as 'extraordinary and compelling,'" but it did not deter that court from prohibiting any consideration of legal errors under Section 3582(c)(1)(A) based on a purported Section 2255 bar. *See* Petition for Certorari at 12, *Von Vader v. United States*, No. 23-354 (Sep. 29, 2023), *cert. denied*, 2023 WL 7287218 (2023).

II. The question presented is important and recurring.

The Government doesn't dispute the importance of the question presented on its own terms. It can't because the petition "involves an issue of exceptional public importance," one that appears before lower "courts on, literally, a daily basis." *United States v. Wesley*, 78 F.4th 1221, 1223 (10th Cir. 2023) (denial of reh'g en banc) (Rossman, J., dissenting).

Instead, the Government's gambit is to rewrite the question presented. But this case is not about whether the district court abused its discretion in denying Ferguson's motion for a sentence reduction. *See* BIO i. It is about a purely legal question: whether an irreconcilable conflict exists between two federal laws such that courts may *never* consider the effect of legal errors on a request for compassionate release. Pet. 24.

That this Court has denied petitions for certiorari about whether non-retroactive changes in statutory law qualify as extraordinary-and-compelling reasons is irrelevant. *See* BIO 10 n.1. Those petitions presented a question stemming from a different circuit split than the one presented here. *See* Pet. 24-25. That split was resolved by the Sentencing Commission's amendments. *See* U.S. Sent'g Guidelines Manual, supp. to app. C, Amendment 814 (U.S. Sent'g Comm'n 2023). In contrast, the issue here is recurring and will continue to affect movants seeking compassionate release until this Court settles the question. *See United States v. West*, 70 F.4th 341 (6th Cir. 2023), *petition pending*, No. 23-5698; *Wesley v. United States*, No. 23A414 (granting extension to applicant to file petition for certiorari).

III. This case provides an excellent vehicle.

The Government acknowledges that the Fourth Circuit squarely resolved the question presented, yet contends that Ferguson's compassionate-release motion would fail as inconsistent with the Sentencing Commission's policy statement or under the Section 3553(a) sentencing factors. The Government is doubly wrong.

A. Contrary to the Government's assertions (BIO 18), several sections of the amended policy statement allow reliance on legal errors to support or inform compassionate release. *See* U.S. Sent'g Guidelines Manual §§ 1B1.13(b)(5), 1B1.13(b)(6), 1B1.13(c) (U.S. Sent'g Comm'n 2023). The catchall category for "other reasons," for example, permits courts to find extraordinary-and-compelling reasons based on any "circumstance or combination of circumstances" that are similar in gravity to the other listed extraordinary-and-compelling reasons. *See* Pet. 25-26. The Commission "rejected a requirement that 'other reasons' be similar in nature and consequence," meaning it is not the category of asserted justification for a sentence reduction that must be like the other enumerated reasons. *United States v. Wesley*, 78 F.4th 1221, 1231 (10th Cir. 2023) (denial of reh'g en banc) (Rossman, J., dissenting) (citing 88 Fed. Reg. 28,258). Rather, the gravity of how the particular circumstance affects an individual must be akin to the gravity of other enumerated extraordinary-and-compelling reasons. *See id.* Only erroneous circuit precedent, not the Sentencing Commission, stands in the way of courts fully and fairly considering compassionate-release motions from individuals like Ferguson.

The Government's position talks past the petition's explanation that circumstances like medical conditions and old age are also ordinary human experiences. Pet. 34-35. All courts and the Sentencing Commission agree those conditions can affect a particular person in an extraordinary-and-compelling way. The question here, then, is whether it is typical for a defendant to be serving a 30-year mandatory

minimum for an offense he was never convicted of and without which he would already be free.

B. The district court's determination that the Section 3553(a) factors weighed against a sentence reduction (*without* consideration of the arguments it held barred by Section 2255) presents no vehicle problem. The Fourth Circuit did not pass on that ruling, and this Court often grants review when a district court has ruled in the alternative on grounds not reviewed by the court of appeals. *See, e.g.*, *Brownback v. King*, 141 S. Ct. 740, 746-47 (2021).

Moreover, a ruling in Ferguson's favor on the question presented is likely to lead to a different Section 3553(a) analysis. That is because the district court's analysis did not, as the Government suggests, "tak[e] into account the entire record." BIO 21. Instead, when the district court concluded that the Section 3553(a) factors weighed against a sentence reduction, it did so without considering the arguments that it viewed as barred by Section 2255. *See* Pet. 27-28. If this Court grants certiorari and reverses, the district court would have discretion to address *all* the factors Ferguson relied on in his Section 3582(c)(1)(A) motion, including that he is serving a sentence for an offense he was never convicted of. *See United States v. Brown*, 78 F.4th 122, 132 (4th Cir. 2023) (proper consideration of the relevant Section 3553(a) factors includes consideration of all the movant's extraordinary-and-compelling reasons for a sentence reduction).

The recent proceedings in *United States v. West*, 2022 WL 16743864 (E.D. Mich. Nov. 7, 2022), *rev'd*, 70 F.4th 341 (6th Cir. 2023), are instructive. There, before the Sixth Circuit's Section 2255 bar compelled

reversal, the district court had considered whether "[e]rrors on the part of competent people—prosecutors, defense counsel, probation officers and, ultimately, th[e] judge at the time of sentencing—resulted in the imposition of a sentence in violation of the law." *Id.* at *1. Specifically, "the jury instructions given at [West's] trial did not sufficiently require the jury to find that death resulted from the conspiracy—a necessary finding for the court to impose a life sentence for the crime." *United States v. West*, 70 F.4th 341, 343 (6th Cir. 2023), *petition pending*, No. 23-5698. After concluding that this error qualified as an extraordinary-and-compelling reason for release, the district court conducted its Section 3553(a) analysis. *West*, 2022 WL 16743864, at *4-6. It held that the Section 3553(a) factors worked in West's favor, in part because the "life sentence imposed" on him did not "reflect the seriousness of the offense" given that the charge submitted by the jury should have "carried a statutory maximum penalty of ten years," not life in prison. *Id.* at *5-6.

The same holds true here. In weighing the Section 3553(a) factors on remand, the district court would not inevitably conclude that Ferguson presents a danger to society or that his sentence reflects the seriousness of the offense. That is because the court would be free to consider that he is serving a 30-year mandatory minimum, even though the jury actually convicted Ferguson of an offense that carries only a five-year mandatory minimum. *See* Pet. 7.

IV. The Fourth Circuit's decision is wrong.

A. Unable to defend the Fourth Circuit's reasoning on its own terms, the Government's lead merits

argument is that the lower court's judgment should be affirmed because legal errors of the magnitude Ferguson experienced are supposedly typical. As explained above (at 7) and in the petition (at 34), that cannot be right.

The Government's unspoken argument seems to be that by requiring courts to find "extraordinary and compelling reasons" to support a sentence reduction, Congress wordlessly signaled that whenever a movant requests relief under Section 3582(c)(1)(A), based in part on an alleged legal error, a different federal statute—Section 2255—applies. BIO 11-13. But if Congress intended for Section 2255 to narrow Section 3582(c)(1)(A), it would have said so expressly. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). The absence of explicit mention in Section 3582 of Section 2255 is especially telling because Section 2255 was already on the books when Section 3582(c)(1)(A) was enacted. *See id.* Thus, here especially, the argument that one federal statute impliedly overrides another is "a stout uphill climb." *Id.*

The Government's underdeveloped effort to conjure a conflict between Sections 3582 and 2255 from the words "extraordinary and compelling" only makes this case more certworthy. After all, the time for a merits defense is at the merits stage, and it is this Court's bailiwick to take up important questions of statutory interpretation when lower courts are divided over the interplay between two federal laws. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974).

B. The Government reiterates that granting compassionate release on grounds that implicate the legal validity of a sentence allows prisoners to "evade" restrictions on "a remedy that is exclusively within the

province of § 2255." BIO 13-15. But the Government fails to respond to the key distinction that compassionate release is an equitable remedy that does not in fact invalidate a conviction or sentence. *See* Pet. 29-31. "Properly understood ... the compassionate release statute is 'an additional, alternative, or supplemental remedy to 28 U.S.C. § 2255.'" *United States v. Wesley*, 78 F.4th 1221, 1227 (10th Cir. 2023) (denial of reh'g en banc) (Rossman, J., dissenting) (citation omitted).

Finding that a prisoner is entitled to compassionate release under Section 3582(c)(1)(A) and the amended policy statement is a contextual determination that a prisoner's particular circumstances, taken together, weigh in favor of mercy. Thus, a grant of compassionate release based in part on legal errors is not equivalent to finding a prisoner is entitled to vacatur as a matter of law. Because Section 3582(c)(1)(A) serves a different purpose and provides different relief, it does not conflict with the core function of Section 2255. *See Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973).

C. The Government further asserts that the decision below does not conflict with this Court's decision in *Concepcion v. United States*, 597 U.S. 481 (2022). BIO 15-16. It argues that this case is different from *Concepcion* because unlike Section 404 of the First Step Act (the statutory provision at issue there), Section 3582(c)(1)(A) as amended by the First Step Act contains the "threshold requirement" that district courts identify extraordinary-and-compelling reasons warranting a sentence reduction. BIO 15. To support this distinction, the Government notes that "the Court in *Concepcion* identified Section 3582(c)(1)(A) as a

statute in which 'Congress expressly cabined district courts' discretion.'" BIO 15-16. But the Government omits the rest of that sentence: "Congress expressly cabined district courts' discretion *by requiring courts to abide by the Sentencing Commission's policy statements*." *Concepcion*, 597 U.S. at 495 (emphasis added). That limitation on district courts' discretion, expressly set forth by Congress in Section 3582(c)(1)(A), is not disputed. Only the supposed Section 2255 bar is.

"The only limitations on a court's discretion to consider any relevant materials … in modifying [a] sentence are those set forth by Congress in a statute or by the Constitution." *Concepcion*, 597 U.S. at 494. Congress set forth no limitation on considering legal errors in Section 3582(c)(1)(A), nor does one inhere in the words "extraordinary and compelling." *See supra* 7, 9-10. Rather, the Fourth Circuit (and other courts of appeals) have manufactured a "new extra-textual threshold inquiry" that limits district courts' discretion. *Wesley*, 78 F.4th at 1223 (Rossman, J., dissenting). As a result, a "once highly discretionary decision of the district court, as broadly suggested by the Supreme Court in *Concepcion* … has been severely and categorically cabined." *United States v. West*, 70 F.4th 341, 347 n.1 (6th Cir. 2023) (citing *United States v. McCall*, 56 F.4th 1048, 1074-76 (6th Cir. 2022) (Gibbons, J., dissenting)), *petition pending*, No. 23-5698. For this reason as well, this Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

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