United States Court of Appeals
for the
Third Circuit

Case No. 23-1904

UNITED STATES OF AMERICA,

– v. –

DANIEL RUTHERFORD,

Appellant.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA IN CASE NO. 2-05-CR-00126-001, HONORABLE JOHN M. YOUNGE, DISTRICT JUDGE

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, FAMM, AND FEDERAL PUBLIC DEFENDERS AND COMMUNITY DEFENDERS FOR THE JUDICIAL DISTRICTS OF THE THIRD CIRCUIT IN SUPPORT OF APPELLANT AND REVERSAL

DAVID A. O'NEIL
DEBEVOISE & PLIMPTON LLP
801 Pennsylvania Avenue NW
Washington, DC 20004
(202) 383-8000
daoneil@debevoise.com

STEVEN G. TEGRAR
ISABELLE M. CANAAN
NICHOLAS H. HALLOCK
DEBEVOISE & PLIMPTON LLP
66 Hudson Boulevard
New York, New York 10001

Counsel for Amici Curiae

(For Continuation of Appearances See Inside Cover)

COUNSEL PRESS (800) 4-APPEAL • (327380)

ERICA K. ZUNKEL
Attorney
NICHOLAS B. SMITH
NATHANIEL G. BERRY
Senior Law Students
CRIMINAL AND JUVENILE JUSTICE CLINIC, THE UNIVERSITY OF CHICAGO LAW SCHOOL
1111 East 60th Street
Chicago, Illinois 60637

ELIZABETH A. BLACKWOOD
Counsel & Director of First Step Act Resource Center
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1660 L Street NW, 12th Floor
Washington, DC 20036

SHELLEY M. FITE
NATIONAL SENTENCING RESOURCE COUNSEL, FEDERAL PUBLIC & COMMUNITY DEFENDERS
22 East Mifflin Street, Suite 1000
Madison, Wisconsin 53703

MARY PRICE
SHANNA RIFKIN
FAMM
1100 H Street NW, Suite 1000
Washington, DC 20005

LISA MATHEWSON
Co-Chair, Amicus Committee National Association of Criminal Defense Lawyers
MATHEWSON LAW LLC
123 South Broad Street, Suite 1320
Philadelphia, Pennsylvania 19109

Counsel for Amici Curiae

Federal Public and Community Defenders of the Third Circuit

Delaware
Eleni Kousoulis

New Jersey
K. Anthony Thomas

Pennsylvania - Eastern
Lisa Lewis

Pennsylvania - Middle
Heidi Freese

Pennsylvania - Western
Lisa Freeland

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Interest of the Amici Curiae[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL is the only nationwide professional bar association for both public defenders and private criminal-defense lawyers, and its members include not only lawyers serving in those roles, but also military defense counsel, law professors, and judges. Consistent with NACDL's mission of advancing the proper, efficient, and fair administration of justice, NACDL files numerous amicus briefs each year in federal and state courts—all to the end of providing assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

FAMM (previously known as Families Against Mandatory Minimums) is a national, nonprofit, nonpartisan organization whose primary mission is to promote fair and rational sentencing policies and to

[1] No counsel for a party authored any portion of this Brief; no party nor party counsel contributed money toward preparing or submitting this Brief; and no person other than counsel to the amici curiae contributed money toward funding or preparing this Brief.

challenge inflexible and excessive penalties imposed by mandatory sentencing laws. Founded in 1991, FAMM currently has over 75,000 members nationwide. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing. FAMM advances its charitable purposes in part through selected amicus filings in important cases.

The Third Circuit Federal and Community Public Defenders represent the five federal defender organizations within this circuit: Delaware Federal Public Defender, New Jersey Federal Public Defender, Pennsylvania Eastern Community Defender, Pennsylvania Middle Public Defender, and Pennsylvania Western Federal Public Defender. Attorneys within these organizations litigate motions under 18 U.S.C. § 3582(c)(1)(A), including motions that come within U.S.S.G. § 1B1.13(b)(6), and have carefully thought through the important legal questions that this Court is being asked to decide in this case. Moreover, the organizations' clients may be directly impacted by the Court's decision in this case.

Both parties have consented to the filing of this brief.

Corporate Disclosure Statement

Amici curiae the National Association of Criminal Defense Lawyers, FAMM, and the Federal Public Defenders and Community Defenders for the Judicial Districts of the Third Circuit are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in amici curiae.

/s/ *David A. O'Neil*
David A. O'Neil

Introduction

This Court's briefing order has asked the parties to address:

(1) whether the Court should consider the impact of the amended policy statement applicable to 18 U.S.C. § 3582(c) motions in the first instance on appeal; and if so,

(2) whether (and to what extent) the amended policy statement abrogates *United States v. Andrews*, 12 F.4th 255, 261 (3d Cir. 2021).

This amicus brief focuses on the Court's second question and also the underlying validity of U.S.S.G. § 1B1.13(b)(6), given that the government has taken the position that this provision is invalid.[2] Amici take no position on the Court's first question other than to note that attorneys affiliated with the amici organizations (and others) are currently involved in § 1B1.13(b)(6) litigation in district courts throughout this circuit. *See, e.g.*, *United States v. Carter*, No. 2:07-cr-374-WB, __ F. Supp. 3d __, 2024 WL 136777 (E.D. Pa. Jan. 12, 2024) (denying relief based on *Andrews*), *appeal filed*, No. 24-1115 (3d Cir.); Motion, *United States v. Andrews*, No. 2:05-cr-280-GJP, ECF No. 284

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[2] *See* Gov't's Response to Appellant's Mot. for Stay and Reply in Support of Mot. for Summary Affirmance, ECF No. 15, at 2-3 ("It is the Justice Department's position that [§ 1B1.13(b)(6)] is invalid, as it conflicts with statutory authority, as addressed in *Andrews*, and thus exceeds the authority of the Sentencing Commission.").

(E.D. Pa. Nov. 1, 2023) (fully briefed). Should the Court decline to address the underlying legal issues in this case, it will doubtless address them soon.

In 1984, through the Sentencing Reform Act ("SRA"), Congress directed the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction" under § 3582(c)(1)(A), "including the criteria to be applied and a list of specific examples." 28 U.S.C. § 994(t). Congress also mandated that judges apply § 3582(c)(1)(A) "consistent with" any resulting, applicable policy statements. 18 U.S.C. § 3582(c)(1)(A). Thus, the amended § 1B1.13, which applies to both BOP- and defendant-filed motions, is now the legal authority for what can be considered "extraordinary and compelling" under § 3582(c)(1)(A).

This Court's prior decision in *Andrews* is no impediment to applying the amended policy statement, including § 1B1.13(b)(6) (Unusually Long Sentence). First, *Andrews* did not decide whether a sentence reduction might be consistent with § 1B1.13(b)(6)'s "descri[ption]" of "what should be considered extraordinary and compelling reasons for a sentence reduction," 28 U.S.C. § 994(t), for the simple reason that *Andrews* pre-dated the promulgation of § 1B1.13(b)(6). *Andrews* dealt exclusively

with a regime in which there was *no* applicable policy statement for defendant-filed motions and, thus, courts were left to determine on their own what reasons were extraordinary and compelling. Second, to the extent that the Court disagrees and reads *Andrews* to conflict with § 1B1.13(b)(6), the new policy statement, not *Andrews*, controls. After November 1, 2023, any judicial reading of "extraordinary and compelling reasons" is valid only to the extent that it is "consistent with" the policy statement definition that went into effect on that date. 18 U.S.C. § 3582(c)(1)(A).

The government does not like the policy choice that the Commission made in promulgating § 1B1.13(b)(6). But that does not make it unlawful: Section 1B1.13(b)(6) fits within the plain language of the statute delegating authority to the Commission, and it is consistent with the surrounding context and the purposes of both the SRA in general and § 3582(c)(1)(A) in particular. Further, no other law forecloses § 1B1.13(b)(6)'s authority as a general matter, or precludes its application to a case involving a gross disparity arising out of new congressional enactments, where individualized circumstances (of the sort required by § 1B1.13(b)(6)) show that sentence reduction is appropriate.

Accordingly, § 1B1.13(b)(6), not *Andrews*, governs cases that come within § 1B1.13(b)(6)'s terms.

Argument

I. The amended § 1B1.13, not *Andrews*, governs what qualifies as an "extraordinary and compelling" reason for reducing a sentence under § 3582(c)(1)(A).

Section 3582(c)(1)(A) permits a court to reduce a sentence where it first finds "extraordinary and compelling reasons warrant such a reduction." This is often called a "compassionate release" statute, but that is a "misnomer." *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020). As noted by the Commission in its Reason for Amendment accompanying § 1B1.13(b)(6), "that phrase appears nowhere in the SRA and sentence reductions that do not result in immediate release are authorized by law." U.S.S.G. App. C, Amend. 814, Reason for Amendment (Nov. 1, 2023). As such, § 3582(c)(1)(A) is not limited to cases involving terminal illness or disability, as are most state "compassionate release" statutes.[3]

[3] *See, e.g.*, N.J. Stat. Ann. § 30:4-123.51e ("Compassionate release; medical diagnosis to determine eligibility; petition; notice and hearing; objections; release on grounds of incapacity; conditions of release; request for return to confinement; definitions").

Section 3582(c)(1)(A) authorizes a sentencing court, as a matter of discretion, to reduce a sentence for "extraordinary and compelling reasons," so long as the reduction "is consistent with applicable policy statements issued by the Sentencing Commission." In the same Act that created § 3582(c)(1)(A), Congress directed the Commission to promulgate a policy statement "describ[ing] what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." 28 U.S.C. § 994(t).

Putting these statutes together, where the Commission has promulgated an applicable policy statement under § 994(t) describing what can be considered "extraordinary and compelling reasons," any sentence reduction under § 3582(c)(1)(A) must be "consistent with" that statement. Section § 3582(c)(1)(A)'s "consistent with" phrase is identical to the one used in § 3582(c)(2), which this Court has held "specifically incorporates the Commission's policy statements" into the statute. *United States v. Doe*, 564 F.3d 305, 310 (3d Cir. 2009), *abrogation on other grounds recognized by United States v. Savani*, 733 F.3d 56 (3d Cir. 2013). The Supreme Court recently commented on this, distinguishing a motion under First Step Act ("FSA") § 404, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (2018), from a

motion under § 3582(c)(1)(A) with reference to how Congress had "expressly cabined district courts' discretion" in § 3582(c)(1)(A) "by requiring courts to abide by the Sentencing Commission's policy statements." *Concepcion v. United States*, 597 U.S. 481, 495 (2022).

With the newly amended § 1B1.13, the Commission has promulgated a policy statement that applies to motions under § 3582(c)(1)(A), whether filed by the BOP or by a defendant. So this policy statement, including the new category for "unusually long sentences" at § 1B1.13(b)(6), is now "incorporat[ed]" into "[t]he plain language of the statute." *Doe*, 564 F.3d at 310. That is, it governs motions that fall within its terms. *See Batterton v. Francis*, 432 U.S. 416, 425 (1977) (explaining that where Congress has "expressly delegated" a policy matter to an agency, that agency's regulations have "legislative effect," and "[a] reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner").

The question posed by this Court is whether the amended policy statement abrogates *Andrews*. Certainly, if the policy statement conflicts with *Andrews*, then, given the above, it does. But *Andrews* and the policy statement do not necessarily conflict: First, *Andrews* does not address the

narrow and rare constellation of circumstances that are described in § 1B1.13(b)(6), *see* Br. of Appellant, at 35-36, which permit the court to find "extraordinary and compelling reasons."

Second, *Andrews* can and should be cabined to the circumstances of the period in which it was decided, when courts faced a uniquely "vexing" situation: Congress had mandated that "all sentence reductions must be 'consistent with applicable policy statements issued by the Sentencing Commission'" and "directed the Sentencing Commission to issue general policy statements 'describ[ing] what should be considered extraordinary and compelling reasons for sentence reduction.'" 12 F.4th at 259 n.4. But the Commission "ha[d] not yet promulgated a post-First Step Act policy statement describing what should be extraordinary and compelling in the context of prisoner-initiated motions." *Id.*

Within that context, the Court in *Andrews* itself imposed a limitation on the phrase "extraordinary and compelling reasons" that temporarily precluded relief for individuals like Mr. Rutherford. But the Court did not purport to announce the only possible interpretation of the words "extraordinary and compelling reasons"; it acknowledged that this phrase

was "amorphous" and "ambiguous." *Andrews*, 12 F.4th at 260.[4] And since November 1, 2023, the "vexing" situation that the Court was presented with in 2021 has since been remedied by the Commission's amendment to § 1B1.13, which includes subsection (b)(6). *Andrews* simply could not have addressed whether any sentencing reduction might be consistent with the *current* version of § 1B1.13.

If, however, this Court determines § 1B1.13(b)(6) conflicts with *Andrews*, the policy statement would abrogate *Andrews*. As discussed, the

[4] In *Carter*, the District Court for the Eastern District of Pennsylvania erroneously held that *Andrews*'s construction of § 3582(c)(1)(A)(i) "follows from the unambiguous terms of the statute" and that therefore judicial interpretation of that statute controlled. 2024 WL 136777, at *6. On appeal, Johnnie Carter will ask this Court to correct that confusion. In the wake of *Carter*, one district court expressly rejected its reasoning, finding that Carter's reliance on *Neal v. United States*, 516 U.S. 284, 290 (1996) was misplaced because *Neal* did not implicate "explicit[] [congressionally] delegated interpretative authority to the Commission." *United States v. Brown*, No. 2:95-cr-66, 2024 WL 409062, at *5 (S.D. Ohio Feb. 2, 2024). And at least one other court addressing essentially the same question has concluded that the statute *is* ambiguous and that the Commission's description of an "unusually long sentence" as an "extraordinary and compelling" reason must prevail. *See United States v. Padgett*, No. 5:06-cr-00013-RH-GRJ, slip op., ECF No. 162, at 6 (N.D. Fla. Jan. 30, 2024) (noting that "the very fact that the circuits split on this issue suggests the meaning of 'extraordinary and compelling' is not as clear as the government now asserts").

policy statement, not *Andrews*, is incorporated into § 3582(c)(1)(A). *See Doe*, 564 F.3d at 310; *Batterton*, 432 U.S. at 425.

Further, although the Supreme Court is usually responsible for resolving circuit conflicts, it has recognized that the Commission can "eliminate circuit conflict[s] over the meaning" of matters that Congress has delegated to the Commission. *Braxton v. United States*, 500 U.S. 344, 348-49 (1991). When amending § 1B1.13 to include (b)(6), the Commission recognized that, during the period in which there was no applicable policy statement, a circuit split arose on whether significant nonretroactive legal changes could be deemed "extraordinary and compelling." *See* U.S.S.G. App. C, Amend. 814, Reason for Amendment (Nov. 1, 2023). The Commission considered *Andrews* and similar opinions, along with contradictory opinions like *United States v. Chen*, 48 F.4th 1092, 1098 (9th Cir. 2022), and *United States v. McGee*, 992 F.3d 1035, 1047-48 (10th Cir. 2021), and it ultimately chose a third way. The Commission agreed with the reasoning in *Chen* and related opinions that the phrase "extraordinary and compelling" could encompass legal changes, but created a standard that would apply only to unusual legal changes and imposed limitations

applicable to legal-change-related filings that no other circuit court had. U.S.S.G. App. C, Amend. 814, Reason for Amendment (Nov. 1, 2023).

To be clear, the Commission's new policy statement does not just *weigh in* on the legal question that was the subject of the pre-amendment circuit split; it *decides* the matter, mooting the circuit split. With § 3582(c)(1)(A), Congress "directed the Sentencing Commission" (not the courts) to set forth "'what should be considered extraordinary and compelling reasons for sentence reduction.'" *Andrews*, 12 F.4th at 259 n.4 (quoting 28 U.S.C. § 994(t)). The Commission now has done so, and its definition could not be said to "bear[] no relationship to any recognized concept" of the phrase extraordinary and compelling, *Batterton*, 432 U.S. at 428, as Congress itself noted that "a reduction of an unusually long sentence" may be appropriate in certain circumstances, S. Rep. No. 98-225, at 55-56 (Aug. 4, 1983). Therefore, the Commission's policy statement is law.

II. The amended § 1B1.13, including subsection (b)(6), is a valid exercise of the Sentencing Commission's delegated authority.

The government is currently arguing throughout the country that § 1B1.13(b)(6) is invalid—apparently as applied to any case—and should be struck down. *E.g.*, Gov't's Response in Opposition, *United States v. Andrews*,

No. 05-cr-280, ECF No. 287, at 20 (E.D. Pa. Nov. 16, 2023) (arguing that "subsection (b)(6) exceeds the Commission's authority").[5] Although this Court's briefing order does not expressly raise this issue, this amicus brief addresses it because the questions that the Court has raised necessarily implicate the government's validity argument. *See* Gov't's Response to Appellant's Mot. for Stay and Reply in Support of Mot. for Summary Affirmance, ECF No. 15, at 2-3 ("It is the Justice Department's position that [§ 1B1.13(b)(6)] is invalid, as it conflicts with statutory authority, as addressed in *Andrews*, and thus exceeds the authority of the Sentencing Commission.").

What the government is asking courts to do—strike down a policy statement that was duly promulgated by the Commission—is no small ask. The validity of § 1B1.13(b)(6) is profoundly important: it implicates not

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[5] Thus far, at least four district judges have rejected this argument and granted relief under § 1B1.13(b)(6). *See United States v. Smith*, No. 5:07-cr-48-MW-GRJ, slip op., ECF No. 303, at 2 (N.D. Fla. Feb. 2, 2024); *Brown*, 2024 WL 409062, at *6 (also explaining that pre-amendment Sixth Circuit case law construing "extraordinary and compelling" had been supplanted by the amended § 1B1.13(b)(6)); *United States v. Capps*, No. 1:11-cr-00108-AGF, slip op., ECF No. 165, at 19-20 (E.D. Mo. Jan. 31, 2024) (same, regarding pre-amendment Eighth Circuit case law); *Padgett*, slip op., at 6-7 (same, regarding pre-amendment Eleventh Circuit case law).

only the lives of many of amici's clients and others, but also the legitimacy of the Commission, which Congress charged in the SRA with setting nationwide policy both for original sentencing and for sentence-reduction proceedings. Given the potentially destabilizing impact of a circuit court striking down a duly promulgated policy statement that fulfills a congressional directive, we urge the Court "to proceed with caution and restraint." *Cf. Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975).

To help the Court understand the complexity of this issue, we turn to the validity of § 1B1.13(b)(6). Congress expressly delegated to the Commission the job of describing what qualify as "extraordinary and compelling reasons" for purposes of § 3582(c)(1)(A). And as the Supreme Court has explained in *Batterton*, where Congress expressly delegates to another entity the job of defining statutory terms, the resulting definition "ha[s] the force and effect of law," and "[a] reviewing court is not free to set [it] aside . . . simply because it would have interpreted the statute in a different manner." 432 U.S. at 425 & n.9.

The government in other cases like this one has agreed that Congress expressly delegated to the Commission the job of defining "extraordinary and compelling," but it has claimed that the Commission exceeded its

authority under this express delegation because § 1B1.13(b)(6) contradicts § 3582(c)(1)(A). The idea put forward by the government is that the three words "extraordinary and compelling" are incapable of encompassing a set of circumstances that includes, among other things, a legal change. But § 3582(c)(1)(A)'s text is remarkably broad and inclusive; it was written to allow the Sentencing Commission to make policy in this space. And § 1B1.13(b)(6) is entirely consistent not only with this text but also with the statute's context and purpose.

A. Section 1B1.13(b)(6) is consistent with § 3582(c)(1)(A)'s text.

The "preeminent canon of statutory interpretation" mandates the presumption that the "legislature says in a statute what it means and means in a statute what it says there." *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) (internal quotation marks omitted). Section 3582(c)(1)(A) uses broad, adaptable language for its threshold standard for sentence reduction: "extraordinary and compelling reasons." The circumstances described in § 1B1.13(b)(6) are capable of meeting this standard. Congress understood how to place certain grounds for relief out of bounds, as demonstrated in § 994(t) itself, which explicitly states that a defendant's

"rehabilitation" alone cannot amount to an extraordinary and compelling reason. Absent that one forbidden ground, however, Congress empowered and directed the Commission to describe and to provide examples for what should be considered extraordinary and compelling reasons for a sentence reduction.[6]

The government, in litigation regarding § 1B1.13(b)(6)'s validity, has been asserting that the word "extraordinary" "should be understood to mean most unusual, far from common, and having little or no precedent.'" *See, e.g.,* Gov't's Response, *United States v. Ramos*, No. 96-cr-815, ECF No. 989, at 15 (N.D. Ill. Jan. 16, 2024) (citing *United States v. McCall*, 56 F.4th 1048, 1055 (6th Cir. 2022) (en banc) (quoting *Webster's Third New*

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[6] Relatedly, the government has raised in other cases an undefined separation-of-powers concern. *See* Gov't's Response in Opposition, *United States v. Andrews*, No. 05-cr-280, ECF No. 287, at 14 (E.D. Pa. Nov. 16, 2023). While the Commission's authority is not unbounded, Congress has granted it "significant discretion in formulating guidelines." *United States v. LaBonte*, 520 U.S. 751, 757 (1997). That is, Congress entrusted the Commission with defining and limiting the kinds of circumstances capable of coming within § 3582(c)(1)(A)'s broad language—meaning that courts are not free to substitute their own opinions for that of the Commission. The Commission's exercise of that authority therefore does not implicate any risk of encroaching on other branches of government. If anything, courts commandeering the role Congress gave to the Commission would prove problematic.

International Dictionary of the English Language 807 (1971))). As for "compelling," it has argued that "compelling" means "forcing, impelling, [or] driving." *Id.* (quoting *McCall*). Amici do not agree with these definitions, *per se*; Mr. Rutherford's brief thoroughly and persuasively explains how members of Congress would have understood "extraordinary" and "compelling" when drafting and enacting the SRA. *See* Br. of Appellant, at 34-38. But even working from the government's preferred definitions, the set of circumstances described in § 1B1.13(b)(6) are "most unusual" and "far from common." And, in individual cases, these circumstances can reveal a serious injustice, "impelling" a district court to act to reduce the sentence.

Further, nothing about the words "extraordinary" and "compelling" excludes, as a category, legal changes. *See Kemp v. United States*, 596 U.S. 528, 540 (2022) (Sotomayor, J., concurring) (explaining in the Fed. R. Civ. P. 60(b)(6) context that "extraordinary circumstances" can include "a change in controlling law"); *see also* Br. of Appellant, at 42-43 & n.14. And crucially, § 1B1.13(b)(6) does not provide that legal changes or prospectively applicable criminal laws, as a general matter, are extraordinary or compelling; nor does it declare that long sentences are necessarily

extraordinary or compelling. Section 1B1.13(b)(6) is far narrower: it requires a defendant to demonstrate a highly specific and rare[7] set of circumstances that includes as just one factor that there is a "gross disparity" related to a "change in law." The English words "extraordinary" and "compelling" are up to the task of encompassing a case that meets this standard, especially now that the Sentencing Commission has adopted it. *See Padgett*, slip op., at 7 ("'Extraordinary' is an adjective addressing matters of degree, not kind. Sunsets occur every day, but some are extraordinary. . . . Nothing about the word 'extraordinary' suggests it could not apply to an unusually long sentence . . . . Similarly, the need to correct an unjust, abnormally disparate sentence . . . can be 'compelling.'").

B. Section 3582(c)(1)(A)'s context reinforces the Sentencing Commission's authority to promulgate § 1B1.13(b)(6).

Section 3582(c)(1)(A)'s context reinforces this plain-text reading. The most essential context for § 3582(c)(1)(A) is that Congress expressly delegated to the Commission the task of "describ[ing] what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples."

[7] *See* Br. of Appellant, at 35-36.

28 U.S.C. § 994(t). With § 1B1.13, the Commission has fulfilled its duty under § 994(t), including by providing that some unusual circumstances that relate, in part, to legal changes can meet this standard. Under §§ 3582(c)(1)(A) and 994(t), this is now the law.

In pending district court cases around the country, the government has entirely ignored this essential context and, instead, has focused on 18 U.S.C. § 3582(c)(2) and 28 U.S.C. § 2255. Its argument appears to be that Congress must have meant for "extraordinary and compelling" not to include changes in law, since an interpretation otherwise would render § 3582(c)(2) (the provision that governs retroactive guideline amendments) irrelevant and conflict with § 2255 (the federal habeas statute).

These two provisions address fundamentally different situations. Section 3582(c)(2) authorizes sentence reductions when an individual "has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). Guidelines are advisory, frequently adjusted, and serve only to channel district courts' discretion within a mandatory statutory range. Congress, rightly recognizing that such changes are unlikely to satisfy § 3582(c)(1)(A)'s "extraordinary and compelling" requirement, yet

believing such amendments may nevertheless justify a sentence reduction, included a separate statutory mechanism for those reductions. Allowing sentence reductions based on the Guidelines' amendments in § 3582(c)(2) should not be interpreted as a Congressional intent to disallow sentence reductions under § 3582(c)(1)(A) based, in part, on changes in the law.

Similarly, a § 3582(c)(1)(A) motion, which allows district courts the discretion to modify a sentence that was lawfully imposed, could never do the work of a § 2255 motion, which seeks to correct convictions or sentences "imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose . . . , or that . . . was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). That is, § 2255 is "a means of contesting the lawfulness of restraint and securing release." *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1969 (2020). By contrast, § 3582(c)(1)(A) is a discretionary safety valve: If the requirements imposed by § 3582(c)(1)(A) and § 1B1.13 are met, and only after consideration of the § 3553(a) factors, a sentencing court has discretion to release the individual from custody, reduce the sentence, or deny the motion entirely. "Properly understood, a motion for a sentence reduction under § 3582(c)(1) or (c)(2)

does not attack the sentence at all. It accepts the legal validity of the sentence imposed but asks for modification to account for changed circumstances." *In re Thomas*, No. 21-1154, __ F.4th __, 2024 WL 389246, at *1 (7th Cir. Feb. 2, 2024); *see also id.* (holding that "[a] motion for a sentence reduction—even one asserting a change in sentencing law—does not qualify as an attack on the original sentencing judgment for the purposes of an *Alexander* filing bar"). Any insinuation by the government that individuals may file § 3582(c)(1)(A) motions that, in essence, are really § 2255 motions is incorrect. Courts know how to recognize an attempt to pass off one kind of claim as another in individual cases, and how to dismiss such claims. *See id*. at *2.

C. Section 1B1.13(b)(6) serves the purposes of § 3582(c)(1)(A) and the Sentencing Reform Act.

In moving away from an opaque parole system as part of the 1984 SRA, Congress acknowledged the need for a "safety valve" for certain defendants. S. Rep. No. 98-225, at 55, 121. That is, Congress recognized the necessity of judicial authority to reduce some previously imposed sentences, acknowledging that "there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by

changed circumstances . . . , [including] cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence." *Id.* at 55-56.

Against that backdrop, the government is unpersuasive in asserting that § 1B1.13(b)(6) runs counter to the SRA's core purposes because it resembles the old parole system and generates the very sentencing disparities that the SRA was designed to reduce. A judicial sentence reduction is nothing like parole, and the Commission, through § 1B1.13(b)(6), is seeking to *reduce* gross disparities that may arise from dramatic legal changes. More fundamentally, the government's notion that § 1B1.13(b)(6) will not advance the SRA's objectives is about *policy*. But Congress entrusted policy decisions in this area to the Commission, not the Department of Justice or the courts.

Historical context leading up to the passage of the SRA is informative in showing that Congress in 1984 would not have thought judicial sentence reductions, even if based in part on a change in law, were akin to the parole system it was abolishing. In most cases under the old system, a person became eligible for parole after serving one-third of their imposed sentence, with the parole decision in the hands of an executive parole board that

focused almost exclusively on rehabilitation. *See Mistretta v. United States*, 488 U.S. 361, 363 (1989) (noting that "parole [was] based on concepts of the offender's possible, indeed probable, rehabilitation"); U.S.S.G. Chapter One, Part A, Introduction and Authority (noting that parole "usually resulted in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence imposed by the court"). Judicial sentence reduction is different—it keeps sentencing decisions in the judiciary (one of the overarching goals of the SRA) and has "deep historical roots" that are distinct from parole. Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 Wm. & Mary L. Rev. 465, 498 (2010). Indeed, the Supreme Court approved of judicial sentence reduction nearly a century ago, decades before the SRA was enacted. *United States v. Benz*, 282 U.S. 304, 311 (1931). Also, far from the parole system's extensive and even exclusive reliance on rehabilitation, § 994(t) expressly prohibits "rehabilitation . . . alone" from serving as the basis for sentence reduction under § 3582(c)(1)(A).

Prior to the SRA, federal law had two judicial sentence-reduction provisions separate from parole: the old Fed. R. Crim. P. 35, and 18 U.S.C.

§ 4205(g). These provisions operated differently, but each gave sentencing courts broad authority to reduce sentences, including based on legal, rather than purely factual, circumstances.[8] Section 3582(c)(1)(A) is narrower than the old Rule 35, or § 4205(g): There must be "extraordinary and compelling" circumstances; any reduction must be consistent with Commission policy statements; and rehabilitation alone is not enough. But given the SRA's replacement of these preexisting mechanisms for judicial reduction, the government is wrong to assume that Congress in 1984 would have thought judicial sentence reduction that could, as a matter of discretion, relate to certain legal changes would undermine its decision to abolish parole.

Far from disregarding the SRA, in promulgating § 1B1.13(b)(6), the Commission looked back to the SRA and also to the role of

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[8] *See, e.g., United States v. Noriega*, 40 F. Supp. 2d 1378, 1380 (S.D. Fla. 1999) (reducing a sentence under Rule 35 based on the "nature of the confinement" and "the considerable disparity between Defendant's sentence and the sentences actually served by his co-conspirators"); *United States v. Diaco*, 457 F. Supp. 371, 376 (D.N.J. 1978) (reducing a sentence under § 4205(g) based on disparities among co-defendants); *see also United States v. Ellenbogen*, 390 F.2d 537, 543 (2d Cir. 1968) ("Rule 35 is intended to give every convicted defendant a second round before the sentencing judge, and at the same time, it affords the judge an opportunity to reconsider the sentence in the light of any further information about the defendant or the case which may have been presented to him in the interim.").

§ 3582(c)(1)(A)—a discretionary judicial sentence-reduction mechanism—within the larger Act. Section 1B1.13(b)(6)'s reference to "unusually long sentences" comes straight from S. Rep. No. 98-225, in which the SRA's Senate drafters explained that the proposed § 3582(c)(1)(A) would apply in "unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances," including not only "cases of severe illness" but also "cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence." S. Rep. No. 98-225, at 55-56, 121; *see also* U.S.S.G. App. C, Amend. 814, Reason for Amendment (Nov. 1, 2023) (citing this language). And, indeed, § 3582(c)(1)(A) may have been essential to the SRA's enactment.[9]

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[9] The Senate Report, which was issued the year before passage, notes that there were those "who would retain parole on the ground that it was a valuable 'safety valve' designed to shorten lengthy sentences." S. Rep. No. 98-225, at 46-47 n.34. It describes congressional testimony explaining that parole was "really unnecessary in order to deal with that occasional case where, in a determinate sentencing scheme, an offender receives a sentence which turns out to be manifestly unfair or 'wrong,' particularly in light of post sentence developments." *Id.* at 53-54 n.74 (citing congressional testimony presented in 1979 by Judge Harold Tyler). Later, the Report explains that § 3582(c)(1)(A) would serve this purpose, as a "safety valve" within the new sentencing scheme. *Id.* at 55-56.

As for disparities, the Commission has promulgated § 1B1.13(b)(6) specifically to address "gross disparities," through reduction of certain unusually long sentences, where changed circumstances compel the court to reduce the sentence. Any claim by the government that § 1B1.13(b)(6) will *increase* unwarranted disparities does not invoke the Commission's authority to promulgate § 1B1.13(b)(6); it is a policy argument suffering from flawed logic.[10] As noted above, the SRA charged the Commission, not the Department of Justice, with formulating sentencing policy. 28 U.S.C. §§ 991, 994.

D. Nothing else invalidates § 1B1.13(b)(6) generally or precludes its application to a claim involving First Step Act § 403.

The government is arguing around the country that § 1B1.13(b)(6) is invalid on its face. But, as discussed above, the government struggles to articulate how the policy statement conflicts with § 3582(c)(1)(A). Many of its arguments suggest that some *other* law prohibits courts from applying

[10] If anything, the nature of § 1B1.13(b)(6)'s individualized analysis means that any resulting disparity will necessarily be *warranted*: Some individuals' circumstances will justify a sentence reduction, while others' circumstances will not. *Cf. Gall v. United States*, 552 U.S. 38, 55 (2007) (sentencing courts should also avoid "unwarranted similarities" in the sentences of defendants who committed the same offense but are not similarly situated).

§ 1B1.13(b)(6) to a case where the gross disparity is related to the FSA's once-in-a-generation amendments reducing statutory sentencing ranges for certain 18 U.S.C. § 924(c) and controlled-substance defendants. Even if the government were correct, such an argument could not invalidate § 1B1.13(b)(6); it would only mean that this provision could not be applied to particular cases. But in any case, the government is wrong.

The FSA itself did not impose any limitation that is relevant here. The applicability provisions in FSA §§ 401 and 403, Pub. L. No. 115-391, §§ 401, 403, 132 Stat. 5194, 5220-22 (2018), which dramatically lowered sentencing ranges for some § 924(c) and controlled-substance defendants, provide for only limited retroactivity: The new lower statutory penalties apply to pending cases, so long as a sentence for the offense has not been imposed as of the date of enactment. Neither provides for full retroactivity, but neither prohibits a court from acknowledging that the impact of this once-in-a-generation legislation on an individual case can be profound and inequitable. Indeed, even those courts that held, in the absence of a policy statement, that legal changes should not be considered in the extraordinary-and-compelling analysis, acknowledged that the same changes could be considered in the context of § 3553(a) factors. *See Andrews*,

12 F.4th at 262 (citing additional cases out of the Sixth and Seventh Circuits). This underscores that there is a meaningful difference between applying a law retroactively and considering the existence of that law when determining, as a discretionary matter, whether a sentence should be reduced.

Finally, background principles of retroactivity, codified in the general federal saving statute, 1 U.S.C. § 109, do not impose any limitation that is relevant here, either. Section 109 states that the "repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide." This simply means that, in the absence of an express command, an ameliorative penalty statute does not, of its own force, affect the legal validity of sentences for offenses committed prior to the statute's enactment. *See Dorsey v. United States*, 567 U.S. 260, 273-75 (2012). In other words, an ameliorative statute does not invalidate sentences already imposed. But § 1B1.13(b)(6) does not purport to declare that any ameliorative statute invalidates any sentence already imposed. Again, it does not even declare that an ameliorative statute—or any other legal change—can, on its own, amount to an extraordinary and compelling basis

for sentencing relief. It instead permits certain kinds of changes to factor into a larger discretionary analysis. The saving statute says nothing at all about whether a court may find that individualized circumstances relating to an unusually long sentence, when combined with the fact that a legal change resulted in a gross disparity impacting the case, present an extraordinary and compelling reason to reduce the lawfully imposed sentence.

Conclusion

Section 1B1.13 now governs all motions under § 3582(c)(1)(A). *Andrews* does not conflict with the new § 1B1.13(b)(6): That opinion was issued during a brief, "vexing" period in which the Sentencing Commission had not yet set policy for defendant-filed motions, and addressed a different legal question. But even to the extent that this Court disagrees and finds that there is a conflict, § 1B1.13(b)(6) abrogates *Andrews*. Further, nothing else invalidates § 1B1.13(b)(6), a duly promulgated policy statement of the Sentencing Commission—the body that Congress charged with making policy here—that courts must follow.

Respectfully submitted,

<u>/s/ David A. O'Neil</u>
David A. O'Neil
Debevoise & Plimpton LLP
801 Pennsylvania Avenue N.W.
Washington, DC 20004
daoneil@debevoise.com
(202) 383-8000

Steven G. Tegrar
Isabelle M. Canaan
Nicholas H. Hallock
Debevoise & Plimpton LLP
66 Hudson Boulevard
New York, New York 10001

Erica K. Zunkel
Attorney
Nicholas B. Smith
Nathaniel G. Berry
Senior Law Students
Criminal and Juvenile Justice Clinic, The University of Chicago Law School
1111 East 60th Street
Chicago, Illinois 60637

Shelley M. Fite
National Sentencing Resource Counsel, Federal Public & Community Defenders
22 East Mifflin Street, Suite 1000
Madison, Wisconsin 53703

Mary Price
Shanna Rifkin
FAMM
1100 H Street NW, Suite 1000
Washington, DC 20005

Lisa Mathewson
Co-Chair, Amicus Committee
National Association of Criminal Defense Lawyers
Mathewson Law LLC
123 South Broad Street, Suite 1320
Philadelphia, PA 19109

Elizabeth A. Blackwood
Counsel & Director of First Step Act Resource Center, National Association of Criminal Defense Lawyers
1660 L Street NW, 12th Floor
Washington, DC 20036

Attorneys for Amici Curiae

Required Certifications

A. Type-Volume. Pursuant to Rule 29(a)(4) of the Federal Rules of Appellate Procedure, and Third Circuit L.A.R. 29.1(b), I certify that, according to the word-counting function of my word processing system (Microsoft Word 2019), this Brief contains 5,659 words, including footnotes, and employs 14-Point Book Antiqua font.

B. Bar Membership. Pursuant to Rules 28.3(d) & 46.1(e) of the Local Appellate Rules, I certify that counsel of record, David A. O'Neil, is an attorney with filing privileges in the United States Court of Appeals for the Third Circuit.

C. Electronic Filing. Pursuant to Rule 31.1(c) of the Local Appellate Rules, I certify that the text of the electronically filed Brief is identical to the text in the paper copies of this Brief as filed with the Clerk. The electronic (PDF) version of this Brief has been checked for viruses using Vipre Virus Protection, Version 3.1, an antivirus program, with all current updates, and no virus was detected.

February 7, 2024 _/s/ *David A. O'Neil*___

Certificate of Service

I certify that on this date, I served the foregoing via this Court's CM/ECF system upon all parties of record.

February 7, 2024 /s/ *David A. O'Neil*