**No. 20-3912**

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# United States Court of Appeals
## FOR THE SIXTH CIRCUIT

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**UNITED STATES,**
***Plaintiff-Appellee,***

**v.**

**JASON JARVIS,**
***Defendant-Appellant.***

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO**

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**BRIEF OF AMICI CURIAE AMERICAN CONSERVATIVE UNION FOUNDATION NOLAN CENTER FOR JUSTICE AND PROFESSOR SHON HOPWOOD IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN BANC**

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## INTERESTS OF AMICI[1]

The American Conservative Union Foundation Nolan Center for Justice is a nonprofit organization dedicated to improving the criminal-justice system in ways that improve public safety, increase government accountability, and protect human dignity. The Center raises public awareness of proposed criminal justice reforms through opinion pieces, media interviews, briefing papers, the testimony of expert witnesses at government hearings, and the judicial process. On occasion, it works with policymakers to advance conservative solutions to address matters of societal concern. The First Step Act was one such occasion, where the Nolan Center worked closely with the White House and conservatives in Congress to craft and enact meaningful federal criminal justice reform legislation.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel, any party, or any other person or entity—other than amici curiae, their members, and their counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

criminal justice reform. He was an advisor to the Trump White House and several members of Congress during the enactment of the First Step Act of 2018. *See Remarks By President Trump at Signing Ceremony for the First Step Act of 2018*, 2018 WL 6715859, at *14 (Dec. 21, 2018) (Hopwood's statement at the White House signing ceremony of the First Step Act).

Amici's interest is in ensuring that federal courts interpret the First Step Act in light of congressional intent as *expressed through the statutory text*.

## ARGUMENT

A panel of this Court held that, in determining whether a defendant has presented "extraordinary and compelling" grounds for a sentence reduction under the First Step Act, a district court may not consider the First Step Act's nonretroactive changes to sentencing law that would have imposed a shorter term of imprisonment had the defendant been convicted after the First Step Act's enactment. The panel held that the First Step Act's nonretroactive changes to sentencing law, even when combined with other factors, *as a matter of law* cannot provide an extraordinary and compelling reason for a compassionate-release

sentence reduction. *See United States v. Jarvis*, 999 F.3d 442, 444 (6th Cir. 2021). This Court should grant rehearing en banc and reverse the erroneous panel decision.

## I. CONGRESS ENACTS THE FIRST STEP ACT TO ADDRESS THE WORST INEQUITIES IN FEDERAL SENTENCING AND EXPAND DISTRICT COURT DISCRETION OVER COMPASSIONATE RELEASE.

The First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018), is "the most significant criminal justice reform bill in a generation," 164 Cong. Rec. S7,649 (Sen. Grassley), and resulted from an "extraordinary political coalition," that came together to support criminal justice reform, *id*. at S7,645 (daily ed. Dec. 17, 2018) (statement of Sen. Durbin).

The impetus for the Act was a federal-prison population explosion that left policymakers with a "stark" choice to reduce prison costs before its budgeting consequences eliminated other criminal-justice priorities, such as hiring more federal agents and prosecutors to enforce federal criminal law. H. Rpt. 115-699, at 24. Mandatory-minimum sentences, in particular, had fueled the explosion of the federal corrections budget, led to excessive punishments, and imposed large social costs on the country. *See* SEN. MIKE LEE: A CONSERVATIVE CASE FOR CRIMINAL JUSTICE REFORM (Nov. 13, 2018), at: https://bit.ly/3B265D0 (making the case for the First

Step Act's sentencing reforms and arguing that federal mandatory-minimum sentences "lead to outcomes that strike many people as unfair" and that "excessive prison sentences break apart families and weaken communities").

Congress consequently enacted several sentencing provisions that reduced mandatory-minimum sentences. *See* First Step Act, §§ 401–404. Congress enacted four changes to sentencing law, three of which were not retroactively applicable to those previously sentenced: Section 401 reduced mandatory-minimum prison sentences for some defendants with prior drug convictions; Section 402 expanded the "safety valve" provision that allows courts to sentence some defendants below the ordinary mandatory-minimum penalties; and Section 403 eliminated the stacking provisions of 18 U.S.C. § 924(c), which previously imposed a consecutive 25-year mandatory-minimum sentence for using a firearm in a "second or subsequent" conviction.

By contrast, in Section 404, Congress allowed district courts to retroactively apply the Fair Sentencing Act of 2010, increasing the threshold quantities of crack cocaine sufficient to trigger mandatory-minimum sentences. But Congress included no language foreclosing

district courts' consideration of the three prospective sentencing reforms as factors in finding extraordinary and compelling reasons for compassionate release. Nothing in the text remotely touches on that issue.

In Section 603(b), Congress amended the compassionate-release statute in 18 U.S.C. § 3582(c)(1)(A). Congress originally enacted compassionate release for district courts to use, on an individualized basis, to correct unusually long sentences in the absence of federal parole. Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 101, 115–18 (2019). At that time, Congress assigned the Bureau of Prisons a gatekeeping role, in that a defendant's sentence could be reduced by a court only if the BOP first moved for release. *See* 18 U.S.C. § 3582(c)(1)(A) (2016). Congress clearly and specifically delegated to the United States Sentencing Commission the role of promulgating policy statements to describe "what should be considered extraordinary and compelling reasons for sentence reduction[s]." 28 U.S.C. § 994(t).

In 2013, the DOJ's Inspector General found that if the BOP "effectively managed [the] compassionate release program," it would allow the BOP to save costs and manage "its continually growing inmate

population." DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM i (Apr. 2013). Congress's intentions for compassionate release, however, were thwarted because the BOP had "not properly manage[d] the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered." *Id*. at 11. Congress responded, with the First Step Act, by removing the BOP's gatekeeper role and permitting district courts to determine when a prisoner has presented extraordinary and compelling circumstances warranting a sentence reduction, even when the BOP disagrees. *See* 18 U.S.C. § 3582(c)(1)(A).

## II. THE PANEL DECISION WRONGLY TREATS DISTRICT COURTS' CONSIDERATION OF THE FIRST STEP ACT'S SENTENCING-LAW REFORMS IN DECIDING COMPASSIONATE-RELEASE MOTIONS IN INDIVIDUAL CASES AS THOUGH IT WERE CONTRARY TO CONGRESS'S DECISION NOT TO MAKE THOSE REFORMS CATEGORICALLY RETROACTIVE.

The panel decision noted that Congress "struck a delicate balance" in enacting the First Step Act's sentencing reforms, one of which was retroactively applicable and several that were not, while also modifying the compassionate-release statute. *Jarvis*, 999 F.3d at 443. From this congressional action, the panel extrapolated that a district court cannot

consider the nonretroactive reforms as extraordinary and compelling reasons in deciding compassionate-release motions because doing so would "thwart Congress's retroactivity choices," rendering them "useless." *Id*. at 444.

The panel decision wrongly treats a district court's use of the First Step Act's sentencing-law reforms in deciding a compassionate-release motion as though it amounts to retroactive application of those same reforms. To obtain compassionate release, a defendant must prove that there are *individualized* extraordinary and compelling circumstances to warrant a sentence-reduction, so a defendant must rely on more than just a categorical change in law to obtain relief. But Congress's decision not to apply all of the First Step Act's reforms retroactively means only that those reforms do not apply *categorically* with retrospective effect. *See United States v. McCoy*, 981 F.3d 271, 286–87 (4th Cir. 2020). That Congress foreclosed categorical relief does not mean that it foreclosed individualized relief where a district court uses nonretroactive sentencing reforms, in addition to other factors, as extraordinary and compelling reasons for a sentence reduction in a particular case. Nor would granting such a reduction render Congress's retroactivity choices

useless. *See id.* at 287 (holding that "we see nothing inconsistent about Congress's paired First Step Act judgments: that not all defendants convicted under § 924(c) should receive new sentences, but that the courts should be empowered to relieve some defendants of those sentences on a case-by-case basis"); Hopwood, *Second Looks*, 41 CARDOZO L. REV. at 124 (same). It instead honors the legislative compromises that Congress made through its duly enacted text, which is silent on whether courts may consider nonretroactive sentencing-law reforms in granting compassionate release. *See* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 431 (2005) (arguing that the messy legislative process "makes it difficult if not impossible" for judges to divine legislative intent divorced from statutory text).

A district court's decision to rest a compassionate-release sentence reduction on Section 403, combined with other factors, is therefore not the same as retroactively applying Section 403. This is analogous to a district court's decision to rest compassionate release, in part, on a defendant's rehabilitation: the compassionate-release regime prohibits the grant of a reduction where rehabilitation *alone* is the only extraordinary and compelling circumstance, and yet rehabilitation is

permissibly considered in combination with other factors. *See* 28 U.S.C. § 994(t) (prohibiting rehabilitation "alone" as a ground for compassionate release); Hopwood, *Second Looks*, 41 CARDOZO L. REV. at 118 ("Congress, however, contemplated that rehabilitation could be considered with other extraordinary and compelling reasons sufficient to resentence people in individual cases. Indeed, the use of the modifier 'alone' signifies that rehabilitation could be used in tandem with other factors to justify a reduction.").

Until and unless the Sentencing Commission promulgates a new policy statement clarifying what factors district courts may consider in deciding motions for compassionate-release sentence reductions, this Court should refrain from holding that factors are legally *impermissible* unless consideration of those factors conflict with the *statutory text*. *See United States v. Owens*, 996 F.3d 755, 764 (6th Cir. 2021) (Thapar, J., dissenting) (explaining that a district court's circumvention of "a contrary statutory command" is impermissible when identifying whether a defendant has extraordinary and compelling circumstances). To do otherwise is to substitute this Court's judgment for Congress's. Because a district court's consideration of nonretroactive sentencing-law reforms

as extraordinary circumstances does not contravene any contrary statutory command, it is legally permissible (and is in fact consistent with the legislative history and plain text of the First Step Act). *See McCoy*, 981 F.3d at 286–87; *United States v. Black*, 999 F.3d 1071, 1075–76 (7th Cir. 2021); *United States v. McGee*, 982 F.3d 1035, 1045–1048 (10th Cir. 2021).

## III. THE PANEL DECISION IGNORED THE STATUTORY TEXT THAT SHOWS CONGRESS'S INTENT NOT TO FORECLOSE A DISTRICT COURT'S CONSIDERATION OF FACTORS IN DETERMINING WHETHER A DEFENDANT HAS EXTRAORDINARY AND COMPELLING CIRCUMSTANCES.

The panel decision also asked, "Why would the same Congress that specifically decided to make these sentencing reductions non-retroactive in 2018 somehow mean to use a general sentencing statute from 1984 to unscramble that approach?" *Jarvis*, 999 F.3d at 444.

With all due respect, that is the wrong question, because it requires courts to "reconstruct what the legislature would have done about a policy question that it did not resolve explicitly in the statute." John F. Manning, *Inside Congress's Mind*, 115 COLUM. LAW REV. 1911, 1918–19 (2015); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 349–51 (2012) (rejecting courts' use of "imaginative reconsideration" when interpreting statutes).

Congress delegated to the Sentencing Commission the responsibility to determine what constitutes extraordinary and compelling circumstances for a sentence reduction. *See* 28 U.S.C. § 994(t). Thus, the relevant question is whether the Commission is empowered to create a policy statement that permits district courts to consider the nonretroactive sentencing-law reforms, combined with other factors, in determining whether a defendant has presented extraordinary and compelling reasons for a sentence reduction.

That question is resolved definitively by looking to the statutory text. When Congress provided the Commission with the role of promulgating policy statements to outline the criteria for compassionate release, it foreclosed only one ground for relief: "Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." 28 U.S.C. § 994(t); *see also* Hopwood, *Second Looks*, 41 CARDOZO L. REV. at 123–24 (noting that Congress limited the ability of rehabilitation alone to constitute extraordinary circumstances, "so that judges could not use it as a direct substitute for the abolished parole system"). Congress excluded nothing else, leaving the Commission with full authority to determine that *any* other factors might permissibly bear on a district

court's determination of extraordinary and compelling circumstances. If the Congress that enacted the First Step Act had intended to *forbid* the Commission from permitting district courts to consider any other factors as extraordinary and compelling circumstances, it could have amended 28 U.S.C. § 994(t) and stated that intention expressly. It did not.

The Sentencing Commission is empowered to promulgate a new policy statement that expressly permits district courts to consider nonretroactive sentencing-law reforms, combined with other factors, in determining whether a defendant has presented extraordinary and compelling reasons. That the Commission presently lacks a quorum is irrelevant to interpretation of the underlying statutes. Since the Commission can promulgate a policy statement permitting consideration of nonretroactive sentencing reforms, district courts may certainly consider such criteria now in the absence of a new and applicable policy statement. *See United States v. Jones*, 980 F.3d 1098, 1111 (6th Cir. 2020) (holding that for defendant-filed motions, district courts "have full discretion to define 'extraordinary and compelling' without consulting the [inapplicable] policy statement" in U.S.S.G. § 1B1.13).

The panel decision disregards the clear text of 28 U.S.C. § 994(t) and is in tension with *Jones*'s holding that district courts possess full discretion to determine extraordinary and compelling circumstances for a defendant-filed motion.

## IV. THE LEGISLATIVE HISTORY CONFIRMS THAT CONGRESS DID NOT INTEND TO PRECLUDE DISTRICT COURTS FROM CONSIDERING NONRETROACTIVE CHANGES IN LAW, COMBINED WITH OTHER GROUNDS, AS EXTRAORDINARY AND COMPELLING CIRCUMSTANCES.

The statutory text of the First Step Act resolves that Congress did not foreclose district courts' consideration of prospective sentencing-law reforms in evaluating whether a defendant has extraordinary and compelling circumstances. That should be the end of the matter.

But the legislative history, too, points in the same direction as the text. A prior version of the First Step Act would have allowed retroactive application of most of its changes. *See* Sentencing Reform and Corrections Act of 2015, S. 2123, §§ 101, 104–106. But by November 2018, the reform bill was stuck in the Senate, and its prospects for passage looked bleak. *See* Philip Elliott, *A Criminal Justice Bill Has Broad Bipartisan Support, Why That's Not Enough*, TIME (Nov. 28, 2018). So lawmakers sought support from law-enforcement groups as a way to move the bill towards passage.

The Fraternal Order of Police voiced support for the bill, but only in exchange for lawmakers' making three of the four sentencing changes apply prospectively. *See* NATIONAL ORDER OF FRATERNAL POLICE, FOP PARTNERS WITH PRESIDENT TRUMP ON CRIMINAL JUSTICE REFORM (Nov. 9, 2018), at: https://bit.ly/2UHTAvk (explaining in a press release that the FOP "engaged with our allies on Capitol Hill to make sure these [sentencing] changes are prospective and would not, except in the case of the existing Fair Sentencing Act, be applied retroactively"). Importantly, neither the FOP nor lawmakers sought corresponding changes to the compassionate-release statute as amended by the First Step Act. The resulting bill—and its inclusions and exclusions of statutory language—was thus a classic result of legislative compromises, and those legislative compromises should be respected.[2]

[2] Allowing district courts to correct unusually long sentences for people with demonstrated records of rehabilitation through compassionate release also represents good public policy. *See* Hopwood, *Second Looks*, 41 CARDOZO L. REV. at 107–15.

## CONCLUSION

For the reasons above, amici respectfully request that the Court grant rehearing en banc and reverse.

Dated: July 22, 2021

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE AND SERVICE

1. This motion complies with the type-volume limitation of Fed. R. App. P. 29(a)(4) and 32(a)(7)(B) because it contains 2,600 words, excluding the parts of the motion exempted by Fed. R. App. P. 32(f). *See* Fed. R. App. P. 29(b)(4) ("The brief must not exceed 2,600 words.").
2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in New Century Schoolbook, Size 14.
3. I certify that on July 22, 2021, I electronically filed the foregoing Brief of Amici Curiae, with notice being sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

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