No. 20-1732

In the Supreme Court of the United States

THOMAS BRYANT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT*

REPLY BRIEF FOR THE PETITIONER

SHON HOPWOOD
KYLE SINGHAL
ANN MARIE HOPWOOD
DAWINDER S. SIDHU
HOPWOOD & SINGHAL PLLC
1701 Pennsylvania Avenue, N.W.
Washington, DC 20006

KANNON K. SHANMUGAM
Counsel of Record
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

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The government acknowledges that, since the enactment of the First Step Act of 2018, the courts of appeals have divided on the question whether Section 1B1.13 of the United States Sentencing Guidelines is an "applicable" policy statement that binds district courts when considering defendant-filed motions for compassionate release under 18 U.S.C. 3582(c)(1)(A). And remarkably, the government does not defend the correctness of the decision below. The government's silence is deafening.

Faced with an obvious candidate for this Court's review, the government attempts to thread the needle by arguing that the question presented here falls within the category of cases involving an application of the Sentencing Guidelines—cases that this Court generally declines to hear under *Braxton* v. *United States*, 500 U.S. 344

(1991). The government further argues that the conflict on the question presented has limited practical importance. Those contentions lack merit. The Court's review is urgently needed, and the petition for a writ of certiorari should be granted.

A. The Question Presented Does Not Implicate The Principle Expressed In *Braxton* v. *United States*

The *Braxton* principle does not apply to the question presented in this case.

1. In *Braxton*, the Court granted review but ultimately declined to resolve a question concerning the applicability of a Guidelines provision because the Sentencing Commission was in the process of amending the relevant provision in a way that would "eliminate" the conflict among the courts of appeals. See 500 U.S. at 348. The "congressional expectation," the Court explained, was that the Commission would resolve such conflicts. *Ibid.* The principle articulated in *Braxton* thus applies in situations in which the courts of appeals are divided on the meaning of a Guidelines provision. Cf. *Longoria* v. *United States*, 141 S. Ct. 978, 979 (2021) (statement of Sotomayor, J., respecting the denial of certiorari).

This case does not present a dispute about the meaning of a Guidelines provision; instead, it presents a question of statutory interpretation about what constitutes an "applicable" policy statement under 18 U.S.C. 3582(c)(1)(A). The traditional expectation is that this Court will resolve conflicts on questions of federal statutory interpretation. See *Braxton*, 500 U.S. at 348. Indeed, this Court has specifically granted review in a number of cases presenting questions of statutory interpretation concerning the interplay between 18 U.S.C. 3582 and the Sentencing Guidelines. See, *e.g.*, *Hughes* v. *United States*, 138 S. Ct. 1765, 1771 (2018); *Freeman* v. *United States*, 564

U.S. 522, 530 (2011); see also *Dillon* v. *United States*, 560 U.S. 817, 826 (2010) (interpreting the text of 18 U.S.C. 3582(c)(2) in the context of proceedings to modify a term of imprisonment based on the retroactive amendment of the Sentencing Guidelines). The Court should likewise resolve the question of statutory interpretation presented here.

In *Braxton*, the Sentencing Commission had "already undertaken a proceeding that w[ould] eliminate the circuit conflict" at issue. 500 U.S. at 348. But here, there is no guarantee that the Commission would definitively resolve the question presented here even if it attained a quorum and then prioritized and promulgated a new policy statement governing compassionate release. As the government recognizes, the Commission "could take a variety of approaches" in crafting a new policy statement. Br. in Opp. 13. For example, the Commission could add to the categories of extraordinary and compelling circumstances without expressly taking a position on whether its policy statement applies to both petitions filed by the Federal Bureau of Prisons and those filed by federal prisoners in a post-First Step Act world. Accordingly, "[t]here is no guarantee that the Commission" will amend U.S.S.G. § 1B1.13 "in a way that w[ill] resolve the conflict here." Barkow & Newton Br. 18.

2. The government has no answer to the practical and political realities that will prevent the Sentencing Commission from attaining a quorum and promulgating a new policy statement anytime soon. See Pet. 19-21; Barkow & Newton Br. 13-17. Even if new Commissioners were nominated, it is highly unlikely that they would be confirmed in light of the prioritization of judicial confirmations before next year's midterm elections. See, *e.g.*, Madison Alder, *Midterm Fears Quicken Pace on Biden Judicial Nominations*, Bloomberg Law (Sept. 27, 2021). As of the

date of this filing, not a single nomination has been made, despite six out of seven positions remaining vacant and the lack of a quorum since January 2019.

Even if new Commissioners were nominated by the end of this year and confirmed sometime in early 2022, it could still take two or more years for a new policy statement to take effect. The Commission would first need to prioritize the promulgation of a new compassionate-release policy statement—hardly a certainty, given that the Commission took more than two decades to issue the existing one. See *United States* v. *Jones*, 980 F.3d 1098, 1104 (6th Cir. 2020). The Commission would then go through a multistep deliberative process that "[i]n the ordinary course" would take "at least a year and a half." Barkow & Newton Br. 11.

The government argues that, because policy statements are not required to be submitted to Congress through the Commission's normal process, the Commission could in theory promulgate a policy statement and "put it into effect any time." Br. in Opp. 16 (citing U.S. Sentencing Commission Rule of Practice & Procedure 4.1 (2016)). But as two former Sentencing Commission officials explain in their brief as amici curiae, "in practice the Commission treats guidelines and policy statements the same for amendment purposes," meaning that a policy statement of this magnitude would go through the normal process. Barkow & Newton Br. 11 (citing U.S. Sentencing Commission Rules of Practice & Procedure 2.2, 4.1, 4.3-4.5, 5.2 & App. C).

In the best-case scenario, therefore, a new policy statement would be unlikely to become law until late 2023. And given the current political realities, it is more likely that any new policy statement will not become law until much later.

In the face of the prospect of such lengthy delay, the government argues (Br. in Opp. 16-17) that review is unwarranted because petitioner could wait to file a second petition for compassionate release if the Commission promulgates a new and favorable policy statement. But that argument assumes that any policy statement promulgated by the Commission at some point in the future will satisfactorily resolve the conflict among the courts of appeals. And it would require federal prisoners sentenced in the Eleventh Circuit—unlike prisoners sentenced anywhere else—to wait in prison for what could be years before having a viable chance at obtaining release. By contrast, if petitioner received a favorable decision from this Court, he could seek immediate release now upon the very grounds that have led to the immediate release of prisoners in other circuits. See Pet. 17-18; FAMM Br. 12-22.

If the Court does not act, the decision below will exacerbate sentencing inequities and place those sentenced in the Eleventh Circuit under a far different compassionate-release regime than prisoners sentenced elsewhere. Such a disparity is untenable, and the resolution of this important question cannot wait for the Commission to act.

B. The Question Presented Is Exceptionally Important And Warrants Review In This Case

The government also argues (Br. in Opp. 17-18) that the practical importance of the disagreement in the court of appeals is "overstated." The government is again incorrect.

1. As a preliminary matter, the government fails to address the various reasons stated by amici as to why this statutory issue is vitally important and warrants immediate review. See FAMM Br. 11-23; Barkow & Newton Br. 18-23; Cato Br. 12-19. The government instead argues (Br. in Opp. 17) that the disagreement among the courts

of appeals is practically unimportant because those courts agree that the policy statement in U.S.S.G. § 1B1.13 guides district courts' review and none of those courts has precluded district courts from consulting the policy statement when adjudicating prisoner-filed motions. But considering the criteria in the policy statement is not the same as being bound by it. Petitioner argued that he presented extraordinary and compelling grounds beyond those grounds listed in the policy statement, and the Eleventh Circuit held that relief was unavailable because the policy statement governed prisoner-filed motions. See Pet. App. 43a-44a. Even if a district court can still consider the policy statement, it would not preclude relief on grounds the statement does not list.

As one amicus explains, the decision below prohibits district courts within the Eleventh Circuit from granting relief on an array of extraordinary and compelling grounds that would be available in most other circuits. See FAMM Br. 12-22. And because any federal prisoner sentenced by a district court in the Eleventh Circuit can seek compassionate release, the resolution of this circuit conflict impacts far more cases than other conflicts over the interpretation of provisions of the First Step Act that the Court has already agreed to decide. See, *e.g.*, *Terry* v. *United States*, 141 S. Ct. 1858, 1860 (2021); *Concepcion* v. *United States*, No. 20-1650 (cert. granted Sept. 30, 2021).

2. The government also argues (Br. in Opp. 17-18) that, even under the decision below, federal prisoners may still be able to obtain some relief as a result of the COVID-19 pandemic. The government notes that it has taken the position that extraordinary and compelling circumstances are present if a federal prisoner "has not been offered a COVID-19 vaccine" and presents some of the risk factors for COVID-19 recognized by the Centers for Disease Control (CDC). *Ibid.* The government further observes

that some district courts have granted relief in pandemic-related cases. See *ibid.*

The government's purported concession is an empty gesture. Today, all federal prisoners now have access to a vaccine. See *United States* v. *Broadfield*, 5 F.4th 801, 802 (7th Cir. 2021). And once a prisoner has been offered the vaccine, the government's apparent position is that the presentation of CDC risk factors do *not* provide extraordinary and compelling reasons for release. See *United States* v. *De Leon*, No. 20-14566, 2021 WL 3478372, at *3 n.2 (11th Cir. Aug. 9, 2021). In addition, the cases cited by the government (Br. in Opp. 18) in which district courts in the Eleventh Circuit have granted release in pandemic-related cases predate the decision below. See *United States* v. *Potts*, Crim. No. 06-80070, 2020 WL 5540126, at *3-*5 (S.D. Fla. Sept. 14, 2020); *United States* v. *Hope*, Crim. No. 13-16, 2020 WL 4207107, at *3-*4 (S.D. Ga. July 22, 2020).

The Eleventh Circuit's recent decision in *United States* v. *Singleton*, No. 20-14366, 2021 WL 4926293 (Oct. 21, 2021), illustrates how the decision below could prevent prisoners with COVID-19 risk factors from receiving compassionate release. There, the prisoner argued that her hypertension was a ground recognized by the CDC as placing her at risk of severe illness or death due to COVID-19, and that it therefore constituted an extraordinary and compelling reason for a sentence reduction. Citing the decision below, the court of appeals held that the policy statement in U.S.S.G. § 1B1.13 precluded relief because the prisoner's medical condition did not "substantially diminish" her ability to provide "self-care" in prison. *Id.* at *3. If it had not been constrained by the decision below, the district court in that case could have concluded that the prisoner's conditions qualified her for compassionate release.

The decision below thus creates situations in which a prisoner has been vaccinated and faces a serious risk of severe illness or death from COVID-19, yet cannot meet the medical criteria in the current Sentencing Guidelines policy statement—which the Commission adopted in 2007 without consideration of the currently ongoing pandemic. Cases of that variety simply underscore why prisoners in the Eleventh Circuit need resolution of the question presented sooner rather than later.

* * * * *

The government acknowledges the clear conflict among the courts of appeals on the question of statutory interpretation presented in this case. It offers no defense of the decision below. And it identifies no impediment to review of the question presented. Its modest arguments against further review wither under scrutiny. The Court's review is urgently required. The petition for a writ of certiorari should be granted.

Respectfully submitted.

SHON HOPWOOD
KYLE SINGHAL
ANN MARIE HOPWOOD
DAWINDER S. SIDHU
HOPWOOD & SINGHAL PLLC
1701 Pennsylvania Avenue, N.W.
Washington, DC 20006

KANNON K. SHANMUGAM
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

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