DAMN THE TORPEDOES! AN UNPRINCIPLED, INCORRECT, AND LONELY APPROACH TO COMPASSIONATE RELEASE

Christopher J. Merken† *& Barnett J. Harris*†

When Congress passed the First Step Act in 2018, it extended to federal prisoners the right to file their own motions for compassionate release under 18 U.S.C. § 3582(c)(1)(A). As COVID-19 ravaged prisons, sentencing courts received a massive influx of prisoner-filed compassionate-release motions. But because the United States Sentencing Guidelines and the relevant Application Note predated the First Step Act, and therefore made no mention of prisoner-filed compassionate-release motions, sentencing courts were unsure whether they had discretion to determine whether a prisoner presented "extraordinary and compelling circumstances" warranting compassionate release.

Every United States Court of Appeals to consider whether sentencing courts had discretion in evaluating prisoner-filed compassionate-release motions agreed they did. All but one. In United States v. Bryant, *the Eleventh Circuit incorrectly interpreted the First Step Act, the Sentencing Guidelines, and the Application Note. Today, two Americas exist. Federal prisoners in forty-seven states may request compassionate release, and sentencing courts have the discretion to determine whether extraordinary and compelling circumstances warrant relief. Federal prisoners in Alabama, Florida, and Georgia may also request compassionate release, but the Bureau of Prisons, not sentencing courts, determines which reasons outside those enumerated in the Application Note are extraordinary and compelling.*

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† Litigation Associate, Dechert, LLP; Former Law Clerk to Judge Jane R. Roth (3d Cir. 2021–2022) and Judge Madeline H. Haikala (N.D. Ala. 2020–2021); B.A., University of Delaware; J.D., Villanova University Charles Widger School of Law; LL.M., Temple University Beasley School of Law.

† Litigation Associate, Willkie Farr & Gallagher, LLP; B.A., University of Delaware; J.D., Georgetown University Law Center.

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This Article examines compassionate release's history, critiques the Eleventh Circuit's Bryant *opinion, and proposes three avenues to return discretion to sentencing judges: the Sentencing Commission could amend the Application Note, Congress could legislate, and a prisoner could seek en banc review in the Eleventh Circuit challenging* Bryant *as wrongly decided.*

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INTRODUCTION

"[T]he judicial enterprise is a *human* enterprise, not a *mechanistic* one."[1] Indeed, "[f]or much of American history, judges had largely unregulated discretion to issue sentences within statutory limits."[2] As the COVID-19 pandemic engulfed federal prisons, federal judges were asked to exercise their discretion under 18 U.S.C. § 3582(c)(1)(A), the compassionate-release statute, and modify the sentences of prisoners they had previously sentenced. "But while the case for compassionate release of elderly, aging, or sick prisoners or prisoners who face family emergencies is easy, almost intuitive, to understand, it has proven hard to administer."[3] Compassionate release is an important discretionary tool in the sentencing court's toolbelt. Although originally available only through a motion filed by the Director of the Bureau of Prisons (BOP), the First Step Act of 2018 (FSA) expanded access to compassionate release. Now, prisoners can file their own motions for compassionate release, a right they embraced during the COVID-19 pandemic.

But what to do about the regulation of compassionate release? The United States Sentencing Commission promulgated a rule years before prisoners could file their own compassionate-release motions. The rule, housed in an Application Note to the United States Sentencing Guidelines,[4] clearly applies only to BOP-filed motions for compassionate release. Indeed, that is all it could cover because, until 2018, BOP-filed motions were the only compassionate-release motions. But now, with the FSA's creation of prisoner-filed motions, courts must decide what to do

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1 WAYNE BATCHIS, THE RIGHT'S FIRST AMENDMENT: THE POLITICS OF FREE SPEECH & THE RETURN OF CONSERVATIVE LIBERTARIANISM 51 (2016).

2 Griffin Edwards, Stephen Rushin & Joseph Colquitt, *The Effects of Voluntary and Presumptive Sentencing Guidelines*, 98 TEX. L. REV. 1, 2 (2019); *see also* PREET BHARARA, DOING JUSTICE: A PROSECUTOR'S THOUGHTS ON CRIME, PUNISHMENT, AND THE RULE OF LAW 234–35 (2019) ("The judge is the robed oracle, the voice of God; if your fate is in a judge's hands, she might as well be holding a wand as a gavel.").

3 Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519, 546 (2020); *see also* Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 232 n.234 (2017) ("[N]arrow eligibility requirements, burdensome application and review procedures, and the ever-present worry of political risk have drastically limited the impact of [compassionate-release] programs.").

4 *See* Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 384 (2005) ("Sentencing guidelines reflect a common way to provide guidance in discretionary, determinate sentencing systems. In broad strokes, sentencing guidelines can be either 'presumptive' or 'voluntary,' although there can be many variations under these labels. Presumptive sentencing guidelines require judges to follow the guidelines' sentencing recommendations or justify their deviation from them. Legislatures often authorize appellate judicial review to enforce these guidelines. Fully voluntary guidelines, in contrast, are true recommendations; they rely on reason and moral suasion to encourage compliance.").

with these prisoner-filed motions. Do sentencing judges have discretion to determine what constitutes an "extraordinary and compelling reason" for compassionate release? Or are they constrained by what the BOP says constitutes an extraordinary and compelling reason?

"To date, only one circuit court has adopted the . . . position that the . . . compassionate release criteria remain binding on district court judges' ability to decide motions for compassionate release, regardless of who brings the motion."[5] In a 2-1 decision in May 2021, a panel of the United States Court of Appeals for the Eleventh Circuit staked out this lonely position.[6] The majority in *United States v. Bryant* suggested that every other circuit had erred in interpreting the Sentencing Guidelines.[7] Although the Eleventh Circuit was alone in its analysis of the Sentencing Guidelines, and although the issue created an extremely lopsided circuit split, the United States Supreme Court denied a petition for a writ of certiorari.[8] So today, federal judges in Alabama, Florida, and Georgia cannot exercise their discretion to grant prisoner-filed motions for compassionate release based on compelling circumstances.

This Article analyzes the Eleventh Circuit's split opinion in *Bryant* and proposes a broad interpretation of the compassionate-release standard to provide the most relief to inmates in need. First, we discuss the history of compassionate release, from the Comprehensive Crime Control Act of 1984 to the FSA and the COVID-19 pandemic's clarifying focus on the compassionate-release issue. Next, we explain and critique the Eleventh Circuit's decision in *Bryant*. Then, we outline the arbitrary negative consequences of the *Bryant* decision. Finally, we offer several proposals to remedy the disparity between *Bryant* and the rest of the United States.

Federal judges should not have to helplessly watch as prisoners they feel have a right to compassionate release remain imprisoned because of outdated language.

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5 John F. Ferraro, Note, *Compelling Compassion: Navigating Federal Compassionate Release After the First Step Act*, 62 B.C. L. REV. 2463, 2500 (2021).

6 United States v. Bryant, 996 F.3d 1243 (11th Cir. 2021).

7 *Id.* at 1259–61.

8 *See* Bryant v. United States, 142 S. Ct. 583 (2021).

I. BACKGROUND

A. *A Brief History of Compassionate Release*

It is hard to understand the modern compassionate-release mechanism, and, importantly, the scope of the federal courts' role in the compassionate-release system, without some historical context. Compassionate release is a process in the criminal justice system that allows judges to release prisoners before they serve their entire sentences in "extraordinary and compelling" circumstances.[9] Congress enacted the modern version of the federal compassionate-release program as part of the Sentencing Reform Act of 1984 (SRA).[10] This statute was a companion of the Comprehensive Crime Control Act of 1984 (CCCA).[11]

The CCCA was "the product of a decade long bipartisan effort . . . to make major comprehensive improvements to the federal criminal laws."[12] Before 1984, judges had almost unfettered discretion in setting a sentence within the statutory limits for each offense.[13] After a judge imposed a sentence, the Parole Commission would then determine how much time a prisoner served before being released on parole, so long as the prisoner served at least one-third of the judicially imposed sentence.[14] Congress became upset with such unfettered judicial discretion in sentencing—and the results that ensued.[15] Congress specifically noted:

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9 Siobhan A. O'Carroll, Note, *"Extraordinary and Compelling" Circumstances: Revisiting the Role of Compassionate Release in the Federal Criminal Justice System in the Wake of the* First Step Act, 98 WASH. U. L. REV. 1543, 1543 (2021).

10 Yolanda Bustillo, Note, *Compassionate Release During Crises: Expanding Federal Court Powers*, 40 YALE L. & POL'Y REV. 223, 232 (2021) (citing 18 U.S.C. § 3582(c)(1)(A) (1984)).

11 *See* Pub. L. No. 98-473, 98 Stat. 1837 (1984).

12 S. REP. NO. 98-225, at 1 (1983), *as reprinted in* 1984 U.S.C.C.A.N. (98 Stat. 1837) 3182, 3184; S. REP. NO. 98-223, at 34 (1983) ("[The federal sentencing system] is in desperate need of reform. . . . It defeats the reasonable expectation of the public that a reasonable penalty will be imposed at the time of the defendant's conviction, and that a reasonable sentence actually will be served." (quoting 129 CONG. REC. S2,090 (daily ed. Mar. 3, 1983) (statement of Sen. Kennedy))).

13 18 U.S.C. § 4205(b) (1982) (repealed 1984). Studies showed similarly situated offenders served widely disparate sentences, which was thought to mask discrimination based on the individual's race, sex, or status in the community. S. REP. NO. 98-225, at 40–50, 3223–33; Ilene H. Nagel, Stephen Breyer & Terence MacCarthy, *Symposium: Equality Versus Discretion in Sentencing*, 26 AM. CRIM. L. REV. 1813, 1815–16 (1989); *see also* Edwards, Rushin & Colquitt, *supra* note 2.

14 § 4205(a); *see also* 131 CONG. REC. H488 (daily ed. Jan. 3, 1985) (statement of Rep. Hamilton) ("[A]bout 80% of all criminals are paroled after serving one third of their time. Now sentences will be reduced only 15% for good behavior.").

15 S. REP. NO. 98-225, at 38, 1984 U.S.C.C.A.N. at 3221 ("One offender may receive a sentence of probation, while another—convicted of the very same crime and possessing a comparable criminal history—may be sentenced to a lengthy term of imprisonment. Even two such offenders

> [E]very day federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. . . .
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> These disparities . . . can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence. This sweeping discretion flows from the lack of any statutory guidance . . . . These problems are compounded by the fact that the sentencing judges and parole officials are constantly second-guessing each other, and, as a result, prisoners and the public are seldom certain about the real sentence a defendant will serve.[16]

The CCCA contained twenty-three chapters, each transforming a range of areas of federal criminal law.[17] Congress believed the existing sentencing system was rooted in an unworkable model of rehabilitation.[18] Part of the changes, Section 218(a)(5), abolished federal parole and replaced it with a more limited and determined mechanism based on sentencing guidelines.[19] The Senate report largely focused on the parole

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who are sentenced to terms of imprisonment for similar offenses may receive widely differing prison release dates; one may be sentenced to a relatively short term and be released after serving most of the sentence, while the other may be sentenced to a relatively long term but be denied parole indefinitely."); *see also* 130 CONG. REC. S976 (daily ed. Jan. 31, 1984) (statement of Sen. Laxalt) (arguing that sentencing disparities can be blamed on "the failure of Federal judges" and that "[t]here is little reason to believe that judges will now begin to do what they have failed to do in the past"); MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 21 (1973) (noting the widely divergent sentences explainable only by differences among judges); Richard A. Bierschbach & Stephanos Bibas, *What's Wrong with Sentencing Equality?*, 102 VA. L. REV. 1447, 1450 (2016) ("In sentencing, equality in practice looks rather different from equality in theory. In theory, egalitarian sentencing could focus on equalizing inputs or processes that determine punishment. But in practice, the sausage factory that is the American criminal justice system focuses not on equal inputs or fair processes but on uniform *outputs*—equalizing the number of years in prison for each crime.").

16 S. REP. NO. 98-225, at 38–39, 1984 U.S.C.C.A.N. at 3221–22. Congress directed the Sentencing Commission to avoid unnecessary disparity in sentencing. *See* 28 U.S.C. § 991(b)(1)(B); *see also* S. REP. NO. 98-225, at 41–47, 1984 U.S.C.C.A.N. at 3224–28.

17 *See* 129 CONG. REC. S22883 (daily ed. Aug. 4, 1983) (statement of Sen. Thurmond) ("[This is] the most comprehensive set of improvements in the Federal criminal laws . . . I have witnessed in all of my years in the Congress."); 129 CONG. REC. S3798 (daily ed. Mar. 3, 1983) (statement of Sen. Kennedy) ("Federal sentencing reform is long overdue."). Members of Congress did not trust judicial discretion as much as they had in the past. *See* 130 CONG. REC. S973 (daily ed. Jan. 31, 1984) (statement of Sen. Mathias) ("The proponents of the bill . . . argue in essence that judges cannot be trusted. You cannot trust a judge . . . you must not trust a judge.").

18 S. REP. NO. 98-225, at 38, 1984 U.S.C.C.A.N. at 3221. To realize this belief, Congress authorized the creation of the United States Sentencing Guidelines. *Id.*

19 *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, § 218(a)(5), 98 Stat. 1837, 2027 (repealing 18 U.S.C. §§ 4201–4208). This made the judicially imposed sentence the sentence actually served by the prisoner. S. REP. NO. 98-225, at 52, 53 n.196, 54; 128 CONG. REC. S11819 (daily ed. May 26, 1982) (statement of Sen. Baker).

system's problems.[20] That said, Congress understood parole's importance, so the CCCA created an exception, § 3582(c), the predecessor of the current compassionate-release provision.[21] Section 3582(c) provided that:

> [U]pon motion of the Director of the Bureau of Prisons, [a district court] . . . may reduce the term of imprisonment . . . after considering the factors set forth in section 3553(a) . . . to the extent that they are applicable, if [the court] finds that . . . extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission . . . .[22]

Congress intended § 3582(c) to operate as a "'safety valve[]' for modification of sentences" that would "assure the availability of specific review and reduction of a term of imprisonment for 'extraordinary and compelling reasons . . . .'"[23] Yet the original compassionate-release statute gave the BOP *exclusive* control over all paths to compassionate release. For the next three decades, any motion for a federal prisoner's compassionate release had to be made by the Director of the BOP.[24] This meant that the BOP could (and did) simply abstain from requesting compassionate release despite circumstances warranting the relief.[25]

Thus, for a federal prisoner to receive compassionate release, four things must have happened. First, the BOP had to move for compassionate release in federal court. Second, "extraordinary and compelling reasons" under § 3582(c)(1)(A)(i) must have existed. Third, the sentence reduction had to be "consistent with applicable policy statements issued by the Sentencing Commission" as contemplated by the court. And fourth, the court must have considered whether the prisoner was a danger under 18 U.S.C. § 3553(a).[26]

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20 S. REP. NO. 98-225, at 38–49, 1984 U.S.C.C.A.N. at 3221–32.

21 *See* 18 U.S.C. § 3582(c) (1984).

22 *Id.* § 3582(c)(1)(A).

23 S. REP. NO. 98-225, at 121, 1984 U.S.C.C.A.N. at 3304.

24 *See* 18 U.S.C. § 3582(c)(1)(A) (2018). No matter what other changes Congress made in the ensuing three decades, the BOP's absolute control remained entrenched. *See, e.g.*, *id.* § 3582(c)(1)(A)(ii) (providing for the release of a federal prisoner, on BOP motion, if the prisoner is at least seventy years old and served at least thirty years of his sentence).

25 Courts uniformly concluded that such action was unreviewable. *See, e.g.*, Crowe v. United States, 430 F. App'x 484, 484–85 (6th Cir. 2011); United States v. Smartt, 129 F.3d 539, 541 (10th Cir. 1997); Fernandez v. United States, 941 F.2d 1488, 1493 (11th Cir. 1991); Simmons v. Christensen, 894 F.2d 1041, 1043 (9th Cir. 1990); Turner v. U.S. Parole Comm'n, 810 F.2d 612, 615 (7th Cir. 1987).

26 *See* Jessica L. Leach, Note, *When Compassion Meets the Law: Sentencing Disparities as Extraordinary and Compelling Reasons Warranting Compassionate Release*, 14 ELON L. REV. 287,

There were also blind spots in the statutory scheme. For one, Congress never defined, or provided examples of, "extraordinary and compelling reasons" that might warrant a sentence reduction. Instead, when it enacted § 3582, Congress simultaneously required the Sentencing Commission to "promulgat[e such] policy statements."[27] This made fulfilling the second factor challenging. Congress only chose to preclude one factor from constituting an extraordinary and compelling reason: "[r]ehabilitation of the defendant."[28] Yet this factor was impermissible only when it was considered "alone."[29] Judges were free to consider it alongside other factors.

Fulfilling the third requirement was also complicated because the Sentencing Commission did not follow Congress's commands for over two decades. This made the third requirement largely illusory. Indeed, it was not until 2007 when the Sentencing Commission issued its first policy statement outlining what constituted extraordinary and compelling reasons to modify a sentence.[30] The examples provided by the Commission included "terminal illness," "serious physical or medical condition," "deteriorating . . . health because of the aging process," "death or incapacitation of the caregiver of [or defendant's only family member capable of caring for] the defendant's minor child," and "an extraordinary and compelling reason other than, or in combination with, the [other] reasons."[31] Section 1B1.13 of the Sentencing Guidelines thus articulated four categories of extraordinary and compelling circumstances: (1) the defendant's medical conditions; (2) the defendant's age; (3) the defendant's family circumstances; and (4) other reasons.[32] The fourth category is a catchall provision permitting further discretion in defining extraordinary and compelling reasons other than those identified by the BOP.

Between 1984—when Congress enacted the compassionate release statute in the SRA—and 2018—when Congress enacted the FSA—the BOP rarely used its power.[33] In fact, the BOP only requested

296–97 (2022) ("Section 3553(a) lists 'sentencing factors' such as the nature and circumstances of the offense, the history and characteristics of the defendant, whether a sentence reduction would properly reflect the seriousness of the offense, and whether the public would be protected from further crimes of the defendant if released.").

27 *See* 28 U.S.C. § 994(t).

28 *See id.*; U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. 3 (U.S. SENT'G COMM'N 2021).

29 28 U.S.C. § 994(t); *see also* U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. 3.

30 U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. 1.

31 *Id.*

32 *Id.*

33 Between 1990 to 2000, on average, only twenty-one prisoners were released on BOP motions annually, representing roughly 0.01% of the federal prison population. *See* Mary Price, *The Other*

compassionate release for terminally ill inmates—largely with less than a year to live—despite no requirement in BOP procedures that its broad discretionary authority was to be exercised so narrowly.[34]

But in 2018, things changed.[35] The FSA removed the BOP as the recalcitrant "gatekeeper of compassionate release."[36] Congress amended § 3582(c) to allow prisoners to file their own compassionate-release motions directly in the courts.[37] This modified the original four-step framework into a new, three-step framework for prisoner-filed compassionate-release motions. First, extraordinary and compelling reasons must support compassionate release.[38] Second, the court must find the reduction is consistent with the Sentencing Commission's applicable policy statements.[39] And third, early release must be consistent with the sentencing factors in 18 U.S.C. § 3553(a).[40]

Despite Congress's advancing the ball, one nascent implementation problem remained. As contemplated by the statute, a sentencing judge

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Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A), 13 FED. SENT'G REP. 188 (2001). Beginning in 2007, the BOP had authority to move for a reduction of a prisoner's sentence for "extraordinary and compelling . . . circumstances," outlined by the policy statement with the caveat that "rehabilitation . . . is not, by itself, an extraordinary and compelling reason." U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmts. 1, 3. Additionally, the BOP retained discretion to determine when other circumstances may be "extraordinary and compelling." U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES, POLICY STATEMENTS, AND OFFICIAL COMMENTARY 1 (2007), https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/20070501_Amendments.pdf [https://perma.cc/JD2T-C8DS]. Between 2006 and 2011, that average number rose to twenty-four, representing the same 0.01%. *See* U.S. DEP'T OF JUST., OFF. OF THE INSPECTOR GEN., THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM 1 & n.9 (2013), https://www.oversight.gov/sites/default/files/oig-reports/e1306.pdf [https://perma.cc/EBD6-DCUJ]. Between 2013 and 2017, the BOP approved 6% of the applications it received. Christie Thompson, *Frail, Old, and Dying, but Their Only Way Out of Prison Is a Coffin*, N.Y. TIMES (Mar. 7, 2018), https://www.nytimes.com/2018/03/07/us/prisons-compassionate-release-.html (last visited Nov. 10, 2022). In 2018, only thirty-four prisoners were released, representing the same 0.01%. Colleen McMahon, *(Re)views from the Bench: A Judicial Perspective on Second-Look Sentencing in the Federal System*, 58 AM. CRIM. L. REV. 1617, 1618 (2021).

34 William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 866 (2009); Price, *supra* note 33, at 188–89.

35 United States v. Long, 997 F.3d 342, 348 (D.C. Cir. 2021) ("Displeased . . . , Congress put this problem in its crosshairs in 2018 when it enacted . . . the First Step Act."); *see also* Chien, *supra* note 3, at 570 ("In the case of federal compassionate release, ruthless iteration and oversight provided by the Office of Inspector General (OIG) of the Department of Justice, watchdog groups, and Congress have helped to, over time, improve implementation of the law.").

36 *Long*, 997 F.3d at 348 (citing United States v. McCoy, 981 F.3d 271, 276 (4th Cir. 2020)). The FSA made significant and varied changes to the U.S. Code, but it made only one—albeit very important—change to the compassionate-release framework in § 3582. First Step Act of 2018, Pub. L. No. 115–391, 132 Stat. 5194, 5239 (codified as amended at 18 U.S.C. § 3582).

37 First Step Act of 2018, 132 Stat. at 5239.

38 § 3582(c)(1)(A).

39 *Id.*

40 *Id.*

must ensure "such a reduction is consistent with applicable policy statements issued by the [United States] Sentencing Commission."[41] "It took the [Sentencing] Commission over twenty years to publish its substantive definition of 'extraordinary and compelling reasons.'"[42] The Sentencing Commission identified four "extraordinary and compelling reasons" for compassionate release: (1) the defendant is suffering a terminal illness; (2) the defendant is over sixty-five years old, is "experiencing a serious deterioration in physical or mental health because of the aging process," and "has served at least 10 years or 75 percent of the term of imprisonment"; (3) certain family obligations, such as "[t]he death or incapacitation of the caregiver of the defendant's minor child . . . [or] [t]he incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver"; and (4) other reasons, noting, "[a]s determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with" the other listed reasons.[43]

This had not been a problem because, before Congress enacted the FSA, only the BOP could move for compassionate release.[44] But with the newly created right for prisoners to file compassionate-release motions, the Sentencing Commission needed to revise its policy statement.[45] Because of this quagmire, "the text of the Sentencing Commission's policy statement still limits compassionate release to 'motion[s] of the

41 *Id.*

42 United States v. Bryant, 996 F.3d 1243, 1249 (11th Cir. 2021) (citing U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2007)).

43 U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. 1 (U.S. SENT'G COMM'N 2021).

44 *Bryant*, 996 F.3d at 1249; *see also* Shon Hopwood, *The Misplaced Trust in the DOJ's Expertise on Criminal Justice Policy*, 118 MICH. L. REV. 1181, 1199 (2020) ("Regarding compassionate release, [the DOJ] argued that the First Step Act would 'require substantial expenditure' of BOP and prosecutorial resources if prisoners could file 'motions for compassionate release in federal court.' Those prosecutorial resources, however, will mostly be employed when the DOJ opposes compassionate release, and there is an easy way to save those resources—concede the release of people who meet the criteria for relief. The DOJ[] . . . also fails to mention that its own inspector general issued a report finding that expanded compassionate release will save the DOJ money and help the BOP manage its prison population." (footnote omitted) (quoting Letter from Stephen E. Boyd, Assistant Att'y Gen., to Marc Short, Assistant to the President (July 12, 2018), https://freebeacon.com/wp-content/uploads/2018/08/DOJ_Letter_Beacon.pdf [https://perma.cc/43EB-NYER])).

45 Therein lay the rub. "The Sentencing Commission has lacked a quorum since early 2019, and so it has been unable to update its preexisting policy statement concerning compassionate release to reflect the First Step Act's changes." United States v. Long, 997 F.3d 342, 348 (D.C. Cir. 2021) (first citing United States v. Brooker, 976 F.3d 228, 234 (2d Cir. 2020); and then citing United States v. Gunn, 980 F.3d 1178, 1180 (7th Cir. 2020)).

Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A).'"[46] And the Sentencing Commission's commentary still reflects the pre-FSA status quo: "A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A)."[47]

So where did this leave the courts? Well, there now existed two discrete categories of compassionate-release motions. The first is the BOP-filed compassionate-release motions. These motions are so rare that, as of 2013, only about twenty-four defendants a year were granted compassionate release.[48] The BOP-filed motions neatly fall under the Sentencing Commission's policy statements on compassionate release—the statements that took "over twenty years to publish."[49]

Then, there are the prisoner-filed compassionate-release motions authorized by the FSA. Enacted without revisions to the Sentencing Commission's policy statements, the prisoner-filed motions were filed in a legal purgatory. Should the pre-FSA policy statement, the one that only contemplates BOP-filed compassionate-release motions, apply equally to the prisoner-filed motions? Put another way, are judges constrained to a BOP-approved definition of "extraordinary and compelling reasons" to justify compassionate release?[50]

Enter COVID-19.

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46 *Long*, 997 F.3d at 349 (alterations in original) (quoting U.S. SENT'G GUIDELINES MANUAL § 1B1.13) (U.S. SENT'G COMM'N 2018)).

47 U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. 4 (U.S. SENT'G COMM'N 2021).

48 *Long*, 997 F.3d at 348 (citing United States v. McCoy, 981 F.3d 271, 276 (4th Cir. 2020)).

49 *Bryant*, 996 F.3d at 1249.

50 Recognizing the unsettled legal question, many judges included some version of the following footnote in resolving prisoner-filed compassionate-release motions:

> There is some debate about § 1B1.13's application to motions for compassionate release filed by a person other than the BOP. The Court looks to § 1B1.13 for guidance even if the guideline is not directly applicable to [the defendant's] motion for compassionate release. *McCall*, 465 F. Supp. 3d at 1203 ("[T]his policy guidance has not been updated since the passage of the First Step Act in December 2018, Pub. L. No. 115-391. This court joins many others around the country in finding that, with regard to any inconsistency between the statute and the policy statement, the policy statement serves as guidance, but does not limit the court's authority.").

United States v. Beam, 506 F. Supp. 3d 1192, 1195 n.3 (N.D. Ala. 2020) (second alteration in original).

B. *COVID-19's Impact on Compassionate Release and the Spike in Prisoner-Filed Compassionate-Release Motions*

American prisons became "ground zero" for COVID-19.[51] "The reasons why COVID infection was so acute inside criminal detention facilities are intuitive. Jails and prisons are under-funded, overcrowded, and populated by detainees who are disproportionately susceptible to illness."[52] Early on, public health experts explained how to minimize infection: social distancing, interacting with others outside, frequent handwashing, and wearing masks. "Yet for the incarcerated, taking these measures has proven close to impossible."[53] Naturally, inmates wanted out. What resulted were "thousands of compassionate release motions, most filed by offenders."[54] "Advocacy efforts . . . principally focused on those near the end of their sentence, pregnant individuals or those with underlying health conditions, and others who might qualify for compassionate release."[55]

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51 Lee Kovarsky, *Pandemics, Risks, and Remedies*, 106 VA. L. REV. ONLINE 71, 73 (2020); *see also* Melissa Benerofe, Note, *Collaterally Attacking the Prison Litigation Reform Act's Application to Meritorious Prisoner Civil Litigation*, 90 FORDHAM L. REV. 141, 142–43 (2021) ("Nowhere else has the destruction of the unprecedented COVID-19 pandemic been more deeply felt than throughout America's prisons. Prisons are notoriously overcrowded and unsanitary, and they house populations that are disproportionately susceptible to illnesses. All of this coupled with initially inadequate responses at the federal and state levels have resulted in over 2600 prisoner deaths since the pandemic's beginning. In an effort to prevent imprisonment from becoming a de facto death sentence, inmates across the country have flocked to the courts seeking relief, whether it be for compassionate release, transfer to home confinement, or on the basis that their constitutional rights have been violated by inadequate protections against COVID-19." (footnotes omitted)).

52 Kovarsky, *supra* note 51, at 73–74.

53 Sharon Dolovich, *Mass Incarceration, Meet COVID-19*, 11/16/2020 U. CHI. L. REV. ONLINE 4, 8 (2020).

54 U.S. SENT'G COMM'N, COMPASSIONATE RELEASE DATA REPORT: CALENDAR YEARS 2020 TO 2021, at 3 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210928-Compassionate-Release.pdf [https://perma.cc/36V4-34TA].

55 Deborah M. Weissman, *Gender Violence, the Carceral State, and the Politics of Solidarity*, 55 U.C. DAVIS L. REV. 801, 832 (2021). For a thorough discussion of the compassionate release campaign during the COVID-19 pandemic, see *id.* at 830–42.

The chart below shows the motions for compassionate release filed between January 2020 and June 2021[56]:

MOTIONS FOR COMPASSIONATE RELEASE BY MONTH OF RESENTENCING DATE[1]

		Total	Granted		Denied	
Year	**Month**	**N**	**N**	**%**	**N**	**%**
TOTAL		**20,565**	**3,608**	**17.5**	**16,957**	**82.5**
2020	January	39	17	43.6	22	56.4
2020	February	32	13	40.6	19	59.4
2020	March	47	19	40.4	28	59.6
2020	April	460	163	35.4	297	64.6
2020	May	896	270	30.1	626	69.9
2020	June	1,327	304	22.9	1,023	77.1
2020	July	1,571	404	25.7	1,167	74.3
2020	August	1,499	332	22.1	1,167	77.9
2020	September	1,319	254	19.3	1,065	80.7
2020	October	2,009	259	12.9	1,750	87.1
2020	November	1,733	241	13.9	1,492	86.1
2020	December	1,994	335	16.8	1,659	83.2
2021	January	1,643	271	16.5	1,372	83.5
2021	February	1,402	206	14.7	1,196	85.3
2021	March	1,398	173	12.4	1,225	87.6
2021	April	1,272	145	11.4	1,127	88.6
2021	May	994	99	10.0	895	90.0
2021	June	930	103	11.1	827	88.9

When the COVID-19 pandemic hit, there was an astronomical increase in the filing of compassionate release motions.

56 U.S. SENT'G COMM'N, *supra* note 54, at 4 tbl.1.

And of the granted motions for compassionate release (only 3,608 of 20,565—17.5%), nearly all of them (3,471 of 3,602—96.4%) were prisoner-filed, while only 32 of 3,602—0.9%—were filed by the BOP:[57]

ORIGIN OF GRANTED MOTIONS FOR COMPASSIONATE RELEASE[1]

	Total	Defendant		Director BOP		Attorney for the Government		Joint Motion[2]	
CIRCUIT	N	N	%	N	%	N	%	N	%
TOTAL	**3,602**	**3,471**	**96.4**	**32**	**0.9**	**5**	**0.1**	**94**	**2.6**
D.C. CIRCUIT	51	50	98.0	0	0.0	0	0.0	1	2.0
FIRST CIRCUIT	149	146	98.0	1	0.7	0	0.0	2	1.3
SECOND CIRCUIT	350	349	99.7	1	0.3	0	0.0	0	0.0
THIRD CIRCUIT	194	182	93.8	2	1.0	0	0.0	10	5.2
FOURTH CIRCUIT	550	542	98.5	5	0.9	1	0.2	2	0.4
FIFTH CIRCUIT	186	180	96.8	5	2.7	1	0.5	0	0.0
SIXTH CIRCUIT	371	363	97.8	3	0.8	0	0.0	5	1.3
SEVENTH CIRCUIT	322	316	98.1	3	0.9	0	0.0	3	0.9
EIGHTH CIRCUIT	279	248	88.9	0	0.0	0	0.0	31	11.1
NINTH CIRCUIT	629	585	93.0	5	0.8	1	0.2	38	6.0
TENTH CIRCUIT	180	175	97.2	3	1.7	0	0.0	2	1.1
ELEVENTH CIRCUIT	341	335	98.2	4	1.2	2	0.6	0	0.0

The magnitude of this data is hard to comprehend. In March 2020, judges across the United States received forty-seven motions for compassionate release. In October 2020, just seven months later, judges received 2,009 motions for compassionate release: a nearly 4,200% increase in just a few months.

It is against this backdrop, with COVID-19 raging unabated and vaccines months away, and with district judges inundated with thousands of motions for compassionate release, that judges began to address the tension between the FSA's prisoner-filed compassionate-release motions and the Sentencing Commission's unrevised policy statement that only contemplated BOP-filed compassionate-release motions.

II. UNDERSTANDING *UNITED STATES V. BRYANT*

A panel of the Eleventh Circuit considered two questions in *Bryant*. First, "whether district courts reviewing defendant-filed motions under Section 3582(c)(1)(A) are bound by the Sentencing Commission's policy

57 *Id.* at 4 tbl.1, 7 tbl.4. There is a discrepancy between the 3,608 granted motions for compassionate release and the 3,602 motions reported in Table 4. The Sentencing Commission explained that "[o]f the 3,608 cases in which the court granted a motion for compassionate release, six cases were excluded from this analysis because the information received by the Commission prevented a determination of motion origin." *Id.* at 7 n.1.

statement" found in Section 1B1.13 of the United States Sentencing Guidelines.[58] Second, because the majority "conclude[d] that [Section] 1B1.13 is an applicable policy statement," it needed to "determine how district courts should apply that statement to motions filed under Section 3582(c)(1)(A)."[59]

A. *The United States Court of Appeals for the Eleventh Circuit's Majority Opinion*

Judge Brasher wrote the *Bryant* majority opinion, which was joined by Judge Luck. The majority began with a discussion of the history of federal sentencing.[60] It recounted that "[f]or a long time, sentencing judges had nearly unbridled discretion, bound only by statutory minimums or maximums," and that "[p]arole boards also had discretion to release a prisoner after he had served as little as one third of his sentence, obscuring at sentencing the actual amount of time that the defendant would serve."[61] These "drastic disparities" and the "uncertainty in sentencing . . . drove Congress to pass the Sentencing Reform Act of 1984."[62] "The SRA sought uniformity and honesty in sentencing" and did so by creating the Sentencing Commission "and delegat[ing] to it the power to create a comprehensive system of sentencing guidelines."[63] The majority correctly noted that "the SRA did not put district courts in charge of determining what would qualify as extraordinary and compelling reasons that might justify reducing a prisoner's sentence."[64] "[T]he SRA made clear that a district court cannot grant a motion for reduction if it would be inconsistent with the Commission's policy statement defining 'extraordinary and compelling reasons.'"[65]

The majority conceded that "[i]t took the Commission over twenty years to publish its substantive definition of 'extraordinary and compelling reasons,'" but said the delay "mattered little because Section 3582(c)(1)(A) allowed only the BOP to file those motions, and the BOP rarely did so. In fact, the BOP failed to file reduction motions even if a defendant's reasons were extraordinary and compelling."[66]

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58 United States v. Bryant, 996 F.3d 1243, 1247 (11th Cir. 2021).

59 *Id.*

60 *Id.* at 1248.

61 *Id.* (citations omitted).

62 *Id.*

63 *Id.*

64 *Id.* at 1249.

65 *Id.*

66 *Id.*

The discussion section begins with the theme that "[f]inality is 'essential to the operation of our criminal justice system,'"[67] particularly that "[d]eterrence depends upon [it.] . . . Rehabilitation demands [it.] . . . [And it] benefits the victim by helping [her] put the trauma of the crime and prosecution behind [her]."[68] The majority explained that the compassionate-release statute is a "congressional act of lenity,"[69] but that the statute "allows a sentence reduction only if 'such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.'"[70]

"The answer to whether the Commission's definition of 'extraordinary and compelling reasons' binds district courts is clear. Indeed, both the Supreme Court and [the Eleventh Circuit] have held that Congress's consistent-with requirement makes the relevant policy statements binding on district courts."[71] As it must, the majority conceded that "parts of the current policy statement are in tension with the FSA."[72]

As for the policy statement's applicability, the majority wrote that "[w]e interpret a statute based on the ordinary meaning of its text when it was enacted."[73] The majority believed "the commonsense reading of 'applicable policy statements' includes U.S.S.G. § 1B1.13, *no matter who files the motion*."[74] It reasoned that "the substantive standards in 1B1.13 are clearly capable of being applied to defendant-filed reduction motions" and that "nothing about 1B1.13 make it less 'capable of application,' 'relevant,' or 'helpful' to defendant-filed motions than to BOP-filed motions."[75]

Next, the majority looked to the context in which the policy statement was drafted, because "[t]hat context is vital to understanding what Congress meant by 'applicable policy statements issued by the Sentencing Commission,' because although a statutory phrase, 'considered in isolation, may be open to competing interpretations,' when it is considered 'in conjunction with the purpose and context,' often 'only

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67 *Id.* at 1251 (quoting Teague v. Lane, 489 U.S. 288, 309 (1989)).

68 *Id.* (alterations in original) (quoting Patterson v. Sec'y, Fla. Dep't of Corr., 849 F.3d 1321, 1325 (11th Cir. 2017)).

69 *Id.* (quoting United States v. Maiello, 805 F.3d 992, 1000 (11th Cir. 2015)).

70 *Id.* (quoting 18 U.S.C. § 3582(c)(1)(A)).

71 *Id.* at 1251–52 (first citing Dillon v. United States, 560 U.S. 817, 826–27 (2010); and then citing United States v. Colon, 707 F.3d 1255, 1262 (11th Cir. 2013)).

72 *Id.* at 1252.

73 *Id.*

74 *Id.* (emphasis added).

75 *Id.* at 1253–54.

one interpretation is permissible.'"[76] The majority saw "two important contextual factors here: the Commission's statutory role in defining 'extraordinary and compelling reasons' and the way courts use the Guidelines every day."[77]

The majority correctly stated that "[t]here is no question that 1B1.13 is *the* policy statement the Commission adopted to comply with [its] statutory mandate."[78] "In other words, the statutory context shows us that the Commission had an obligation to define 'extraordinary and compelling reasons' for all motions under the statute, and that the Commission did so in 1B1.13."[79]

Next, the majority contended that "1B1.13 is 'applicable' in the same way anything else in the sentencing guidelines is 'applicable'—it implements the relevant statute."[80] "A sentencing court must ask only what guideline the Commission has tied to the relevant statute; it is prohibited from looking at the 'circumstances of a particular case' to determine the 'applicable guideline.'"[81] "In other words, determining whether something is an 'applicable guideline' under the Sentencing Guidelines is resolved based on the statutory provision at issue and nothing else."[82] This means that "consistent with the structure of the Guidelines as a whole and with the Commission's choice about how to structure its policy statements, an applicable policy statement for a sentence reduction is the one that corresponds with the reduction motion's authorizing statute."[83] At bottom, the majority concluded that "[f]or Section 3582(c)(1)(A) motions the applicable policy statement is 1B1.13."[84]

The majority then considers the statute's purpose. According to the majority, "[i]nterpreting 1B1.13 as an applicable policy statement for all Section 3582(c)(1)(A) motions is not only a textually permissible interpretation, it is the better one. It both furthers the SRA's purposes and effectuates other congressional sentencing decisions, such as mandatory

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76 *Id.* at 1254 (quoting Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 7 (2011)). It is unclear why Judge Brasher would consider the context and try to understand what Congress meant where the Application Note's text is clear.

77 *Id.* at 1255.

78 *Id.* (first citing United States v. Gunn, 980 F.3d 1178, 1180 (7th Cir. 2020); and then citing United States v. Maumau, 993 F.3d 821, 835 (10th Cir. 2021)).

79 *Id.*

80 *Id.*

81 *Id.* (quoting United States v. Irey, 612 F.3d 1160, 1242 (11th Cir. 2010) (en banc) (Tjoflat, J., concurring in part and dissenting in part)).

82 *Id.* at 1256.

83 *Id.*

84 *Id.*

minimums and retroactivity."[85] "The SRA's purpose was to limit discretion and to bring certainty and uniformity to sentencing."[86] The majority reasoned that:

> Interpreting 1B1.13 as inapplicable to defendant-filed Section 3582(c)(1)(A) motions would return us to the pre-SRA world of disparity and uncertainty. Except worse. Unlike a parole board—which could not reduce an imposed sentence until a defendant had served at least a third of that sentence—sentencing courts need wait only 30 days after imposing a sentence before granting a Section 3582(c)(1)(A) reduction. More concerning, sentencing courts are not bound by even the statutory minimums when granting Section 3582(c)(1)(A) motions.[87]

The majority explained that "[o]f course, 'purpose . . . cannot be used to contradict the text or to supplement it,'"[88] and "[w]e must not 'engage in purpose-driven statutory interpretation,'"[89] or "the familiar tactic of substituting the purpose of the statute for its text, freeing the Court to write a different [guideline] that achieves the same purpose,"[90] but then said "a statute's purpose, which itself must be derived from the text, is a constituent of meaning and can be helpful in understanding the 'ordinary, contemporary, common meaning' of the statute's language."[91] In sum:

> If the text could be read more than one way when considered in a vacuum, a statute's purpose may reveal which reading is correct. And a textually permissible interpretation that does not frustrate a statute's purpose is preferred over one that does. Here, the statute's purpose supports our reading, even though it could not alone justify it.[92]

The majority then turned to "other general canons of statutory interpretation [to] bolster the understanding of 1B1.13 as an applicable policy statement for all Section 3582(c)(1)(A) motions, regardless of who files them."[93] These "other general canons" include the statute's title and that "the same words will be interpreted the same way in the same statute."[94] The majority reasoned that "we should not interpret 'applicable

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85 *Id.*

86 *Id.* at 1257 (first citing United States v. Booker, 543 U.S. 220, 264 (2005); and then citing *Irey*, 612 F.3d at 1181).

87 *Id.* (citations omitted).

88 *Id.* (quoting Bellitto v. Snipes, 935 F.3d 1192, 1201 (11th Cir. 2019)).

89 *Id.* (quoting Arcia v. Fla. Sec'y of State, 772 F.3d 1335, 1347 (11th Cir. 2014)).

90 *Id.* (alteration in original) (quoting Rapanos v. United States, 547 U.S. 715, 755 (2006)).

91 *Id.* (quoting United States v. Haun, 494 F.3d 1006, 1009 (11th Cir. 2007)).

92 *Id.* at 1257–58.

93 *Id.* at 1258.

94 *Id.*

policy statement' in a way that gives 'extraordinary and compelling'—which is only used in the statute once—different meanings depending on who files a motion."[95] Then it explained that "what Congress chose not to change can be as important as what it chose to change" and that courts "recognize that a statute's text often 'reflect[s] hard-fought compromises.'"[96] And although Congress knew the limited power the Sentencing Commission wielded, the constraints under which it operated, and how the policy statement controlled these motions, it

> chose not to redefine that phrase, change the substantive standard for granting a motion, or modify a district court's obligation to follow the policy statement. If Congress had meant to free district courts from following the Commission's guidance for defendant-filed motions, "we would expect the text . . . to say so."[97]

The majority then turned its focus to the other courts of appeals which had addressed the applicability of Section 1B1.13 to defendant-filed compassionate-release motions. It identified what it said were two errors the other circuits made: they misinterpreted the prefatory phrase of Section 1B1.13 and the repetition of that clause in Application Note 4; and they made purposivist points.

As for the prefatory language argument, the majority explained that the prefatory language "[u]pon motion of the Director of the Bureau of Prisons," is "prologue. The prefatory part of the policy statement orients the reader by paraphrasing the statute as it existed at the time the policy statement was enacted. But the important operative provisions of the policy statement are found in the application notes."[98] The Application Notes "define 'extraordinary and compelling reasons' as being medical, age, family, or 'other reasons.' And they operate independently of the prefatory clause that has caused so much confusion in our sister circuits."[99]

The majority charged that the other courts of appeals "give these clauses an operative meaning only by retconning them."[100] It said that "our sister circuits expressly interpret 1B1.13's language anachronistically

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95 *Id.*

96 *Id.* (alteration in original) (quoting Bd. of Governors of Fed. Rsrv. Sys. v. Dimension Fin. Corp., 474 U.S. 361, 374 (1986)).

97 *Id.* at 1259 (quoting Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 127 (2016)).

98 *Id.* at 1259–60 (alteration in original) (citing Stinson v. United States, 508 U.S. 36, 43 (1993)).

99 *Id.* at 1260.

100 *Id.*

instead of consistently with its ordinary meaning when the Commission published it."[101] The majority acknowledged that:

> When the Commission published 1B1.13, there was no such thing as a defendant-filed motion under Section 3582(c)(1)(A). As a procedural matter, only the BOP could file that reduction motion. It therefore makes very little sense to say that the policy statement distinguishes between a BOP-filed motion and some other kind of motion that did not exist when the policy statement was adopted.[102]

The majority then turned to the "purposivist points" it contended the other courts of appeals made. The other courts, it said, noted that the Sentencing Commission lacked a quorum, pointed to Congress's purpose in passing the FSA and expanding compassionate release, and explained that Section 1B1.13 does not allow that congressionally intended expansion.[103] But, the majority explained, "it is not our role to predict what the Sentencing Commission will do or what Congress wants it to do. Our role is to interpret the relevant legal texts and apply them as they exist."[104]

B. *Judge Martin's Dissenting Opinion*

Judge Martin sharply dissented.[105] She began by saying that "[e]ach of the *seven* circuits that has considered the issue has held that the policy statement we consider here applies only to compassionate release motions filed by the BOP, as opposed to those filed by defendants on their own behalf."[106] In a footnote, Judge Martin pointedly said:

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101 *Id.* (first citing United States v. Brooker, 976 F.3d 228, 236 (2d Cir. 2020); and then citing United States v. Shkambi, 993 F.3d 388, 392 (5th Cir. 2021)). Again, the language of Section 1B1.13 explains that the statement applies to BOP-filed motions.

102 *Id.*

103 *Id.* at 1261.

104 *Id.* (citing Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018)).

105 Judge Martin retired from the Eleventh Circuit in September 2021, explaining that she was "just ready to do something else." Bill Rankin, *Judge to Leave Atlanta Appeals Court, Giving President Biden a Vacancy to Fill*, ATLANTA J.-CONST. (May 18, 2021), https://www.ajc.com/news/atlanta-news/judge-to-leave-atlanta-appeals-court-giving-president-biden-a-vacancy-to-fill/KO4YIGOPBBHH7FAR4JUVEMF4RM [https://perma.cc/P2BP-VB52].

106 *Bryant*, 996 F.3d at 1268 (Martin, J., dissenting) (footnote omitted) (first citing *Brooker*, 976 F.3d at 235–36; then citing United States v. McCoy, 981 F.3d 271, 275–77, 280–84 (4th Cir. 2020); then citing *Shkambi*, 993 F.3d at 392–93; then citing United States v. Jones, 980 F.3d 1098, 1109–11 (6th Cir. 2020); then citing United States v. Gunn, 980 F.3d 1178, 1180 (7th Cir. 2020); then citing United States v. Aruda, 993 F.3d 797, 799–802 (9th Cir. 2021) (per curiam); and then citing United States v. McGee, 992 F.3d 1035, 1048–51 (10th Cir. 2021)).

> I have not found even a dissenting or concurring opinion among any of the circuit opinions deciding this issue that advocates for what the majority does here. As I understand it, that means my two colleagues in the majority are the only federal appellate court judges in the country to interpret the policy statement in the way they do here.[107]

Judge Martin then discussed the FSA and the sole Sentencing Commission policy statement addressing "extraordinary and compelling" circumstances (and its Application Note).[108] "By its express terms," Judge Martin explained, "the policy statement applies only to motions brought by the Director of the BOP."[109] "[T]his means the policy statement at issue here survives insofar as it applies to those motions brought by BOP. But BOP filed no motion here. Mr. Bryant filed his own motion for compassionate release, so this policy statement, and accompanying application note, simply are not 'applicable' to his motion."[110]

Then, Judge Martin turned to the majority:

> The majority says that, even though the policy statement expressly cabins itself to motions brought by the BOP Director, it is still an "applicable" policy statement. And this has the effect of limiting federal judges from considering anything other than what the BOP considers an "extraordinary and compelling reason" justifying compassionate release. Thus, the courts are confined to the footprint made by BOP. And again, the First Step Act was meant to address BOP's poor record on allowing compassionate release.[111]

The majority "relies primarily on dictionary definitions of the word 'applicable,'" but "[t]his interpretation fails to persuade for several reasons:"[112]

> First, the majority's dictionary-based theory about when a policy statement may be "applicable" flies in the face of the statement's plain text that tells us when it is actually "applicable." . . . .
>
> Second, the majority's definitional argument proves too much, and at the same time, too little. . . .
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> Third, in advancing its definitional argument, the majority asserts that "[t]here is no question that 1B1.13 is the policy statement the Commission adopted to comply with th[e] statutory mandate." But

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107 *Id.* at 1268 n.4.

108 *Id.* at 1268–69.

109 *Id.* at 1269 (first citing *Brooker*, 976 F.3d at 235; and then citing *Jones*, 980 F.3d at 1109).

110 *Id.* (citing *Gunn*, 980 F.3d at 1180).

111 *Id.*

112 *Id.*

> again, the fact that the policy statement applies to some compassionate release motions doesn't mean it applies to them all.[113]

Judge Martin also identified "the matter of fidelity to the text[,] . . . find[ing] it noteworthy that in insisting the policy statement is 'applicable' to Mr. Bryant's motion, the majority has to blue-pencil the statement and application note to get around phrases that explicitly address the scope of the statement's applicability."[114]

The majority's explanation that the "phrases confining [the policy statement] to BOP motions are merely non-operative 'prefatory phrases'" had two errors, according to Judge Martin:[115]

> First, turnabout is fair play. If these two phrases that conflict with the majority's interpretation can be dismissed as non-operative, prefatory phrases, then why isn't the same true of the phrase "[a]s determined by the Director of the Bureau of Prisons" in Application Note 1(D)? . . .
>
> Second, even if these phrases could have been characterized as prefatory before enactment of the First Step Act, that characterization doesn't work now that the First Step Act is law. These phrases no longer "paraphras[e] the statute." At least, not the whole statute. Instead, the phrases still parallel the language in the provision that empowers BOP to file compassionate release motions.[116]

Judge Martin pointed to the Supreme Court's decision in *Bostock v. Clayton County*, where the Court made clear that "[w]hen the express terms of a statute give us one answer and extratextual considerations

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113 *Id.* at 1269–1270 (second alteration in original) (footnote omitted) (citation omitted) (citing United States v. Shkambi, 993 F.3d 388, 392 (5th Cir. 2021)). The majority acknowledged Judge Martin's dissent but countered that, although she "quibbles with our definition of 'applicable,' she offers no alternative definition of her own. Instead, [she] says that the policy statement tells us when it is applicable." *Id.* at 1262 (majority opinion).

114 *Id.* at 1270 (Martin, J., dissenting); *see* Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 681 (2008) ("The 'blue-pencil test' is a 'judicial standard for deciding whether to invalidate [a] whole contract or only the offending words.' If the blue pencil doctrine is strictly applied, 'only the offending words are invalidated if it would be possible to delete them simply by running a blue pencil through them, as opposed to changing, adding, or rearranging words.'" (footnote omitted) (quoting *Blue-Pencil Test*, BLACK'S LAW DICTIONARY (8th ed. 2004))). The Supreme Court has rejected the "blue pencil" method of statutory interpretation. *See, e.g.*, Mass. Mut. Life Ins. v. Russell, 473 U.S. 134, 142 (1985) ("This 'blue pencil' method of statutory interpretation—omitting all words not part of the clauses deemed pertinent to the task at hand—impermissibly ignores the relevant context in which statutory language subsists.").

115 *Bryant*, 996 F.3d at 1271 (Martin, J., dissenting).

116 *Id.* (alterations in original) (citation omitted).

suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit."[117]

Not only was the majority's interpretation incorrect for these reasons, but Judge Martin also asserted that the interpretation results in an unlawful delegation of authority to the BOP.[118] "Congress delegated the authority to determine the meaning of 'extraordinary and compelling reasons' to the Sentencing Commission, not BOP."[119]

> Before the First Step Act, Application Note 1(D) effected no illegal sub-delegation because only BOP could file a compassionate release motion. . . . But now, reading the Application Note in line with the majority's interpretation, BOP is suddenly empowered to significantly restrain the universe of available "other reasons" for defendants seeking compassionate release on their *own* behalf. And Congress never gave BOP this authority.[120]

Finally, Judge Martin explained why "[t]he [m]ajority's [p]urposivist [a]rgument [i]s [m]isplaced."[121] Judge Martin charged that:

> The majority goes to great lengths to explain why its interpretation squares with the 1984 Sentencing Reform Act. But it does not explain the large regard it gives the purpose of this 1984 statute, in contrast with the little regard it gives to the purpose of the much more recent First Step Act.[122]

The majority "ignores the transformational intent and purpose of the First Step Act, the 'most meaningful criminal-justice reform at the federal level in decades.'"[123]

> First, the majority ignores that the Sentencing Reform Act, in abolishing the federal parole system, and the First Step Act, in eliminating BOP's gatekeeping function over compassionate release,

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117 *Id.* at 1271–72 (quoting Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020)). Judge Brasher, in response, explained that Judge Martin's "reading of the policy statement ignores the mandate that we must interpret the statement based on the ordinary meaning of its text when it was enacted." *Id.* at 1262 (majority opinion) (citing Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2074 (2018)). Judge Martin "argues that the prefatory phrases can no longer be interpreted as prefatory phrases because they could, now, be interpreted as operative in light of the FSA's changes. But if they were prefatory when 1B1.13 was published, they are still prefatory today." *Id.*

118 *Id.* at 1272 (Martin, J., dissenting).

119 *Id.*

120 *Id.*

121 *Id.* at 1272–73.

122 *Id.* (citation omitted).

123 *Id.* at 1273 (quoting Brief of the American Conservative Union Foundation Nolan Center for Justice et al. as Amici Curiae Supporting Appellant and Reversal at 4, *Bryant*, 996 F.3d 1243 (No. 19-14267), 2020 WL 582813).

> in fact advanced a common goal: keeping sentencing "within the province of the judiciary." . . . .
>
> Second, the First Step Act empowers defendants to seek compassionate release not only when BOP does not act quickly enough on the defendant's request, but also when BOP altogether refuses to act.[124]

According to Judge Martin, "[t]hat tells us that Congress was concerned not only with BOP's ability to timely review compassionate release requests, but also with its substantive judgment about what circumstances warrant compassionate release."[125]

In closing, Judge Martin explained that Mr. Bryant "has devoted significant efforts to rehabilitate himself. The majority opinion defies the text of the First Step Act and the policy statement and undermines the monumental efforts Congress undertook to transform compassionate release."[126] Presciently, Judge Martin expressed her "fear [that] the majority opinion today sets our Court on a path, alone among Courts of Appeal, that will deprive Mr. Bryant and thousands like him in the states of Georgia, Florida, and Alabama of access to compassionate release."[127]

III. ARGUMENT

A. *The Majority Opinion in* Bryant *Produces Arbitrary Effects*

Taking a second look at prison sentences was not something federal judges were used to doing. In fact, the law had long forbidden federal judges from taking those second looks, save extremely limited circumstances. This dynamic shifted drastically when President Trump signed the FSA into law in 2018. Section 603(b) amended § 3582(c)(1)(A) to allow prisoners to move for compassionate release on their own

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124 *Id.* (emphasis omitted) (quoting S. REP. NO. 98-225, at 54 (1983), *as reprinted in* 1984 U.S.C.C.A.N. (98 Stat. 1837) 3182, 3237) (citing 18 U.S.C. § 3582(c)(1)(A)).

125 *Id.* Judge Brasher contended the majority was not blue-penciling the policy statement: It was

> not severing anything from, or adding anything to, the policy statement. Instead, we are recognizing that district courts are bound by the Commission's definition of "extraordinary and compelling reasons" found in 1B1.13 because, under our understanding of the statute, Congress said they are. That means that courts may grant defendant-filed motions that the BOP refuses to bring, but they must apply 1B1.13's definition of "extraordinary and compelling reasons" in doing so.

Id. at 1262.

126 *Id.* at 1274 (Martin, J., dissenting).

127 *Id.*

behalf.[128] Section 3582(c)(1)(A) still requires that a sentence reduction be consistent with "applicable policy statements issued by the Sentencing Commission . . . ."[129] At the same time, the Sentencing Commission had no indication Congress would allow prisoners to file their own compassionate-release motions—and Section 1B1.13 reflects that belief by repeatedly stating that it governs only BOP-filed compassionate-release motions.[130]

The Eleventh Circuit created an extremely lopsided circuit split when it decided in *Bryant* that Section 1B1.13 of the 2007 Sentencing Guidelines applies to prisoner-filed compassionate-release motions. This means courts must therefore give effect to Section 1B1.13's restriction that only the BOP can determine what reasons beyond an inmate's age, health, or family circumstances justify compassionate release, regardless of who filed the § 3582 motion.[131] The Eleventh Circuit did more than just create a circuit split. This decision goes against the plain text of the statute and the context of compassionate release, and it creates arbitrary, adverse consequences that bind district courts in the Eleventh Circuit and illogically harm prisoners.[132]

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128 *See* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5239 (codified as amended at 18 U.S.C. § 3582); § 3582(c)(1)(A) (noting a prisoner may move for compassionate release directly in federal court when he "has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier"). Thus, district judges were able to reduce sentences of federal inmates upon a request by an inmate after the inmate had exhausted administrative remedies. *See id.*

129 *See* § 3582(c)(1)(A)(ii).

130 *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2021) (noting clearly in the text of Section 1B1.13 that it only applies to "motion[s] of the Director of the Bureau of Prisons"); *see also id.* cmt. 4 ("A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons . . . .").

131 *Bryant*, 996 F.3d at 1264.

132 In terms of numbers alone, this outcome cannot be understated. Federal district courts within the Eleventh Circuit sentence thousands of defendants every year. *See* U.S. SENT'G COMM'N, 2021 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 35–36, tbl.1 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/2021_Annual_Report_and_Sourcebook.pdf [https://perma.cc/5QYY-5R8Y] (showing that in 2021, 4,311 out of 57,287 defendants were sentenced within the Eleventh Circuit); *see also* U.S. SENT'G COMM'N, FIRST STEP ACT OF 2018 RESENTENCING PROVISIONS: RETROACTIVITY DATA REPORT tbl.3 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20210519-First-Step-Act-Retro.pdf [https://perma.cc/MD9M-GUGH] (reporting that, through September 2020, 12.3% of sentence reductions under the FSA were in the Eleventh Circuit).

1. District Courts in the Eleventh Circuit Lack Discretion to Determine Extraordinary and Compelling Circumstances in Prisoner-Filed Petitions

Under the FSA, the Sentencing Guidelines, and the Application Note, district judges have discretion to determine what constitutes an extraordinary and compelling circumstance warranting compassionate release. Yet the opinion in *Bryant* goes against the great weight of persuasive authority: ten other courts of appeals have confronted this question, and every single one came out the other way.[133] The uniformity of opinions across the courts of appeals supports the proposition that analysis of the policy statement's application to prisoner-filed motions for compassionate release is obvious.

There are nearly 16,000 federal inmates in the Eleventh Circuit.[134] If these individuals had been sentenced in the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, or D.C. Circuits, a district judge could make an individualized determination about whether his circumstances would qualify as extraordinary and compelling. Yet in the Eleventh Circuit, functionally only the BOP may request compassionate release for reasons other than those enumerated in the Application Note. This distinction is arbitrary.[135]

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133 *See* United States v. Ruvalcaba, 26 F.4th 14, 21 (1st Cir. 2022); United States v. Brooker, 976 F.3d 228, 234 (2d Cir. 2020); United States v. Andrews, 12 F.4th 255, 259 (3d Cir. 2021); United States v. Shkambi, 993 F.3d 388, 393 (5th Cir. 2021); United States v. Elias, 984 F.3d 516, 519–20 (6th Cir. 2021); United States v. Aruda, 993 F.3d 797, 802 (9th Cir. 2021); United States v. McGee, 992 F.3d 1035, 1050 (10th Cir. 2021); United States v. Long, 997 F.3d 342, 355 (D.C. Cir. 2021); United States v. McCoy, 981 F.3d 271, 281–82 (4th Cir. 2020); United States v. Gunn, 980 F.3d 1178, 1180–81 (7th Cir. 2020).

134 *See Population Statistics*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited Aug. 28, 2022) (noting that as of August 25, 2022, 15,924 individuals were incarcerated in Florida, Georgia, and Alabama).

135 To see it in practice, just take as an example five categories of extraordinary and compelling circumstances that the Eleventh Circuit's decision in *Bryant* forbids district court judges from considering. First, sentences and changed mandatory minimums. *See McCoy*, 981 F.3d at 274. Second, the penalty defendants receive for taking cases to trial. *See, e.g.*, JED S. RAKOFF, WHY THE INNOCENT PLEAD GUILTY AND THE GUILTY GO FREE 24 (2021) ("[T]he information-deprived defense lawyer, typically within a few days after the arrest, meets with the overconfident prosecutor, who makes clear that, unless the case can be promptly resolved by a plea bargain, he intends to charge the defendant with the most severe offenses he can prove. Indeed, for several decades now, prosecutors in many jurisdictions have been required by their superiors to charge the defendant with the most serious charges that can be proved—unless, of course, the defendant is willing to enter into a plea bargain. If the defendant wants to plead guilty, the prosecutor will offer him a considerably reduced charge—but only if the plea is agreed to promptly (thus saving the prosecutor valuable resources). Otherwise, he will charge the maximum, and, while he will not close the door to any later plea bargain, it will be to a higher-level offense than the one offered at the outset of the

As discussed above, compassionate release's history counsels a broad and permissive understanding of congressional intent. The FSA's amendments to § 3582 show that Congress sought to expand the circumstances where federal judges could exercise discretion in considering compassionate-release motions.[136] Congress concluded that compassionate release had not functioned as it was intended to under the BOP's management.[137] To remedy this, Congress explicitly sought to "[i]ncreas[e] the [u]se and [t]ransparency of [c]ompassionate [r]elease" by allowing prisoner-initiated motions.[138]

To be sure, Congress does still empower the Sentencing Commission to issue policy statements related to the appropriate use of compassionate release provisions under § 3582. At the same time, "the Commission is fully accountable to Congress, which can revoke or amend *any or all of the Guidelines . . . at any time*."[139] Thus, the FSA's

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case."); *see also* Emily Yoffe, *Innocence Is Irrelevant*, ATLANTIC (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171 [https://perma.cc/6FGQ-8G4T] ("As prosecutors have accumulated power in recent decades, judges and public defenders have lost it. To induce defendants to plead, prosecutors often threaten 'the trial penalty': They make it known that defendants will face more-serious charges and harsher sentences if they take their case to court and are convicted."). Third, an individual's youth and immaturity when originally sentenced. *See* United States v. Ramsay, 538 F. Supp. 3d 407 (S.D.N.Y. 2021). Fourth, the sentencing disparities between codefendants. *See* United States v. Price, 496 F. Supp. 3d 83, 84 (D.D.C. 2020). And fifth, "other reasons" beyond those articulated in the policy statement. *See Ramsay*, 538 F. Supp. 3d at 410.

136 If the BOP was still the sole determiner of what would ever constitute "other" extraordinary and compelling reasons to justify compassionate release, the FSA's changes in the statute to allow a defendant to bring his own § 3582(c)(1)(A) motion would be in contradiction with the explicit purpose of the amendments to the compassionate-release provision of the FSA. This understanding grants the BOP a power it has never possessed—and especially one Congress or the Sentencing Commission never granted it. The BOP has no power to block an inmate-initiated motion *sub silentio*. *See* 164 CONG. REC. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Cardin) ("[T]his legislation includes several positive reforms from the House-passed FIRST STEP Act. . . . The bill expands compassionate release under the Second Chance Act and expedites compassionate release applications.").

137 First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5239 (codified as amended at 18 U.S.C. § 3582); *see also* U.S. DEP'T OF JUST., *supra* note 33, at 11 ("The BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered.").

138 First Step Act of 2018, 132 Stat. at 5239.

139 Mistretta v. United States, 488 U.S. 361, 393–94 (1989) (emphasis added). Further, even if it did possess such authority, as a practical matter, the BOP rarely invokes it. Before the FSA's enactment, only 306 prisoners were released—and 81 prisoners died while their requests were pending with the BOP. *See* Norman L. Reimer, Symposium, *Prison Brake: Rethinking the Sentencing Status Quo*, 58 AM. CRIM. L. REV. 1585, 1598 (2021). The FSA was not merely a procedural adjustment to a barely used statute. It worked a complete and material shift, which expanded opportunities for sentence reductions that for decades simply were not available. For example, there were only twenty-four grants of compassionate release in fiscal year 2018. *See* U.S. SENT'G COMM'N,

amendment to § 3582 clearly *can*—and did—cause certain provisions of the policy statement to no longer have the same effect. Given the material changes to the compassionate release provision, the Sentencing Commission's policy statement from 2007 no longer fits.

2. District Courts in the Eleventh Circuit Cannot Evaluate Changes in Law or Policy That May Constitute Extraordinary and Compelling Circumstances

District courts should have the discretion to evaluate changes in law which may now constitute extraordinary and compelling circumstances warranting compassionate release. Yet the majority opinion in *Bryant* forbids district courts from considering these changes. One example of how this discretion may play out is whether a district court may consider nonretroactive changes in federal law to constitute an extraordinary and compelling circumstance. To explain this circumstance more fully, we provide a brief example.

Through 18 U.S.C. § 924(c), Congress made it a crime to "use[ ] or carr[y] a firearm" "during and in relation to any crime of violence or drug trafficking crime" or to "possess[ ] a firearm" "in furtherance of any such crime."[140] A defendant convicted under this statute faced a mandatory minimum term of imprisonment of at least five years.[141] Additionally, any "second or subsequent conviction" yielded a mandatory twenty-five-year sentence, to be served consecutively.[142] Thus, defendants convicted of three counts of violating 18 U.S.C. § 924(c) would be sentenced to a mandatory term of at least fifty-five years in prison, as each conviction would be *stacked* one upon another—even if the first violation came in the same case as the second and third violations.[143]

THE FIRST STEP ACT OF 2018: ONE YEAR OF IMPLEMENTATION 47 n.143 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf [https://perma.cc/XR75-NB33]. Since the FSA became law, there have been over 4,000 grants—with ninety-nine percent of them being granted by judges over the BOP's objections. *See First Step Act*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/fsa [https://perma.cc/G6GP-7P9Y]; Keri Blakinger & Joseph Neff, *31,000 Prisoners Sought Compassionate Release During COVID-19. The Bureau of Prisons Approved 36.*, MARSHALL PROJECT (June 11, 2021, 6:00 AM), https://www.themarshallproject.org/2021/06/11/31-000-prisoners-sought-compassionate-release-during-covid-19-the-bureau-of-prisons-approved-36 [https://perma.cc/6DDW-547S].

140 18 U.S.C. § 924(c)(1)(A).

141 *Id.* § 924(c)(1)(A)(i).

142 Deal v. United States, 508 U.S. 129 (1993); 18 U.S.C. § 924(c)(1)(C).

143 *See, e.g.*, United States v. Bizzell, 480 F. App'x 520, 521 (11th Cir. 2012) (per curiam) (affirming, in part, a sentence of 660 months for three violations of § 924(c)(1)–(2)).

The "stacking" practice led to severe sentences for many defendants. Stacking was often brought against individuals who never brandished or fired the weapon, and it was disproportionately brought against minorities as well.[144] Congress recognized the manifest injustice in stacking when the FSA amended § 924(c)(1)(C)(i) to "[c]larif[y]" that the twenty-five-year penalty applies only to violations "that occur[] after a prior conviction" has become final.[145] Yet Congress did not make these changes fully retroactive.[146] This decision left open whether such a change in the law that was not made retroactive could be used as an extraordinary and compelling reason to seek a sentence reduction.

The gross disparity in sentencing under the old § 924(c), not just compared to what a defendant would be sentenced to under § 924(c) as it currently stands, but also against other serious offenses, is an extraordinary and compelling circumstance. For example, in 2018, the national average sentence for murder was 291 months, and the average sentence in district courts in the Eleventh Circuit was 393 months; the national average sentence for child pornography was 104 months, and the average sentence in district courts in the Eleventh Circuit was 111 months.[147] Yet a getaway driver who neither brandished nor fired a weapon could be sentenced to a term up to and exceeding his natural life for multiple § 924(c) convictions.[148] In fact, before the FSA, over two-thirds of all federal prisoners serving a life sentence were convicted of nonviolent crimes.[149]

Considering the principle that a sentence should be "sufficient, but not greater than necessary,"[150] and the fact that, for many defendants, a sentence they would now receive may be less than half of the sentence they were given, courts have decided to take a second look at these sentences under the FSA's amendments. Four circuits hold that such a

144 *See, e.g.*, United States v. Adeyemi, 470 F. Supp. 3d 489, 526 (E.D. Pa. 2020); *see* U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf [https://perma.cc/P3C2-29NF].

145 First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5221–22 (codified as amended at 18 U.S.C. § 924).

146 *Id.* at 5222.

147 *See* U.S. SENT'G COMM'N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2018 ELEVENTH CIRCUIT 11, tbl. 7 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2018/11c18.pdf [https://perma.cc/6J6G-UAKA].

148 *See, e.g.*, United States v. Reid, No. 05-CR-596(1), 2021 WL 837321, at *2 (E.D.N.Y. Mar. 5, 2021) (imposing a sentence of 107 years for five § 924(c) convictions in the same case).

149 *See* Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next [https://perma.cc/NZ7L-AARN].

150 *See* 18 U.S.C. § 3553(a).

gross disparity can constitute an extraordinary and compelling circumstance justifying compassionate release.[151] Four other circuits, however, have come to the opposite conclusion, holding that a nonretroactive change in the law cannot be deemed an extraordinary and compelling circumstance.[152]

Bryant, however, punts this question to the Sentencing Commission. This is a mistaken conclusion, as this is a *statutory interpretation* question—left for judges alone. If the Sentencing Commission issued a policy statement, in each of the circuits that have held—as a matter of statutory interpretation—that § 3582(c)(1)(A) does not permit such a consideration, the courts in those circuits likely would simply hold that the policy statement violates the law and is invalid.

This would leave the Sentencing Commission in a position where its policy statements are not uniformly obeyed—which undercuts the mandate that courts follow the statements—or that they could only issue a policy statement that prohibits the consideration of such a factor. Yet this would also be incorrect. Nothing in the text of § 3582(c)(1)(A) grants the Sentencing Commission any power to prohibit considerations. Section 994(t) only grants the power to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied."[153] Thus, neither statute empowers the Sentencing Commission to say what cannot be considered extraordinary and compelling.

This also undercuts Congress's and the Sentencing Commission's clear manifestation that the first three categories of cases are not the only extraordinary and compelling reasons to grant compassionate release.[154]

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151 *See* United States v. Ruvalcaba, 26 F.4th 14, 24 (1st Cir. 2022); United States v. McGee, 992 F.3d 1035, 1045–48 (10th Cir. 2021); United States v. McCoy, 981 F.3d 271, 285–87 (4th Cir. 2020); United States v. Owens, 996 F.3d 755, 760 (6th Cir. 2021); *see also* 164 CONG. REC. S7747 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar) ("The sentencing laws . . . . resulted in prison sentences that actually don't fit the crime."); 164 CONG. REC. S7649 (daily ed. Dec. 17, 2018) (statement of Sen. Grassley) ("[N]eedlessly long prison sentences divert[] resources that are needed elsewhere to fight crime."). *But see* United States v. Tomes, 990 F.3d 500 (6th Cir. 2021) (holding that nonretroactive changes in the law cannot be considered).

152 *See* United States v. Crandall, 25 F.4th 582, 585–86 (8th Cir. 2022); United States v. Andrews, 12 F.4th 255, 261 (3d Cir. 2021); United States v. Thacker, 4 F.4th 569, 574 (7th Cir. 2021); *Tomes*, 990 F.3d at 505. *But see* United States v. McCall, 20 F.4th 1108 (6th Cir. 2021) (holding that nonretroactive changes in the law can be considered).

153 28 U.S.C. § 994(t).

154 S. REP. No. 98-225, at 55–56 (1983), *as reprinted in* 1984 U.S.C.C.A.N. (98 Stat. 1837) 3182, 3238–39; U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. 1(D) (U.S. SENT'G COMM'N 2021). It also, arguably, undermines the original compassionate release statute enacted as part of the CCCA, as Congress made clear that the length of a sentence can constitute an extraordinary and compelling circumstance if the sentence is "unusually long." S. REP. No. 98-225, at 55, 1984 U.S.C.C.A.N. at 3238.

Congress contemplated the need for § 3582, especially when "the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment."[155] Courts attempting to cabin judicial discretion seek to provide the BOP with power that neither Congress nor the Sentencing Commission has granted it, all the while undermining the FSA.

Furthermore, it also undermines Supreme Court precedent. As *Concepcion v. United States*—the Supreme Court's most recent case interpreting the FSA—makes abundantly clear, efforts to undercut the FSA by creating extra-textual limits on resentencing considerations are not permitted.[156] The Court in *Concepcion* made clear that the "only limitations" on considerations for judges are those in the Constitution or those that Congress has expressly set forth.[157] Thus, although *Concepcion* is a crack case, the holding should benefit every federal prisoner moving for compassionate release on all possible grounds not expressly excluded by Congress or the Constitution—including those in the Eleventh Circuit.[158]

3. District Courts in the Eleventh Circuit Cannot Respond Nimbly to Crises

Alarmingly, this position precludes district courts from responding nimbly to crises like COVID-19. As of August 2022, more than 55,000 federal prisoners contracted COVID-19.[159] That is nearly forty percent of all prisoners in BOP custody.[160] The pandemic has killed prisoners at significantly higher rates than the general population.[161] At one point in

155 S. REP. No. 98-225, at 55–56, 1984 U.S.C.C.A.N. at 3238–39.

156 *See* Concepcion v. United States, 142 S. Ct. 2389, 2395–96 (2022) ("It is only when Congress or the Constitution limits the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, that a district court's discretion to consider information is restrained. Nothing in the First Step Act contains such a limitation. Because district courts are always obligated to consider nonfrivolous arguments presented by the parties, the First Step Act requires district courts to consider intervening changes when parties raise them.").

157 *Id.* at 2394 ("The only limitations on a court's discretion to consider relevant materials . . . in modifying that sentence are those set forth by Congress in a statute or by the Constitution.").

158 *Id.* at 2398 ("Federal courts historically have exercised this broad discretion to consider all relevant information at . . . later proceedings that may modify an original sentence.").

159 *See COVID-19 Coronavirus*, FED. BUREAU OF PRISONS, https://www.bop.gov/coronavirus [https://perma.cc/7LCR-BZLR].

160 *Id.*

161 Eddie Burkhalter et al., *Incarcerated and Infected: How the Virus Tore Through the U.S. Prison System*, N.Y. TIMES (Apr. 10, 2021), https://www.nytimes.com/interactive/2021/04/10/us/covid-prison-outbreak.html (last visited Oct. 28, 2022); *see also* Editorial Board, *America Is Letting the*

the pandemic, cases were nearly three times higher in federal prisons than in the general population.[162] Yet in the Eleventh Circuit, only the BOP could ever determine that medical conditions that increase an inmate's risk of contracting coronavirus, and the consequences from such contraction, constitute an extraordinary and compelling reason—even though courts outside the Eleventh Circuit have repeatedly found this to constitute an extraordinary and compelling circumstance.[163] "To effectively curb the consequences of COVID-19 and future novel deadly infectious diseases in prisons, it may be prudent to lessen the degree to which the [BOP] or courts consider reasons for release to be 'extraordinary and compelling.'"[164]

B. Proposal

1. District Courts Should Have Discretion to Determine What Constitutes Extraordinary and Compelling Circumstances for All Compassionate-Release Motions, Both Prisoner-Filed and BOP-Filed

The FSA's amendments did far more than just alter procedural aspects of the compassionate-release process. It was a complete shift, expanding opportunities for compassionate release that could not have been imagined before its enactment. For the first time, prisoners could seek compassionate release themselves. Yet courts attempt to undermine such changes by reading the statute in a way that finds no support.

When a court is asked to resolve a question of statutory interpretation, it always begins "with the language of the statute."[165] The FSA contains explicit language that empowers judges to decide whether

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Coronavirus Rage Through Prisons, N.Y. TIMES (Nov. 21, 2020), https://www.nytimes.com/2020/11/21/opinion/sunday/coronavirus-prisons-jails.html [https://perma.cc/WLL8-QXHT] ("[T]he death rate is more than twice as high.").

162 Note, *A Textual Argument for Challenging Conditions of Confinement Under Habeas*, 135 HARV. L. REV. 1397, 1397 (2022).

163 *Compare* United States v. Garcia, No. 20-12868, 2021 WL 3029753, at *1 (11th Cir. July 19, 2021), *with* United States v. Reyes-De La Rosa, No. 18-CR-55, 2020 WL 3799523, at *3 (S.D. Tex. July 7, 2020); United States v. Muniz, No. 09-CR-0199-1, 2020 WL 1540325, at *2 (S.D. Tex. Mar. 30, 2020); United States v. Ennis, No. EP-02-CR-1430-PRM-1, 2020 WL 2513109, at *6 (W.D. Tex. May 14, 2020); United States v. Gustafson, No. 15-cr-00073-1, 2020 WL 4877252, at *10 (W.D. Pa. Aug. 20, 2020); United States v. Fluellen, No. 15-cr-00435, 2020 WL 4003039, at *1 (N.D. Ohio July 15, 2020); United States v. Mapp, 467 F. Supp. 3d 63, 65–66 (E.D.N.Y. 2020); United States v. Feucht, 462 F. Supp. 3d 1339, 1340 (S.D. Fla. 2020).

164 Drew Lewis, *Compassionate Release in the Context of COVID-19 and Future Pandemics*, 21 HOUS. J. HEALTH L. & POL'Y 371, 373–74 (2022).

165 Kingdomware Techs. v. United States, 579 U.S. 162, 171 (2016) (quoting Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002)).

an extraordinary and compelling circumstance exists.[166] The first two words of the provision are "the court," and the last four are "if it finds that."[167] The language makes clear that Congress contemplated significant judicial discretion in making such a determination. And it serves an important purpose.[168] The uniformity of this understanding is further borne out by the courts of appeals's consistent application of the policy statements' limitations to BOP-filed compassionate-release motions.[169]

Consider the now-repudiated § 924(c), which permitted imposing draconian, enhanced mandatory sentences under the practice of stacking.[170] Both Congress and President Trump deemed stacked

166 Section 3582(c)(1)(A) authorizes district courts to reduce a term of imprisonment when "extraordinary and compelling reasons warrant such a reduction." 18 U.S.C. § 3582(c)(1)(A)(i). But the statute also provides for this authority as long as the district courts consider whether the reduction is "consistent with" policy statements that are "applicable." *Id.* § 3582(c)(1)(A)(ii). The most recent policy statement's text states "[u]pon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A)." U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2021). Clearly the policy statement is "applicable" only to BOP-filed motions. On the most natural reading, prisoner-filed motions are not included. *See generally* Republic of Sudan v. Harrison, 139 S. Ct. 1048, 1056 (2019) (choosing the "most natural" reading of a statute); United States v. Hohri, 482 U.S. 64, 69–71 (1987); Scialabba v. De Osorio, 573 U.S. 41, 61 (2014); Gabelli v. SEC, 568 U.S. 442, 448 (2013). The Sentencing Commission's commentary buttresses this natural reading. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. 4 (U.S. SENT'G COMM'N 2021) ("A reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons pursuant to 18 U.S.C. § 3582(c)(1)(A)."). This commentary is considered binding on the courts. *See* Stinson v. United States, 508 U.S. 36, 38 (1993).

167 18 U.S.C. § 3582(c)(1)(A).

168 By permitting prisoner-filed compassionate-release motions, § 3582(c)(1)(A) expanded the universe of those who seek compassionate release beyond simply the BOP. And because the most recent policy statement makes clear it only applies to BOP-filed compassionate-release motions, this language is best read to contemplate judicial determination of what constitutes an extraordinary and compelling circumstance. *See Kingdomware Techs.*, 579 U.S. at 172–73 (noting that the opening language of a provision is not merely just prologue). Thus, district courts have the discretion to determine what constitutes extraordinary and compelling circumstances because the texts permit it, and this reading allows courts to effectuate the letter and spirit of the FSA. *See* King v. Burwell, 576 U.S. 473, 486 (2015) ("[Courts] must read the words [of a statute] 'in their context and with a view to their place in the overall statutory scheme.'" (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000))).

169 *See* United States v. Ruvalcaba, 26 F.4th 14, 21 (1st Cir. 2022); United States v. Andrews, 12 F.4th 255, 259 (3d Cir. 2021); United States v. Shkambi, 993 F.3d 388, 393 (5th Cir. 2021); United States v. Elias, 984 F.3d 516, 519–20 (6th Cir. 2021); United States v. Aruda, 993 F.3d 797, 802 (9th Cir. 2021); United States v. McGee, 992 F.3d 1035, 1050 (10th Cir. 2021); United States v. Long, 997 F.3d 342, 355 (D.C. Cir. 2021); United States v. Brooker, 976 F.3d 228, 235 (2d Cir. 2020); United States v. McCoy, 981 F.3d 271, 282 (4th Cir. 2020); United States v. Gunn, 980 F.3d 1178, 1180–81 (7th Cir. 2020).

170 Section 924(c) made it a crime for an individual to, "during and in relation to any crime of violence . . . , use[] or carr[y] a firearm." 18 U.S.C. § 924(c)(1)(A). The mandatory minimum sentence for an individual convicted of that offense was a term of imprisonment of five years. *Id.*

sentences under this provision so excessive that they revised the provision to ensure that individuals would not be put in those circumstances again.[171] Arguably, there is not a factor more relevant to determining whether an extraordinary and compelling circumstance exists than new developments of law which bear on whether the current sentence reflects "the seriousness of the offense."[172] Nothing in § 3582 or any other part of the FSA limits what judges may consider to be an extraordinary and compelling reason justifying compassionate release[173]—especially because Congress has charged judges with the "need to avoid unwarranted sentence disparities" when deciding compassionate release motions.[174] Congress would not have enacted two statutes with such

§ 924(c)(1)(A)(i). In addition, § 924(c)(1)(C) then provided for a twenty-five-year mandatory minimum sentence for any second or subsequent conviction for violating § 924(c), to be served consecutively. *Id.* § 924(c)(1)(C).

171 *See* First Step Act of 2018, Pub. L. No. 115-391, § 403, 132 Stat. 5194, 5221–22 (codified as amended at 18 U.S.C. § 924) (amending § 924(c) to limit the application of a twenty-five-year mandatory minimum sentence).

172 18 U.S.C. § 3553(a)(2)(A).

173 There are currently over 2,000 federal inmates who were sentenced to thousands of years in prison under the now-repudiated § 924(c), which permitted stacking. U.S. SENT'G COMM'N, ESTIMATE OF THE IMPACT OF SELECTED SECTIONS OF S. 1014, THE FIRST STEP ACT IMPLEMENTATION ACT OF 2021 1 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/October_2021_Impact_Analysis_for_CBO.pdf [https://perma.cc/NHR2-PM8C]. The average sentence of these individuals is 418 months, or nearly 35 years. *Id.* These are not hypothetical disparities. Rather, individuals sentenced under the current statutory scheme receive sentences decades shorter than those sentenced under the earlier scheme. *See, e.g.*, United States v. Clausen, No. CR 00-291-2, 2020 WL 4260795, at *1 (E.D. Pa. July 24, 2020) (a difference of over 150 years); United States v. Young, 458 F. Supp. 3d 838, 848 (M.D. Tenn. 2020) (a difference of 67 years); United States v. Urkevich, No. 03CR37, 2019 WL 6037391, at *2 (D. Neb. Nov. 14, 2019) (a difference of 40 years). Congress requires federal judges to impose a sentence that is "sufficient, but not greater than necessary." 18 U.S.C. § 3553(a). Federal judges cannot properly fulfill this mandate if they are not permitted to use all the tools to aid in this endeavor. The fact that often decades—and sometimes even centuries—would be removed from the possible outcome today, especially when such punishment was imposed in a racially discriminatory manner, just furthers the point. *See* United States v. Holloway, 68 F. Supp. 3d 310, 313 (E.D.N.Y. 2014) ("Black defendants . . . have been disproportionately subjected to the 'stacking' of § 924(c) counts . . . ."); U.S. SENT'G COMM'N, 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 360 n.904 (2011), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_12.pdf [https://perma.cc/8MNA-R7G8]. To fully effectuate the FSA to the extent Congress intended, district judges should be able to enjoy broad discretion to make individualized determinations. Since judges enjoy broad discretion when it comes to sentencing, courts should not cabin such discretion unless that indication has been made clear by Congress.

174 *See* 18 U.S.C. §§ 3553(a)(6), 3582(c)(1)(A). It would be absurd to suggest that an individual sentenced on December 1, 2018, to a life sentence for multiple § 924(c) violations is more dangerous than his codefendant, sentenced to over a half-century less, convicted of the same exact crime, the same exact counts, with the same background, but was lucky enough to be sentenced on December 30, 2018.

commands that they work in unison if it did not want courts to use them.[175]

But even looking beyond the plain meaning of § 3582(c)(1)(A) to the congressional intent in enacting the FSA, we see that curbing district courts' discretion thwarts Congress's goals and leads to perverse results. Consequently, the Eleventh Circuit's opinion in *Bryant* fails to afford thousands of inmates their statutory right to seek relief. These inmates continue to be harmed by the Sentencing Commission's and the BOP's failures. Such a result diverges from both the letter and spirit of the FSA.

No doubt, this statute, like any other statute enacted by Congress, must also be read in context.[176] The context of § 3582(c) suggests that there is not an intent to limit judicial discretion in determining what constitutes an extraordinary and compelling circumstance. For example, when Congress enacted the SRA, it explicitly stated that one avenue for relief using a sentence reduction would be for sentences which were "unusually long."[177] At the same time, the BOP heeded neither Congress's nor the Sentencing Commission's guidance by consistently declining to bring any motions.[178] Frustrated with the BOP's performance, Congress amended § 3582(c)(1)(A) to increase the use of compassionate release by allowing defendants to go straight to the district courts.[179] Unlike other parts of the FSA that expressly limit judges reviewing compassionate release motions, § 3582(c)(1)(A) is not so limited.[180] Section 603(b)

175 *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (commanding courts to "interpret [a] statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole'" (citation omitted) (first quoting Gustafson v. Alloyd Co., 513 U.S. 561, 569 (1995); and then quoting FTC v. Mandel Bros., Inc., 359 U.S. 385, 389 (1959))); United States v. Bass, 404 U.S. 336, 344 (1971); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 180 (2012) ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory.").

176 *See* Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604, 610 (1978).

177 S. REP. NO. 98-225, at 55 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3238.

178 *See* U.S. DEP'T OF JUST., *supra* note 33, at ii.

179 *See* First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239 (codified as amended at 18 U.S.C. § 3582); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 356 (2013) ("Text may not be divorced from context."). Curbing judicial discretion when it comes to compassionate release also does not fit within the broader FSA. Federal judges were given significantly greater discretion in sentencing in other parts of the Act. *See* First Step Act of 2018, § 401, 132 Stat. at 5220–21. Congress expected these provisions to work in harmony, expanding judicial discretion in all of them.

180 *See* First Step Act of 2018, § 404(b), 132 Stat. at 5222 (concluding that courts may "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act . . . were in effect at the time the covered offense was committed," which reduced sentences for certain cocaine offenses); *see also* 28 U.S.C. § 994(t) ("Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason."). Congress has demonstrated its ability to create limitations when it pleases. The Supreme Court has made clear that a reading that creates atextual limitations should not be done routinely. *See* Whitfield v. United States, 543 U.S. 209, 216–17 (2005).

reshaped the dynamic of compassionate release by permitting the district court to consider a defendant's motion, regardless of the BOP's position. Congress knew of the BOP's rare granting of compassionate release petitions.[181] Thus, Congress explicitly intended the FSA to respond to decades of BOP failure to request compassionate release where it was warranted.[182] Yet some courts believe the plain language of § 3582(c)(1)(A) does not mean what it says.[183] Nothing in the text or legislative history supports that proposition—in fact, the legislative record reveals precisely the opposite.[184]

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181 The FSA's compassionate-release provision was originally a stand-alone bill which explicitly sought to "improve the compassionate release process of the Bureau of Prisons." Granting Release and Compassion Effectively Act of 2018, S. 2471, 115th Cong. 1 (2018).

182 *See* U.S. DEP'T OF JUST., *supra* note 33, at iii ("[F]rom 2006 through 2011 . . . , in 13 percent (28 of 208) of the cases where inmate requests had been approved . . . , the inmate died before a final decision was made by the BOP Director."); Thompson, *supra* note 33 (noting multiple examples of several terminally ill and elderly inmates who died awaiting their requests); SENT'G RES. COUNS. FOR THE FED. PUB. CMTY. DEFS., THE COVID-19 CRISIS IN FEDERAL DETENTION: DECEMBER 2020 1 (2020), https://www.fd.org/sites/default/files/covid19/bop_jail_policies_and_information/sentencing_resource_counsel_fact_sheet-december.pdf [https://perma.cc/MXX7-7XJG]. Yet the BOP is not completely excluded, as the FSA gives the Director at least thirty days to articulate the BOP's decision and rationale. 18 U.S.C. § 3582(c)(1)(A).

183 *See, e.g.*, Mass. Mut. Life Ins. v. Russell, 473 U.S. 134, 141–42 (1985) (noting that courts are not permitted to perform judicial surgery and "blue pencil" unambiguous text so as to divorce it from its context).

184 *See* First Step Act of 2018, § 603(b), 132 Stat. at 5239; *see also* 164 CONG. REC. S7649 (daily ed. Dec. 17, 2018) (statement of Sen. Grassley) ("Third, the bill provides for more judicial discretion by expanding the existing Federal safety valve to include more low-level, nonviolent offenders."); 164 CONG. REC. S7756 (daily ed. Dec. 18, 2018) (statement of Sen. Nelson) ("This legislation will allow judges to do the job that they were appointed to do—to use their discretion to craft an appropriate sentence to fit the crime. . . . These rigid sentences that do not fit the crimes ought to be turned around, and that is exactly what this legislation does."); 164 CONG. REC. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Booker) ("[T]his bill includes critical sentencing reform that will reduce mandatory minimums and give judges discretion back—not legislators but judges who sit and see the totality of the facts."). Simply put, judges should have the discretion to determine what constitutes an extraordinary and compelling circumstance because the goal of Section 603 of the FSA—increasing the use of compassionate release—is undermined without it. *See* Letter from Brian Schatz, U.S. Senator et al., to J. Rod Rosenstein, Deputy Att'y Gen., U.S. Dep't. of Just., & Dr. Thomas R. Kane, Acting Dir., Fed. Bureau of Prisons (Aug. 3, 2017), https://famm.org/wp-content/uploads/2017.08.03-Letter-to-BOP-and-DAG-re.-Compassionate-Release.pdf [https://perma.cc/C2PC-77KL] ("[T]he sentencing court, rather than the BOP, is best suited to decide if the prisoner deserves compassionate release."). Cabining this discretion frustrates the purpose of the FSA, as well as undermines the efforts Congress made in crafting the provision. *See* Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 7 (2011) (noting that one must consider a statute "in conjunction with the purpose and context"); Gomez-Perez v. Potter, 553 U.S. 474, 486–88 (2008); *see also* SCALIA & GARNER, *supra* note 175, at 63 (arguing that courts should decide the "textually permissible interpretation that furthers rather than obstructs" the statute's purpose).

Faced with the undeniably broad text, courts have chosen to narrow the statute by assuming that Congress implied what it did not say.[185] This understanding is flawed, would exacerbate the problems the FSA sought to correct, and would create arbitrary barriers not based on the individual's circumstance, but on where they were sentenced.

To begin, this reading deviates from the statute's overall design.[186] When Congress amended § 3582(c)(1), it chose to insert the ability of inmates to bring motions directly to the courts.[187] The title of the FSA section which amended § 3582(c)(1)(A), "Increasing the Use and Transparency of Compassionate Release," also shows that Congress was determined to address the BOP's failures.[188] Further, a different provision enacting the SRA contains an express reference that rehabilitation, when considered alone, may not be considered an extraordinary and compelling circumstance under § 3582(c)(1)(A).[189] If Congress desired to limit judicial discretion, both in determining whether courts can decide what constitutes extraordinary and compelling circumstances, as well as what is or is not off-limits, it could have used language similar to what it invoked in § 994(t). Or, it could have inserted the command to follow the Sentencing Commission's policy statement provision without the "applicable" qualifier. That said, Congress did neither of those things, and courts "must give effect to Congress' choice."[190] As a whole, the text thus supports judicial discretion.

Further, it can never be the case that the BOP will invoke the ground set forth in Section 1(D) of the Sentencing Commission's commentary. That is because internal BOP guidance prohibits the director from bringing a motion for compassionate release that is not based on one of the three enumerated categories in the 2007 Sentencing Commission policy statement.[191] But internal guidance can easily change. After

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185 In essence, courts are requiring "extratextual evidence as a precondition for enforcing an *unambiguous* congressional mandate." *See* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 121 (2007) (Scalia, J., dissenting).

186 And courts are not permitted to consider a statute's words in isolation. *See* Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text [and] considering the purpose and context of the statute . . . .").

187 18 U.S.C. § 3582(c)(1)(A).

188 *See* First Step Act of 2018, § 603(b), 132 Stat. at 5239.

189 *See* 28 U.S.C. § 994(t). This makes clear that "extraordinary and compelling" includes not only what the Sentencing Commission or BOP determine it to be, but also what a court decides after an individualized assessment. *See* 18 U.S.C. § 3582(c)(1)(A).

190 Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177 n.3 (2009).

191 *See* U.S. DEP'T OF JUST., FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5050.50, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582 AND 4205(G) (2019), https://www.bop.gov/policy/progstat/5050_050_EN.pdf [https://perma.cc/85QE-RNGA]. This policy statement undermines the amendments to

Congress passed the FSA, the BOP released a program statement which outlines standards far more stringent than those stated in Section 1B1.13.[192] In other words, the program statement that governs the BOP's procedure for assessing requests for compassionate release from inmates limits the possible grounds to age, medical condition, and caregiver status.[193] Thus, if an extraordinary and compelling reason outside of those three enumerated categories justifying compassionate release does exist, it must come from the policy statement by the Sentencing Commission, as the BOP's program statement eliminates the "other" provision in its entirety. Congress amended § 3582(c)(1)(A) to *increase* the use of compassionate release. By permitting the BOP to both be the arbiter of what constitutes "other" extraordinary and compelling circumstances, and then permit the BOP to eliminate that ground for relief, courts allow the BOP to undermine the FSA.[194]

2. Congress Should Legislate

"Just as a painter need not start every new work from a clean canvas, Congress may add to what it has already created."[195] Congress enacted the FSA to be just that—a *first* step. So, Congress could pass a law to remedy the issue.[196] We propose Congress adopt legislation that vests district

compassionate release that Congress clearly intended be available. In a case where an inmate has filed a § 3582(c)(1)(A) motion directly in the court, the Director of the BOP has *inescapably* not made any such determination. When a court decides that only the BOP can make such a determination, it patently undercuts Congress's intent to expand the transparency and use of compassionate release.

192 *See id.*

193 *See id.* Despite explicit language which makes clear that "other reasons" outside of the three specified grounds may exist, the BOP has decided not to follow the Sentencing Commission's instruction.

194 This is not terribly surprising, however, as the BOP has long failed to heed the instructions of the Sentencing Commission. The BOP has read the compassionate release provision very narrowly for decades. Prior to 2006, the BOP only granted compassionate release to terminally ill inmates. Ferraro, *supra* note 5, at 2477. After 2006, the policy statement expanded that category to include inmates who were at least seventy years old and had served at least thirty years. Berry, *supra* note 34, at 859; Ferraro, *supra* note 5, at 2478. Despite this, the BOP has mostly ignored it, and largely limited their motions to those who were terminally ill. Berry, *supra* note 34, at 853; *see* McMahon, *supra* note 33, at 1618.

195 Cheneau v. Garland, 997 F.3d 916, 933 (9th Cir. 2021) (en banc) (Bress, J., dissenting).

196 *See, e.g.*, Wooden v. United States, 142 S. Ct. 1063, 1077 (2022) (Barrett, J., concurring in part) ("[W]e have recognized that a judicial decision or line of decisions has provided the impetus for legislation. In some instances, enacted findings have explicitly connected the statute to a prior decision."); Beras v. Johnson, 978 F.3d 246, 255 (5th Cir. 2020) (Oldham, J., concurring) ("Of course, only Congress can write law. And since it's Congress's law to write, it's also Congress's law to shape. Therefore, Congress always has the first word; and in the absence of a constitutional problem, it also has the last." (citations omitted)).

courts with the discretion to determine whether a prisoner is experiencing extraordinary and compelling circumstances warranting compassionate release in *all* cases, both on prisoner-filed compassionate-release motions and BOP-filed compassionate-release motions.

This proposal is not as far-fetched as it may sound. Professor Blumstein explains that:

> In today's highly polarized political environment, one of the few issues on which one can see widespread agreement across the parties is the desire to reduce prison populations. This agreement results from the nation's impressively high incarceration rate (typically described as "mass incarceration"), which is almost five times its formerly stable rate, several times higher than all the other developed countries, and is essentially the highest rate in the world. Such agreement also flies in the face of the impressively low crime rate currently prevailing in the United States.[197]

"Fortunately, bipartisanship is flourishing in many areas of the criminal justice reform agenda."[198] Recall a Republican Congress passed, and President Trump signed, the FSA. Indeed, "[g]roups as diverse as the American Civil Liberties Union, the Heritage Foundation, the Brennan Center for Justice, and the American Conservative Union Foundation all support federal criminal justice reform."[199] This trend in bipartisan criminal justice reform rings true at both the state and federal level.[200]

But Professor Herman raises an important point about the longevity of bipartisan criminal justice reform. To continue, the big question will be "whether public opinion will continue to move toward acceptance of data-driven solutions, or whether exaggerated fear of violent crime will stymy further reduction of the prison population."[201]

So long as the bipartisan approach to criminal justice reform continues, an opportunity exists for Congress to pass a law building on the progress of the FSA and explain who gets to determine whether a prisoner has identified extraordinary and compelling circumstances warranting compassionate release. We believe the political will is there,

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197 Alfred Blumstein, *Dealing with Mass Incarceration*, 104 MINN. L. REV. 2651, 2651 (2020) (footnotes omitted).

198 Susan N. Herman, *Getting There: On Strategies for Implementing Criminal Justice Reform*, 23 BERKELEY J. CRIM. L. 32, 36 (2018).

199 Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J.F. 791, 793 n.14 (2019).

200 *See, e.g.*, Pauline Quirion, *Sealing and Expungement After Massachusetts Criminal Justice Reform*, 100 MASS. L. REV. 100, 100 (2019) (discussing Massachusetts's 2018 "bipartisan legislation heralded by many legislators and other supporters as a landmark measure that would enhance public safety, promote more equitable outcomes and emphasize rehabilitation and re-integration").

201 Herman, *supra* note 198, at 42.

and Congress should not hesitate to act to codify district courts' authority to grant compassionate release where appropriate.

3. The United States Sentencing Commission Should Revise the Application Note to Reflect the First Step Act's Creation of a Prisoner-Filed Compassionate-Release Motion

Of course, the Sentencing Commission could update the Application Note to reflect the FSA's changes permitting prisoners to file their own motions for compassionate release. Easier said than done. From January 2019 until August 2022, the Commission did not have a quorum.[202] After years of impasse, President Biden nominated, and the Senate confirmed, seven bipartisan members to the Commission.[203] But the policy statement has not been revised since Congress amended § 3582(c)(1) to allow *federal inmates*, not simply the BOP, to move for compassionate release directly in federal courts. Even so, simply having a quorum matters little. Nothing forces the Sentencing Commission to produce an updated policy statement. It took the Sentencing Commission twenty-two years to produce the first policy statement—ignoring the mandate from Congress in the process.[204] The Commission also follows a deliberative and multi-step process before it votes on changes, which can take months or even years to complete in its own right.[205] Although the Commission now has a quorum, nothing precludes it from waiting another twenty-two years to produce another policy statement.[206] This

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202 Guerrant v. United States, 142 S. Ct. 640, 641 (2022) (statement of Sotomayor, J.) ("[T]he Sentencing Commission has not had a quorum for three full years."). Because the Sentencing Commission has not had a quorum, its most recent policy statement is stated in the 2007 Guidelines, which reads:

> *Upon motion of the Director of the Bureau of Prisons* . . . the court may reduce a term of imprisonment . . . if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, the court determines that . . . extraordinary and compelling reasons warrant the reduction; or . . . the defendant (i) is at least 70 years old; and (ii) has served at least 30 years in prison[;] . . . the defendant is not a danger to the safety of any other person or to the community[;] . . . and . . . the reduction is consistent with this policy statement.

U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2007) (emphasis added).

203 Press Release, U.S. Sent'g Comm'n, Acting Chair Judge Charles Breyer, Incoming Chair Judge Carlton W. Reeves Applaud Senate Confirmation of New Commissioners (Aug. 5, 2022), https://www.ussc.gov/about/news/press-releases/august-5-2022 [https://perma.cc/A48W-PS3A].

204 United States v. Shkambi, 993 F.3d 388, 391 (5th Cir. 2021).

205 *See* U.S. SENT'G COMM'N, RULES OF PRACTICE AND PROCEDURE 2.2, 4.1–4.5 (Aug. 18, 2016), https://www.ussc.gov/about/rules-practice-and-procedure [https://perma.cc/95MZ-2V2D].

206 This would trigger the presumption against ineffectiveness: that Congress presumably does not enact useless laws. SCALIA & GARNER, *supra* note 175, at 63.

would render § 3582(c)(1)(A) largely a dead letter.[207] To be clear, we do not suggest this is likely.

Nevertheless, courts have no ability to update the Commission's 2007 policy statement by ignoring the pre-FSA language relating solely to BOP-filed motions.[208] That reading also places the commentary in direct conflict with both the text of the amended § 3582(c)(1)(A) and the text of the policy statement on which the commentary expands. Neither § 3582(c)(1)(A) nor Section 1B1.13 command a finding of extraordinary and compelling reasons by the Sentencing Commission.

Perhaps the most ideal remedy to the *Bryant* problem would be for the Sentencing Commission to amend the Application Note. This may not be as idealistic as observers believed just months ago, given the new quorum. We suggest the first task the Sentencing Commission should undertake with a new quorum is remedying this blind spot that the court in *Bryant* misinterpreted. Even so, this process will not happen overnight, and litigation or legislation may move more quickly to re-vest judges with their discretion.

4. Another Inmate in the Eleventh Circuit Should Seek En Banc Review to Overturn *Bryant*

Finally, another prisoner could litigate his claim in the Eleventh Circuit and attempt to secure en banc review of the erroneous *Bryant* decision. The Eleventh Circuit, like other circuits, follows the "prior panel rule," which "is simply that '[the Eleventh Circuit is] bound by the holdings of earlier panels unless and until they are clearly overruled *en banc* or by the Supreme Court.'"[209] Federal Rule of Appellate Procedure

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207 Corley v. United States, 556 U.S. 303, 314 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (quoting Hibbs v. Winn, 542 U.S. 88, 101 (2004))).

208 It is a well-understood principle that where two statutes are in conflict, the latter enacted is given preference over the former. *See* SCALIA & GARNER, *supra* note 175, at 327 ("[T]he last in order of time shall be preferred to the first." (quoting THE FEDERALIST NO. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

209 Gandara v. Bennett, 528 F.3d 823, 829 (11th Cir. 2008) (quoting Swann v. S. Health Partners, Inc., 388 F.3d 834, 837 (11th Cir. 2004)). Professor Wyatt Sassman recently proposed a new streamlined method by which circuits can remedy splits. Professor Sassman proposed that:

> [T]he courts of appeals should relax the law of the circuit doctrine when a prior panel opinion has subsequently resulted in a conflict with another circuit. Courts should relax the doctrine to allow the latter panel to revisit the prior decision and address the grounds for the conflict with another circuit.

Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, 103 MARQ. L. REV. 1401, 1451 (2020). Professor Sassman's compelling proposition, however, would not help here because the Eleventh Circuit panel decided *Bryant* to *create* the circuit split.

35 explains that en banc review is ordered where the "majority of the circuit judges who are in regular active service and who are not disqualified . . . order that an appeal . . . be heard or reheard by the court of appeals en banc."[210] Although generally disfavored, en banc review may be appropriate if "a petition . . . assert[s] that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue."[211]

This hypothetical is the reality of *Bryant*. The Eleventh Circuit broke with every other court of appeals to consider prisoner-filed petitions. Although unlikely, an en banc Eleventh Circuit could embrace its sister circuits' approach and overrule *Bryant*.

CONCLUSION

"You will not find God or grace in legal concepts, in formal notions of criminal justice. Certain values and ideals are beyond justice. These include mercy, forgiveness, redemption, dignity."[212] We trust judges to uphold these values and ideals. We trust judges to be merciful. Or we should. Indeed, federal judges "have life tenure to insulate rulings from public influence."[213] The Eleventh Circuit's opinion in *Bryant*, however, weakens that trust and binds the hands of sentencing courts. "[B]y a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language, 'uncontradicted' legislative history and uniform precedent," the majority in *Bryant* wrought harm and despair on prisoners in the Eleventh Circuit.[214] And the Supreme Court denied Bryant's petition for a writ of certiorari to remedy the majority's obvious error.[215] So we join the unanimous commentary critiquing this erroneous decision.[216]

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210 FED. R. APP. P. 35(a).

211 FED. R. APP. P. 35(b)(1)(B).

212 BHARARA, *supra* note 2, at 323.

213 Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937, 960 (2022); *see also* M. Margaret McKeown, *The Judiciary Steps up to the Workplace Challenge*, 116 NW. U. L. REV. ONLINE 275, 282 (2021) ("The life tenure of federal judges is intended to insulate them from shifting political winds and outside pressures in reaching their decisions and to further support their independence.").

214 United Steelworkers of Am. v. Weber, 443 U.S. 193, 222 (1979) (Rehnquist, J., dissenting).

215 Bryant v. United States, 142 S. Ct. 583 (2021).

216 *See* Ferraro, *supra* note 5; Leach, *supra* note 26; Allison Cheney, Comment, *Procedural Pitfalls: The Eleventh Circuit Holds That the Sentencing Commission's Policy Statement on Sentence Reduction Is Binding on Defendant-Filed Motions*, 63 B.C. L. REV. ELEC. SUPP. II.-61 (2022); Case

So, what now? We offer a few solutions. The Sentencing Commission can begin to undertake the pressing work of revising the Application Note. But the process is long and arduous. Congress could pass a law returning compassionate-release discretion to sentencing judges, either for only prisoner-filed petitions or both BOP-filed and prisoner-filed petitions for compassionate release. And an intrepid lawyer could go back to the Eleventh Circuit and attempt, through en banc review, to have *Bryant* overturned as wrongly decided.

This Article discusses only federal sentencing and federal compassionate release. But of course, "[s]tate courts handle many more criminal cases than the federal courts," and "[s]tate sentencing procedures touch the lives of many more defendants, victims and witnesses than the federal sentencing system."[217] Regrettably, "[s]tate sentencing is under-examined in part because state systems are difficult to comprehensively analyze, either individually or collectively."[218] "Especially in the academic world, there is seemingly endless interest in federal sentencing law and practices, but precious little discussion of state sentencing reforms generally or of developments in particular states."[219] This Article should be the beginning, not the end, of the discussion of compassionate release. Future scholarship should turn to the states, evaluating compassionate release at the state level and importing the discretion that we propose federal judges enjoy in compassionate release determinations to state judges.

"There is no way to sugar coat it—the COVID-19 pandemic has forever impacted society as we know it."[220] But the pandemic shone a light on compassionate release in a way other events had not. COVID-19 put front and center the issue of judicial discretion in determining when a prisoner has identified "extraordinary and compelling circumstances" that may warrant her compassionate release. Whether because of newly enacted legislation not made retroactive or because of a global pandemic, federal judges must have the discretion to determine whether a prisoner identifies circumstances appropriate for compassionate release.

Comment, *Sentencing—Statutory Interpretation—Eleventh Circuit Creates Circuit Split by Holding That the First Step Act Does Not Grant Courts the Authority to Determine What Circumstances Justify Compassionate Release.*—United States v. Bryant*, 996 F.3d 1243 (11th Cir. 2021)*, 135 HARV. L. REV. 1182 (2022).

217 Douglas A. Berman & Steven L. Chanenson, *The Real (Sentencing) World: State Sentencing in the Post*-Blakely *Era*, 4 OHIO ST. J. CRIM. L. 27, 28 (2006).

218 *Id.*

219 *Id.*

220 Joshua Grissom, *An Analysis of the Temporary and Lasting Effects of the COVID-19 Pandemic on International Human Rights*, 24 GONZ. J. INT'L L. 178, 179 (2021).