

OPENING THE SAFETY VALVE: A SECOND LOOK AT COMPASSIONATE RELEASE UNDER THE FIRST STEP ACT

*Michael T. Hamilton**

Under federal law, judges are generally prohibited from changing a sentence once it has been imposed. Compassionate release, to put it simply, provides a “safety valve” against this general principle, allowing federal judges to reduce a prisoner’s sentence when it is warranted by “extraordinary and compelling reasons.” For the past thirty years, statutory and bureaucratic roadblocks made compassionate release an unlikely avenue for prisoners to receive sentence reductions. With the passage of the First Step Act of 2018, the U.S. Congress made the first significant changes to the compassionate release statute in decades, permitting defendants for the first time to bring such motions directly to their sentencing courts. An overwhelming majority of circuit courts have concluded that the First Step Act’s changes to the compassionate release statute mean that district judges are not free to consider any extraordinary and compelling reason that a defendant might raise. Nevertheless, appellate courts remain divided over what exactly constitutes an extraordinary and compelling reason for a sentence reduction.

This Note examines the historical development of, and rationales for, compassionate release and the reasons why appellate courts have struggled to define and apply the “extraordinary and compelling reasons” standard consistently. After recognizing that Congress’s goals in creating the compassionate release mechanism were to promote consistency while keeping the sentencing power in the judiciary, this Note proposes a two-part solution to balance these goals. This Note’s proposed framework ensures that judicial discretion continues to serve a critical role in compassionate release decisions and seeks to resolve the current disagreements among appellate courts.

* J.D. Candidate, 2023, Fordham University School of Law; B.A., 2016, The College of William & Mary. I would like to thank Professor Bruce A. Green and the editors and staff of the *Fordham Law Review* for their guidance and assistance throughout the writing process. I would also like to thank my family and friends for their encouragement and support.

INTRODUCTION.....	1745
I. THE EVOLUTION OF FEDERAL COMPASSIONATE RELEASE.....	1749
<i>A. Early History and Federal Parole</i>	1750
<i>B. The Sentencing Reform Act of 1984</i>	1750
<i>C. The First Step Act of 2018</i>	1754
II. DEFINING AND APPLYING THE “EXTRAORDINARY AND COMPELLING” STANDARD: CONFUSION IN THE CIRCUITS .	1757
<i>A. Defining the Standard: Appellate Courts Review Compassionate Release Decisions for Abuse of Discretion</i>	1758
<i>B. Applying the Standard: Nonretroactive Changes to Sentencing Laws</i>	1759
1. Where Nonretroactive Changes to Sentencing Laws Can Be Grounds for Compassionate Release.....	1761
2. Where Nonretroactive Changes to Sentencing Laws Cannot Be Grounds for Compassionate Release	1762
<i>C. Applying the Standard: Youth, Codefendant Sentencing Disparities, and Other Circumstances at the Time of Sentencing</i>	1765
1. Where Youth and Codefendant Disparities Can Be Grounds for Compassionate Release	1766
<i>a. Youth</i>	1766
<i>b. Sentencing Disparities Between Codefendants</i> .	1767
2. Where Youth and Codefendant Disparities Cannot Be Grounds for Compassionate Release	1768
III. RESOLVING CURRENT AND FUTURE DISAGREEMENTS THROUGH GUIDED JUDICIAL DISCRETION.....	1770
<i>A. The Short-Term Fix: Appellate Courts Should Embrace District Courts’ Broad Discretion to Grant Compassionate Release</i>	1771
<i>B. Looking Ahead: Lessons and Recommendations for the Sentencing Commission</i>	1774
1. Solution 1: A National Standard.....	1775
2. Solution 2: Resolving Disparities Through Guided Judicial Discretion	1776
<i>a. Preserving the Catchall Provision</i>	1776
<i>b. A New Role for the Sentencing Commission</i>	1777
CONCLUSION	1778

INTRODUCTION

Nearly two decades ago, Thomas McCoy participated in a series of armed robberies.¹ Even though McCoy was just nineteen years old at the time of the robberies, with only one prior conviction for reckless driving, the court had no choice but to sentence him to more than thirty-five years in prison.² The vast majority of that sentence—thirty-two years—resulted from one of the harshest mandatory sentencing laws the federal system had to offer: the twenty-five-year mandatory and consecutive sentence for “second or subsequent” firearms convictions under 18 U.S.C. § 924(c).³ At McCoy’s sentencing, the court expressed concern about the length and fairness of the sentence it was about to impose: “Congress has decided what the punishment is. They don’t know you. They don’t see you. All they know is probably everyone who commits the crime probably ought to get the max, in their view, so they don’t know what the Court sees here.”⁴

In 2020, after serving over seventeen years of his sentence, McCoy petitioned the U.S. District Court for the Eastern District of Virginia for compassionate release, a reduction in sentence available to prisoners presenting “extraordinary and compelling” circumstances.⁵ McCoy argued that had he been sentenced under the current sentencing regime, he would have received a much more lenient sentence.⁶ The district court judge agreed, finding that the “incredible length” of McCoy’s sentence and the “disparity between his sentence and those sentenced for similar crimes [today]” amounted to extraordinary and compelling reasons for compassionate release.⁷ Accordingly, the court granted McCoy’s motion and reduced his sentence to time served.⁸ The U.S. Attorney’s Office appealed,

1. *See* United States v. McCoy, 981 F.3d 271, 277 (4th Cir. 2020).

2. *See id.*

3. *See id.* at 275. Section 924(c) mandates consecutive minimum sentences for using or possessing a firearm in connection with a crime of violence: a five- to ten-year mandatory minimum, depending on the circumstance, for a defendant’s first conviction and a consecutive twenty-five-year mandatory minimum for a subsequent conviction. *Id.* (citing 18 U.S.C. § 924(c)). Until 2018, a § 924(c) conviction was treated as “second or subsequent” even if, as in McCoy’s case, it was obtained in the same proceeding as the first. *Id.* The practice of charging multiple § 924(c) counts in a single case became known as “stacking.” *See id.*; *see also* John Gleeson, *Debevoise’s Holloway Project and “Second Looks”: How Challenging One Discrete Racial Inequity in Federal Criminal Justice Can Help Produce Systemic Change*, 33 FED. SENT’G REP. 319, 320–21 (2021) (describing how § 924(c) “stacking” often resulted in defendants receiving “draconian” sentences).

4. McCoy v. United States, No. 03-cr-197, 2020 WL 2738225, at *5 (E.D. Va. May 26, 2020) (quoting Transcript of Proceedings at 19, United States v. McCoy, No. 03cr197-006 (E.D. Va. July 12, 2004), ECF No. 193), *aff’d*, 981 F.3d 271 (4th Cir. 2020).

5. *See id.* at *1–2.

6. *See id.* at *5–6. In 2018, Congress amended 18 U.S.C. § 924(c) and discontinued the practice of “stacking” multiple § 924(c) convictions. *Id.* at *2. As a result, if McCoy were sentenced today, he would likely be subjected to less than half the mandatory sentence he received in 2004. *Id.* at *6.

7. *Id.* at *5–6. The court additionally noted that McCoy was a teenager with no relevant criminal history at the time of the offenses and that he had made efforts to rehabilitate himself in prison. *Id.* at *6.

8. *Id.* at *6.

but the Fourth Circuit affirmed the district court's decision.⁹ After spending almost two decades behind bars, Thomas McCoy was free.¹⁰

However, not all inmates in McCoy's position have been so fortunate. Jason Jarvis was serving a forty-year sentence as a result of multiple "stacked" § 924(c) convictions when he petitioned the U.S. District Court for the Northern District of Ohio for compassionate release in 2020.¹¹ Like McCoy, Jarvis argued that, had he been sentenced for the same offense today, his sentence would have been several decades shorter.¹² The judge deciding Jarvis's motion, however, was not persuaded and denied his motion.¹³ On appeal, the Sixth Circuit affirmed the district court's denial, holding that such sentencing disparities cannot, either alone or in combination with other extraordinary and compelling factors, serve as a basis for compassionate release.¹⁴ The incongruity of McCoy's and Jarvis's cases illustrates the fundamental disagreements surrounding compassionate release that have quietly developed in the lower courts over the past two and a half years.¹⁵

Compassionate release is a "safety valve"¹⁶ that allows for the release of federal prisoners in extraordinary and compelling circumstances.¹⁷ Following the "truth in sentencing" movement of the 1980s, the federal prison system grew at a breakneck speed.¹⁸ Despite the skyrocketing prison population, compassionate release was an exceedingly unlikely avenue for

9. See *McCoy v. United States*, 981 F.3d 271, 288 (4th Cir. 2020).

10. See *id.*

11. See *United States v. Jarvis*, No. 94-CR-68, 2020 WL 4726455, at *1 (N.D. Ohio Aug. 14, 2020), *aff'd*, 999 F.3d 442 (6th Cir. 2021), *cert. denied*, No. 21-568, 2022 WL 89314 (U.S. Jan. 10, 2022) (mem.).

12. See *id.* at *3–4.

13. See *id.*

14. See *United States v. Jarvis*, 999 F.3d 442, 446 (6th Cir. 2021), *cert. denied*, No. 21-568, 2022 WL 89314 (U.S. Jan. 10, 2022) (mem.).

15. See *infra* Parts II.B–C.

16. See Mary Price, *The Other Safety Valve: Sentence Reduction Motions Under 18 U.S.C. § 3582(c)(1)(A)*, 13 FED. SENT'G REP. 188, 188 (2000).

17. See 18 U.S.C. § 3582(c)(1)(A)(i)–(ii) (providing that courts may reduce the term of imprisonment for defendants presenting extraordinary and compelling circumstances or for certain elderly defendants). The statute does not use the phrase "compassionate release." See *id.* § 3582(c). Instead, the statutory title is "Modification of an Imposed Term of Imprisonment." *Id.* The commonly used term "compassionate release" is thus technically a "misnomer." *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020). Other common terms for this mechanism include "reduction in sentence" and "sentence reduction." See FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582 AND 4205(G), at 1–2 (2019), https://www.bop.gov/policy/progstat/5050_050_EN.pdf [<https://perma.cc/EFH8-JYH5>]. This Note uses these terms interchangeably.

18. See Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 698 (2010) (examining how various changes in federal criminal sentencing over the past several decades have led to the rapid growth of the federal prison population); Miles Pope, *What We Have Wrought: Compassionate Release in the Time of Our Plague*, *ADVOC.*, Feb. 2021, at 20, 20–21 (attributing the rapid growth in the federal prison population since the 1980s to determinate sentencing, mandatory sentencing ranges, and the elimination of federal parole).

prisoners to successfully seek sentence reductions until recently.¹⁹ For over three decades, only one avenue existed by which an inmate could obtain compassionate release: the Federal Bureau of Prisons (BOP) had to file the motion on the inmate's behalf.²⁰ The BOP used that power so sparingly that a 2013 report by the U.S. Department of Justice's Office of the Inspector General (OIG) found that an average of only twenty-four prisoners were released on BOP motion each year.²¹

Congress appeared to recognize these concerns when it passed the First Step Act of 2018²² (FSA). The FSA drastically expanded inmates' abilities to seek compassionate release by allowing inmates to file compassionate release motions on their own.²³ As the COVID-19 pandemic swept through the country's prisons, tens of thousands of federal prisoners applied for compassionate release.²⁴ Despite the recent passage of the FSA, however, the vast majority of the motions were denied, and the criminal justice system has struggled to reach a consensus on how these motions should be resolved.²⁵ According to one report, 3221 prisoners have been granted compassionate release since the start of the pandemic—but 99 percent of those releases were granted by judges over the BOP's objections.²⁶ In some cases, prisoners seeking compassionate release died before a judge could rule on their motion.²⁷

The compassionate release statute, 18 U.S.C. § 3582(c)(1)(A), does not define “extraordinary and compelling reasons” but instructs judges to consider the sentencing factors set forth in 18 U.S.C. § 3553(a), as well as policy statements published by the U.S. Sentencing Commission.²⁸ However, because the Sentencing Commission has lacked a quorum since early 2019, it has been unable to update its policy statement to reflect the

19. See *Brooker*, 976 F.3d at 233 (describing the procedural and substantive changes to the compassionate release process resulting from the FSA).

20. See 18 U.S.C. § 3582(c)(1)(A) (2012) (amended 2018).

21. See OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM 1 (2013), <https://oig.justice.gov/reports/2013/e1306.pdf> [<https://perma.cc/BN46-8M8C>].

22. Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18, 21, and 34 U.S.C.); see also *Brooker*, 976 F.3d at 233 (describing how the FSA altered the compassionate release process by removing the Bureau of Prisons as “the sole arbiter of compassionate release motions”).

23. See First Step Act § 603(b) (amending 18 U.S.C. § 3582(c)(1)(A)).

24. See 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/2YN7-5JQX>].

25. See *id.*

26. See *id.*

27. See *id.*

28. See 18 U.S.C. § 3582(c)(1)(A) (requiring courts evaluating compassionate release motions to consider the sentencing factors set forth in 18 U.S.C. § 3553(a) and providing that any sentence reduction be “consistent with applicable policy statements issued by the Sentencing Commission”).

FSA's changes to the compassionate release statute.²⁹ As a result, federal judges have been largely left to determine the meaning of "extraordinary and compelling reasons" on their own.³⁰

The FSA's amendments to the compassionate release statute have created questions in the federal courts. As a threshold matter, district courts were initially divided on whether judges considering defendant-filed compassionate release motions remained bound by the Sentencing Commission's pre-FSA guidelines, limiting the circumstances for which federal prisoners can receive a sentence reduction to a few narrow circumstances.³¹ But, over the past year and a half, an overwhelming majority of circuits have construed post-FSA judicial discretion broadly, concluding that judges are free to define "extraordinary and compelling" on their own initiative.³²

But even where district judges now wield broad discretion in defining "extraordinary and compelling" circumstances, appellate courts have failed to reach a consensus on just how far a judge may go in making such a determination.³³ Many circuits have been receptive to granting compassionate release in cases where a defendant is elderly, suffers from a severe medical condition, or faces a heightened risk of contracting COVID-19.³⁴ But as the cases of Thomas McCoy and Jason Jarvis illustrate, appellate courts are divided over what other circumstances can rise to the level of "extraordinary and compelling."³⁵ These courts are applying the

29. See *United States v. Brooker*, 976 F.3d 228, 233–34 (2d Cir. 2020). Currently, six of the seven voting-member seats are vacant. See U.S. SENT'G COMM'N, *Organization*, <https://www.usc.gov/about/who-we-are/organization> [<https://perma.cc/BE3X-LKPD>] (last visited Feb. 2, 2022). The votes of at least four members are required for the Sentencing Commission to promulgate amendments to the guidelines. *Id.*

30. See Casey Tolan, *Compassionate Release Became a Life-Or-Death Lottery for Thousands of Federal Inmates During the Pandemic*, CNN (Sept. 30, 2021, 7:05 AM), <https://www.cnn.com/2021/09/30/us/covid-prison-inmates-compassionate-release-invs/index.html> [<https://perma.cc/55CG-VBL7>] (analyzing compassionate release data from the U.S. Sentencing Commission and finding that the percentage of motions granted in 2020 and 2021 varied dramatically among federal courts across the country).

31. Compare *United States v. Young*, 458 F. Supp. 3d 838, 845 (M.D. Tenn. 2020) (concluding that the FSA freed district courts to exercise their discretion in determining what are extraordinary and compelling circumstances and collecting similar cases), with *United States v. Fox*, No. 14-cr-03, 2019 WL 3046086, at *2 (D. Me. July 11, 2019) (collecting cases holding that district courts considering defendant-initiated compassionate release motions remain bound by the Sentencing Commission's pre-FSA policy statement). See generally John F. Ferraro, Note, *Compelling Compassion: Navigating Federal Compassionate Release After the First Step Act*, 62 B.C. L. REV. 2463 (2021) (examining this divide); Marielle Paloma Greenblatt, Note, *In Search of Judicial Compassion: The Cantu-Lynn Divide over Compassionate Release for Federal Prisoners*, 52 COLUM. HUM. RTS. L. REV. 140 (2020) (examining this divide).

32. See *infra* notes 105–07 and accompanying text.

33. See *infra* Parts II.B–C.

34. See, e.g., *United States v. Elias*, 984 F.3d 516, 520 (6th Cir. 2021); *United States v. Adamson*, 831 F. App'x 82, 83 (4th Cir. 2020).

35. Compare *United States v. McCoy*, 981 F.3d 271, 285 (4th Cir. 2020) (holding that district courts may grant compassionate release based on "the severity of a § 924(c) sentence, combined with the enormous disparity between that sentence and the sentence a defendant would receive today"), with *United States v. Jarvis*, 999 F.3d 442, 445 (6th Cir. 2021) (holding

same “extraordinary and compelling” standard but at times reaching diametrically opposed conclusions.³⁶ Wide disparities in decisions across the United States suggest that a defendant’s success on a compassionate release motion depends almost as much on the court hearing the motion as it does on the facts of the case.³⁷

This Note examines the newfound discretion district court judges have in defining “extraordinary and compelling” reasons for compassionate release in the wake of the FSA. Part I provides a brief history of the federal compassionate release statute and an overview of how it operates. Part II examines how federal courts have interpreted the FSA’s changes to § 3582(c)(1)(A) and why circuit courts have at times struggled to reach a consensus over what may or may not qualify as extraordinary and compelling reasons for sentence reduction. Finally, Part III argues that appellate courts should avoid limiting the discretion of district court judges in determining the circumstances that justify compassionate release and offers specific recommendations for the Sentencing Commission in promulgating future guidance on compassionate release.

I. THE EVOLUTION OF FEDERAL COMPASSIONATE RELEASE

Compassionate release, expanded by Congress in the landmark First Step Act of 2018, has operated as a safety valve for the federal prison system during the COVID-19 pandemic, with more than 3600 prisoners being released in 2020 and in the first half of 2021.³⁸ Yet, the FSA has also afforded judges broad discretion to determine which sentences should be reduced, resulting in a nationwide patchwork of compassionate release outcomes among federal courts.³⁹

To contextualize how the FSA altered the compassionate release system, this part briefly outlines the history of federal sentencing. Part I.A provides an overview of the early history of federal sentencing and the historic federal parole system. Part I.B examines the origins of the current compassionate release statute and describes how it operates. Finally, Part I.C outlines how the FSA altered the compassionate release framework by eliminating the

that “[t]he text of the[] sentencing statutes does not permit us to treat the First Step Act’s non-retroactive amendments, whether by themselves or together with other factors, as ‘extraordinary and compelling’ explanations for a sentencing reduction”), *cert. denied*, No. 21-568, 2022 WL 89314 (U.S. Jan. 10, 2022) (mem.).

36. *See Jarvis*, 999 F.3d at 444 (acknowledging that circuit courts are divided over whether nonretroactive changes to sentencing laws can constitute extraordinary and compelling reasons for compassionate release).

37. *See Tolan*, *supra* note 30 (describing how the percentage of compassionate release motions granted between January 2020 and June 2021 varied dramatically among federal district courts).

38. *Id.*; *see also* U.S. SENT’G COMM’N, U.S. SENTENCING COMMISSION COMPASSIONATE RELEASE DATA REPORT: CALENDAR YEARS 2020 TO 2021, at 4 tbl.1 (2021), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210928-Compassionate-Release.pdf> [<https://perma.cc/6SXW-XCLL>].

39. *See Tolan*, *supra* note 30.

BOP's gatekeeping role and expanding judicial discretion in granting compassionate relief.

A. Early History and Federal Parole

For most of the twentieth century, the federal criminal justice system left imprisonment decisions to trial judges and parole boards.⁴⁰ District court judges had nearly unbridled discretion in sentencing, bound only by statutory minimums or maximums.⁴¹ This indeterminate sentencing scheme was essentially one of individualized sentencing.⁴² In theory, judges would consider the nature of the offense and the individual characteristics of the offender in relation to the purposes of criminal punishment—specific and general deterrence, retribution, rehabilitation, and incapacitation—and impose a sentence no greater than necessary to serve those purposes.⁴³ In practice, however, the sentences they imposed were often inconsistent in severity: some judges imposed harsh sentences while others imposed lenient ones.⁴⁴ There was no common judicial view on how long, if at all, a prison sentence should be in a given situation to achieve the ends of the criminal justice system.⁴⁵ Parole boards also had discretion to release prisoners after they had served as little as one-third of their sentences, often obscuring at sentencing the actual amount of time the defendants would serve.⁴⁶ This system spawned drastic disparities and uncertainty in sentencing, which prompted Congress to pass the Sentencing Reform Act of 1984⁴⁷ (SRA).⁴⁸

B. The Sentencing Reform Act of 1984

The Sentencing Reform Act sought to bring uniformity and certainty to federal sentencing.⁴⁹ To achieve uniformity, it created the U.S. Sentencing

40. See Paul Larkin, Jr., *The Future of Presidential Clemency Decision-Making*, 16 U. ST. THOMAS L.J. 399, 410 (2020). See generally Robert Howell, Comment, *Sentencing Reform Lessons: From the Sentencing Reform Act of 1984 to the Feeney Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 1069 (2004) (describing the historical development of the indeterminate sentencing structure).

41. See, e.g., *Dorszynski v. United States*, 418 U.S. 424, 431 (1974) (“[O]nce it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end.”).

42. See Bruce Green, *Thinking About White-Collar Crime and Punishment*, CRIM. JUST. Fall 2020, at 1, 1.

43. See *id.*

44. See *id.*

45. See *id.*

46. See *United States v. Bryant*, 996 F.3d 1243, 1248 (11th Cir.) (describing the problems associated with the federal parole system), *cert. denied*, 142 S. Ct. 583 (2021) (mem.); *cf.* *Setser v. United States*, 566 U.S. 231, 248 (2012) (Breyer, J., dissenting) (noting how the system often involved “a parole commission and a judge trying to second-guess each other about the time an offender will actually serve in prison”).

47. Pub. L. No. 98-473, ch. 2, 98 Stat. 1837, 1987–2040 (codified as amended in scattered sections of 18 and 28 U.S.C.).

48. See Gertner, *supra* note 18, at 698.

49. See Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and*

Commission⁵⁰ and delegated to it the power to create a comprehensive system of sentencing guidelines.⁵¹ To achieve certainty, the SRA effectively abolished the federal parole system and generally prohibited courts from modifying a term of imprisonment once it had been imposed.⁵² The SRA's determinate sentencing scheme was designed to regulate the front end of the correctional process.⁵³ The SRA's determinate sentencing and mandatory guidelines "amounted to a massive transfer of power away from dispassionate actors in the criminal justice system (judges and, in theory, the parole commission) to prosecutors."⁵⁴

Having eliminated parole as a "second look" at lengthy sentences, Congress recognized the need for an alternative and carved out a "safety valve"⁵⁵ colloquially known as compassionate release: federal courts could reduce a sentence when "extraordinary and compelling reasons" warranted release.⁵⁶ The SRA thus replaced the U.S. Parole Commission's "opaque review of every federal sentence with a much narrower judicial review of cases presenting 'extraordinary and compelling reasons' for relief."⁵⁷ By lodging the authority to review and reduce sentences in federal district courts, Congress intended to "keep[] the sentencing power in the judiciary where it belongs."⁵⁸

In crafting § 3582(c)(1)(A), Congress divided compassionate release responsibility among three actors.⁵⁹ First, the Sentencing Commission was tasked with describing what qualified as extraordinary and compelling reasons for release by issuing general policy statements.⁶⁰ Second, the BOP would identify prisoners who met the criteria and bring their cases to the

Effective Sentencing System, 28 WAKE FOREST L. REV. 185, 188–90 (1993) (describing the purpose, history, and various components of the Sentencing Reform Act of 1984).

50. See 28 U.S.C. § 991(a). The Sentencing Commission is an independent commission located within the judicial branch of the federal government consisting of seven voting members appointed by the president of the United States and confirmed by the U.S. Senate. *Id.*

51. See *id.* § 994.

52. See 18 U.S.C. § 3582(b); *Dillon v. United States*, 560 U.S. 817, 824 (2010); Hatch, *supra* note 49, at 189 (describing the abolishment of federal parole under the SRA).

53. See Larkin, *supra* note 40, at 411.

54. Pope, *supra* note 18, at 21; see also John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1106 (2013) ("At least since 1994, it appears that almost all the growth in prison populations has come from prosecutors' decisions to file felony charges.").

55. S. REP. NO. 98-225, at 121 (1983).

56. See 18 U.S.C. § 3582(c)(1)(A)(i).

57. Petition for Writ of Certiorari at 13, *Thacker v. United States*, No. 21-877, 2021 WL 5930591 (U.S. Dec. 10, 2021).

58. S. REP. NO. 98-225, at 121 (1983).

59. See FAMILIES AGAINST MANDATORY MINIMUMS, COMPASSIONATE RELEASE AND THE FIRST STEP ACT: THEN AND NOW 1, <https://famm.org/wp-content/uploads/Compassionate-Release-in-the-First-Step-Act-Explained-FAMM.pdf> [<https://perma.cc/Z6SS-XRAD>].

60. See 28 U.S.C. § 994(t) (instructing the Sentencing Commission to promulgate general policy statements "describ[ing] what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples").

courts' attention by filing a motion for a reduction in sentence.⁶¹ Finally, the sentencing court would decide whether to reduce the sentence after finding that extraordinary and compelling reasons warrant a reduction and after considering the § 3553(a) sentencing factors.⁶² But the BOP and the Sentencing Commission usurped the process, circumscribing the courts' abilities to reduce sentences under § 3582(c)(1)(A).⁶³ As a result, compassionate release under the SRA was widely regarded as both underutilized and dysfunctional.⁶⁴

In enacting the Sentencing Reform Act of 1984, Congress never defined or provided examples of "extraordinary and compelling" and, instead, delegated that task to the Sentencing Commission.⁶⁵ Despite this command, it took the Sentencing Commission over twenty years to publish a substantive description of "extraordinary and compelling reasons."⁶⁶ When the Sentencing Commission finally acted in 2007, it promulgated U.S. Sentencing Guideline § 1B1.13 ("U.S.S.G. § 1B1.13"), a policy statement advising that "extraordinary and compelling reasons" warranting a sentence reduction could include terminal illness, serious medical conditions, advanced age, and family circumstances.⁶⁷ The 2007 policy statement also introduced what has now become known as the catchall provision, permitting compassionate release for any "other" reasons as determined by the BOP director.⁶⁸

But the Sentencing Commission's twenty-year delay mattered little. Although the Sentencing Commission was tasked with defining the "extraordinary and compelling" standard, its role was largely constrained by the BOP's "absolute gatekeeping authority."⁶⁹ For over thirty years, the BOP maintained exclusive power over all avenues of compassionate release, as any motion for compassionate release had to be made by the BOP director.⁷⁰ The BOP used this gatekeeping power sparingly, seldom bringing such motions to the courts.⁷¹

61. See 18 U.S.C. § 3582(c)(1)(A) (providing that courts may reduce a term of imprisonment "upon motion of the Director of the Bureau of Prisons").

62. See *id.*

63. See *United States v. Brooker*, 976 F.3d 228, 231–33 (2d Cir. 2020).

64. See, e.g., *id.* (describing the BOP's mismanagement of the compassionate release process prior to the FSA); Shon Hopwood, *Second Looks and Second Chances*, 41 CARDOZO L. REV. 83, 101–06 (2019) (examining the flaws of compassionate release under the SRA).

65. See *supra* note 60 and accompanying text. Congress's only other guidance was that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." 28 U.S.C. § 994(t).

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

67. See *id.* § 1B1.13 cmt. n.1(A)(i)–(iii).

68. See *id.* § 1B1.13 cmt. n.1(A)(iv) (stating that compassionate release is warranted if, "[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 reasons described in [the other parts of the policy statement]"); *Brooker*, 976 F.3d at 232.

69. *Brooker*, 976 F.3d at 232.

70. See 18 U.S.C. § 3582(c)(1)(A) (2012) (amended 2018).

71. See 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> [https://perma.cc/NQ8Y-YUE6].

A 2013 report from the OIG painted a bleak picture.⁷² The OIG report found that the BOP rarely brought compassionate release motions to the courts, even when defendants had satisfied the Sentencing Commission's objective criteria for a sentence reduction.⁷³ In concluding that the BOP failed to properly manage the compassionate release program, the report found that BOP's "implementation of the program [was] inconsistent and result[ed] in ad hoc decision making," with "no timeliness standards for reviewing . . . requests."⁷⁴ From 2006 to 2011, an average of just twenty-four defendants were granted compassionate release each year.⁷⁵ These failures had tragic consequences: of the 208 people whose release requests were approved by both a warden and a BOP regional director, 13 percent died awaiting a final decision by the BOP director.⁷⁶ Moreover, the OIG report found that the BOP did not approve a single nonmedical compassionate release request during this period.⁷⁷

In 2016, responding to widespread criticism of the compassionate release system, the Sentencing Commission conducted an in-depth review, held a public hearing, and revised its policy statement.⁷⁸ It also expanded, reorganized, and clarified the four categories of extraordinary and compelling reasons.⁷⁹ The Sentencing Commission even made a plea to the BOP to file such motions whenever prisoners were found to meet the criteria.⁸⁰ Despite the Sentencing Commission's efforts, however, the BOP continued to grant exceedingly few compassionate release motions.⁸¹ The BOP rarely filed such motions and few prisoners received compassionate release, effectively eliminating any meaningful post-sentencing safety valve.⁸² Indeed, one federal judge who has been on the bench for twenty-two years stated that she had never received such a motion from the BOP.⁸³

72. See OFF. OF THE INSPECTOR GEN., *supra* note 21.

73. See *id.* at 11.

74. *Id.*

75. See *id.* at 1.

76. See *id.* at 11.

77. See *id.* at 20.

78. See U.S. SENT'G GUIDELINES MANUAL app. C, *supp.*, amend. 799, at 135 (U.S. SENT'G COMM'N 2016).

79. See *id.* at 135–36.

80. See U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.4 (U.S. SENT'G COMM'N 2016) ("The Commission encourages the Director of the Bureau of Prisons to file such a motion if the defendant meets any of the circumstances set forth in Application Note 1.").

81. Between 2013 and 2017, the BOP granted only 6 percent of all compassionate release requests. See Thompson, *supra* note 71. In 2018, only twenty-four individuals were released under § 3582(c)(1)(A). See U.S. SENT'G COMM'N, THE FIRST STEP ACT OF 2018: ONE YEAR OF IMPLEMENTATION 47 & 66 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/3NEL-AR3H>].

82. See Thompson, *supra* note 71.

83. See 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).

C. The First Step Act of 2018

Against this grim backdrop, Congress passed the First Step Act of 2018.⁸⁴ The FSA passed with overwhelming bipartisan support⁸⁵ and was described by one of its cosponsors as “the most significant criminal justice reform bill in a generation.”⁸⁶ Among other reforms—such as easing mandatory minimums for certain firearm and drug offenses and requiring inmates to be housed closer to their families⁸⁷—the FSA made the first major changes to the compassionate release statute since it was enacted in 1984.⁸⁸ Section 603(b) of the FSA, titled “Increasing the Use and Transparency of Compassionate Release,” amended § 3582(c)(1)(A) by removing the BOP as the gatekeeper of compassionate release motions and empowering defendants to file such motions directly with their sentencing judges.⁸⁹

The FSA was met with widespread approval and optimism. One lawmaker described the FSA’s changes as both “expand[ing]” and “expedit[ing]” compassionate release.⁹⁰ Another representative stated that the FSA was “improving application of compassionate release.”⁹¹ A number of legal commentators saw the updated compassionate release mechanism as creating a new avenue for judicial “second looks” at sentences.⁹² Margaret Love, a former pardon attorney in the Department of Justice’s Office of the Pardon Attorney, described the modified compassionate release mechanism as “the hidden, magical trapdoor in the First Step Act that has yet to come to everyone’s attention.”⁹³

In its current form, § 3582(c)(1)(A) provides that a court may reduce a prisoner’s sentence if it finds that the sentence reduction is (1) warranted by “extraordinary and compelling reasons”; (2) “consistent with applicable policy statements issued by the Sentencing Commission”; and (3) supported

84. Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18, 21, and 34 U.S.C.).

85. See Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), <http://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next> [<https://perma.cc/NS9A-UX9P>] (describing the passage of the FSA).

86. 164 CONG. REC. S7649 (daily ed. Dec. 17, 2018) (statement of Sen. Chuck Grassley).

87. See First Step Act §§ 401, 403, 601; see also U.S. SENT’G COMM’N, *supra* note 81, at 1–2.

88. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. 2, 98 Stat. 1837, 1987–2040 (codified as amended in scattered sections of 18 and 28 U.S.C.).

89. First Step Act § 603(b) (amending 18 U.S.C. § 3582(c)(1)(A) by permitting defendants to move for compassionate release “after the defendant 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”).

90. 164 CONG. REC. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Ben Cardin).

91. 164 CONG. REC. H10362 (daily ed. Dec. 20, 2018) (statement of Rep. Jerrold Nadler).

92. See, e.g., Todd Bussert, *What the FIRST STEP Act Means for Federal Prisoners*, CHAMPION, May 2019, at 28, 32; Hopwood, *supra* note 64, at 106–07; Sarah French Russell, *Second Looks at Sentences Under the First Step Act*, 32 FED. SENT’G REP. 76, 78 (2019).

93. RJ Vogt, *How Courts Could Ease the White House’s Clemency Backlog*, LAW360 (Aug. 25, 2019, 8:02 PM), <https://www.law360.com/articles/1191991/how-courts-could-ease-the-white-house-s-clemency-backlog> [<https://perma.cc/568U-4B5X>].

by the sentencing factors under 18 U.S.C. § 3553(a), to the extent they are applicable.⁹⁴ At first blush, this framework seems simple enough. But there was a problem: because the Sentencing Commission has lacked a quorum since early 2019, it has been unable to update its policy statement to reflect the FSA's changes.⁹⁵ As a result, the policy statement still refers in multiple places to the BOP having the exclusive authority to bring compassionate release motions and to determine the circumstances that qualify as extraordinary and compelling.⁹⁶ Thus, as the COVID-19 pandemic spread through the federal prison system and compassionate release petitions piled up on court dockets, district judges were largely left to decipher the meaning of "extraordinary and compelling" on their own.⁹⁷

The first question that district courts grappled with was whether judges considering defendant-initiated compassionate release requests remained bound by the Sentencing Commission's pre-FSA policy statement.⁹⁸ The FSA added the procedure for prisoner-initiated motions but left the rest of the compassionate release statute unchanged.⁹⁹ Moreover, as noted above, § 3582(c)(1)(A) requires that any sentence reduction granted by a court be "consistent with applicable policy statements issued by the Sentencing Commission."¹⁰⁰ Some district courts initially ruled in 2019 and 2020 that they remained bound by the Sentencing Commission's outdated policy statement,¹⁰¹ thereby limiting the permissible reasons for sentence reduction to those reasons specifically listed in the policy statement.

The Second Circuit was the first appellate court to address this question directly. In *United States v. Brooker*,¹⁰² the Second Circuit held that the FSA's changes to § 3582(c)(1)(A) empower district courts evaluating motions for compassionate release to consider *any* extraordinary and compelling reasons for granting release or a sentence reduction, not just those

94. 18 U.S.C. § 3582(c)(1)(A). The sentencing factors include (1) the nature and circumstances of the offense and the characteristics of the defendant; (2) whether the sentence reflects the severity of the offense, affords adequate deterrence, and promotes respect for the law; (3) whether the sentence is reasonable given the available sentences; (4) the kind of sentence and the relevant guidelines; (5) pertinent policy statements issued by the Sentencing Commission; (6) the "need to avoid unwanted sentencing disparities" among similar defendants; and (7) the need to provide restitution to any victims of the offense. *Id.* § 3553(a).

95. *See United States v. Brooker*, 976 F.3d 228, 234 (2d Cir. 2020). The most recent version of the policy statement was promulgated by the Sentencing Commission in November 2018. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2018).

96. *See Brooker*, 976 F.3d at 234; U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2018) (stating that a court may reduce a defendant's sentence "[u]pon motion of the Director of the Bureau of Prisons"); *id.* § 1B1.13 cmt. n.1(D) (providing for compassionate release based on "other" extraordinary and compelling reasons "[a]s determined by the Director of the Bureau of Prisons"); *id.* § 1B1.13 cmt. n.4 (stating that "[a] reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons").

97. *See Tolan*, *supra* note 30.

98. *See supra* note 31 and accompanying text.

99. *See United States v. Andrews*, 12 F.4th 255, 258 (3d Cir. 2021).

100. 18 U.S.C. § 3582(c)(1)(A).

101. *See supra* note 31 and accompanying text.

102. 976 F.3d 228 (2d Cir. 2020).

criteria set forth in the pre-FSA policy statement.¹⁰³ The Second Circuit emphasized that the FSA was intended to expand and expedite compassionate release by allowing defendants to make motions directly to the district courts—thus ending the BOP’s role as the “sole arbiter” of such claims—and by permitting those courts greater discretion in granting release.¹⁰⁴ Accordingly, the Second Circuit held that the constraints imposed by U.S.S.G. § 1B1.13 do not apply to compassionate release motions brought to the courts directly by defendants, as opposed to those brought by the BOP.¹⁰⁵ In short, the FSA freed district courts to consider “the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them.”¹⁰⁶

An overwhelming majority of circuits have followed the Second Circuit’s lead, likewise concluding that the Sentencing Commission’s failure to update its policy means that there is no “applicable” policy statement to apply to defendant-initiated compassionate release motions under the FSA.¹⁰⁷ These courts point to three key reasons for why the pre-FSA policy statement is no longer binding on federal courts: (1) the plain language of § 3582(c)(1)(A),¹⁰⁸ (2) the text of the Sentencing Commission’s policy statement,¹⁰⁹ and (3) congressional intent.¹¹⁰ To date, only the Eleventh Circuit has held that the judges reviewing defendant-filed compassionate

103. *Id.* at 236.

104. *Id.*

105. *Id.* at 233, 235–36.

106. *Id.* at 237.

107. *See* *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021); *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021); *United States v. Shkambi*, 993 F.3d 388, 392–93 (5th Cir. 2021); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021); *United States v. McCoy*, 981 F.3d 271, 282 (4th Cir. 2020); *United States v. Jones*, 980 F.3d 1098, 1109 (6th Cir. 2020); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020). *But see* *United States v. Bryant*, 996 F.3d 1243, 1247–48 (11th Cir.) (holding that district courts reviewing defendant-initiated compassionate release motions remain bound by the Sentencing Commission’s pre-FSA policy statement), *cert. denied*, 142 S. Ct. 583 (2021) (mem.).

108. The statute requires courts to consider “applicable policy statements issued by the Sentencing Commission.” 18 U.S.C. § 3582(c)(1)(A). Because the Sentencing Commission has failed to update its policy statement to reflect the FSA’s amendments, most appellate courts have concluded it is no longer “applicable.” *See, e.g., Brooker*, 976 F.3d at 235–36.

109. First, the policy statement begins with the words “[u]pon motion of the Director of the Bureau of Prisons.” U.S. SENT’G GUIDELINES MANUAL § 1B1.13 (U.S. SENT’G COMM’N 2018). Second, Application Note 4 states that a “reduction under this policy statement may be granted *only* upon motion by the Director of the Bureau of Prisons.” *Id.* § 1B1.13 cmt. n.4 (emphasis added). Third, the catchall provision in Application Note 1(D) allows only the “Director of the Bureau of Prisons” to determine “other” extraordinary and compelling reasons. *Id.* § 1B1.13 cmt. n.1(D). Thus, courts have found, the policy statement by its very terms is not applicable—and not binding—for courts considering prisoner-initiated motions. *See, e.g., Brooker*, 976 F.3d at 235–36; *McCoy*, 981 F.3d at 282 (“A sentence reduction brought about by motion of a defendant, rather than the BOP, is not a reduction ‘under this policy statement.’”).

110. *See Brooker*, 976 F.3d at 235–36 (describing Congress’s intent to expand and expedite compassionate release by removing the BOP as the gatekeeper).

release motions remain bound by the Sentencing Commission's pre-FSA policy statement.¹¹¹

II. DEFINING AND APPLYING THE “EXTRAORDINARY AND COMPELLING” STANDARD: CONFUSION IN THE CIRCUITS

Part II of this Note examines how appellate courts have struggled to reach a consensus on what, if any, constraints there are on district court judges' discretion to determine the types of circumstances that can amount to extraordinary and compelling reasons for compassionate release. Part II.A analyzes how the majority of circuit courts have defined the “extraordinary and compelling” standard following the FSA's amendments to § 3582(c)(1)(A). Part II.B considers two examples of extraordinary and compelling circumstances frequently raised by defendants that have sharply divided appellate courts.

Given that most circuits agree that district court judges have significant discretion in defining “extraordinary and compelling” circumstances,¹¹² one might assume that appellate courts have been willing to leave such determinations squarely in the hands of district court judges. Indeed, in the two and a half years since the passage of the FSA, district courts across the United States have granted compassionate release for reasons far beyond those enumerated in the policy statement.¹¹³ Even so, some appellate courts have emphasized that district court judges' authority to independently define

111. See *Bryant*, 996 F.3d at 1248. In *Bryant*, a divided panel held that the Sentencing Commission's pre-FSA policy statement continues to bind judges because “1B1.13 is an applicable policy statement for all Section 3582(c)(1)(A) motions,” and “Application Note 1(D) does not grant discretion to courts to develop ‘other reasons’ that might justify a reduction in a defendant's sentence.” *Id.* The court began by citing two dictionary definitions of “applicable” to conclude that the policy statement is both “capable of being applied” and “relevant” to all § 3582(c)(1)(A) motions, regardless of who files them. *Id.* at 1252–54. The Eleventh Circuit then determined that two contextual factors support the conclusion that § 1B1.13 continues to be an “applicable” policy statement. *Id.* at 1255–56. First, in passing the Sentencing Reform Act of 1984, Congress sought to curtail judicial discretion by giving the Sentencing Commission the authority to define “extraordinary and compelling reasons.” *Id.* at 1255. Second, courts must interpret statutes based on how they would have been understood at the time they were enacted. *Id.* Thus, “[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.’” *Id.*

112. See *supra* notes 103–07 and accompanying text.

113. See, e.g., *United States v. Ramsay*, No. 96-cr-1098, 2021 WL 1877963, at *1 (S.D.N.Y. May 11, 2021) (granting compassionate release based on the defendant's youth at the time of the offense and his substantial rehabilitation while in prison); *United States v. Hatcher*, 18-CR-454-10, 2021 WL 1535310, at *5 (S.D.N.Y. Apr. 19, 2021) (granting compassionate release based on the harshness of confinement during the COVID-19 pandemic); *United States v. Price*, 496 F. Supp. 3d 83, 90 (D.D.C. 2020) (granting compassionate release based on unwarranted sentencing disparities between codefendants); *McCoy v. United States*, No. 03-cr-197, 2020 WL 2738225, at *8 (E.D. Va. May 26, 2020) (granting compassionate release based on nonretroactive changes to sentencing laws), *aff'd*, 981 F.3d 271 (4th Cir. 2020).

“extraordinary and compelling” is not boundless.¹¹⁴ Because a grant of compassionate release is purely discretionary, decisions to grant or deny a compassionate release motion are reviewed for abuse of discretion.¹¹⁵ Circuit courts therefore retain significant power to determine whether a district court judge has gone too far in granting or denying compassionate release.

A. Defining the Standard: Appellate Courts Review Compassionate Release Decisions for Abuse of Discretion

Because Congress never defined the meaning of “extraordinary and compelling reasons,” federal courts have largely been left to puzzle out that standard on their own.¹¹⁶ In doing so, courts have generally considered the statute’s text, dictionary definitions, and the examples provided in the Sentencing Commission’s pre-FSA policy statement to form a working definition of “extraordinary and compelling reasons.”¹¹⁷ For starters, appellate courts have emphasized that judges interpreting the statute remain bound by the plain meaning of those words.¹¹⁸ As the Seventh Circuit explained: “The statute itself sets the standard [A] judge who strikes off on a different path risks an appellate holding that judicial discretion has been abused.”¹¹⁹ Similarly, several circuits have noted that even if it is no longer binding, the pre-FSA policy statement’s description of “extraordinary and compelling” circumstances can “guide discretion without being conclusive.”¹²⁰

As an initial matter, it is worth highlighting several types of circumstances that courts generally agree *are* extraordinary and compelling reasons for compassionate release. First, appellate courts are in universal agreement that individuals with circumstances falling within the categories enumerated in

114. *See, e.g.*, *United States v. Andrews*, 12 F.4th 255, 258 (3d Cir. 2021) (“The inapplicability of the policy statement [does] not mean . . . that all of [the defendant’s] proposed reasons [fall] within the statutory meaning of ‘extraordinary and compelling.’”).

115. *See, e.g., id.* at 259; *United States v. McCoy*, 981 F.3d 271, 280 (4th Cir. 2020).

116. *See Tolan, supra* note 30.

117. *See, e.g., Andrews*, 12 F.4th at 260 (noting that courts interpreting “extraordinary and compelling reasons” may look to the statute’s language, dictionary definitions, and the existing policy statement to “give shape to the otherwise amorphous phrase”); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020).

118. *See, e.g., Andrews*, 12 F.4th at 260; *Gunn*, 980 F.3d at 1180.

119. *Gunn*, 980 F.3d at 1180.

120. *Id.*; *see also Andrews*, 12 F.4th at 260; *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021) (“The Sentencing Commission’s statements in U.S.S.G. § 1B1.13 may inform a district court’s discretion for § 3582(c)(1)(A) motions filed by a defendant, but they are not binding.”); *United States v. Tomes*, 990 F.3d 500, 503 n.1 (6th Cir. 2021) (“[B]ecause district courts are free ‘to define ‘extraordinary and compelling’ on their own initiative,’ they may look to § 1B1.13 as relevant, even if no longer binding.” (quoting *United States v. Elias*, 984 F.3d 516, 519–20 (6th Cir. 2021))); *McCoy*, 981 F.3d at 282 n.7 (stating that the pre-FSA policy statement “remains helpful guidance even when motions are filed by defendants”). *But see United States v. Shkambi*, 993 F.3d 388, 392 (5th Cir. 2021) (concluding that a district court “cannot rely on the BOP-specific policy statement when considering a non-BOP § 3582 motion” because doing so would “rely on pieces of text in an otherwise inapplicable policy statement”).

the Sentencing Commission's pre-FSA policy statement continue to be eligible for compassionate release.¹²¹ Thus, prisoners who satisfy U.S.S.G. § 1B1.13's criteria relating to health, age, or family circumstances remain unaffected by the FSA's changes to § 3582(c)(1)(A).¹²² The only difference is that these individuals now have the ability to bring their motions directly to the courts and need not rely on the BOP bringing a motion on their behalf.¹²³ Similarly, in the context of the COVID-19 pandemic, most circuits have been receptive to granting compassionate release in cases in which an inmate shows both a particularized susceptibility to the disease and a particularized risk of contracting the disease at a prison facility.¹²⁴

There is an inherent tension between affording judges broad discretion and seeking to promote consistent interpretations of the law and consistent outcomes. On the one hand, most appellate courts have recognized that Congress's purpose in passing the FSA was to expand the use of compassionate release.¹²⁵ Similarly, without an "applicable" policy statement from the Sentencing Commission, most appellate courts agree that district court judges are free to define "extraordinary and compelling" on their own initiative.¹²⁶ This would suggest that judges should have wide latitude in making compassionate release decisions.

On the other hand, some courts and legal commentators have raised concerns that too much discretion will give judges unfettered power to invent their own policies about compassionate release.¹²⁷ The following sections illustrate how appellate courts have struggled to draw a clear line between acceptable exercises of judicial authority and abuse of discretion.

B. Applying the Standard: Nonretroactive Changes to Sentencing Laws

Part II.B of this Note examines two examples of extraordinary and compelling circumstances that have sharply divided appellate courts. Part II.B.1 considers sentencing disparities resulting from nonretroactive changes to sentencing laws. Part II.B.2 evaluates circumstances that existed at the time a defendant was originally sentenced, namely a defendant's youth and sentencing disparities between codefendants.

121. See *United States v. Bryant*, 996 F.3d 1243, 1248 (11th Cir.) (describing how courts may grant compassionate release for the reasons listed in the pre-FSA policy statement), *cert. denied*, 142 S. Ct. 583 (2021) (mem.).

122. See U.S. SENT'G GUIDELINES MANUAL § 1B1.13, cmt. n.1(A)–(C) (U.S. SENT'G COMM'N 2018).

123. See 18 U.S.C. § 3582(c)(1)(A).

124. See, e.g., *Elias*, 984 F.3d at 520; *United States v. Adamson*, 831 F. App'x 82, 83 (4th Cir. 2020).

125. See *supra* notes 103–10 and accompanying text.

126. See *supra* notes 103–07 and accompanying text.

127. See, e.g., *Bryant*, 996 F.3d at 1257 (contending that broad judicial discretion in defining "extraordinary and compelling" circumstances "would return us to the pre-SRA world of disparity and uncertainty"); Larkin, *supra* note 40, at 416–20 (arguing that the FSA liberalized compassionate release by providing prisoners an additional method of review, not by expanding judicial discretion via the catchall provision).

In the two and a half years since the passage of the FSA, many defendants have sought compassionate release based on sentencing disparities resulting from nonretroactive changes to federal sentencing laws.¹²⁸ These cases typically involve significant—often decades-long—differences between the sentence that a particular defendant received under the previous sentencing regime and the sentence that the same defendant would likely receive for the same crime today.¹²⁹ Many defendants have raised these arguments in the context of the FSA’s nonretroactive changes to firearm and drug sentences.¹³⁰ In addition to modifying the compassionate release statute, the FSA also made changes to two especially harsh provisions of federal sentencing law. First, as described briefly above, section 403 of the FSA amended 18 U.S.C. § 924(c) to reduce mandatory consecutive sentences for multiple firearms convictions, putting an end to the practice of § 924(c) “stacking.”¹³¹ Second, section 401 of the FSA reduced enhanced penalties imposed on recidivist offenders for certain federal drug offenses under 21 U.S.C. § 851.¹³² Notably, however, Congress made these amendments applicable to pending cases without providing for retroactive application.¹³³ As a result, the new sentencing schemes do not apply to defendants who were initially sentenced before the FSA came into law.¹³⁴

As an alternative, many defendants have sought to reduce their sentences via the updated compassionate release statute.¹³⁵ Appellate courts have diverged on whether these nonretroactive changes constitute an extraordinary and compelling reason for sentence reduction.¹³⁶ Part II.B.1 analyzes the reasoning circuit courts have relied on to find that nonretroactive changes can provide sufficient grounds for compassionate release. Part II.B.2 then discusses the alternative lines of reasoning that appellate courts have

128. See Gleeson, *supra* note 3, at 322.

129. See *id.*

130. See *id.*; Hopwood, *supra* note 64, at 109–10.

131. See First Step Act of 2018, Pub. L. No. 115-391, § 403(a), 132 Stat. 5194, 5221–22 (codified as amended at 18 U.S.C. § 924); *supra* notes 3, 6 and accompanying text. Prior to the FSA, the common practice of “stacking” multiple § 924(c) counts in a single prosecution could readily escalate to defendants receiving life—or near-life—sentences without parole. See Gleeson, *supra* note 3, at 319–20. Even more troubling, the government habitually deployed the practice in a racially disproportionate fashion against Black men. See *id.* at 320 & 326 n.14. In passing the FSA, Congress abolished § 924(c) “stacking” by clarifying that the recidivist provisions for a “second or subsequent” § 924(c) offense applied only “after a prior conviction under [§ 924(c)] has become final.” See First Step Act § 403(a).

132. See First Step Act § 401; see also U.S. SENT’G COMM’N, *supra* note 81, at 7–9 (describing these changes).

133. See First Step Act § 401(c) (“APPLICABILITY TO PENDING CASES.—This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.”); *id.* § 403(b) (same).

134. *Id.* §§ 401(c), 403(b).

135. See, e.g., Gleeson, *supra* note 3, at 322–24 (describing ongoing litigation). The question of whether sentencing disparities may constitute “extraordinary and compelling” circumstances has also been raised in cases where defendants seek compassionate release based on the Supreme Court’s nonretroactive decision in *United States v. Booker*, 543 U.S. 220 (2005). See, e.g., *United States v. Hunter*, 12 F.4th 555, 559 (6th Cir. 2021).

136. See *infra* Parts II.B.1–2.

employed to conclude that such changes cannot be considered extraordinary and compelling.

1. Where Nonretroactive Changes to Sentencing Laws Can Be Grounds for Compassionate Release

Some appellate courts have found that sentencing disparities resulting from nonretroactive changes in sentencing laws can, either alone or in combination with other factors, constitute extraordinary and compelling grounds for compassionate release.¹³⁷ At first glance, it is not clear whether courts should be permitted to grant compassionate release to prisoners sentenced under laws that Congress has since found too punitive and that Congress amended but did not make retroactively applicable.¹³⁸ As legal scholar Shon Hopwood notes, one could view Congress's decision not to make such amendments retroactive in two ways.¹³⁹ On the one hand, Congress's decision to change these laws indicates that Congress viewed those punishments as too punitive and unfair.¹⁴⁰ On the other hand, Congress's decision not to make these changes retroactive could be seen as a deliberate choice to preclude those already sentenced from benefitting from any type of sentence reduction.¹⁴¹

Yet, Hopwood argues that Congress took a middle ground—opting not to make defendants sentenced under the earlier sentencing regime *categorically* eligible for relief but, instead, allowing these individuals to establish extraordinary and compelling reasons *individually*.¹⁴² As Hopwood notes, “[t]hat Congress chose to foreclose one avenue for relief does not mean it chose to foreclose all means of redressing draconian sentences imposed under [the earlier regime].”¹⁴³

At least three courts of appeals have agreed with Hopwood's reasoning and concluded that sentencing disparities resulting from these nonretroactive changes may constitute extraordinary and compelling circumstances. In *United States v. McCoy*,¹⁴⁴ described above, the Fourth Circuit held that the district court had not abused its discretion by granting compassionate release to a defendant based largely on the FSA's nonretroactive changes to § 924(c) mandatory minimums.¹⁴⁵ In affirming the lower court's decision to reduce McCoy's sentence, the Fourth Circuit stated, “We think courts legitimately may consider, under the ‘extraordinary and compelling reasons’ inquiry, that defendants are serving sentences that Congress itself views as dramatically longer than necessary or fair.”¹⁴⁶ The Second Circuit has seemingly

137. See *infra* notes 144–48 and accompanying text.

138. See Hopwood, *supra* note 64, at 109–10.

139. *Id.*

140. *Id.*

141. *Id.* at 110.

142. *Id.*

143. *Id.*

144. 981 F.3d 271 (4th Cir. 2020).

145. *Id.* at 285–86.

146. *Id.*

embraced a similar position.¹⁴⁷ The Tenth Circuit has opted for a middle ground, determining that the FSA's nonretroactive amendments can constitute sufficient grounds to justify a sentence reduction under § 3582(c)(1)(A) when combined with other extraordinary and compelling reasons.¹⁴⁸

2. Where Nonretroactive Changes to Sentencing Laws Cannot Be Grounds for Compassionate Release

Other appellate courts have reached the opposite conclusion. The Third and Seventh Circuits, for example, have expressly prohibited district courts from relying on nonretroactive changes to sentencing laws as a basis for granting a sentence reduction.¹⁴⁹ This is also the case in the Eleventh Circuit where, as described above, district courts remain bound by the Sentencing Commission's pre-FSA policy statement.¹⁵⁰ The typical refrain from courts adopting this view is that allowing defendants to seek compassionate release under the updated version of § 3582(c)(1)(A) would contravene Congress's deliberate choice to make sections 401 and 403 of the FSA prospective only.¹⁵¹ Under the nonretroactivity doctrine, the "ordinary practice" in federal sentencing is to apply new penalties to defendants that have not yet been sentenced, while withholding those changes from defendants already sentenced.¹⁵² Thus, "[w]hat the Supreme Court views as the 'ordinary practice' cannot also be an 'extraordinary and compelling' reason to deviate from that practice."¹⁵³

In *United States v. Thacker*,¹⁵⁴ the Seventh Circuit acknowledged that, until the Sentencing Commission updates its policy statement to reflect the FSA's changes, district court judges have broad discretion to determine what else may constitute extraordinary and compelling reasons warranting a

147. *See* *United States v. Rose*, 837 F. App'x 72, 73–74 (2d Cir. 2021) (stating that a court evaluating a compassionate release motion "may look to, but is not bound by, the mandatory minimums that the defendant would face if being sentenced for the first time under revised guidelines or statutes").

148. *See* *United States v. McGee*, 992 F.3d 1035, 1048 (10th Cir. 2021).

149. *See* *United States v. Andrews*, 12 F.4th 255, 261 (3d Cir. 2021) (holding that the nonretroactive changes to the § 924(c) mandatory minimums "cannot be a basis for compassionate release" because "Congress specifically decided that the changes to the § 924(c) mandatory minimums would not apply to people who had already been sentenced"); *United States v. Thacker*, 4 F.4th 569, 576 (7th Cir. 2021) (reaching the same conclusion).

150. *See* *United States v. Jackson*, No. 20-14840, 2021 WL 3522399, at *2 (11th Cir. Aug. 11, 2021) ("*Bryant* forecloses [the] argument that the sentencing disparity caused by the amendment to § 924(c)'s stacking provision . . . constitute[s] [an] extraordinary and compelling reason[] to warrant a sentence reduction.>").

151. *See, e.g., Thacker*, 4 F.4th at 573 (noting that because Congress chose to make other provisions of the FSA categorically retroactive, there is no way to read Congress's choice to limit the scope of sections 401 and 403 as "anything other than deliberate").

152. *See* *United States v. Wills*, 997 F.3d 685, 688 (6th Cir. 2021) (citing *Dorsey v. United States*, 567 U.S. 260, 280 (2012)).

153. *Id.*

154. 4 F.4th 569 (7th Cir. 2021).

sentence reduction.¹⁵⁵ Yet, the court went on to explain that “the discretionary authority conferred by § 3582(c)(1)(A) only goes so far.”¹⁵⁶ It cannot be used to effect a sentence reduction at odds with Congress’s express determination that the FSA’s mandatory minimum amendments would apply only prospectively.¹⁵⁷ In other words, “there is nothing ‘extraordinary’ about leaving untouched the exact penalties that Congress prescribed and that a district court imposed for particular violations of a statute.”¹⁵⁸

A string of recent Sixth Circuit decisions illustrates the difficulties some appellate courts have had in defining the “extraordinary and compelling” standard in the context of nonretroactive changes to sentencing laws. Over the past year, the Sixth Circuit has published no fewer than six separate opinions addressing the question but has thus far been unable to reach a consensus.¹⁵⁹ These decisions illustrate that these disagreements exist not only *between* the various courts of appeals but also *within* them.

The story began in March 2021, when two separate Sixth Circuit panels considered for the first time whether the FSA’s nonretroactive changes to mandatory minimum laws can constitute an extraordinary and compelling reason for release.¹⁶⁰ In *United States v. Tomes*,¹⁶¹ defendant Tomes argued that his chronic asthma, which placed him at increased risk of serious complications from COVID-19, coupled with the disparity between his sentence and the sentence he might have received under the FSA, were extraordinary and compelling reasons sufficient to warrant compassionate release.¹⁶² The panel dismissed Tomes’s chronic asthma complaint as “unpersuasive” because he failed to provide adequate records to support his diagnosis or demonstrate that the BOP was unable to control COVID-19 outbreaks in his facility.¹⁶³ Then, offering “[o]ne last point,” the panel rejected Tomes’s argument that section 401 of the FSA warranted his compassionate release,¹⁶⁴ concluding that it “[would] not render § 401(c) useless by using § 3582(c)(1)(A) as an end run around Congress’s careful effort to limit the retroactivity of the First Step Act’s reforms.”¹⁶⁵ That same

155. *Id.* at 573.

156. *Id.* at 574.

157. *Id.*

158. *Id.*; *see also* *United States v. Jarvis*, 999 F.3d 442, 444 (6th Cir. 2021) (“Why would the same Congress that specifically decided to make these sentencing reductions non-retroactive in 2018 somehow mean to use a general sentencing statute from 1984 to unscramble that approach?”), *cert. denied*, No. 21-568, 2022 WL 89314 (U.S. Jan. 10, 2022) (mem.).

159. *See* *United States v. McCall*, No. 21-3400, 2021 WL 5984403 (6th Cir. Dec. 17, 2021); *United States v. Hunter*, 12 F.4th 555 (6th Cir. 2021); *Jarvis*, 999 F.3d 442; *United States v. Owens*, 996 F.3d 755 (6th Cir. 2021); *United States v. Tomes*, 990 F.3d 500 (6th Cir. 2021); *United States v. Wills*, 991 F.3d 720 (6th Cir.), *amended and superseded by* 997 F.3d 685 (6th Cir. 2021).

160. *See Tomes*, 990 F.3d 500; *Wills*, 991 F.3d 720.

161. 990 F.3d 500 (6th Cir. 2021).

162. *Id.* at 501.

163. *Id.* at 504–05.

164. *Id.* at 505.

165. *Id.*

day, another Sixth Circuit panel reached the same conclusion in *United States v. Wills*.¹⁶⁶

Two months later, the Sixth Circuit changed course. In *United States v. Owens*,¹⁶⁷ a third Sixth Circuit panel affirmed a sentence reduction that was based in part on section 403 of the FSA.¹⁶⁸ The panel distinguished *Owens* from *Tomes* and *Wills* on the grounds that those decisions held only that a defendant may not rely on a nonretroactive amendment *alone* when trying to establish extraordinary and compelling reasons.¹⁶⁹ The *Owens* panel thus concluded that “in making an individualized determination about whether extraordinary and compelling reasons merit compassionate release, a district court may include, along with other factors, the disparity between a defendant’s actual sentence and the sentence that he would receive if the First Step Act applied.”¹⁷⁰ For the time being, it appeared that the Sixth Circuit had taken the middle path adopted by the Tenth Circuit.¹⁷¹

Less than a month after *Owens*, however, the Sixth Circuit reversed course again.¹⁷² In *United States v. Jarvis*,¹⁷³ a divided Sixth Circuit panel expressly rejected *Owens* and held that district courts cannot treat the FSA’s nonretroactive amendments, whether alone or in combination with other factors, as extraordinary and compelling reasons for release.¹⁷⁴ The *Jarvis* majority acknowledged that its decision was in direct conflict with *Owens* but concluded that it was bound by the Sixth Circuit’s earlier decision in *Tomes*.¹⁷⁵ “Forced to choose between conflicting precedents,” the *Jarvis* majority stated, “we must follow the first one, *Tomes*.”¹⁷⁶ Another Sixth Circuit panel followed suit in *United States v. Hunter*,¹⁷⁷ described further below, likewise holding that the nonretroactive changes to sentencing laws can never serve as a basis for compassionate release.¹⁷⁸

166. 991 F.3d 720, 722–24 (6th Cir.), *amended and superseded by* 997 F.3d 685 (6th Cir. 2021).

167. 996 F.3d 755 (6th Cir. 2021).

168. *See id.* at 763.

169. The *Owens* panel emphasized that while *Tomes* and *Wills* had sought compassionate release based solely on the FSA’s amendments, *Owens* had pointed to additional factors meriting compassionate release, namely the fact that his lengthy sentence resulted from exercising his right to a trial and his rehabilitative efforts while in prison. *Id.* at 760–61.

170. *Id.* at 763.

171. *See supra* note 148 and accompanying text.

172. *See United States v. Jarvis*, 999 F.3d 442, 445 (6th Cir. 2021), *cert. denied*, No. 21-568, 2022 WL 89314 (U.S. Jan. 10, 2022) (mem.).

173. 999 F.3d 442 (6th Cir. 2021), *cert. denied*, No. 21-568, 2022 WL 89314 (U.S. Jan. 10, 2022) (mem.).

174. *See id.* at 445 (“The text of these sentencing statutes does not permit us to treat the First Step Act’s non-retroactive amendments, whether by themselves or together with other factors, as ‘extraordinary and compelling’ explanations for a sentencing reduction.”).

175. *See id.* at 445.

176. *Id.* at 445–46.

177. 12 F.4th 555 (6th Cir. 2021).

178. *See id.* at 563 (holding that “[t]he district court erred when it considered *Booker*’s non-retroactive change in sentencing law as a factor to support an ‘extraordinary and compelling’ reason for *Hunter*’s release”).

But the Sixth Circuit wasn't finished. In December 2021, the court changed course yet again. Opting to embrace *Owens* over *Jarvis*, another divided panel in *United States v. McCall*¹⁷⁹ held that district courts in fact *can* consider nonretroactive changes in the law as one of several factors forming extraordinary and compelling circumstances.¹⁸⁰ In doing so, the panel determined cases holding otherwise had improperly ignored the circuit's ruling in *Owens* and thus were not binding.¹⁸¹ In his dissent, Judge Raymond M. Kethledge stated that “[f]or the district courts in this circuit, our decision in this case renders the law on the issue presented unknowable.”¹⁸²

C. Applying the Standard: Youth, Codefendant Sentencing Disparities, and Other Circumstances at the Time of Sentencing

Like nonretroactive changes to sentencing laws, considerable disagreement also exists among circuit courts over whether circumstances that existed when a defendant was initially sentenced may qualify as extraordinary and compelling.¹⁸³ Compassionate release motions based on these types of circumstances raise somewhat different questions than those discussed in the previous section. While motions for compassionate release based on nonretroactive changes to sentencing laws generally concern circumstances that did not arise until *after* sentencing (and thus could not have been considered by the sentencing judge), the types of compassionate release motions analyzed in this section concern facts that existed at the time of sentencing and that were (or could have been) considered by the sentencing judge.¹⁸⁴

Notably, nothing in § 3582(c)(1)(A) prohibits a court from considering factors that existed at sentencing when deciding whether to grant compassionate release.¹⁸⁵ But such motions also raise unique concerns. Defendants who base their § 3582(c)(1)(A) motions on factors that existed at the time they were sentenced are essentially asking for a “do-over”—that is, they are asking the judge considering the compassionate release motion to

179. No. 21-3400, 2021 WL 5984403 (6th Cir. Dec. 17, 2021).

180. *Id.* at *6 (“Under our precedents, a court may consider a nonretroactive change in the law as one of several factors forming extraordinary and compelling circumstances qualifying for sentence reduction under 18 U.S.C. § 3582(c)(1)(A).”).

181. *See id.* at *5 (“*Owens* was the first in-circuit case to address the issue of a nonretroactive sentence as one of several factors creating an extraordinary and compelling reason for compassionate release. *Jarvis*, by contravening *Owens*, created an intra-circuit split. Because *Owens* was published before *Jarvis*, *Owens* ‘remains controlling authority’ that binds future panels.”).

182. *Id.* at *6 (Kethledge, J., dissenting).

183. *See infra* Parts II.B.1–2.

184. *See United States v. Logan*, 532 F. Supp. 3d 725, 731–35 (D. Minn. 2021) (describing the differences between these types of compassionate release motions).

185. *See* 18 U.S.C. § 3582(c)(1)(A). Similarly, Application Note 2 to the Sentencing Commission’s policy statement states that “an extraordinary and compelling reason need not have been unforeseen at the time of sentencing” and that a sentencing court’s earlier knowledge or anticipation of the asserted reason “does not preclude consideration for a reduction under this policy statement.” U.S. SENT’G GUIDELINES MANUAL § 1B1.13, cmt. n.2 (U.S. SENT’G COMM’N 2018).

“reweigh the law and facts that were before the sentencing judge at the time of sentencing.”¹⁸⁶ Accordingly, courts may be reluctant to give such factors much weight when deciding whether to grant compassionate release, especially when a different judge imposed the original sentence.¹⁸⁷ Countless circumstances may fall into this bucket, and this Note examines two of the most common: (1) a defendant’s relative youth at the time of the offense and (2) disparities in sentences between codefendants.

1. Where Youth and Codefendant Disparities Can Be Grounds for Compassionate Release

a. Youth

At least three circuit courts—the Second, Fourth, and Tenth—have indicated that a defendant’s relative youth at the time of an offense may contribute to a finding of extraordinary and compelling circumstances.¹⁸⁸ District courts in a number of other circuits have reached the same conclusion.¹⁸⁹ Few courts, however, have addressed exactly how such a factor should be considered.¹⁹⁰ A recent decision from the Southern District of New York offers perhaps the most in-depth analysis of how—and why—an offender’s youth matters to the § 3582(c)(1)(A) inquiry. In *United States v. Ramsay*,¹⁹¹ Judge Jed S. Rakoff found that the defendant’s youth at the time of the offense, in combination with other reasons, amounted to extraordinary and compelling reasons for release.¹⁹²

In 1992, Andrew Ramsay, then seventeen years old, was convicted of murdering two bystanders, one of whom was pregnant, at a Labor Day block party.¹⁹³ In Ramsay’s case, like many others, the then mandatory sentencing scheme compelled Judge Rakoff to sentence Ramsay to life imprisonment without considering Ramsay’s youth.¹⁹⁴ However, in light of the Second

186. *Logan*, 532 F. Supp. 3d at 731.

187. *See, e.g., id.* at 740 (“[F]actors [that existed at sentencing] should generally be given little weight when a judge decides whether to grant a compassionate-release request—particularly when, as here, a different judge (one who was far more familiar with the defendant and the case) imposed the sentence.”).

188. *United States v. Maumau*, 993 F.3d 821, 837 (10th Cir. 2021) (affirming the district court’s grant of compassionate release based on a combination of factors, including “Maumau’s young age at the time of sentencing”); *United States v. McCoy*, 981 F.3d 271, 286 (4th Cir. 2020) (“[T]he courts [below] focused on the defendants’ relative youth—from 19 to 24 years old—at the time of their offenses, a factor that many courts have found relevant under § 3582(c)(1)(A)(i).”); *United States v. Brooker*, 976 F.3d 228, 238 (2d Cir. 2020) (“Zullo’s age [between 17 and 20,] at the time of his crime . . . might perhaps weigh in favor of a sentence reduction.”).

189. *See United States v. Ramsay*, No. 96-cr-1098, 2021 WL 1877963, at *5 n.5 (S.D.N.Y. May 11, 2021) (collecting cases).

190. *See id.* at *5 (“[T]his Court is unaware of any prior case addressing how and why an offender’s youth matters to the § 3582(c)(1)(A)(i) inquiry.”).

191. No. 96-cr-1098, 2021 WL 1877963 (S.D.N.Y. May 11, 2021).

192. *See id.* at *1.

193. *See id.*

194. *See id.*

Circuit's conclusion that judges are now free to consider *any* extraordinary and compelling circumstances for a sentence reduction,¹⁹⁵ Judge Rakoff posed the question: "Can an offender's youth, combined with society's evolving understanding of the adolescent brain, constitute such a circumstance?"¹⁹⁶ He found that it could.¹⁹⁷

Judge Rakoff began by citing U.S. Supreme Court precedent indicating that the Eighth Amendment compels sentencing courts to consider offenders' relative youth when determining whether especially severe sentences can and should be imposed.¹⁹⁸ Judge Rakoff then referred to a growing body of research on the adolescent brain suggesting that youthful offenders possess common characteristics of immaturity, salvageability, dependence, and susceptibility to negative influences and outside pressures.¹⁹⁹ Judge Rakoff concluded by granting Ramsay's motion for compassionate release, holding that sentencing courts should consider an adolescent offender's immaturity, salvageability, dependency, and susceptibility when determining whether extraordinary and compelling circumstances exist.²⁰⁰

b. Sentencing Disparities Between Codefendants

Federal courts have also determined that disparities between the sentences of codefendants can support a finding of extraordinary and compelling reasons for release. Take the case of James Edwards, who, in 2006, pled guilty to one count of conspiracy to possess with intent to distribute cocaine.²⁰¹ Because he had previously been convicted of at least two prior controlled substance offenses, Edwards was deemed a career offender under the Sentencing Guidelines and sentenced to 292 months in prison.²⁰² While Edwards remained incarcerated, his principal coconspirator, Lester Fletcher, who was originally sentenced to life imprisonment, was released to home confinement despite engaging in "far more egregious conduct."²⁰³ Based in part on their sentence disparities, Edwards moved for compassionate release.²⁰⁴

In weighing Edwards's motion, Judge Peter J. Messitte observed that Fletcher's significantly reduced sentence "resulted in a striking disparity

195. See *United States v. Brooker*, 976 F.3d 228, 236 (2d Cir. 2020) (holding that district courts may consider "the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them").

196. *Ramsay*, No. 96-cr-1098, 2021 WL 1877963, at *1.

197. *Id.*

198. See *id.* at *6–7. In several cases since the 1980s, the Supreme Court has held, based on "the evolving standards of decency that mark the progress of a maturing society," *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)), that "[y]outh matters in sentencing," *Jones v. Mississippi*, 141 S. Ct. 1307, 1316 (2021).

199. See *Ramsay*, No. 96-cr-1098, 2021 WL 1877963, at *7–13.

200. See *id.*

201. See *United States v. Edwards*, No. 05-179, 2021 WL 1575276, at *1 (D. Md. Apr. 22, 2021).

202. See *id.*

203. See *id.*

204. See *id.*

where a middling supplier of drugs is punished far more severely than the violent ‘ringleader’ of a drug trafficking organization that dealt in far greater amounts of drugs.”²⁰⁵ While the court acknowledged the government’s concern that such an expansive reading of § 3582(c)(1)(A) could lead to a “bottomless inventory of compassionate release motions,” it concluded that the Fourth Circuit’s decision in *McCoy* had clearly instructed that courts are free to consider *any* extraordinary and compelling reason that a defendant might raise.²⁰⁶ Judge Messitte found that the disparity between the sentences of Edwards and Fletcher was sufficiently extraordinary and compelling and granted release.²⁰⁷

Judge Messitte is not alone in reaching this conclusion. District judges in other jurisdictions have similarly found that, based on the FSA’s changes to § 3582(c)(1)(A), disparities between codefendants’ sentences can qualify as extraordinary and compelling reasons for sentence reduction.²⁰⁸ As such, it appears that courts in multiple circuits have given district judges substantial leeway to grant compassionate release based on circumstances that existed when a defendant was initially sentenced.

2. Where Youth and Codefendant Disparities Cannot Be Grounds for Compassionate Release

The positions described above, however, are by no means universally accepted by the federal courts. The Sixth Circuit, for example, has expressly prohibited district judges from considering youth and sentencing disparities and has held that facts that existed when a defendant was sentenced *cannot* later be construed as extraordinary and compelling.²⁰⁹ In *United States v. Hunter*, the Sixth Circuit held that a district court had abused its discretion by granting compassionate release based in part on the defendant’s young age at the time of the offense and sentence disparities between the defendant and his coconspirators.²¹⁰ The Sixth Circuit panel began by reiterating that, under the FSA, district courts have discretion to define “extraordinary and

205. *Id.* at *2 (quoting *United States v. Payton*, No. 06-cr-341, 2021 WL 927631, at *2 (D. Md. Mar. 11, 2021)).

206. *Id.* (“[T]he Fourth Circuit has clearly instructed that ‘courts are “empowered . . . to consider any extraordinary and compelling reason for release that a defendant might raise.”” (quoting *United States v. McCoy*, 981 F.3d 271, 284 (4th Cir. 2020))).

207. *See id.* at *3.

208. *See, e.g.*, *United States v. Minicone*, 521 F. Supp. 3d 163, 166–69 (N.D.N.Y. 2021) (granting compassionate release to an elderly defendant whose sentence was out of step with his codefendants’ sentences); *United States v. Price*, 496 F. Supp. 3d 83, 90 (D.D.C. 2020) (granting compassionate release to a defendant who received a longer sentence than more culpable codefendants and whose equally culpable peers in the conspiracy had all already received compassionate release); *United States v. Millan*, No. 91-CR-685, 2020 WL 1674058, at *15 (S.D.N.Y. Apr. 6, 2020) (granting compassionate release based in part on sentence disparities between a defendant and similarly situated codefendants).

209. *See United States v. Hunter*, 12 F.4th 555, 562 (6th Cir. 2021).

210. *Id.* at 560.

compelling” on their own initiative.²¹¹ But, in considering youth and codefendant disparities, the Sixth Circuit concluded that the district court had simply gone too far.²¹² As the Sixth Circuit explained, § 3582(c)(1)(A) precludes courts from “simply taking facts that existed at sentencing and repackaging them as ‘extraordinary and compelling.’”²¹³

The Sixth Circuit’s principal concern was that allowing courts to reconsider facts that existed at the time of sentencing would nullify the extraordinary and compelling requirement and transform § 3582(c)(1)(A) into an “unbounded resentencing statute.”²¹⁴ In order to avoid this, the court explained that the extraordinary and compelling reasons inquiry must focus only on *post*-sentencing factual developments.²¹⁵ The Sixth Circuit also cited policy concerns arising from allowing district courts to relabel facts that existed at sentencing as “extraordinary and compelling.”²¹⁶ The court first emphasized the importance of finality in criminal sentencing.²¹⁷ The Sixth Circuit also criticized the district court’s reliance on scientific articles about the development of the adolescent brain by asserting that “there will always be a new academic article a defendant can marshal to recharacterize their background and the facts of the offense.”²¹⁸ The Sixth Circuit posited that because there is no limit on the number of successive motions a defendant can file under § 3582(c)(1)(A), permitting district courts to relitigate and reweigh facts that existed at sentencing would render illusory the statute’s general rule of finality.²¹⁹ Finally, the Sixth Circuit indicated that giving judges the power to second-guess old sentencing decisions is especially problematic when the judge considering the compassionate release motion is not the judge who originally sentenced the defendant.²²⁰

211. *See id.* at 562 (noting that “until Congress or the [Sentencing] Commission acts, ‘district courts have discretion to define “extraordinary and compelling” on their own initiative’” (quoting *United States v. Elias*, 984 F.3d 516, 519–20 (6th Cir. 2021))).

212. *See id.* (“[T]he mere fact that defining *extraordinary and compelling* ‘is left to the district court’s discretion, with no heavy congressional thumb on either side of the scales, does not mean that no legal standard governs that discretion . . . “[A] motion to [a court’s] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.’” (second and third alterations in the original) (quoting *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005))).

213. *Id.* at 569.

214. *Id.* at 570.

215. *Id.* at 569. According to the *Hunter* panel, the 1983 Senate Report seems to indicate that Congress enacted § 3582(c)(1)(A) to allow for compassionate release based on developments that occurred after sentencing. *See id.* The Senate Report states that § 3582(c)(1)(A)(i) “applies, regardless of the length of sentence, to *the unusual case* in which the *defendant’s circumstances are so changed*, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner.” *Id.* (quoting S. REP. NO. 98-225, at 121 (1983)).

216. *See id.* at 569.

217. *See id.* (stating that “[t]he problem with such an approach is that it renders the general rule of finality and the extraordinary-and-compelling-reasons requirement ‘superfluous, void or insignificant’” (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009))).

218. *Id.* at 571.

219. *See id.*

220. *See id.* (criticizing the district court for granting compassionate release based on “a mere difference of opinion” regarding the fairness of the sentence originally imposed).

Legal scholar Paul J. Larkin, Jr. agrees with the Sixth Circuit's view that the FSA's amendments should not be viewed as having created a broadscale "second look" mechanism.²²¹ According to Larkin, the text of section 603 clearly says that the BOP failed to adequately manage the compassionate release process as Congress expected it would.²²² However, that text does not say that district courts are now "open for the business of resentencing offenders and answering for themselves all the questions that [one] would have expected Congress to answer" before taking such a radical step.²²³ As Justice Antonin Scalia once stated, "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."²²⁴

III. RESOLVING CURRENT AND FUTURE DISAGREEMENTS THROUGH GUIDED JUDICIAL DISCRETION

As described in Part I, most circuits²²⁵ have concluded that the Sentencing Commission's failure to update its policy statement to reflect the FSA's changes to § 3582(c)(1)(A) means that, presently, there is no "applicable" policy statement governing defendant-initiated compassionate release motions.²²⁶ As a result, the amorphous phrase "extraordinary and compelling reasons" is presumably limited only by the statute's plain meaning and whatever an appellate court would consider an abuse of discretion.²²⁷ Yet, as Parts II.B and II.C illustrate, circuit courts have struggled at times to draw a clear line between acceptable exercises of judicial authority and abuse of discretion.²²⁸

But these are not simple questions with simple answers. In each of the cases described above, the courts engaged in nuanced, reasoned, and principled decision-making. Occasionally, those courts reached very different conclusions.²²⁹ These issues are exacerbated by the fact that similar disagreements will almost certainly emerge in other contexts as courts continue to face new compassionate release motions that raise novel arguments. Given the vast legal complexities underlying these questions and the highly individualized nature of every compassionate release request, this Note does not attempt to directly resolve the debates discussed in Parts II.B and II.C. Rather, this Note pursues a more fundamental question: what is

221. See Larkin, *supra* note 40, at 418 (claiming that it is "dubious in the extreme" that Congress intended to sneak a second-look provision into a revision of the compassionate release section of the Sentencing Reform Act of 1984).

222. See *id.* at 417.

223. *Id.* at 418.

224. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

225. See *supra* notes 103–07 and accompanying text.

226. See 18 U.S.C. § 3582(c)(1)(A) (requiring that any sentence reduction be "consistent with applicable policy statements issued by the Sentencing Commission").

227. See, e.g., *United States v. Hunter*, 12 F.4th 555, 562 (6th Cir. 2021); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020).

228. See *supra* Parts II.B–C.

229. See *supra* Parts II.B–C.

the best method for resolving these disagreements and similar disagreements that will likely arise in the future?

A. The Short-Term Fix: Appellate Courts Should Embrace District Courts' Broad Discretion to Grant Compassionate Release

Despite the underdeveloped doctrine governing compassionate release, federal appellate courts should embrace the broad discretion that Congress provided to district judges in the amended version of § 3582(c)(1)(A),²³⁰ and the appellate courts should articulate a body of law that effectively promotes both fairness and consistency. As an initial matter, the First, Eighth, and Eleventh Circuits should join the majority position in holding that the Sentencing Commission's pre-FSA policy statement no longer binds district courts considering defendant-filed motions for compassionate release.²³¹ Simply recognizing that district judges may look beyond the reasons enumerated in the pre-FSA policy statement, however, is not enough. Appellate courts should also adopt a strong presumption against overturning grants of compassionate release for abuse of discretion. Such an interpretation of § 3582(c)(1)(A) is consistent with the statute's text, purpose, and legislative history.

First, in passing § 3582(c)(1)(A) as part of the Sentencing Reform Act of 1984, Congress vested significant discretionary power within the district courts.²³² The statute empowered district courts to determine in individualized cases whether “there is justification for reducing a term of imprisonment.”²³³ Congress envisioned that § 3582(c)(1)(A) would act as a “safety valve” for modifying sentences and intended for district courts to be able to reduce sentences when justified by the various factors and reasoning that the Parole Commission had previously considered in making parole decisions.²³⁴ Congress further noted that such an approach would keep “the sentencing power in the judiciary where it belongs” and that § 3582(c)(1)(A) would allow for the “later review of sentences in particularly compelling situations.”²³⁵ This legislative history demonstrates that Congress, in passing the SRA, intended to give district courts an equitable power to correct individual sentences when extraordinary and compelling circumstances indicate that the original sentence no longer served legislative objectives.

Second, nothing in the text or legislative history of § 3582(c)(1)(A) indicates that Congress intended to limit its application only to the types of circumstances described in the Sentencing Commission's outdated policy statement. Rather, the statute provides that if a judge finds any extraordinary

230. See David Roper, *Pandemic Compassionate Release and the Case for Improving Judicial Discretion over Early Release Decisions*, 33 FED. SENT'G REP. 27, 31 (2020).

231. See *supra* notes 103–07 and accompanying text.

232. The statute expressly provides that a court may reduce a defendant's sentence if “the court . . . finds that . . . extraordinary and compelling reasons warrant such a reduction.” 18 U.S.C. § 3582(c)(1)(A) (emphasis added).

233. S. REP. NO. 98-225, at 56 (1983).

234. See *id.* at 121.

235. *Id.*

and compelling reasons warranting a sentence reduction, those reasons could form the legal basis for reducing “an unusually long sentence.”²³⁶ Indeed, the legislative history of § 3582(c)(1)(A) indicates that lawmakers believed that the “extraordinary and compelling reasons” standard could encompass a wide range of “circumstances.”²³⁷ In crafting the compassionate release statute, Congress imposed only one limitation on district courts: “Rehabilitation of the defendant *alone* shall not be considered an extraordinary and compelling reason.”²³⁸ Given this broad mandate, appellate courts should be hesitant to conclude that a district court judge has abused judicial discretion by granting a sentence reduction based on novel or largely unforeseeable circumstances.

Third, Congress’s explicit motivation for passing the FSA supports giving district judges broad discretion in defining “extraordinary and compelling” reasons. In amending § 3582(c)(1)(A) to allow defendants to bring compassionate release motions directly to their sentencing courts, Congress sought to expand and expedite the compassionate release process by empowering the courts to step in when the BOP fails to act.²³⁹ As many courts have recognized, the FSA’s amendments to the compassionate release statute were a direct response to the BOP’s decades-long mismanagement of the compassionate release mechanism.²⁴⁰ Even the title of the FSA’s compassionate release provision indicates Congress’s desire to expand and democratize the compassionate release mechanism: “Increasing the Use and Transparency of Compassionate Release.”²⁴¹ As such, providing judges broad discretion will best effectuate Congress’s goals in revising the compassionate release statute.

Critics of this approach raise several concerns regarding broad judicial discretion in defining “extraordinary and compelling” reasons for sentence reductions. Fundamentally, critics claim that broader judicial discretion will

236. *Id.* at 55–56.

237. *Id.* (“The [Senate Judiciary] Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, *cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence*, and some cases in which the sentencing guidelines for the offense of which the defendant was convicted have been later amended to provide a shorter term of imprisonment.” (emphasis added)).

238. 28 U.S.C. § 994(t) (emphasis added).

239. *See* *United States v. Brooker*, 976 F.3d 228, 236 (2d Cir. 2020) (discussing how Congress was motivated by the BOP’s failure to bring compassionate release motions to sentencing courts when amending § 3582(c)(1)(A) in the FSA); OFF. OF THE INSPECTOR GEN., *supra* note 21, at 27–28 (providing data on the BOP’s failure to bring compassionate release motions to sentencing courts); 164 CONG. REC. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Ben Cardin) (asserting that that the FSA would “expand[] compassionate release” and “expedite[] compassionate release applications”); 164 CONG. REC. H10362 (daily ed. Dec. 20, 2018) (statement of Rep. Jerrold Nadler) (noting that the FSA would “improv[e] application of compassionate release”).

240. *See supra* notes 103–10 and accompanying text; *see also* OFF. OF THE INSPECTOR GEN., *supra* note 21, at 11 (summarizing the BOP’s underutilization of compassionate release).

241. 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).

give district judges unfettered power to invent their own policies regarding compassionate release.²⁴² But these concerns are not necessarily well founded—while the FSA significantly expanded judicial discretion over compassionate release decisions, Congress presumably did not intend for district courts to make these decisions on a whim. Judicial discretion over compassionate release after the FSA will likely be considerably different from judicial discretion exercised before the SRA.

District judges, unlike the BOP and the Parole Commission, are subject to appellate review and potential reversal by circuit courts.²⁴³ Judicial control over compassionate release decisions also promotes transparency, as district courts must explain their reasons for granting or denying each compassionate release motion.²⁴⁴ Moreover, from a practical standpoint, district court judges are presumably best situated to evaluate these requests:²⁴⁵ they are likely most familiar with the facts of the case, they can hold hearings and speak directly with prisoners,²⁴⁶ and they have extensive experience considering the § 3553(a) sentencing factors.²⁴⁷ The reviewability and transparency of compassionate release decisions under the FSA is thus a significant improvement from the black-box decision-making of parole boards and the BOP.²⁴⁸

Perhaps most importantly, the existence of extraordinary and compelling reasons does not make compassionate release a guarantee. Even where a defendant has demonstrated extraordinary and compelling circumstances, the compassionate release statute still requires the court to undertake an analysis

242. See, e.g., *United States v. Bryant*, 996 F.3d 1243, 1257 (11th Cir.) (contending that broad judicial discretion in defining “extraordinary and compelling” circumstances “would return us to the pre-SRA world of disparity and uncertainty”), *cert. denied*, 142 S. Ct. 583 (2021) (mem.); *Larkin*, *supra* note 40, at 416–20 (arguing that the FSA liberalized compassionate release by providing prisoners an additional method of review, not by expanding judicial discretion via the catchall provision).

243. *Ferraro*, *supra* note 31, at 2508. Compare *Gunn*, 980 F.3d at 1181 (holding that district court decisions on compassionate release are subject to appellate review), with *Crowe v. United States*, 430 F. App’x 484, 485 (6th Cir. 2011) (per curiam) (stating that the BOP’s failure to bring a compassionate release motion is not reviewable), and *Zannino v. Arnold*, 531 F.2d 687, 691 (3d Cir. 1976) (noting that the judiciary has limited discretion to review decisions by parole boards).

244. See *Chavez-Meza v. United States*, 138 S. Ct. 1959, 1963 (2018) (requiring district courts to adequately explain sentencing modification decisions); *Highmark Inc. v. Allcare Health Mgmt. Sys.*, 572 U.S. 559, 563 n.2 (2014) (holding that appellate courts can correct legal or factual errors made by district courts); *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005) (“Discretion is not whim . . .”).

245. Indeed, even the Sentencing Commission has acknowledged that district courts are “in a unique position to assess whether the circumstances exist, and whether a reduction is warranted.” U.S. SENT’G GUIDELINES MANUAL app. C, supp., amend. 799, at 136 (U.S. SENT’G COMM’N 2016).

246. See *Russell*, *supra* note 92, at 81 (arguing that “[a]ppellate courts should recognize that district court judges are better situated to evaluate requests for modification, and give deference to those determinations”).

247. See *Roper*, *supra* note 230, at 32.

248. See *supra* note 243 and accompanying text; see also *Ferraro*, *supra* note 31, at 2508–09.

of the § 3553(a) sentencing factors.²⁴⁹ Indeed, district courts continue to deny a vast majority of compassionate release petitions.²⁵⁰ In short, giving judges broad authority to grant compassionate release is far from a get-out-of-jail-free card for prisoners.

B. Looking Ahead: Lessons and Recommendations for the Sentencing Commission

The trickier question is how to resolve disagreements among the various courts of appeals. Given the current state of affairs, it is unlikely that appellate courts will be able to reach a consensus on these questions anytime soon. Similarly, the Supreme Court to date has shown little interest in wading into the various existing compassionate release debates.²⁵¹ It is possible that Congress could seek to step in and resolve some of these debates,²⁵² but this would be a long and arduous process. Moreover, given the incalculable number of extraordinary and compelling reasons defendants might raise, federal courts will continue to grapple with similar types of issues going forward. Likely, only the Sentencing Commission can permanently resolve these conflicts.²⁵³

When the Sentencing Commission regains its quorum and issues an updated policy statement consistent with the FSA, district courts will once again be bound by the policy statement's contents.²⁵⁴ In doing so, it is essential that the Sentencing Commission avoid making the same mistakes it

249. See 18 U.S.C. § 3582(c)(1)(A) (requiring that courts consider the § 3553(a) sentencing factors before granting a sentence reduction).

250. See U.S. SENT'G COMM'N, *supra* note 38, at 4 tbl.1. Overall, 17.5 percent of compassionate release motions were granted in 2020 and the first six months of 2021 combined. *Id.*

251. See, e.g., *Jarvis v. United States*, No. 21-568, 2022 WL 89314 (U.S. Jan. 10, 2022) (mem.) (denying petition for certiorari seeking to overturn the Sixth Circuit's decision in *United States v. Jarvis*); *Bryant v. United States*, 142 S. Ct. 583 (2021) (mem.) (denying petition for certiorari seeking to overturn the Eleventh Circuit's decision in *United States v. Bryant*); cf. *Longoria v. United States*, 141 S. Ct. 978, 979 (2021) (statement of Sotomayor, J., joined by Gorsuch, J., respecting the denial of certiorari) (observing, with respect to another Guidelines dispute, that the "Commission should have the opportunity to address [the] issue in the first instance, once it regains a quorum of voting members").

252. In March 2021, Senators Dick Durbin and Chuck Grassley, the lead sponsors of the FSA, introduced the First Step Implementation Act of 2021, S. 1014, 117th Cong. (2021), which aims to further implement the FSA and advance its goals. See Press Release, United States Senate Committee on the Judiciary, Durbin, Grassley Introduce Bipartisan Legislation to Advance the First Step Act's Goals (Mar. 26, 2021), <https://www.judiciary.senate.gov/press/dem/releases/durbin-grassley-introduce-bipartisan-legislation-to-advance-the-first-step-acts-goals> [<https://perma.cc/JK48-EUKR>]. Notably, the First Step Implementation Act would allow courts to apply the FSA's sentencing reform provisions to reduce sentences imposed prior to the enactment of the FSA. See First Step Implementation Act, S. 1014, 117th Cong. § 101 (2021).

253. See 18 U.S.C. § 3582(c)(1)(A) (requiring that sentence reductions be consistent with the Sentencing Commission's policy statements); 28 U.S.C. § 994(t) (empowering the Sentencing Commission to issue policy statements as needed, especially in response to new legislation); see also Ferraro, *supra* note 31, at 2514.

254. See 18 U.S.C. § 3582(c) (stating that decisions to grant sentence reductions must be consistent with applicable policy statements from the Sentencing Commission).

has made in the past. As many courts have already begun granting compassionate release for a broad range of extraordinary and compelling circumstances, the Sentencing Commission can—and should—recognize and respond to these developing trends. But how exactly should the Sentencing Commission seek to accomplish this?

1. Solution 1: A National Standard

One option would be to simply expand the categories supporting compassionate release that are enumerated in the policy statement. The Sentencing Commission could take the position that its updated policy statement should provide concrete guidance as to what qualifies—or doesn't qualify—as an extraordinary and compelling reason for sentence reduction. Judge Charles Breyer, the only current member of the Sentencing Commission, appears to support this type of solution.²⁵⁵ In a recent interview, Breyer stated, “You need a national standard,” and added that the absence of one “creates a vacuum and . . . creates uncertainty, and most importantly . . . creates disparity.”²⁵⁶ A number of legal commentators have likewise suggested expanding the list of criteria for compassionate release.²⁵⁷

To be sure, providing an exhaustive list of extraordinary and compelling reasons might be helpful to judges deciding compassionate release petitions, but it comes at a heavy cost. First, even with broadened categories, an updated policy statement could never capture the full universe of extraordinary and compelling reasons for a sentence reduction. And, while the types of inconsistent outcomes described in Parts II.B and II.C ought to be minimized, it is not clear that a purely statutory solution is the best option. Certainly, the Sentencing Commission should avoid a “solution” that discourages judges from weighing all the relevant circumstances or that leads to consistently harsh outcomes that contravene Congress's purposes for passing the FSA. Attempting to eliminate judicial disparities in compassionate release outcomes by limiting judicial discretion would result in across-the-board treatment of truly different defendants.²⁵⁸

Second, a national standard would be inconsistent with Congress's desire to keep compassionate release decision-making in the judiciary's hands.²⁵⁹ A national standard risks removing judges from the decision-making process. Unless a defendant's circumstances fall within one of the specifically enumerated categories outlined in the updated policy statement, a judge would be prohibited from considering the circumstance as a basis for granting

255. See Tolan, *supra* note 30.

256. See *id.*

257. See, e.g., Ferraro, *supra* note 31, at 2510–12; Roper, *supra* note 230, at 32 (noting that the Sentencing Commission could amend U.S.S.G. § 1B1.13 to expand the health-related criteria for compassionate release and “expressly allow district courts to grant relief when a prior sentence is grossly disproportionate to current sentencing standards or is clearly no longer necessary to achieve the sentencing goals in 18 U.S.C. § 3553(a)(2)”).

258. See Robert W. Sweet et al., *Towards a Common Law of Sentencing: Developing Judicial Precedent in Cyberspace*, 65 *FORDHAM L. REV.* 927, 934–35 (1996).

259. See S. REP. NO. 98-225, at 56 (1983).

a sentence reduction. An updated policy statement that restricts compassionate release to certain specifically enumerated situations—or one that returns significant gatekeeping power back to the hands of the BOP—would effectively put judges in the same position they were in prior to the FSA’s passage.

2. Solution 2: Resolving Disparities Through Guided Judicial Discretion

But perhaps there is another option: one that emphasizes the importance of judicial discretion in the compassionate release process, while seeking to minimize disparate outcomes over time. Instead of cabining judicial discretion by adopting a national standard, the Sentencing Commission could encourage judges to rely on their experience, reasoned judgment, and common sense.

This Note proposes a two-step solution to achieve this. First, the Sentencing Commission should preserve the catchall “other reasons” provision in any future policy statement but vest the power to define those reasons in the hands of district court judges.²⁶⁰ Second, to help resolve current and future disagreements regarding compassionate release motions, the Sentencing Commission should create a depository of compassionate release decisions, transcripts, and other useful information and make this information available to judges and litigants. In other words, rather than seeking to cabin district court discretion by prescribing an exhaustive list of extraordinary and compelling reasons, the Sentencing Commission should support the courts in their development of a “common law” of compassionate release.

a. Preserving the Catchall Provision

For starters, the Sentencing Commission should seek to emphasize that judicial discretion holds utmost importance in compassionate release decisions. To achieve this, the Sentencing Commission should retain the current policy statement’s catchall “other reasons” provision but amend it to permit sentence reductions for any other extraordinary and compelling reasons as determined by the *court*.²⁶¹ Such an amendment would not only be consistent with Congress’s desire to “keep[] the sentencing power in the judiciary where it belongs”²⁶² but would also allow for more transparent construction of legal precedent.²⁶³ As federal district court judge Robert W.

260. See U.S. SENT’G GUIDELINES MANUAL § 1B1.13 cmt. n.1(D) (U.S. SENT’G COMM’N 2018) (allowing for sentence reductions for “Other Reasons . . . [a]s determined by the Director of the Bureau of Prisons”).

261. See *id.*

262. S. REP. NO. 98-225, at 121 (1983).

263. See Roper, *supra* note 230, at 32 (“Outcomes aside, decision making about compassionate release benefits from the influence of the judiciary by allowing for more transparent construction of precedent and limiting the perception that unseemly political considerations are influencing these decision-making processes.”). But see Bryant S. Green, Comment, *As the Pendulum Swings: The Reformation of Compassionate Release to*

Sweet described: “A system of justice, and society generally, benefit greatly when an identifiable and responsible party exercises discretion to fashion sentences that are appropriate to individual defendants.”²⁶⁴ Accordingly, to the extent the Sentencing Commission decides to include specific examples of extraordinary and compelling reasons in its updated policy statement, it should also make clear that any such list is nonexhaustive. By leaving space for judicial discretion subject to deferential appellate review, the Sentencing Commission can enable district judges to meaningfully address entirely unforeseeable circumstances and novel issues.

b. A New Role for the Sentencing Commission

Some judges may need guidance in exercising reasoned judgment, especially if the goal is to simultaneously minimize disparate outcomes and promote consistency in sentencing. To promote uniformity, the Sentencing Commission can create a depository of compassionate release decisions and other useful information to help guide judges and foster the development of a compassionate release “common law.”²⁶⁵ In this way, the Sentencing Commission can play a central role in resolving current and future disagreements among federal courts, such as those described in Part II, while at the same time allowing compassionate release jurisprudence to develop over time.

Such a system may not be as impracticable as it first sounds. Since October 2020, the Sentencing Commission has collected court documentation for all compassionate release motions, regardless of whether the motions were granted or denied.²⁶⁶ But this standardized data does not begin to capture the thinking that goes into a judge’s decision to grant or deny a particular motion for compassionate release. Thus, the Sentencing Commission should review transcripts and opinions in which district judges

Accommodate Changing Perceptions of Corrections, 46 U. TOL. L. REV. 123, 143–45 (2014) (arguing that there are strong historical, policy, and separation of powers arguments in favor of vesting a high degree of discretion over compassionate release in the executive branch).

264. Sweet et al., *supra* note 258, at 934.

265. Legal commentators have argued that developing a common law of sentencing through published opinions and data regarding sentencing decisions is a better way to cabin judicial discretion than mandatory guidelines from the Sentencing Commission. *See, e.g.*, Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. L. & POL’Y REV. 261, 280 (2009) (contending that “[w]ider use and availability of formal sentencing opinions is . . . critical to developing a common law of sentencing and to cabining discretion”); Green, *supra* note 42, at 57–58 (suggesting that the Sentencing Commission create an “electronic repository of sentencing wisdom” by collecting and disseminating sentencing decisions in white collar criminal cases); Russell, *supra* note 92, at 81 (recommending that the Sentencing Commission “support district courts in their development of common law standards” for compassionate release); Sweet et al., *supra* note 258, at 928 (arguing that “[a] return to a guided form of judicial sentencing, relying on common law principles and modern technology, would result in a more just and individualized form of sentencing”).

266. *See* U.S. SENT’G COMM’N, *supra* note 38, at 3. Prior to October 1, 2020, courts submitted to the Sentencing Commission documentation regarding motions for all compassionate release that were granted, but not for all compassionate release motions that were denied. *Id.*

explain their decisions more extensively, analyze the judge's reasoning, and make exemplary opinions and other materials available for judges, lawyers, and defendants to use in connection with future compassionate release motions.²⁶⁷ The goal is not to intimidate judges by subjecting their decisions to greater scrutiny but rather to collect reasoned opinions to serve as precedents for their peers.²⁶⁸

By continuously monitoring compassionate release decisions from across the country, the Sentencing Commission can use its expertise to generate valuable and accurate data, particularly insofar as consensus emerges. Similarly, the Sentencing Commission can keep a close watch on developing disparities on important issues impacting large categories of defendants. For example, the Sentencing Commission could update its policy statement to specifically allow sentence reductions in light of nonretroactive changes to sentencing laws. This would allow the Sentencing Commission to help resolve disagreements among appellate courts without constraining judicial discretion. More importantly, however, making judicial decisions and other data more widely accessible would help to foster the development of a "common law" of compassionate release, thereby promoting greater fairness and consistency across the system.

CONCLUSION

For the past thirty years, statutory and bureaucratic roadblocks have made compassionate release an unlikely avenue for prisoners to receive sentence reductions. Once a sentence was imposed, it was virtually impossible to get it reduced. At the same time, sentencing laws often tied the hands of judges and forced them to impose punishments that were vastly disproportionate to the crimes. With the passage of the First Step Act of 2018, however, a crack has emerged in the façade of federal sentencing laws. Under the revised compassionate release statute, district courts are increasingly asserting the authority to look back at old cases and reduce some of the most egregious and unfair sentences.

Yet, appellate courts have struggled at times to define and apply the "extraordinary and compelling reasons" standard consistently. Once the Sentencing Commission regains its quorum and issues an updated policy statement consistent with the FSA, the updated policy statement will once again become fully binding on federal courts. In doing so, it is essential that the Sentencing Commission avoid making the same mistakes it has made in the past. Instead of rolling back judicial discretion, the Sentencing Commission should help federal judges make *better* discretionary decisions. By encouraging a form of guided judicial discretion, the Sentencing Commission can achieve compassionate release decisions that are more

267. For a similar proposal in the context of reducing sentencing disparities in white-collar criminal sentencing under the advisory guidelines scheme, see Green, *supra* note 42, at 58.

268. *See id.*

reasoned, more transparent, more persuasive, more effective, and more just.²⁶⁹

269. See Gertner, *supra* note 265, at 262.