

# EXTRAORDINARILY COMPELLING: ASSESSING THE ROLE OF NON- RETROACTIVE LAWS IN MOTIONS FOR COMPASSIONATE RELEASE

**Abstract:** Compassionate release has long been an evolving legal issue in the United States. This evolution is particularly salient today as federal courts struggle to decide whether non-retroactive changes in sentencing laws qualify as extraordinary and compelling reasons for a sentence reduction. This Note explores the development of compassionate release through the Sentencing Reform Act, the First Step Act of 2018, and the resulting surge in motions for compassionate release, especially in response to the COVID-19 pandemic. Additionally, this Note argues that non-retroactive changes in sentencing laws should be considered when deciding whether a defendant's circumstances meet the threshold for extraordinary and compelling reasons to reduce a sentence. Excluding such changes from consideration perpetuates inequities in the criminal justice system, particularly for individuals sentenced under laws that have since been reformed. Failure to recognize the impact of non-retroactive law changes also undermines the legitimacy of the U.S. Sentencing Commission and the integrity of compassionate release as a tool for justice.

## INTRODUCTION

Philip Lochmiller could no longer recognize himself in a mirror.<sup>1</sup> In 2014, after a hip replacement, Lochmiller's personality began to change.<sup>2</sup> He displayed confusion and disorientation, requiring assistance with many basic tasks, like placing a phone call.<sup>3</sup> By 2020, Lochmiller began suffering from

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<sup>1</sup> See Motion for Reduction in Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) at 8, *United States v. Lochmiller*, 473 F. Supp. 3d 1245 (D. Colo. 2020) (No. 1:09-cr-00529) (describing the daily challenges faced by Lochmiller because of his disease).

<sup>2</sup> See *id.* at 7 (explaining the inception of many of Lochmiller's symptoms). The surgery took place on January 13, 2014. *Id.* On April 10, 2014, Lochmiller was transferred to a Nursing Care Center due to "rapid cognitive deterioration." See *id.* (noting the cognitive defects, memory loss, and agitation associated with Lochmiller's cognitive deterioration). Alzheimer's disease typically develops in stages, with each subsequent stage involving more cognitive decline. See Mayo Clinic Staff, *Alzheimer's Stages: How the Disease Progresses*, MAYO CLINIC (June 7, 2023), <https://www.mayoclinic.org/diseases-conditions/alzheimers-disease/in-depth/alzheimers-stages/art-20048448> [<https://perma.cc/3Z4J-AQCD>] (describing the progression of Alzheimer's disease). Each individual progresses differently through these stages, with some living from three to eleven years post-diagnosis, and some living over twenty years post-diagnosis. See *id.* (noting the differences in life expectancy across patients).

<sup>3</sup> See Motion for Reduction in Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), *supra* note 1, at 8 (explaining the decline in Lochmiller's condition over six years).

delirium and hallucinations, became unable to recognize family members, and experienced trouble speaking in full sentences.<sup>4</sup> Philip Lochmiller had Alzheimer's disease.<sup>5</sup> He was also serving a thirty-three-year sentence in prison for running a Ponzi scheme.<sup>6</sup>

At the start of Lochmiller's cognitive decline in 2014, his family requested on his behalf that the court reduce his sentence via compassionate release, and, after rejection, again in February 2017, July 2017, and December 2019.<sup>7</sup> By April 2020, Lochmiller was seventy-two years old and had served less than a quarter of his sentence in the Federal Bureau of Prisons, but his cognitive abilities had continued to decline.<sup>8</sup>

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<sup>4</sup> See *id.* (describing the progression of Lochmiller's disease). The filing also noted that Lochmiller struggles to recognize family members and often cannot identify the year or day he is in. See *id.* (same). Lochmiller also started lashing out at people and wandering into others' personal spaces. See *id.* (explaining Lochmiller's condition). After Lochmiller physically lashed out at a guard on his unit, Psychology Services determined he was "not competent and not responsible" for the behavior due to his cognitive impairments. *Id.*

<sup>5</sup> See *id.* at 7 (noting Lochmiller's official diagnosis as Probable Major Neurocognitive Disorder Due to Alzheimer's Disease).

<sup>6</sup> See *United States v. Lochmiller*, 473 F. Supp. 3d 1245, 1246 (D. Colo. 2020) (summarizing Lochmiller's convictions); Jury Verdict as to Philip R. Lochmiller, *United States v. Lochmiller*, No. 1:09-cr-00529 (D. Colo. July 21, 2011) (finding Lochmiller guilty). On July 21, 2011, a jury found Lochmiller guilty of conspiracy to commit securities and mail fraud, and money laundering, as well as money fraud. See *Lochmiller*, 473 F. Supp. 3d at 1246 (discussing the charges levied against Lochmiller). Lochmiller was the owner of Valley Mortgage, a home mortgage brokerage, and Valley Investments, an investment company, that used investor funds to acquire vacant land or mobile home parks and convert them into affordable housing lots. See Indictment as to Philip R. Lochmiller, *United States v. Lochmiller*, No. 1:09-cr-00529, 2 (D. Colo. Dec. 15, 2009) (describing Lochmiller's ownership). Over ten years, Lochmiller ran a Ponzi scheme in which he used new investors' money to pay earlier investors' returns and overvalued or failed to record the deeds of the properties they used as collateral. See *United States v. Lochmiller*, 521 F. App'x 687, 689 (10th Cir. 2013) (summarizing Lochmiller's fraudulent conduct). According to the court, Lochmiller utilized much of the investment funding he acquired to buy homes and cars, a vacation home in Mexico, and to pay his daughter a salary although she never worked for Valley Investments. See *id.* at 691 (describing Lochmiller's spending). By 2009, Lochmiller had accumulated around \$34 million in liabilities. See *id.* at 689 (detailing the background of Lochmiller's conviction). Lochmiller was sentenced to 405 months in prison, and an \$18.65 million restitution penalty. See Judgment as to Defendant Philip R. Lochmiller, *United States v. Lochmiller*, No. 1:09-cr-00529, (D. Colo. Mar. 15, 2012) (stating Lochmiller's term of imprisonment and amount of restitution).

<sup>7</sup> See Motion for Reduction in Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), *supra* note 1, at 6 (summarizing the process of motions filed for compassionate release since 2014); *United States v. Brock*, 39 F.4th 462, 463 (7th Cir. 2022) (referring to 18 U.S.C. § 3582(c)(1)(A) as the compassionate release statute). Lochmiller's 2014 request for a reduced sentence was denied on the grounds that his illness was not terminal. See Motion for Reduction in Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), *supra* note 1, at 6 (explaining the circumstances of the 2014 motion rejection).

<sup>8</sup> See Motion for Reduction in Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), *supra* note 1, at 6, 8 (describing the portion of his sentence Lochmiller had served and his continually declining cognitive abilities). Including good time credits, Lochmiller had served the equivalent of 110 months of his sentence by April 2020. See *id.* (noting the good time credits Lochmiller had earned while in prison). Good time credits allow a federal prisoner's time in custody to be reduced for "exemplary compliance" with prison rules. See *Frequently Asked Questions: Federal Good Time Credit*, FAMM, <https://>

On April 14, 2020, Lochmiller's counsel filed his final motion for compassionate release, arguing that his advanced dementia was an extraordinary and compelling reason justifying a sentence reduction.<sup>9</sup> The U.S. District Court for the District of Colorado agreed.<sup>10</sup> The court cited for support a policy guideline issued by the United States Sentencing Commission (Sentencing Commission) defining advanced dementia as a medical condition that may qualify as an extraordinary and compelling reason for a sentence reduction.<sup>11</sup> On July 20, 2020, the court ordered that Lochmiller's sentence be reduced to time served and he be released once his travel arrangements were made.<sup>12</sup>

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famm.org/wp-content/uploads/2018/04/faq-federal-good-time-credit.pdf[https://perma.cc/62NA-YPD7] (quoting 18 U.S.C. § 3582(c)(1)(A)(i)) (describing federal good time credits). Mr. Lochmiller was sixty-four years old when sentenced, spending eight years in prison. *See* Motion for Reduction in Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), *supra* note 1, at 6 (stating Lochmiller's age when sentenced and his current age of seventy-two).

<sup>9</sup> *See Lochmiller*, 473 F. Supp. 3d at 1246–47 (recounting Lochmiller's arguments). According to the United States Sentencing Commission, a defendant's medical condition may qualify as an extraordinary and compelling reason for release when it is a terminal illness, a serious medical or physical condition, a serious cognitive or functional impairment, or age-related deterioration of physical or mental health limiting one's ability to care for themself. *See* U.S. SENT'G COMM'N, GUIDELINES MANUAL § 1B1.13 (2024) (hereinafter U.S.S.G.) (providing examples of extraordinary and compelling reasons).

<sup>10</sup> *See Lochmiller*, 473 F. Supp. 3d at 1248 (finding that Lochmiller's condition was an extraordinary and compelling reason justifying a reduction of his sentence). The court also surmised that given Lochmiller's condition, he would not pose a danger to the public if released. *See id.* (assessing other factors relevant to Lochmiller's release). It stated that he no longer possessed the mental capacity necessary to perpetrate the category of crime of which he was convicted. *See id.* (supporting the court's finding that Lochmiller would not pose a danger to the public). Although individuals with dementia may become more aggressive as the disease progresses, the court here refers to the unlikely result of Lochmiller perpetrating another financial crime, which required a good deal of cognition to carry out. *See id.* (stating that Lochmiller lacked the capacity to perpetrate the same crime he had before his diagnosis); *Coping with Agitation, Aggression, and Sundowning in Alzheimer's Disease*, NAT'L INST. ON AGING (July 17, 2024), <https://www.nia.nih.gov/health/alzheimers-changes-behavior-and-communication/coping-agitation-aggression-and-sundowning> [https://perma.cc/Q8PD-BK35] (noting the behavioral changes that may be caused by Alzheimer's Disease).

<sup>11</sup> *See Lochmiller*, 473 F. Supp. 3d at 1247–48 (utilizing the Sentencing Commission's definition of an extraordinary and compelling medical condition). In response to the victims of Lochmiller's fraud recounting the suffering he caused them, the court noted that where Lochmiller could once consciously look someone in the eye, take their life savings, and know it would not be returned, he could now not even recognize his own face. *See id.* at 1249 (noting that a prisoner's inability to understand that they are being punished erases its punitive purpose). The court's discussion of the punitive purpose of punishment finds support in the Eighth Amendment, which the Supreme Court has interpreted to prohibit the execution of prisoners with dementia who cannot "rationally understand" why they are being punished. *See* *Madison v. Alabama*, 586 U.S. 265, 275 (2019) (holding that the Eighth Amendment may prohibit the execution of a defendant with dementia).

<sup>12</sup> *See Lochmiller*, 473 F. Supp. 3d at 1249–50 (granting Lochmiller's motion for a reduced sentence); Order at 8, *Lochmiller*, (D. Colo. July 20, 2020) (No. 1:09-cr-00529) (ordering Lochmiller's release). Lochmiller's plan for release included living with his wife, who stated she would seek care for him at Veterans Affairs facilities in their area. *See* Motion for Reduction in Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i), *supra* note 1, at 15 (describing Lochmiller's release plan). Lochmiller's motion also mentioned that as a member of the Choctaw Nation, Lochmiller could access medical

Daniel Rutherford was not so lucky.<sup>13</sup> On July 11, 2003, in the Eastern District of Pennsylvania, Rutherford entered DePativo Chiropractor Center armed with a handgun, forced a receptionist and doctor into a rear office at gunpoint, and stole jewelry and cash totaling \$900 after being told there were no drugs at the facility.<sup>14</sup> Only four days earlier, Rutherford had robbed a chiropractor at the same office at gunpoint, stealing \$390 and a watch.<sup>15</sup>

On September 16, 2005, a jury found Rutherford guilty of four counts relating to the robberies, including committing a crime of violence while carrying a firearm.<sup>16</sup> In January 2005, at twenty-two-years of age, the court sentenced Rutherford to 509 months in prison—approximately forty-two years.<sup>17</sup>

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services offered to the tribe. *See id.* (noting Lochmiller's Indigenous heritage). Some of Lochmiller's victims in the Colorado area expressed anger at this result. *See* Alex Zorn, *Compassionate Release for Man Convicted on Ponzi Scheme*, DAILY SENTINEL (July 24, 2020), [https://www.gjsentinel.com/news/western\\_colorado/compassionate-release-for-man-convicted-on-ponzi-scheme/article\\_817fae50-cd0a-11ea-8f3b-0f9f669a445c.html](https://www.gjsentinel.com/news/western_colorado/compassionate-release-for-man-convicted-on-ponzi-scheme/article_817fae50-cd0a-11ea-8f3b-0f9f669a445c.html) [<https://perma.cc/MA74-5ZFU>] (speaking with victims of Lochmiller's crimes). Arthur Moss, the son of Harold Moss, who lost around half a million dollars to Lochmiller's Ponzi scheme, said "[i]t was hard to get through the day" after learning of Lochmiller's release. *Id.* Attorney Jason Dunn, writing on behalf of the government to oppose Lochmiller's motion, described the more than 400 people—mostly elderly individuals—who lost retirement savings and homes as a result of being defrauded by Lochmiller. *See* Government's Response to Defendant's Motion for Reduction in Sentence at 5–6, *Lochmiller*, 473 F. Supp. 3d 1245 (D. Colo. Apr. 20, 2020) (No. 1:09-cr-00529) (describing the ramifications of Lochmiller's crimes). The government also noted that Lochmiller had made no progress toward paying his court-ordered restitution of over \$18 million. *See id.* at 6 (emphasizing further reasons to deny Lochmiller's motion). Mr. Lochmiller passed on September 20, 2023. *See* Philip Lochmiller Sr., Death Record, LEXIS (stating that on September 20, 2023, Lochmiller died in Indiana at seventy-five years old).

<sup>13</sup> *See* United States v. Rutherford, 120 F.4th 360, 380 (3d Cir. 2024) (denying Rutherford's motion for compassionate release), *cert. granted*, No. 24-820, 2025 WL 1603603 (2025).

<sup>14</sup> *See* Indictment as to Daniel Rutherford, Elijah Smith, at 2–3, United States v. Rutherford, 2023 WL 3136125 (E.D. Pa. Mar. 8, 2005) (No. 2:05-cr-00126) (explaining the circumstances of the crime). Dr. Anthony DePativo, the son of the office's owner, was robbed, handing over \$10, his credit card, and a chain from his neck. *See* Brief for Appellant at 5–6, United States v. Rutherford, 2006 WL 6221239, (E.D. Pa. Jan. 25, 2006) (No. 06-1437) (describing the circumstances of the second robbery). Rutherford had a prior record of criminal activity and, at the time of the robberies, was on escape status for failure to return from work release. *See* United States v. Rutherford, No. 05-cr-0126-JMY-1, 2023 WL 3136125, at \* 1 (E.D. Pa. Apr. 23, 2023) (noting Rutherford's previous criminal record).

<sup>15</sup> *See* *Rutherford*, 120 F.4th at 368 (noting the money amounts stolen in the two robberies); Indictment as to Daniel Rutherford, Elijah Smith, *supra* note 14, at 3–4 (describing the robbery Rutherford committed alone). According to Rutherford's brief on appeal of this sentence, Dr. Carl DePativo—the owner of the chiropractic practice—admitted Rutherford into the office, thinking he was a patient. *See* Brief for Appellant, *supra* note 14, at 5 (describing the circumstances of the first robbery). Rutherford then pointed a gun at DePativo and said, "give me your money," receiving \$390 in cash and a watch from DePativo. *Id.*

<sup>16</sup> *See* United States v. Rutherford, No. 05-cr-0126-JMY-1, 2006 WL 7349954, at \*1 (E.D. Pa. Jan. 25, 2006) (noting the jury's verdict against Rutherford), *aff'd*, 236 Fed. Appx. 835 (3d Cir. 2007). The charges included "conspiracy to interfere with interstate commerce by robbery," "interference with interstate commerce by robbery," "using and carrying a firearm during a crime of violence," and "aiding and abetting." *Id.* On appeal, Rutherford sought acquittal, arguing that the government had failed to demonstrate that his crimes influenced interstate commerce—an element of one of his charges. *Id.* The court ultimately denied Rutherford's motion, explaining that the government had provided

Between 2020 and 2021, Rutherford filed three motions for compassionate release, one of which eventually made its way to the Third Circuit Court of Appeals.<sup>18</sup> To receive compassionate release, Rutherford needed to prove that there were extraordinary and compelling reasons justifying a sentence reduction and that any reduction would be consistent with existing federal sentencing policies.<sup>19</sup> Rutherford argued in this motion that had he been convicted today, he would have faced a minimum sentence of fourteen years instead of the thirty-two-year mandatory minimum that applied to him in 2006 due to sentencing reforms instituted under the First Step Act of 2018.<sup>20</sup> Rutherford

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enough evidence from which a jury could determine that the robberies had a potential impact on interstate commerce. *See id.* at 2 (finding support for the determination that the robberies had a potential impact on interstate commerce). Such evidence included the fact that the office purchased its supplies from out of state, the office remained closed for a day due to the robbery, and that appointments were canceled as a result. *See id.* (summarizing the evidence presented at trial regarding the robberies' impacts on interstate commerce).

<sup>17</sup> *See* Brief for Appellant, *supra* note 14, at 3 (stating the sentence imposed upon Rutherford for his crimes).

<sup>18</sup> *See Rutherford*, 120 F.4th at 368–69 (noting that Rutherford had filed prior motions for compassionate release). In 2020, Rutherford sent the federal office of the public defenders a motion for compassionate release, believing that they would file the motion on his behalf. *See id.* at 368 (describing the history of Rutherford's motions). After not hearing back, Rutherford filed a handwritten motion again seeking compassionate release with the district court, stating that this motion never received a response. *See id.* at 368–69 (detailing the factual and procedural history of the case). Rutherford obtained counsel on his appeal to the Third Circuit. *See id.* at 362 (listing attorneys and law firms).

<sup>19</sup> *See* 18 U.S.C. § 3582 (c)(1)(A) (describing the conditions required to receive a modification of a sentence). This statute is often referred to as the compassionate release statute, as it is a mechanism for criminal defendants to seek sentence reductions for unforeseen circumstances occurring during their incarceration. *See United States v. Chen*, 48 F.4th 1092, 1098–99 (9th Cir. 2022) (describing compassionate release as a safety valve); *United States v. Brock*, 39 F.4th 462, 463 (7th Cir. 2022) (referencing 18 U.S.C. § 3582 (c)(1)(A) as the compassionate release statute); *United States v. Rodriguez*, 451 F. Supp. 3d 392, 394 (E.D. Pa. 2020) (same); *United States v. Brooker*, 976 F.3d 228, 231 (2d Cir. 2020) (same).

<sup>20</sup> *See United States v. Rutherford*, No. 05-cr-0126-JMY-1, 2023 WL 3136125, at \*1–2, 5 (E.D. Pa. Apr. 27, 2023) (recalling Rutherford's 2006 sentence, his current arguments, and rejecting Rutherford's motion for compassionate release), *aff'd*, 120 F.4th 360 (3d Cir. 2024), *cert. granted*, No. 24-820, 2025 WL 1603603 (June 6, 2025). Although Rutherford faced a mandatory minimum of thirty-two years in 2006, the sentencing judge, Judge Davis, decided to impose the maximum of the recommended sentence of forty-two years and five months of incarceration. *See id.* at \*1 (discussing Judge Davis's sentencing decision). Under today's law, Rutherford would face a seven-year minimum sentence for each robbery charge, whereas in 2006, he faced a seven-year mandatory minimum for the first robbery charge, but a twenty-five-year mandatory minimum for the second robbery charge. *See id.* at \*1–2 (noting the difference between mandatory minimum sentences for Rutherford's crimes). Under the 2006 version of the robbery statute, when a defendant committed the same crime again, a twenty-five-year minimum automatically applied. *See* 18 U.S.C. § 924(c)(1)(C) (2006) (amended 2018) (imposing a twenty-five-year mandatory minimum for a subsequent armed robbery). Under the First Step Act's amendment, the twenty-five-year minimum applies to a subsequent crime only if the first crime had already resulted in a final conviction, something that had not occurred with Rutherford as he was simultaneously charged with two counts of armed robbery. *See* First Step Act of 2018, Pub. L. No. 115-391, § 403, 132 Stat. 5194, 5221 (2018) (amending § 924(c) to change mandatory minimums for certain crimes of violence); *Rutherford*, 120 F.4th at 368 (summarizing that Rutherford was

argued that this wide discrepancy in the current sentence imposed and the sentence he received in 2006 was an extraordinary and compelling reason justifying a reduction of his sentence.<sup>21</sup>

Unfortunately for Rutherford, none of these efforts could persuade the Third Circuit to reduce his sentence.<sup>22</sup> The Third Circuit reaffirmed its stance that changes in the law that Congress has deemed inapplicable to pre-existing sentences cannot be considered extraordinary and compelling reasons for granting compassionate release.<sup>23</sup> In doing so, the Third Circuit invalidated the Sentencing Commission's policy statement that allows for such an analysis.<sup>24</sup>

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charged with two counts of armed robbery and received seven years for the first offense and twenty-five years for the second).

<sup>21</sup> See *Rutherford*, 120 F.4th at 369 (describing Rutherford's arguments). Rutherford further bolstered his argument for release by pointing to his completion of more than fifty educational courses while incarcerated, the fact that he secured employment post-release, and that his obesity and hypertension increased his risk of death from COVID-19. See *id.* (detailing Rutherford's additional arguments in support of his motion). Rutherford received support from several amici curiae, including Senators Cory Booker and Dick Durbin, the National Association of Criminal Defense Lawyers, and Federal Public Defenders and Community Defenders for the Judicial Districts of the Third Circuit. See Brief of Amici Curiae National Association of Criminal Defense Lawyers, Famm, & Federal Public Defenders and Community Defenders for the Judicial Districts of the Third Circuit in Support of Appellant and Reversal at 12–13, *Rutherford*, 120 F.4th 360 (3d Cir. 2024) (No. 2-05-CR-00126-001) (arguing that the change in sentencing for Rutherford's crimes should be considered by the court in the extraordinary and compelling analysis); Brief of Senators Cory Booker and Dick Durbin as Amici Curiae in Support of Appellant at 3, *Rutherford*, 120 F.4th 360 (3d Cir. 2024) (No. 2-05-CR-00126-001) (recognizing that the Sentencing Commission has the authority to define what constitutes an extraordinary and compelling reason for release). Senators Booker and Durbin state their "strong interest" in the correct interpretation of federal sentencing laws that speak to the authority of the Sentencing Commission to issue statements on compassionate release policy. See Brief of Senators Cory Booker and Dick Durbin as Amici Curiae in Support of Appellant at 2, *supra* (affirming the Senators' interest in seeing the issue resolved).

<sup>22</sup> See *Rutherford*, 120 F.4th at 380 (affirming the lower court's decision to deny Rutherford's motion for compassionate release).

<sup>23</sup> See *id.* at 376 (stating that it would conflict with Congress's intent in passing the First Step Act to allow non-retroactive changes in the law to enter the extraordinary and compelling analysis). The court recognized the circuit split on this issue, where the First, Fourth, Ninth, and Tenth Circuits allow such changes to be considered, but the Sixth, Seventh, Eighth, and D.C. Circuits do not. See *id.* at 366 (identifying the circuit split on compassionate release). The court cited its opinion from 2021, in *United States v. Andrews*, where it held that the First Step Act's non-retroactive changes to mandatory minimums could not provide a basis for compassionate release. See *id.* (citing 12 F.4th 255, 261 (3d Cir. 2021)).

<sup>24</sup> See U.S.S.G. § 1B1.13(c)(6) (stating the Sentencing Commission's stance on whether changes in the law may be considered extraordinary and compelling). Specifically, the Sentencing Commission states that if a defendant was given an unusually long sentence and has already served ten years of it, a change in the law can be considered in deciding whether the defendant has presented an extraordinary and compelling reason, only where the law change would result in a "gross disparity" between the sentence that was imposed and the sentence likely to be imposed under the current law. See *id.* (describing the circumstances when a change in the law may be considered). The Sentencing Commission notes that this analysis must also include full consideration of the individual circumstances of the defendant. See *id.* (elaborating upon the proper analysis). In other words, an unusually

This disagreement and its ramifications for criminal defendants and the Sentencing Commission is the subject of this Note.<sup>25</sup>

Part I of this Note provides a brief history of sentencing in the United States, the development of compassionate release, and the primary statutes impacting a court's analysis of a motion for compassionate release.<sup>26</sup> Part II assesses the circuit split regarding non-retroactive changes in the law and whether they may be assessed as extraordinary and compelling reasons for a sentence reduction.<sup>27</sup> Part III argues that courts should consider non-retroactive changes in the law when deciding whether a defendant has demonstrated extraordinary and compelling reasons for release and suggests that to decide otherwise perpetrates an injustice on imprisoned individuals while delegitimizing the Sentencing Commission.<sup>28</sup>

### I. A SENTENCING COMMISSION, A FEW STATUTES, AND A PANDEMIC: THE RECIPE FOR COMPASSIONATE RELEASE

Circuit courts are split on the issue of whether changes in the law that Congress deems non-retroactive can be considered an extraordinary and compelling reason warranting a defendant's compassionate release.<sup>29</sup> The Sentencing Commission's silence on this issue throughout the COVID-era surge of

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long sentence cannot, by itself, be an extraordinary and compelling reason warranting compassionate release. *See id.* (recognizing that the defendant's particular case must be considered).

<sup>25</sup> *See infra* notes 29–184 and accompanying text.

<sup>26</sup> *See infra* notes 29–89 and accompanying text.

<sup>27</sup> *See infra* notes 90–137 and accompanying text.

<sup>28</sup> *See infra* notes 138–184 and accompanying text.

<sup>29</sup> *See* United States v. Rutherford, 120 F.4th 360, 380 (3d Cir. 2024) (holding that the non-retroactive sentencing changes wrought by the First Step Act could not be considered as extraordinary and compelling factors for compassionate release), *cert. granted*, No. 24-820, 2025 WL 1603603 (2025); United States v. McCall, 56 F.4th 1048, 1065–66 (6th Cir. 2022) (holding that non-retroactive legal changes either considered by themselves or with other factors cannot be an extraordinary and compelling reason for compassionate release); United States v. Jenkins, 50 F.4th 1185, 1198 (D.C. Cir. 2022) (agreeing with the Third, Seventh, and Eighth Circuits in their refusal to consider non-retroactive laws as a part of the extraordinary and compelling analysis); United States v. Crandall, 25 F.4th 582, 586 (8th Cir. 2022) (concluding that non-retroactive changes in the law do not constitute extraordinary and compelling reasons); United States v. Thacker, 4 F.4th 569, 576 (7th Cir. 2021) (same). *But see* United States v. Chen, 48 F.4th 1092, 1101 (9th Cir. 2022) (stating that non-retroactive changes in the law, along with other factors particular to the defendant's case, may be considered in the extraordinary and compelling analysis); United States v. Ruvalcaba, 26 F.4th 14, 28 (1st Cir. 2022) (concluding that a court may consider the First Step Act's non-retroactive amendments to mandatory minimum penalties within their individual case as part of the extraordinary and compelling analysis); United States v. McGee, 992 F.3d 1035, 1047–48 (10th Cir. 2021) (stating that non-retroactive laws may be considered in context with the defendant's other circumstances); United States v. McCoy, 981 F.3d 271, 288 (4th Cir. 2020) (finding no error in the lower courts' decisions to examine the discrepancy between defendants' sentences and sentences now imposed under the First Step Act as extraordinary and compelling reasons).

compassionate release motions left courts on their own to decide this issue.<sup>30</sup> A recent attempt by the sentencing commission to clarify the issue may have only deepened the divide.<sup>31</sup> Section A of this Part discusses the Sentencing Reform Act of 1984 that codified compassionate release and created the Sentencing Commission.<sup>32</sup> Section B of this Part discusses the enactment of the First Step Act of 2018, its broadening of access to compassionate release, and the ramifications of this accessibility during the COVID-19 pandemic.<sup>33</sup> Finally, Section C of this Part situates the reader in the current circuit court divide, providing a brief explanation of retroactive laws and their significance in motions for compassionate release.<sup>34</sup>

### *A. The Sentencing Reform Act of 1984: Origin of Compassionate Release*

Before passage of the Sentencing Reform Act of 1984, judges and parole boards possessed wide discretion in determining the appropriate sentences for convicted individuals.<sup>35</sup> In addition, appellate review of sentencing was a rare occurrence, as many regarded judges and parole authorities as the sentencing experts.<sup>36</sup> This flexibility contributed to the imposition of indeterminate and disparate sentences, criticized as permitting discriminatory and arbitrary sentencing outcomes.<sup>37</sup> In this early era, the indeterminate sentence became the

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<sup>30</sup> See *Rutherford*, 120 F.4th at 365–66 (describing how in the absence of guidance from the Sentencing Commission, the courts had to decide how the First Step Act impacted the compassionate release process, specifically the extraordinary and compelling analysis); *United States v. Brooker*, 976 F.3d 228, 233–34 (2d Cir. 2020) (highlighting the lack of a quorum of voting members at the Sentencing Commission and indicating that no update to the Sentencing Commission’s policy statement on compassionate release appeared forthcoming).

<sup>31</sup> See *Rutherford*, 120 F.4th at 380 (holding that the Sentencing Commission’s amended 2023 policy statement conflicts with its prior precedent and that its prior precedent—not the policy statement—is controlling).

<sup>32</sup> See *infra* notes 35–54 and accompanying text.

<sup>33</sup> See *infra* notes 55–70 and accompanying text.

<sup>34</sup> See *infra* notes 71–89 and accompanying text.

<sup>35</sup> See Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 696, 698 (2010) (describing the latitude in sentencing extended to parole authorities and judges). Sentencing determinations in America have been described as a continually shifting allocation of power between Congress, the judiciary, and parole authorities. See Alan M. Dershowitz, *Criminal Sentencing in the United States: An Historical and Conceptual Overview*, 423 ANNALS AM. ACAD. POL. & SOC. SCI. 117, 118 (1976) (introducing the history of sentencing in America).

<sup>36</sup> See Gertner, *supra* note 35, at 696 (explaining the general unwillingness to challenge judges’ decisions about what sentence would effectively rehabilitate a defendant). Judge Nancy Gertner, a former federal judge, also noted that in the early to mid-nineteenth century, most criminal law was state-oriented rather than federal, so federal sentencing was relatively undeveloped. See *id.* (describing the history of sentencing at federal and state levels); Nancy Gertner, <https://nancygertner.com> [<https://perma.cc/MW34-JZHM>] (describing Judge Gertner’s career).

<sup>37</sup> See Gertner, *supra* note 35, at 696–97 (describing the criticism and practical effects of broad judicial sentencing discretion). Gertner explained that absent a common law of sentencing, due process review of sentences was often denied, and federal sentencing appeared lawless. See *id.* (expound-



most popular form of sentencing, where a judge sentenced an individual but left their term of imprisonment for determination by parole authorities.<sup>38</sup>

To remedy these disparities and reduce the imposition of indeterminate sentences, Congress passed the Sentencing Reform Act of 1984 (SRA).<sup>39</sup> In enacting the SRA, Congress emphasized three main sentencing goals: uniformity, honesty, and proportionality.<sup>40</sup> Among a host of other sentencing re-

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ing upon the realities of federal sentencing practices). The concern for discriminatory sentencing remains relevant today. *See 2023 Demographic Differences in Federal Sentencing*, U.S. SENT'G COMM'N (2023) (summarizing its study of demographic differences in sentences). Findings from the United States Sentencing Commission's five-year study spanning 2017–2021 reveal that Black males received 13.4% longer sentences than white males, Hispanic females received 27.8% longer sentences than white females, and Black males were 23.4% less likely to receive a sentence of probation than white males. *Id.*

<sup>38</sup> *See* Dershowitz, *supra* note 35, at 128 (highlighting the growing prominence of the indeterminate sentence). A judge sentencing an individual to a term of between five and ten years is an example of an indeterminate sentence as it gives the parole board the ultimate authority on how long the defendant will serve. *See id.* (illustrating the indeterminate sentence). In 1976, less than ten years before the Sentencing Reform Act, Dershowitz aptly predicted that criticism of indeterminate sentencing will lead to a return of sentencing authority to the legislative branch. *See id.* at 117, 132 (noting the publishing year as 1976 and predicting the future of United States sentencing practices); Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2032 (1984) (codified as amended at 18 U.S.C. §§ 3551–3559, 3561–3566, 3571–3574, 3581–3586, & 28 U.S.C. §§ 991–998 (1988)) (including the Sentencing Reform Act in the 98th Congress's October 1984 public laws compilation).

<sup>39</sup> *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984) (codified as amended at 18 U.S.C. §§ 3551–3559, 3561–3566, 3571–3574, 3581–3586, & 28 U.S.C. §§ 991–998 (1988)); *United States v. Rutherford*, 120 F.4th 360, 363 (3d Cir. 2024) (describing the origins of the Sentencing Reform Act of 1984), *cert. granted*, No. 24-820, 2025 WL 1603603 (2025). In his statement introducing the Sentencing Reform Act of 1984 (SRA), Senator Edward Kennedy emphasized the issues with then-existing federal sentencing practices, pointing to the phenomenon whereby offenders who may have been convicted of the same crime were sentenced to vastly different terms of imprisonment. *See* 129 CONG. REC. 2090 (1983) (statement of Sen. Kennedy) (explaining his and his fellow senators' impetus for introducing the Act). Senator Kennedy referred to the then-existing system of federal sentencing as a 'nonsystem' and noted that the SRA will clearly define the purposes of sentencing and end the imposition of indeterminate sentences. *See id.* (expounding upon the purpose of the proposed Act). The SRA is merely a chapter in the robust Comprehensive Crime Control Act of 1984, an act that overhauled many federal criminal statutes. *See* Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 U.C.L.A. L. REV. 83, 83 (1988) (situating the SRA within the broader scope of the Comprehensive Crime Control Act of 1984). The Comprehensive Crime Control Act of 1984 impacts legal issues such as bail, sentencing, fraud, violent crime, terrorism, mental defects, drug infractions, racketeering, victim compensation, and many other facets of crime. *See id.* at 84 n.3 (listing the variety of topics implicated under the statute). This Act is beyond the scope of this Note, but its ramifications for federal criminal law are undeniably immense.

<sup>40</sup> *United States v. Williams*, 891 F.2d 962, 963 (1st Cir. 1989). Honesty reflects Congress's intent to regain public trust in the sentencing system by ensuring that judges would provide a determinate length of incarceration, or "real-time" sentencing. *See id.* (describing Congress's motive for maintaining honesty as a sentencing goal). Uniformity would ensure that disparate sentences for similar crimes would be avoided, and proportionality would equate sentence duration with the severity of criminal conduct. *See id.* at 963–64 (elaborating on Congress's decision to emphasize uniformity and proportionality).

forms, the SRA eliminated the federal parole system and, importantly, established the Sentencing Commission.<sup>41</sup>

### 1. Origins and Purpose of the United States Sentencing Commission

Under the nondelegation doctrine, Congress may delegate broad powers to federal agencies so long as it articulates an “intelligible principle” for the agency to follow.<sup>42</sup> In 1984, when Congress created the Sentencing Commission, it formed an independent agency and delegated to it the power to establish federal sentencing policies that align with the purposes of the SRA, provide fairness and predictability in sentencing, and avoid disparities in sentencing for similar crimes.<sup>43</sup> In essence, the Sentencing Commission gives effect to the provisions of the SRA, but Congress has given the Sentencing Commission only general direction as to the content of sentencing guidelines and policy.<sup>44</sup>

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<sup>41</sup> See Summary: S.668—Sentencing Reform Act of 1984, CONGRESS.GOV, <https://www.congress.gov/bill/98th-congress/senate-bill/668> [<https://perma.cc/LNY4-TSDV>] (describing the key provisions of the SRA). By eliminating the federal parole system, Congress ensured that sentences would be determinate and decreased the discretion of federal judges. See *United States v. Mejia-Orosco*, 867 F.2d 216, 218–19 (5th Cir. 1989) (explaining the significance of Congress eliminating federal parole).

<sup>42</sup> See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (reiterating the core analysis under the nondelegation doctrine). In 1989, in *Mistretta v. United States*, the Supreme Court concluded that Congress had articulated an intelligible principle in its delegation to the Sentencing Commission because it assigned it with three clear goals, four clear purposes, and the guidelines system as the method by which the new agency could regulate. *Id.* at 374. This means that Congress had constitutionally delegated some of its authority to the Sentencing Commission. See *id.* (finding that Congress’s delegation satisfied constitutional requirements).

<sup>43</sup> See 28 U.S.C. § 991(b)(1) (outlining the purpose of the Sentencing Commission); see also *United States v. Booker*, 543 U.S. 220, 253 (2005) (describing uniformity as Congress’s primary goal in enacting the SRA). The declared purpose of the SRA is to require a sentencing court to consider the “nature and circumstances” of the criminal conduct and the defendant’s history and characteristics as well as the need for the sentence to reflect the severity of the offense, enhance respect for the law, punish and deter, and protect the public. See 18 U.S.C. § 3553(a)(1)–(2) (listing the factors for a sentencing court’s consideration). The Sentencing Commission lies within the judicial branch and is composed of seven voting members as well as one nonvoting member. See 28 U.S.C. § 991(a) (describing the structure of the Sentencing Commission). The President, with input from interested parties such as judges, attorneys, law enforcement, and victims, appoints the voting members, one of whom retains the role of Chair and three of whom serve as Vice Chairs. See *id.* (elaborating upon the membership of the Sentencing Commission). At least three of the seven members of the Sentencing Commission must be Article III judges. See *id.* (requiring some commissioners to be federal judges).

<sup>44</sup> See 28 U.S.C. § 991(b)(1)(A) (directing the Sentencing Commission to meet the purposes of sentencing described in the SRA); Weigel, *supra* note 39, at 85 (noting the relative discretion given to the Sentencing Commission). The Sentencing Commission has been perceived as destroying the discretion judges and parole boards had long enjoyed in making sentencing determinations. See Weigel, *supra* note 39, at 86 (stating that the Sentencing Guidelines destroyed a trial court’s discretion to determine sentences). Some have characterized the advent of the Sentencing Guidelines as one of the largest developments in judging since 1938. See KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 2 (1998) (describing the practical impact of the Sentencing Guidelines on federal judging). A 2004 study of the impact of the Sentencing Guidelines on federal judges concluded that sentencing guidelines reduce the power of federal judges and

In pursuing its statutorily-authorized purpose, the Sentencing Commission promulgates sentencing guidelines, published in Guidelines Manuals, every one to two years.<sup>45</sup> These guidelines and the relative discretion the Sentencing Commission has to produce them were subject to constitutional challenges in the years following the Sentencing Commission's creation.<sup>46</sup> In 2005, in *United States v. Booker*, the Supreme Court held that the sentences promulgated by the Sentencing Commission in the Guidelines Manual are advisory, but not mandatory, thereby limiting the influence of the Sentencing Commission.<sup>47</sup> The Sentencing Commission also issues policy statements to help courts apply the Sentencing Guidelines and to further the other purposes of the Sentencing Commission, including the appropriate use of sentence modifications.<sup>48</sup>

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increase the opportunity for their sentencing decisions to be overturned. *See* Richard T. Boylan, *Do the Sentencing Guidelines Influence the Retirement Decisions of Federal Judges?*, 33 J. LEGAL STUD. 231, 251 (2004) (surveying the impact of sentencing guidelines on federal judges). In fact, the study even suggests that the advent of sentencing guidelines led to federal judges selecting senior status 0.4 years after becoming eligible rather than the longstanding three years they usually waited to retire. *Id.*

<sup>45</sup> *See Guidelines Archive*, U.S. SENT'G COMM'N, <https://www.ussc.gov/guidelines/archive> [<https://perma.cc/R8B6-HX33>] (providing a record of each Federal Sentencing Guideline Manual from 1987–2024). These guidelines include sections for numerous categories of crimes, associating with each of them a Base Offense Level that may be increased if other Specific Offense Characteristics are present. *See* U.S.S.G. § 2A2.2 (describing the Base Offense Level and Special Offense Characteristics for aggravated assault). For example, the crime of aggravated assault carries a Base Offense Level of fourteen that may be increased by five levels if a firearm was discharged, or increased by up to seven levels if a life-threatening or permanent bodily injury occurred. *See id.* (noting the offense level for aggravated assault). The Total Offense Level, paired with the defendant's Criminal History level, lead to a Sentencing Range with maximum and minimum months of imprisonment. *See* Weigel, *supra* note 39, at 86 (explaining the interaction between the two levels and their impact on the ultimate sentence imposed).

<sup>46</sup> *See, e.g., United States v. Johnson*, 682 F. Supp. 1033, 1033 (W.D. Mo. 1988) (confronting a claim of the Sentencing Guidelines' unconstitutionality and holding that the Sentencing Commission was carrying out a congressional mandate), *aff'd*, 488 U.S. 361 (1989); *United States v. Frank*, 682 F. Supp. 815, 823 (W.D. Pa. 1988) (holding that the mandatory inclusion of federal judges on the Sentencing Commission was a violation of the separation of powers).

<sup>47</sup> *See* 543 U.S. 220, 222 (2005) (holding a portion of the Sentencing Guidelines unconstitutional). A more recent challenge to the Sentencing Commission's authority to define the extraordinary and compelling analysis for compassionate release will be discussed in subsequent sections of this Note. *See infra* notes 127–137 and accompanying text.

<sup>48</sup> *See* 28 U.S.C. § 994(a)(1)–(2) (establishing the Sentencing Commission's responsibility of releasing general policy statements and sentencing guidelines). Other issues for the policy statements to address include conditions of supervised release, the imposition of fines for criminal conduct, accepting or rejecting plea agreements, temporary release, and prerelease custody. *See* 28 U.S.C. § 994(a)(2)(B),(D)–(E) (specifying expected elements within the policy statements). Each year, the Sentencing Commission reviews these policies, considering recent court decisions, sentencing data, and input from interested parties in criminal justice, and it often issues amendments to policy statements. *See Policymaking*, U.S. SENT'G COMM'N, <https://www.ussc.gov/policymaking> [<https://perma.cc/K5DR-DWKZ>] (describing the policy statement). There have been more than 800 amendments to policy statements since 1987. *See id.* (noting the number of amendments issued since the first sentencing guidelines went into effect).

## 2. The Compassionate Release Statute

The compassionate release statute is merely a page within the robust SRA, but it is a page with great power.<sup>49</sup> The compassionate release statute states that a sentence may be reduced if: (1) extraordinary and compelling reasons justify the reduction, and (2) the reduction is otherwise consistent with the Sentencing Commission's policy statements and the sentencing factors found in 18 U.S.C. § 3553(a).<sup>50</sup>

Although Congress did not define “extraordinary and compelling reasons”, instead delegating the task to the Sentencing Commission, the Sentencing Commission has promulgated policy statements indicating that particular medical conditions, age, health, and other factors may be extraordinary and compelling.<sup>51</sup>

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<sup>49</sup> See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2032 (1984) (codified as amended at 18 U.S.C. §§ 3551–3559, 3561–3566, 3571–3574, 3581–3586, & 28 U.S.C. §§ 991–998 (1988)) (encompassing over twenty sections codified in the United States Code); 18 U.S.C. § 3582 (comprising one section of the SRA).

<sup>50</sup> See 18 U.S.C. § 3582 (c)(1)(A) (describing the conditions required to receive a modification of a sentence). Until the passage of the First Step Act in 2018, the SRA authorized the Director of the Federal Bureau of Prisons (BOP) to bring a motion requesting an inmate receive compassionate release for “extraordinary and compelling” reasons. See EVALUATION & INSPECTIONS DIV., OFF. INSPECTOR GEN., U.S. DEP’T JUST., I-2013-006, THE FEDERAL BUREAU OF PRISONS’ COMPASSIONATE RELEASE PROGRAM (2013) (summarizing the process of obtaining compassionate release). This request may be based on medical or non-medical factors that the sentencing judge could not reasonably have foreseen during sentencing. See *id.* (noting the factors a judge may consider in deciding upon a compassionate release motion). In its 2013 review of the BOP’s compassionate release program, the Department of Justice determined that although an effective program could result in cost savings, the program at the time lacked consistent application, and some inmates were dying before requests could be decided upon. See *id.* (referencing case files from the BOP in which 13% of cases resulted in the inmate dying before the BOP Director made a final decision about bringing a compassionate release motion). A sentence may also be reduced under this provision if the defendant is a minimum of seventy years old, has served a minimum of thirty years in prison for that offense, and the Director of the BOP has determined that they do not present a threat to the public. See 18 U.S.C. § 3582(c)(1)(A)(ii) (describing the additional circumstance in which a defendant’s sentence may be reduced).

<sup>51</sup> See 28 U.S.C. § 994(t) (stating that the Sentencing Commission shall describe extraordinary and compelling reasons, including a list of specific examples and criteria); *United States v. Rutherford*, 120 F.4th 360, 365 (3d Cir. 2024) (noting that the only limitation Congress placed on defining extraordinary and compelling was that rehabilitation alone may not be an extraordinary and compelling reason), *cert. granted*, No. 24-820, 2025 WL 1603603 (2025); U.S.S.G. Supp. App. C, amend. 698 (2007) (providing specific examples of extraordinary and compelling reasons warranting release); U.S.S.G. Supp. App. C, amend. 799 (2016) (adding age and health to the list of examples from 2007). In the wake of the First Step Act of 2018, the Sentencing Commission published another amendment to its policy guidelines in 2023, once again expanding the definition of extraordinary and compelling. See Sentencing Guidelines for the United States Courts, 88 Fed. Reg. 28,254 (Nov. 1, 2023) (describing the policy guideline amendments). This amendment will be discussed in greater detail in Part II.D of this Note. See *infra* notes 127–137 and accompanying text.

Courts have also taken on a role in defining what conditions are extraordinary and compelling enough to warrant a sentence modification.<sup>52</sup> Some courts assert that the plain meaning of the terms should guide analysis, whereas others assume wide discretion to assess a defendant's individual case.<sup>53</sup> Ultimately, identifying extraordinary and compelling reasons that warrant a sentence reduction has become a growing issue, particularly after the passage of

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<sup>52</sup> See *infra* note 53, for a discussion of the varying stances courts take when deciding motions for compassionate release.

<sup>53</sup> See *United States v. Canales-Ramos*, 19 F.4th 561, 566 (1st Cir. 2021) (stating that the extraordinary and compelling standard must be defined using the plain meaning of the terms); *United States v. Andrews*, 12 F.4th 255, 260 (3d Cir. 2021) (explaining that the Sentencing Commission's policy statements defining extraordinary and compelling are not binding upon the court); *United States v. Rodriguez*, 451 F. Supp. 3d 392, 400 (E.D. Pa. 2020) (emphasizing that the text of 18 U.S.C. § 3582(c)(1)(A) requires a court to "find" extraordinary and compelling reasons and concluding that the court has discretion in this area). In 2019, in *United States v. Bucci*, a judge from the U.S. District Court for the District of Massachusetts determined that the defendant, who argued he was the sole available caregiver for his dying mother, had demonstrated extraordinary and compelling reasons justifying his release. See *The Answer Can Be Yes: The First Step Act and Compassionate Release*, HARV. C.R.-C.L. L. REV. (Oct. 23, 2019), <https://journals.law.harvard.edu/crcl/the-answer-can-be-yes-the-first-step-act-and-compassionate-release/> [<https://perma.cc/2R3Y-RB25>] (comparing the outcomes in *United States v. Bucci* and *United States v. Ingram*). Previously, in *United States v. Bucci*, the U.S. Court of Appeals for the First Circuit upheld the same defendant's conviction for drug trafficking, tax evasion, and money laundering. 525 F.3d 116, 125, 134 (1st Cir. 2008) (recounting and then affirming Bucci's sentence). In 2019, the District Court relied upon the similarity between Bucci's circumstances and the examples that the Sentencing Commission had delineated as extraordinary and compelling reasons in determining whether his role as the sole caregiver for his incapacitated mother warranted his release. See *United States v. Bucci*, 409 F. Supp. 3d 1, 2 (D. Mass. 2019) (describing the court's reasoning). The court bolstered its decision to grant Bucci's motion by examining his rehabilitation and participation in caring for terminally ill inmates. See *id.* at 2–3 (emphasizing that accompanying court filings demonstrated Bucci's rehabilitation). Yet, in the same year, in *United States v. Ingram*, a judge from the U.S. District Court for the Southern District of Ohio determined that the defendant, who also claimed to be the sole available caregiver for his dying mother, had failed to demonstrate extraordinary and compelling reasons warranting his release. See No. 2:14-cr-40, 2019 WL 3162305, at \*2 (S.D. Ohio July 16, 2019) (describing the court's decision to deny Ingram's motion for compassionate release). In 2014, Ingram was convicted of receiving child pornography—violating his pre-trial release terms—and was sentenced to ninety-four months in prison, having served eighty-six of those months at the time of his motion for compassionate release. See *id.* at \*1 (summarizing Ingram's charges and sentence); *The Answer Can Be Yes: The First Step Act and Compassionate Release*, *supra* (providing additional insight into Ingram's sentence). Ingram argued that he should be released to care for his mother, who had no other relatives to care for her and was suffering from chronic kidney disease and cancer. See *Ingram*, 2019 WL 3162305 at \*1 (relaying Ingram's arguments). Despite having similar circumstances to those in *Bucci*, the court denied Ingram's motion, stating that most people have sick and aging parents, so such a case was not extraordinary. See *id.* at \*2 (empathizing with Ingram's situation but denying his motion). The disparity in outcomes between these two cases, which involve nearly identical facts, has been criticized as a reason for the Sentencing Guidelines to create a consistent definition of 'extraordinary and compelling' that would reduce judicial discretion. See *The Answer Can Be Yes: The First Step Act and Compassionate Release*, *supra* (arguing that defendants with identical circumstances received disparate treatment based on the jurisdiction where they filed their motions for compassionate release).

the First Step Act in 2018 and the global health crisis brought on by the COVID-19 pandemic.<sup>54</sup>

### *B. The First Step Act and the Impact of the COVID-19 Pandemic*

In December 2018, Congress passed the First Step Act of 2018, enhancing the availability of compassionate release to convicted individuals.<sup>55</sup> Congress enacted the First Step Act to reform the federal prison system by controlling spending, managing prison populations, and reducing recidivism.<sup>56</sup> Before the First Step Act, only the Director of the Federal Bureau of Prisons (BOP) had the authority to file motions for compassionate release on behalf of federal prisoners.<sup>57</sup> The Director of the BOP utilized this power sparingly, with only twenty-four compassionate release motions granted in 2018.<sup>58</sup> Incarcerated individuals also had little recourse to challenge the Director's refusal to file a motion for their release, as many federal appellate courts had determined that

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<sup>54</sup> See *infra* notes 55–89 and accompanying text.

<sup>55</sup> First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239 (2018) (permitting defendants to file their own motions for compassionate release); see Linda M. Richmond, *First Step Act Is Start Toward Meaningful Prison Reform*, 54 PSYCHIATRIC NEWS 3, 3 (2019) (calling the First Step Act the “most ambitious criminal justice and sentencing overhaul in decades”).

<sup>56</sup> See *United States v. Simons*, 375 F. Supp. 3d 379, 385 (E.D.N.Y. 2019) (noting the primary motivations behind the Act). A House Judiciary Committee Report noted its concerns that the increasing costs of incarceration due to a growing prison population could become a threat to public safety as greater proportions of the Department of Justice's budget continue to be funneled towards prison management. See H.R. REP. NO. 115-699, at 23 (2018) (expressing concern over the fiscal burden imposed on taxpayers and federal agencies by prison management).

<sup>57</sup> See *United States v. Brooker*, 976 F.3d 228, 231 (2d Cir. 2020) (stating that the BOP's authority over compassionate release motions remained untouched for more than thirty years); Michael Doering, *One Step Forward: Compassionate Release Under the First Step Act*, 2020 WIS. L. REV. 1287, 1293 (noting that the sole authority to file compassionate release motions historically lay with the Director of the BOP).

<sup>58</sup> See *Brooker*, 976 F.3d at 231 (citing a report in which only twenty-four individuals a year received compassionate release on the BOP's motion); Julie Zibulsky & Christine Kitchens, *The First Step Act of 2018: One Year of Implementation*, 33 FED. SENT'G REP. 144, 146 (2020) (same). In its 2013 report reviewing the BOP's Compassionate Release Program, the Department of Justice noted that BOP staff are not required to inform inmates about the compassionate release program. See THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM, *supra* note 50, at ii (describing that only eight of the 111 handbooks provided to new inmates included details about the compassionate release program). Even after the BOP expanded access to eligibility for compassionate release based on age and portion of sentence served, only eighty-three eligible inmates were released. See *Statement of Michael E. Horowitz, Inspector General, U.S. Department of Justice Before the United States Sentencing Commission Hearing on “Compassionate Release and the Conditions of Supervision,” Off. Inspector Gen.*, <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160217/IG.pdf> [<https://perma.cc/8BDZ-RA8U>] (describing the effects of the revised eligibility program within the first thirteen months of its introduction); John F. Ferraro, Note, *Compelling Compassion: Navigating Federal Compassionate Release After the First Step Act*, 62 B.C. L. REV. 2463, 2465 (2021) (noting that prison wardens could “hold up requests [for compassionate release] for months by simply refusing or neglecting to act on them”).

the Director's failure to file a motion for compassionate release is judicially unreviewable.<sup>59</sup>

Now, under the First Step Act, a convicted defendant may file a motion for compassionate release, provided they have exhausted their administrative remedies in challenging the BOP Director's refusal to file the motion on their behalf.<sup>60</sup> Although the identity of the petitioner may be different, the same extraordinary and compelling standard applies.<sup>61</sup> The expansion in access to compassionate release has resulted in nearly 5,000 approved motions for compassionate release since the Act's passage in 2018, with a success rate of about sixteen percent.<sup>62</sup>

In 2019, Daniel Brown, convicted of drug-related offenses and sentenced to over forty years in prison, filed a motion for compassionate release.<sup>63</sup> The

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<sup>59</sup> See *Rodriguez-Aguirre v. Hudgins*, 739 F. App'x 489, 491 (10th Cir. 2018) (holding that the BOP has absolute discretion to decide whether a motion for compassionate release will be filed and that such a decision is not judicially reviewable); *Fields v. Warden Allenwood USP*, 684 F. App'x 121, 123 (3d Cir. 2017) (same); *DeLuca v. Lariva*, 586 F. App'x 239, 240–41 (7th Cir. 2014) (same); *Crowe v. United States*, 430 F. App'x 484, 485 (6th Cir. 2011) (same).

<sup>60</sup> See 18 U.S.C. § 3582(c)(1)(A) (stating that once a defendant has exhausted all administrative avenues to appeal the BOP's failure to bring a motion for compassionate release on their behalf, the defendant may file their own motion). Other aspects of the First Step Act beyond the scope of this Note include its retroactive application of the 2010 Fair Sentencing Act, discretion for judges to sentence a defendant below mandatory minimums for drug offenses, revisions to mandatory minimum penalties for drug-related offenses, and provision of incentives and rewards for individuals who participate in productive activities while incarcerated. See Julie Samuels, Nancy La Vigne & Chelsea Thomson, *Next Steps in Federal Corrections Reform: Implementing and Building on the First Step Act*, 32 FED. SENT'G REP. 92, 94 (2019) (summarizing the key provisions of the First Step Act).

<sup>61</sup> See *United States v. Chambliss*, 948 F.3d 691, 692–93 (5th Cir. 2020) (applying the extraordinary and compelling standard to a defendant's motion for compassionate release); *United States v. Cochran*, 784 F. App'x 960, 962 (7th Cir. 2019) (same).

<sup>62</sup> See *First Step Act*, FED. BUREAU PRISONS, <https://www.bop.gov/inmates/fsa/> [<https://perma.cc/2M8S-3KA2>] (including release statistics under the First Step Act); *United States Sentencing Commission Compassionate Release Data Report*, U.S. SENT'G COMM'N (Oct. 2024), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/FY24Q4-Compassionate-Release.pdf> [<https://perma.cc/9LFK-ETQG>] (noting that 15.9% of compassionate release motions filed between October 2019 and September 2024 were granted); see also *United States v. Young*, 458 F. Supp. 3d 838, 840, 850 (M.D. Tenn. 2020) (granting the defendant's motion for compassionate release after noting that the First Step Act transformed the process for obtaining such relief); *United States v. Gotti*, 433 F. Supp. 3d 613, 617, 620 (S.D.N.Y. 2020) (noting that the defendant has a new found right to petition the court directly for compassionate release, but denying his motion); *United States v. Beck*, 425 F. Supp. 3d 573, 577–78, 588 (M.D.N.C. 2019) (noting the change in compassionate release procedure under the First Step Act and granting the defendant's motion).

<sup>63</sup> See *United States v. Brown*, 457 F. Supp. 3d 691, 694 (2020) (relaying the process of Brown's petition). According to the court, Brown's sentence was a result of "stacking," where multiple charges, each holding a mandatory minimum penalty of years, run consecutively to each other. See *id.* (describing Brown's sentencing); Note, *Stacked: Where Criminal Charge Stacking Happens—and Where It Doesn't*, 136 HARV. L. REV. 1390, 1390 (2023) (explaining the process of stacking). The court further noted that even Brown's sentencing judge believed his sentence was longer than necessary and

court granted his motion, citing Brown's rehabilitation, unusually long sentence, and the threat of COVID-19 to those like Brown who have existing health conditions as extraordinary and compelling reasons.<sup>64</sup>

When the COVID-19 pandemic began in early 2020, motions for compassionate release—now broadly accessible under the First Step Act—surged across the country.<sup>65</sup> Life in prison during the COVID-19 pandemic was exceedingly dangerous, with one study indicating that imprisoned individuals died three and a half times more often than the general population during the

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supported a commutation of Brown's sentence. *See Brown*, 457 F. Supp. 3d at 694 (expounding upon Brown's motion and his conviction).

<sup>64</sup> *See Brown*, 457 F. Supp. 3d at 701–05 (explaining the court's reasoning). The court noted the increasing number of COVID-19-induced grants of compassionate release. *See id.* at 703 (collecting cases in which compassionate release was granted due to COVID-19 concerns). Brown's medical records indicated he had hypertension and low white blood cell levels, heightening his risk of complications from COVID-19. *See id.* (exploring Brown's susceptibility to COVID-19 as an extraordinary and compelling reason). In 2023, Divine Johnson, convicted of armed robbery and sentenced to nine and a half years in prison, sought release under § 3582(c)(1)(A), arguing that his medical condition put him at increased risk from COVID-19 and that his sentence had been more punitive than expected due to his incarceration during a pandemic. *United States v. Johnson*, 671 F. Supp. 3d 265, 268–69 (E.D.N.Y. 2023). Johnson came from a troubled background: his mother struggled with drug abuse and passed when he was fifteen; he had been diagnosed with PTSD and borderline personality disorder; and he experienced drug addiction and homelessness for many years. *Id.* at 269. As part of his argument, Johnson argued that COVID-19 restrictions, including lockdowns, curtailed visitation, and facility programming, rendered his imprisonment more punitive than intended. *Id.* The court granted Johnson's motion, agreeing that COVID-19 had rendered his sentence more punitive than the sentencing court intended, considering Johnson's constant fear of contracting the virus, lockdowns, and limited visitation. *See id.* at 280, 284–85 (stating that the severe conditions imposed in prisons as a result of the pandemic, and the large portion of Johnson's sentence that he had already served, weighed in favor of his release). Taken together, the court determined that these factors qualified as extraordinary and compelling reasons warranting his release. *Id.* The court, however, rejected Johnson's argument about his susceptibility to COVID-19 as an extraordinary and compelling reason, stating that with the decline of the pandemic in recent months, courts had become less willing to find the risk of contracting the virus an extraordinary and compelling reason by itself. *Id.* at 280.

<sup>65</sup> *See United States v. Jones*, 980 F.3d 1098, 1100 (6th Cir. 2020) (noting the massive increase in imprisoned individuals filing motions for compassionate release as a result of the First Step Act and the COVID-19 pandemic); Thomas W. Hutchinson, *Compassionate Release, COVID-19, and the Dangerous Futility of the First Step Act's Administrative Exhaustion Requirement*, 25 J. GENDER RACE & JUST. 279, 284 (2022) (describing the influx of compassionate release motions due to the pandemic). In 2020, courts decided compassionate release motions for over 7,000 defendants and granted them for over 1,800 defendants, a twelvefold increase from the 145 defendants who received compassionate release in 2018. U.S. SENT'G COMM'N, COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC 3 (2022), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220310\\_compassionate-release.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220310_compassionate-release.pdf) [<https://perma.cc/X85Z-TSLY>]. The United States Sentencing Commission report also found that in 2020, 96% of compassionate release motions were filed by defendants. *Id.* In 71.5% of cases in which offenders' motions were granted, the court cited COVID-19 health risks as a reason for granting the motion. *Id.*



pandemic's peak.<sup>66</sup> Approximately 31,000 American prisoners applied for compassionate release during the pandemic.<sup>67</sup>

Amidst this upheaval brought about by a surge in compassionate release motions and substantive changes to the process under the First Step Act, the Sentencing Commission remained silent, lacking a voting quorum to take action.<sup>68</sup> Without input from the Sentencing Commission, federal courts were left to fill in the gaps regarding what, if anything, had changed about the extraordinary and compelling analysis now that defendants could file their own motions for compassionate release.<sup>69</sup> One such gap that courts have filled differently is whether a change in the law that Congress deems non-retroactive can nevertheless be considered an extraordinary and compelling reason warranting a sentence reduction.<sup>70</sup>

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<sup>66</sup> See Anna Flagg, Jamiles Lartey & Shannon Heffernan, *Officials Failed to Act When COVID Hit Prisons. A New Study Shows the Deadly Cost*, MARSHALL PROJECT (2024) (noting that 6,000 imprisoned people died in 2020, a 50% spike in the prison mortality rate). Older prisoners died at an even higher rate than people under the age of fifty. See *id.* (describing the vulnerability of older prisoners). Higher COVID-19 death rates can be attributed to close quarters, shared facilities, and overcrowding, factors that also make quarantining prisoners especially challenging. See *Key Insights: COVID-19 in Correctional and Detention Facilities*, PANDEMIC OVERSIGHT, <https://www.pandemicoversight.gov/oversight/our-publications-reports/key-covid-19-insights-in-correctional-and-detention-facilities> [<https://perma.cc/HN5M-ZUFX>] (explaining the unique challenges associated with COVID-19 outbreaks in prisons).

<sup>67</sup> See Mariah D. Haley, *Unequal Treatment: (In)Compassionate Release from Federal Prison in the Context of the COVID-19 Pandemic and Vaccine*, 122 COLUM. L. REV. 1997, 1999 (2022) (describing the number of compassionate release applications during COVID-19).

<sup>68</sup> See *Commission Regains Quorum for the First Time in Three Years, Enabling It to Amend Federal Sentencing Guidelines, Issue Sentencing Policy*, U.S. SENT'G COMM'N (Aug. 5, 2022), <https://www.ussc.gov/about/news/press-releases/august-5-2022> [<https://perma.cc/LHR3-8D7A>] (describing the confirmation of seven new Commissioners to provide guidance on sentencing policy). Sentencing Commission Chair Carlton W. Reeves noted that the federal criminal justice system had seen some troubling conflict arising between courts during the time the Sentencing Commission lacked a quorum. See *id.* (remarking upon the challenges the Sentencing Commission will be addressing). The Sentencing Commission requires a majority, in this case, four voting members, to conduct its practices, and from 2019 to 2022 it lacked this required quorum. See *Rules of Practice and Procedure, Rule 2.2*, U.S. SENT'G COMM'N (Aug. 18, 2016), <https://www.ussc.gov/about/rules-practice-and-procedure> [<https://perma.cc/X3J5-7XHF>] (reciting the voting rules for the Sentencing Commission, including the quorum required for action); *United States v. Rutherford*, 120 F.4th 360, 365–66 (3d Cir. 2024) (discussing the three-year gap in action by the Sentencing Commission), *cert. granted*, No. 24-820, 2025 WL 1603603 (2025); *United States v. Brooker*, 976 F.3d 228, 233–34 (2d Cir. 2020) (noting that despite material changes to compassionate release procedures, the Sentencing Commission had not updated its compassionate release policy statement as it lacked a voting quorum).

<sup>69</sup> See *Rutherford*, 120 F.4th at 366 (describing how the lack of guidance from the Sentencing Commission forced courts to determine what circumstances were extraordinary and compelling for defendant-initiated motions for compassionate release).

<sup>70</sup> See *infra* notes 90–119 and accompanying text.

### C. A Non-retroactive Change in the Law

The United States Constitution prohibits ex post facto laws, or criminal statutes that retroactively punish conduct.<sup>71</sup> In other words, Congress and states may not pass laws punishing prior conduct that was legal when committed.<sup>72</sup> In 1798, in the U.S. Supreme Court case *Calder v. Bull*, Justice Chase clarified the four instances in which a law may be regarded as ex post facto: (1) a law that criminalizes and punishes conduct that was legal when undertaken; (2) a law that enhances the severity of the crime from when it was committed; (3) a law that inflicts a greater punishment for a crime than when it was committed; and (4) a law that alters the rules of evidence or alters testimony to secure a conviction.<sup>73</sup>

Yet, laws that retroactively remove or reduce criminal punishments fall outside of the bar on ex post facto laws.<sup>74</sup> In *Calder*, the Court clarified that laws intending to benefit the public, such as a statute of pardon, may justly be applied retroactively.<sup>75</sup> Such statutes pose no violation of the Constitution as long as

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<sup>71</sup> See U.S. CONST. art. 1 §§ 9–10 (prohibiting Congress and states from passing ex post facto laws); *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (describing the ex post facto bar as prohibiting laws that punish acts that were legal when committed). The rationale behind this prohibition was to ensure the public had fair warning of what conduct was legal and illegal and to allow them to rely upon this knowledge in going about their lives. See *Weaver*, 450 U.S. at 28–29 (explaining the purpose of the ex post facto law prohibition); *Dobbert v. Florida*, 432 U.S. 282, 298 (1976) (referring to the existence of a statute as a warning to the petitioner of the penalty associated with first-degree murder). Another purpose behind the bar on ex post facto laws is the protection of personal rights against arbitrary and abusive legislation. See *Malloy v. South Carolina*, 237 U.S. 180, 183 (1915) (describing the protection of personal rights afforded by the ban on ex post facto legislation).

<sup>72</sup> See *Calder v. Bull*, 3 U.S. 386, 390–91 (1798) (stating that the ex post facto prohibition applies only to criminal laws that increase punishment, create or enhance a crime, or alter the rules of evidence for the purposes of obtaining a conviction). The Court at the time, still relatively young in the aftermath of the American Revolution, described the prohibition on ex post facto laws as a caution stemming from the Parliament of Great Britain abusing its legislative authority. See *id.* at 389 (observing the likely cause of the constitutional bar on ex post facto laws). Specifically, the Court described how the Parliament used its lawmaking authority to pass laws making certain conduct that was once legal an act of treason, or inflicting punishment where the law required none. See *id.* (illustrating the abuses of the English Parliament).

<sup>73</sup> See *id.* at 390 (describing the four circumstances in which a law may be regarded as ex post facto). This definition of ex post facto laws has been widely accepted by the Court. See *Carmell v. Texas*, 529 U.S. 513, 513 (2000) (citing the four *Calder* factors and noting their acceptance by the Court); *Peugh v. United States*, 569 U.S. 530, 538 (2013) (citing the four *Calder* factors); *Stogner v. California*, 539 U.S. 607, 607 (2003) (recognizing Justice Chase’s definition as authoritative). The Court in *Dobbert v. Florida* noted that there is no precise definition of “ex post facto” law, but that case law has given the phrase its substance. See 432 U.S. at 292 (describing the case law-based process of defining an ex post facto law).

<sup>74</sup> See *Calder*, 3 U.S. at 391 (noting that every ex post facto law is retrospective, but every retrospective law is not an ex post facto law); *Retroactivity*, RESTORE JUST., <https://www.restorejustice.org/legal-explainer/explainer-retroactivity/> [<https://perma.cc/ED9L-FPK9>] (explaining that retroactive laws decreasing one’s sentence are not constitutionally prohibited).

<sup>75</sup> See *Calder*, 3 U.S. at 391 (describing laws that mollify the strength of criminal law as falling outside the scope of ex post facto laws).

Congress makes clear its intention for the statute to apply retroactively.<sup>76</sup> This allowance permits the retroactive application of sentencing reforms to already-sentenced defendants where Congress desires this result.<sup>77</sup>

For example, in 2018, Section 404 of the First Step Act amended Sections Two and Three of the Fair Sentencing Act of 2010 to make them retroactive.<sup>78</sup> Section Two of the Fair Sentencing Act reduced the disparity in cocaine sentencing by increasing the quantity of crack cocaine that would trigger a mandatory minimum penalty, and Section Three eliminated the mandatory minimum sentence for simple possession of crack cocaine.<sup>79</sup> As a result of this resentencing provision within the First Step Act, by August 2022 federal courts across the country had granted 4,226 motions for sentence reductions.<sup>80</sup> Some regard this retroactive application of the law as a reduction of the disparate burden of harsh drug laws, particularly upon people of color.<sup>81</sup>

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<sup>76</sup> See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 268 (1994) (stating that requiring Congress to make its intent clear ensures that it has found the benefits of retroactivity greater than the potential disruption or unfairness they may cause); see also *United States v. Heth*, 7 U.S. 399, 413 (1806) (refusing to apply a federal statute retroactively absent clear congressional intent requiring it); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (same).

<sup>77</sup> See *Retroactivity*, *supra* note 74 (noting the critical influence of retroactive sentencing reforms for people with ongoing sentences). In April 2023, the United States Sentencing Commission decided to amend the Sentencing Guidelines by reducing penalties for certain offenders to make them retroactively applicable. See *Amendment to the Sentencing Guidelines*, U.S. SENT’G COMM’N (Aug. 31, 2023), [https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202308\\_RF-retro.pdf](https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202308_RF-retro.pdf) [<https://perma.cc/Y9QN-MJM8>] (summarizing the retroactive application of certain parts of a prior amendment). As a result, an estimated 18,000 inmates became eligible for sentence reductions, many of them people of color. Nate Raymond, *Thousands of Federal Inmates Become Eligible for Sentence Reductions*, REUTERS (Feb. 1, 2024), <https://www.reuters.com/legal/government/thousands-federal-inmates-become-eligible-sentence-reductions-2024-02-01/> [<https://perma.cc/C4DW-QLAJ>]. The Sentencing Commission also decided to apply changes to its sentencing guidelines retroactively in 2014, making 50,000 inmates charged with drug offenses eligible for reductions in their sentences. *Id.*

<sup>78</sup> See Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222 (2018) (stating that for defendants previously sentenced, a court may reduce their sentence as if Sections Two and Three of the Fair Sentencing Act were in effect when the offense occurred).

<sup>79</sup> See Pub. L. No. 111-120, 124 Stat. 2372 (2010) (describing the changes to the Controlled Substances Act made under Sections Two and Three of the Fair Sentencing Act). The First Step Act allows the defendant, the Director of the BOP, a government attorney, or the court to make a motion to reduce the defendant’s sentence. See Pub. L. No. 115-391, § 404(b) (noting who may file a motion for a sentence reduction).

<sup>80</sup> *First Step Act of 2018 Resentencing Provisions Retroactivity Data Report*, U.S. SENT’G COMM’N (Aug. 2022), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20220818-First-Step-Act-Retro.pdf> [<https://perma.cc/2V2Q-CRE2>]. Nearly 13.5% of the motions for reduced sentences granted came from North Carolina, and around 11.8% came from Florida. *Id.*

<sup>81</sup> See *The First Step Act: Ending Mass Incarceration in Federal Prisons*, SENT’G PROJECT (Aug. 2023), <https://www.sentencingproject.org/app/uploads/2023/08/First-Step-Act-2023.pdf> [<https://perma.cc/K33E-FLH8>] (describing the effects of the First Step Act’s retroactive application of the Fair Sentencing Act).

Congress took the opposite approach with Sections 401 and 403 of the First Step Act, deciding that their amendments would not apply retroactively.<sup>82</sup> Section 401 of the First Step Act amended parts of the Controlled Substances Act, reducing penalties for certain drug-related offenses.<sup>83</sup> Section 403 of the Act amended 18 U.S.C. § 924(c), reducing the penalties associated with using or carrying a firearm in the furtherance of drug trafficking or crimes of violence.<sup>84</sup> In both sections, Congress states its intention that these changes shall not be applied retroactively, noting that the amendments will only apply to offenses occurring before the First Step Act's enactment if no sentence had yet been imposed.<sup>85</sup> This decision has been referred to as a bipartisan compromise, where certain senators desired more comprehensive retroactive application and others hoped for more modest reforms.<sup>86</sup>

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<sup>82</sup> See *United States v. Rutherford*, 120 F.4th 360, 376 (3d Cir. 2024) (specifying that Congress made its changes in § 403 non-retroactive), *cert. granted*, No. 24-820, 2025 WL 1603603 (2025); *United States v. Andrews*, 12 F.4th 255, 261 (3d Cir. 2021) (explaining that Congress specifically made § 403 non-retroactive); *United States v. Jarvis*, 999 F.3d 442, 444 (6th Cir. 2021) (stating that Congress made § 403 non-retroactive); *United States v. Tomes*, 990 F.3d 500, 505 (6th Cir. 2021) (noting that Congress made a “careful effort” to limit the First Step Act’s retroactivity including by making § 401 non-retroactive).

<sup>83</sup> See Pub. L. No. 115-391, § 401 (reducing and restricting certain sentences for drug felonies). The Controlled Substances Act, enacted in 1970, creates a framework by which certain drugs likely to pose a risk of dependence and abuse can be regulated. See JOANNA LAMPE, CONG. RSCH. SERV., R45948, THE CONTROLLED SUBSTANCES ACT (CAS): A LEGAL OVERVIEW FOR THE 119TH CONGRESS (2025), <https://crsreports.congress.gov/product/pdf/r/r45948> [<https://perma.cc/8F4T-UCQD>] (describing the Controlled Substances Act). The Act divides substances into five different schedules based on their potential for dependence and abuse and their use for medical purposes. See *id.* (describing the scheduling process).

<sup>84</sup> See Pub. L. No. 115-391, § 403 (amending § 924(c) to change mandatory minimums for drug-related felonies); 18 U.S.C. § 924(c)(1)(A) (2006) (amended 2018) (assessing penalties for the crime of carrying a firearm during a crime of drug trafficking or violence). Section 924(c)(1)(C) originally stated that if an individual who carried or possessed a firearm in furtherance of a crime of violence or drug trafficking then committed that crime again, they would be sentenced to a mandatory minimum of twenty-five years imprisonment. 18 U.S.C. § 924(c)(1)(A)–(C) (2006) (amended 2018). The First Step Act’s amendment changed this language to read that if an individual possessed a firearm in furtherance of a crime of violence or drug trafficking and another violation of this section occurs *after the prior conviction has become final*, then the twenty-five-year mandatory minimum will apply. 18 U.S.C. § 924(c)(1)(C) (2018). In *Rutherford*’s case, the first charge for robbery had not become final when the court imposed a mandatory twenty-five years for the second robbery, a process eliminated by the First Step Act. *Id.*; see *United States v. Rutherford*, No. 24-820, 2023 WL 3136125, at \*1 (E.D. Pa. 2023) (describing *Rutherford*’s sentencing process), *aff’d*, 120 F.4th 360 (3d Cir. 2024), *cert. granted*, 2025 WL 1603603 (2025).

<sup>85</sup> See Pub. L. No. 115-391, § 401(c) (“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.”); Pub. L. No. 115-391, § 403(b) (same).

<sup>86</sup> See *United States v. Andrews*, 480 F. Supp. 3d 669, 681 n.13 (E.D. Pa. 2020) (citing senatorial remarks in the Congressional Record Daily), *aff’d*, 12 F.4th 255 (3d Cir. 2021); 164 CONG. REC. 7748–49 (daily ed. Dec. 18, 2018) (statement of Sen. Leahy) (desiring greater retroactive application); 164 CONG. REC. 7649–50 (daily ed. Dec. 17, 2018) (statement of Sen. Grassley) (affirming his approval of mandato-

Although defendants sentenced under the Controlled Substances Act or 18 U.S.C. § 924(c) before 2018 could not receive a reduced sentence under the amended statutes' new sentencing schemes, they could still initiate motions for compassionate release.<sup>87</sup> In many post-First Step Act compassionate release motions, convicted individuals such as Daniel Rutherford have argued that non-retroactive changes to mandatory minimums contrasted with their own sentences demonstrate an extraordinary and compelling reason justifying their release.<sup>88</sup> Specifically, many defendants argue that when conducting an extraordinary and compelling analysis, courts should examine the disparity between the sentence imposed upon them and what sentence would be imposed today under the First Step Act's adjustments.<sup>89</sup>

## II. CAN NON-RETROACTIVE LAW CHANGES BE EXTRAORDINARY AND COMPELLING REASONS? THE CIRCUIT SPLIT AND THE SENTENCING COMMISSION'S TWO CENTS

This Part of the Note explores the opposing rationales of a circuit split in which one side argues that non-retroactive changes in the law may not constitute extraordinary and compelling reasons for compassionate release, whereas the other side, backed by the United States Sentencing Commission, asserts

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ry minimum sentences in spite of the First Step Act's reforms). For example, former Senator Leahy noted that he would have liked to see additional retroactive application of the First Step Act's reforms, but that the nature of compromise kept him from achieving everything he had hoped to see. *See* 164 CONG. REC. 7748–49 (daily ed. Dec. 18, 2018) (statement of Sen. Leahy) (describing the bipartisan collaboration allowing the First Step Act's passage). Senator Grassley also recognized the bipartisan compromise resulting in the First Step Act's package, but noted that he was a supporter of mandatory minimum sentences, though he acknowledged that they could sometimes be applied unfairly. *See* 164 CONG. REC. 7649–50 (daily ed. Dec. 17, 2018) (statement of Sen. Grassley) (applauding the Senate for its compromise on complex issues).

<sup>87</sup> *See* *United States v. Andrews*, 12 F.4th 255, 257 (3d Cir. 2021) (noting that although Andrews was not eligible for a sentence reduction under the new 18 U.S.C. § 924(c) sentencing scheme, the First Step Act provided him with the ability to file a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)). In 2006, Andrews was convicted of robbing thirteen businesses at gunpoint in North Philadelphia and sentenced to 312 years in prison, including a twenty-five year mandatory minimum for each of the thirteen counts. *Id.* According to the court, had Andrews been sentenced in 2021 under the modified 18 U.S.C. § 924 sentencing regime, he would have faced a ninety-one-year sentence. *Id.*

<sup>88</sup> *See* *United States v. Rutherford*, 120 F.4th 360, 369 (3d Cir. 2024) (confronting the defendant's claim that the First Step Act's adjustment of mandatory minimums for the crime he was charged with was an extraordinary and compelling reason), *cert. granted*, No. 24-820, 2025 WL 1603603 (2025); *United States v. Ruvalcaba*, 26 F.4th 14, 17 (1st Cir. 2022) (same); *United States v. Chen*, 48 F.4th 1092, 1094 (9th Cir. 2022) (same); *United States v. Thacker*, 4 F.4th 569, 571 (7th Cir. 2021) (same); *United States v. McCoy*, 981 F.3d 271, 274 (4th Cir. 2020) (same).

<sup>89</sup> *See* *United States v. Tronco-Ramirez*, No. 5:10-cr-028, 2024 WL 4713576, at \*2 (W.D. Va. 2024) (summarizing the defendant's argument); *Ruvalcaba*, 26 F.4th at 16 (summarizing the defendant's argument that the First Step Act's reformation of sentencing for certain crimes should be considered extraordinary and compelling); *Thacker*, 4 F.4th at 571 (assessing the defendant's argument for compassionate release relying upon the First Step Act's changes to sentencing practices).

that such changes may be considered in concert with other factors unique to the defendant.<sup>90</sup> Sections A and B of this Part outline the development of the circuit split and highlight key cases molding this legal issue.<sup>91</sup> Section C describes a Supreme Court case that has shaped some circuit courts' responses to the conflict.<sup>92</sup> Section D delves into the Sentencing Commission's 2023 policy statement amendments and their validity in the eyes of federal courts.<sup>93</sup>

### *A. A Not So Extraordinary but Increasingly Compelling Circuit Split*

The approach followed by the Third, Fifth, Sixth, Seventh, Eighth, and D.C. Circuits is that non-retroactive changes in the law—such as the First Step Act's sentencing reforms—may not be considered as a factor in the extraordinary and compelling analysis.<sup>94</sup> This conclusion rests on the premise that because Congress stated in Sections 401 and 403 of the First Step Act that its amendments would apply only to defendants who had not yet been sentenced, it would obfuscate congressional intent to allow already-sentenced defendants to rely on these sections for compassionate release.<sup>95</sup>

In March 2021, in *United States v. Tomes*, the U.S. Court of Appeals for the Sixth Circuit was the first to elucidate this aforementioned stance on the

<sup>90</sup> See *infra* notes 94–137 and accompanying text.

<sup>91</sup> See *infra* notes 94–119 and accompanying text.

<sup>92</sup> See *infra* notes 120–126 and accompanying text.

<sup>93</sup> See *infra* notes 127–137 and accompanying text.

<sup>94</sup> See *United States v. Austin*, 125 F.4th 688, 693 (5th Cir. 2025) (stating that non-retroactive law changes may not be an extraordinary and compelling reason for a sentence reduction); *United States v. Jenkins*, 50 F.4th 1185, 1198 (D.C. Cir. 2022) (agreeing with the Third, Seventh, and Eighth Circuits that non-retroactive changes in law do not constitute extraordinary and compelling reasons); *United States v. Crandall*, 25 F.4th 582, 586 (8th Cir. 2022) (emphasizing that Congress made the First Step Act non-retroactive and so sentencing disparities between the original sentence imposed and what might be imposed today could not be extraordinary and compelling reasons); *United States v. Andrews*, 12 F.4th 255, 260–61 (3d Cir. 2021) (explaining that the court would not ignore Congress's non-retroactivity directive by allowing defendants to utilize the First Step Act's sentence reforms as an extraordinary and compelling reason); *Thacker*, 4 F.4th at 574 (noting that there is nothing extraordinary about leaving in place a prisoner's lawfully-imposed sentence); *United States v. Tomes*, 990 F.3d 500, 505 (6th Cir. 2021) (explaining that it would render the non-retroactive component of the First Step Act useless if defendants were able to use its sentencing reforms as an argument for compassionate release).

<sup>95</sup> See *United States v. McMuryion*, No. 21-50450, 2023 WL 4118015, at \*2 (5th Cir. 2023) (emphasizing that the court would not usurp Congress's decision by permitting the retroactive application of laws where it was not intended); *Thacker*, 4 F.4th at 571 (highlighting Congress's express decision to keep certain amendments in the First Step Act from applying retroactively); *United States v. Richardson*, 948 F.3d 733, 748 (6th Cir. 2020) (stating that Congress drew a line in the sand by applying certain sections of the First Step Act only to unsentenced defendants). Such a principle is said to comply with the separation of powers. See *Andrews*, 12 F.4th at 261 (noting that considering the length of a lawfully-imposed sentence as a reason to reduce it would interfere with the congressional power of setting penalties); *Thacker*, 4 F.4th at 574 (stating that any other conclusion beside refusing to allow non-retroactive sections of the First Step Act to qualify as extraordinary and compelling reasons would offend the separation of powers).

interplay between the First Step Act and compassionate release.<sup>96</sup> Tomes argued in his motion for compassionate release that the lighter sentence he would receive if charged today, his asthma, and vulnerability to COVID-19 all represented extraordinary and compelling reasons for his release.<sup>97</sup> The court affirmed the lower court's dismissal of Tomes's motion, emphasizing the non-retroactive effect of Section 401 of the First Step Act and refusing to consider Tomes's potentially lighter sentence as a part of its extraordinary and compelling analysis.<sup>98</sup>

Just months later, the Third and Seventh Circuits applied the same analysis to factually similar motions for compassionate release, emphasizing that Congress' non-retroactive command prohibits district courts from considering non-retroactive laws.<sup>99</sup> In both cases, the defendants argued that recent sentencing reforms should factor in to a district court's consideration of compassionate release, but the Third and Seventh Circuits determined that Congress did not intend for this outcome and refused to allow non-retroactive law changes to be an available factor.<sup>100</sup>

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<sup>96</sup> See 990 F.3d at 505 (addressing as the final point of the court's opinion the defendant's argument on applying the First Step Act). Just two paragraphs of the court's opinion address this issue that has now ballooned into full disagreement across the circuit courts. See *id.* (dedicating the last dozen sentences to a discussion of non-retroactive changes in the law and their application to motions for compassionate release).

<sup>97</sup> See *id.* at 501 (summarizing the defendant's argument regarding the First Step Act and other factors). Tomes was sentenced to twenty years in prison for charges relating to drugs, firearms, and money laundering. See Opening Brief for Appellant at 5–7, *United States v. Tomes*, 990 F.3d 500 (6th Cir. 2020) (No. 20-6056) (recapitulating the charges against Tomes). As discussed earlier in this Note, one of the statutes Tomes was charged under—21 U.S.C. § 841(b)(1)(A)—was amended by § 401 of the First Step Act to reduce the mandatory minimum sentence for defendants who had a prior felony drug conviction from twenty years to fifteen years. See *Tomes*, 990 F.3d at 505 (describing the sentencing change instituted under the First Step Act for one of Tomes's charges). Tomes's other argument for compassionate release focused on his vulnerability to COVID-19 due to his asthma, and the BOP's inability to adequately address the outbreak of the virus in prisons. Opening Brief for Appellant, *supra*, at 10–11.

<sup>98</sup> See *Tomes*, 990 F.3d at 505 (refusing to utilize compassionate release to subvert Congress's careful decision to limit the application of some of the First Step Act's reforms).

<sup>99</sup> See *Andrews*, 12 F.4th at 258, 261 (addressing a defendant's motion for compassionate release arguing that reductions in the sentence for one of the counts he was charged under should be considered extraordinary and compelling reasons supporting a sentence reduction); *Thacker*, 4 F.4th at 571, 574 (same).

<sup>100</sup> See *Andrews*, 12 F.4th at 258, 261 (summarizing the defendant's argument for compassionate release); *Thacker*, 4 F.4th at 571, 574 (same). In July 2021, in *United States v. Thacker*, the U.S. Court of Appeals for the Seventh Circuit determined that although district courts had broad discretion to define what might be extraordinary and compelling reasons for prisoner-initiated motions in the absence of guidance from the Sentencing Commission, this discretion did not allow courts to disregard Congress's non-retroactive directive in § 403 of the First Step Act. See 4 F.4th at 573–74 (recognizing the lower court's discretion but remarking that it must comply with congressional intent). The court noted that without guidance from the Sentencing Commission on how to analyze prisoner-initiated motions for compassionate release, federal courts must determine what factors constitute extraordinary and compelling reasons. See *id.* at 573 (explaining the discretion afforded to district courts in

As the pandemic raged on and motions for compassionate release continued working their way through the courts, the Eighth and D.C. Circuits both joined the approach of declining to consider non-retroactive changes in law.<sup>101</sup> In February 2022, in *United States v. Crandall*, the U.S. Court of Appeals for the Eighth Circuit stated that non-retroactive law changes were neither extraordinary nor compelling because Congress often prospectively reduces criminal penalties and its present-day views on the proper punishment for an offense do not have an impact on a sentence imposed in the past.<sup>102</sup> The court accordingly disregarded the fact that the defendant had been sentenced to a stacked sentence of nearly forty-seven years in prison for armed robberies, and that he would have faced between eighteen and twenty-one years for the same crimes today.<sup>103</sup> In October 2022, in *United States v. Jenkins*, the U.S. Court of

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deciding prisoner-initiated motions for compassionate release). Thus, the court viewed the Sentencing Commission's policy statements as binding only for BOP-initiated motions, at least until the Sentencing Commission amended its policy statements. *See id.* (noting that the Sentencing Commission's policy statements are only binding upon the courts when considering motions for compassionate release filed by the BOP). The court bolstered its argument that Congress specifically intended certain sections of the First Step Act to apply non-retroactively by citing other provisions of the Act where Congress stated the amendment *did* apply retroactively. *See id.* (citing the retroactive application of § 404 of the First Step Act, concerning the elimination of minimum sentences for simple drug possession and increasing threshold quantities of crack cocaine that would lead to mandatory penalties). In August 2021, in *United States v. Andrews*, the U.S. Court of Appeals for the Third Circuit trod a familiar path, concluding that sentencing reforms under the First Step Act could not be considered extraordinary and compelling reasons, holding that to decide otherwise would sow discord within the statute. *See* 12 F.4th at 261 (utilizing canons of statutory construction to support the court's holding).

<sup>101</sup> *See* *United States v. Jenkins*, 50 F.4th 1185, 1198 (D.C. Cir. 2022) (confronting the circuit split surrounding non-retroactive changes in the law for compassionate release motions); *United States v. Crandall*, 25 F.4th 582, 585 (8th Cir. 2022) (recognizing the split across circuits and joining the no consideration of non-retroactive laws approach); *see also* *COVID-19 Timeline*, DAVID J. SENCER CDC MUSEUM, <https://www.cdc.gov/museum/timeline/covid19.html> [<https://perma.cc/F2VE-UDTJ>] (noting a number of COVID-19 spikes throughout 2022, largely attributed to the Omicron variant). By February 2022, over 900,000 people had died from COVID-19 in the United States. *COVID-19 Timeline, supra*. Between March 2020 and February 2021, nearly 2,500 prisoners died from COVID-19, with 298 out of 1,000 federal prisoners risking exposure. *Impact of COVID-19 on State and Federal Prisons, March 2020–February 2021*, BUREAU JUST. STAT. (Aug. 25, 2022), <https://bjs.ojp.gov/press-release/impact-covid-19-state-and-federal-prisons-march-2020-february-2021> [<https://perma.cc/YBP7-V2DY>].

<sup>102</sup> 25 F.4th at 585–86. In rejecting Crandall's argument, the court noted that the First Step Act's amendments did not indicate Congress's disapproval of sentences imposed prior to the Act because Congress opted to leave these sentences in place. *See id.* at 586 (describing the effect of the First Step Act's amendments on future, but not past, sentences). The court also emphasized that the prior sentencing regime was utilized in a different era than the one we are currently in. *See id.* (situating prior and current criminal penalties in their respective eras).

<sup>103</sup> *See* Appellant's Brief at 3–4, 12, *United States v. Crandall*, (8th Cir. 2021) (No. 20-3611) (detailing the charges and sentence levied upon Crandall). In his motion for compassionate release, Crandall argued that due to the First Step Act's changes in the laws he was charged under, he would have received between eighteen and twenty-one years in prison, which he urged the court to consider as an extraordinary and compelling reason for his release. *See id.* at 11–12 (noting the sentencing reforms of § 924(c) by § 403 of the First Step Act).



Appeals for the District of Columbia Circuit explained that there was nothing extraordinary about non-retroactive statutes and that the court must abide by statutory constraints or risk violating the separation of powers.<sup>104</sup>

In 2024, in *United States v. Jean*, The U.S. Court of Appeals for the Fifth Circuit took a more circuitous route to reach the same result, as it originally allowed the consideration of the First Step Act's sentencing reforms as a factor in the extraordinary and compelling analysis.<sup>105</sup> Yet, in January 2025, in *United States v. Austin*, the U.S. Court of Appeals for the Fifth Circuit backtracked, deciding that non-retroactive laws could not be extraordinary and compelling reasons for compassionate release.<sup>106</sup> The court abrogated *Jean*, arguing that the court failed to adhere to pre-*Jean* circuit precedent barring non-retroactive law changes for consideration as extraordinary and compelling reasons.<sup>107</sup>

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<sup>104</sup> See 50 F.4th at 1198–99 (explaining the court's decision to leave non-retroactive law changes out of the extraordinary and compelling analysis). After a traffic stop of Jenkins's car, police recovered a handgun, crack cocaine, and \$2,500 from his person. Appellee Memorandum of Law and Fact at 3–4, *United States v. Jenkins* (D.C. Cir. 2022) (No. 21-03089). About a month later, officers again recovered a gun, cocaine, and money from Jenkins and his car after another traffic stop. *Id.* Jenkins was sentenced to eight years in prison. *Id.* at 2. Jenkins argued in his motion for compassionate release that his sentence length was arbitrarily enhanced by the stacking provision of § 924(c), which was amended by § 403 of the First Step Act. Appellant Memorandum of Law and Fact at 6, *United States v. Jenkins* (D.C. Cir. 2022) (No. 21-03089). In rejecting this argument, the court noted that it is the legislature's role to define and punish crimes and that by applying § 403 of the First Step Act only retroactively, Congress affirmed the sentences imposed prior to the Act. *Jenkins*, 50 F.4th at 1198–99. Other courts coming out on this side of the split also utilize the separation of powers argument. See *Andrews*, 12 F.4th at 261 (evoking the separation of powers to explain why non-retroactive changes in the law may not be considered extraordinary and compelling reasons); *Thacker*, 4 F.4th at 574 (same).

<sup>105</sup> See 108 F.4th 275, 290 (5th Cir. 2024) (holding that it is within the district court's discretion to consider non-retroactive changes in the law in conjunction with other factors), *abrogated by*, *United States v. Austin*, 125 F.4th 688 (5th Cir. 2025). In *Jean*, the court explained that there is no basis for a categorical ban on any consideration of non-retroactive law changes as one potentially extraordinary and compelling reason in the compassionate release context. See *id.* at 281 (emphasizing the district court's discretion in sentencing and its translation to discretion in compassionate release motions).

<sup>106</sup> See 125 F.4th 688, 692 (5th Cir. 2025) (overruling the court's decision in *Jean*). The defendant was sentenced to twenty-five years imprisonment for participating in a drug distribution conspiracy, possession with intent to distribute cocaine, possessing a firearm in furtherance of drug trafficking, and possessing a firearm as a felon. See Memorandum Brief of Appellee at 2–3, *United States v. Austin*, 125 F.4th 688 (5th Cir. 2025) (No. 24-30039) (recapitulating the defendant's charges and sentence). The court determined that the First Step Act's explicit retroactivity demand for § 401 precluded that section from being considered by the court. See *Austin*, 125 F.4th at 692–93 (stating the court's conclusion and referring to *Jean* as wrongly decided). The Second and Eleventh Circuits are the last remaining federal courts of appeals to have left this issue undecided. See *United States v. Silva*, 01 CR 1110, 2024 WL 5155524, at \*6 (S.D.N.Y. 2024) (noting that the Second Circuit has not yet directly addressed this issue); *United States v. Elie*, 739 F. Supp. 3d 1032, 1053 (M.D. Fla. 2024) (addressing the lack of binding law on this issue within the Eleventh Circuit).

<sup>107</sup> See *Austin*, 125 F.4th at 693 (noting that the *Jean* majority openly disregarded prior precedent indicating that non-retroactive law changes may not be extraordinary and compelling reasons). Specifically, the court cited *United States v. Escajeda*, where the court defined extraordinary and compelling reasons as particularly unusual and unique to the life of the defendant. See *id.* (citing *Escajeda* for support); 58 F.4th 184, 186 (5th Cir. 2023) (stating that compassionate release should be used only for

### *B. The Other Side of the Split*

The First, Fourth, Ninth, and Tenth Circuits disagree, holding that non-retroactive changes in the law may be considered in the extraordinary and compelling analysis—in concert with other factors—when deciding upon motions for compassionate release.<sup>108</sup> These circuits contend that imposing a categorical bar on considering non-retroactive law changes would interfere with compassionate release as a safety valve—when defendants’ circumstances had changed so as to render their current sentence inequitable.<sup>109</sup> They also emphasize that reducing a defendant’s sentence for extraordinary and compelling reasons is not against congressional intent as this does not render every defendant automatically eligible for resentencing.<sup>110</sup>

In December 2020, in *United States v. McCoy*, the U.S. Court of Appeals for the Fourth Circuit became the first circuit to decide that non-retroactive changes in the law could be considered in motions for compassionate release.<sup>111</sup> In a consolidated motion for compassionate release, four defendants argued that their sentences were unreasonably long as a result of a stacking

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cases of extreme exigency unforeseeable at the time of sentencing). The court utilized this definition to argue that a non-retroactive change in the law is not a severe exigency or unique to the individual prisoner. See *Austin*, 125 F.4th at 692 (indicating that a straightforward reading of *Escajeda* illustrates that a non-retroactive change in the law is not extraordinary and compelling).

<sup>108</sup> See *United States v. Chen*, 48 F.4th 1092, 1101 (9th Cir. 2022) (allowing the consideration of non-retroactive law changes alongside other factors); *United States v. Ruvalcaba*, 26 F.4th 14, 28 (1st Cir. 2022) (determining that courts may consider a broad range of factors, including non-retroactive changes in the law, when deciding motions for compassionate release); *United States v. McGee*, 992 F.3d 1035, 1047–48 (10th Cir. 2021) (noting that non-retroactive changes in the law may permissibly be considered alongside the defendant’s individual circumstances); *United States v. McCoy*, 981 F.3d 271, 286–87 (4th Cir. 2020) (finding no error where a district court considered non-retroactive changes in the law in combination with the defendant’s individual circumstances).

<sup>109</sup> See *Chen*, 48 F.4th at 1098–99 (noting that compassionate release is a safety valve for when a change in the defendant’s conditions indicated that their sentence was no longer equitable); *Ruvalcaba*, 26 F.4th at 26 (same); *McGee*, 992 F.3d at 1047 (explaining that compassionate release acts as a safety valve for defendants when other statutory remedies are unavailable but extraordinary and compelling reasons still warrant a sentence reduction). This notion of compassionate release as a safety valve stems from a Senate Report on the Sentencing Reform Act, where the report referred to compassionate release and other sentence reduction mechanisms as safety valves. See S. REP. NO. 98-225, at 121 (1983) (referencing three safety valves for defendants to receive sentence modifications, including compassionate release).

<sup>110</sup> See *Chen*, 48 F.4th at 1097 (summarizing the reasoning for the First, Fourth, and Tenth Circuits’ approaches); *Ruvalcaba*, 26 F.4th at 26 (referencing the creation of compassionate release as a safety valve for when defendants’ circumstances had changed so much as to render the length of their sentence inequitable); *McCoy*, 981 F.3d at 286–87 (noting the difference between the automatic vacatur of a class of sentences and allowing individual relief for the most severe cases); *McGee*, 992 F.3d at 1047 (finding the *McCoy* court’s analysis compelling).

<sup>111</sup> See 981 F.3d at 285–86 (locating only district court opinions that have discussed the bearing of non-retroactive law changes on compassionate release motions). The court further noted the “new” right of defendants to file their own motions, as by that point, the First Step Act had only existed for two years. See *id.* at 281 (referencing criminal defendants’ right to initiate their own motions for compassionate release).

provision for firearms offenses and that the court should consider Section 403 of the First Step Act amending this stacking provision as an extraordinary and compelling reason.<sup>112</sup> The court agreed, emphasizing that district courts should be able to consider—in combination with other factors—the length of a sentence that Congress itself has deemed unnecessarily long or unfair via the First Step Act.<sup>113</sup> The court also pointed to the role of compassionate release as a safety valve that will not require the resentencing of every defendant.<sup>114</sup>

The First, Ninth, and Tenth Circuits also distinguished the individualized remedy offered by compassionate release from automatic resentencing eligibility for all defendants charged under since-reformed statutes.<sup>115</sup> Recognizing the role of compassionate release as a remedy for when statutory relief is unavailable, these circuit courts refuse to impose a categorical bar on the consideration of non-retroactive changes in the law.<sup>116</sup>

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<sup>112</sup> See *id.* at 271–72, 274 (naming the defendants, describing the procedural history of the appeals, and the defendants’ arguments at the district court level). This case was a consolidated appeal from the denial of motions for compassionate release filed by Thomas McCoy, Keith Bryant, Kittrell Decator, and Craig Scott. *Id.* at 271–72. In 2004, Thomas McCoy was sentenced to 421 months in prison for his participation in twelve armed robberies in Virginia. Opening Brief by the United States at 1, *United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020) (No. 20-06821). In 1993 and 1994, Bryant, Decator, and Scott attempted one armed bank robbery and completed two and were each charged with a fifty-two to fifty-three-year term of imprisonment. *McCoy*, 981 F.3d at 278.

<sup>113</sup> See *McCoy*, 981 F.3d at 286–87 (explaining the court’s stance that non-retroactive changes in the law may permissibly be examined in concert with other factors).

<sup>114</sup> See *id.* at 288 (noting that the district courts engaged in individualized determinations of each defendant’s circumstances, including their young age at the time of their crimes, their rehabilitations, and the length of their sentences already served). The court concluded that this case-by-case inquiry did not amount to full-blown retroactive application of the First Step Act’s non-retroactive reforms. *Id.*

<sup>115</sup> See *Chen*, 48 F.4th at 1098–99 (describing compassionate release as a safety valve for when defendants’ conditions changed enough to render continued incarceration inequitable); *Ruvalcaba*, 26 F.4th at 26 (same); *McGee*, 992 F.3d at 1047 (explaining that compassionate release offers a safety valve for defendants when no statute affords them relief but extraordinary and compelling reasons still permit a sentence reduction). The defendant in *McGee* was found guilty of conspiring to possess PCP, causing another person to unlawfully possess PCP with the intent to distribute, and “using a communication facility to facilitate . . . a felony.” 291 F.3d at 1225. McGee was previously sentenced to life imprisonment and a concurrent term of eight years in 2002. Appellant’s Opening Brief at 6, *United States v. McGee*, 992 F.3d 1035 (10th Cir. 2021) (No. 20-5047). In reversing the district court’s rejection of McGee’s motion for compassionate release, the Tenth Circuit asserted that it would not usurp Congress’s power to base a finding of extraordinary and compelling reasons in part upon a defendant’s pre-First Step Act sentence. *McGee*, 992 F.3d at 1047. In *Ruvalcaba*, the defendant was charged with conspiracy to distribute methamphetamine and sentenced to a “mandatory minimum term of life imprisonment” in 2009. Brief of Appellant at 1, *United States v. Ruvalcaba*, 26 F.4th 14 (1st Cir. 2022) (No. 21-1064). Ruvalcaba argued that his motion for compassionate release should be granted because Congress, through the First Step Act, amended the penalties for the statute he was charged under to reduce the mandatory minimum sentence. *Id.* at 2, 4.

<sup>116</sup> See *Chen*, 48 F.4th at 1098, 1100 (noting the distinction between automatic resentencing and analyzing non-retroactive laws as one factor in a motion for compassionate release); *Ruvalcaba*, 26 F.4th at 26 (reiterating the safety valve purpose of compassionate release); *McGee*, 992 F.3d at 1047 (noting the absence in the First Step Act of Congress’s intent to keep district courts from granting motions for compassionate release to some defendants sentenced prior to the act). In *Ruvalcaba*, the

For example, in 2022, in *United States v. Chen*, the defendant argued to the U.S. Court of Appeals for the Ninth Circuit that the elimination of stacking for the firearms statute he was charged under and his substantial rehabilitation should be considered extraordinary and compelling reasons for a sentence reduction.<sup>117</sup> The court determined that if Congress wanted to impose an additional limit on district courts' ability to examine non-retroactive changes in law, they could have done so, but the court would not infer a categorical bar.<sup>118</sup>

One limit that each of these circuits imposes is that non-retroactive changes in sentencing laws alone cannot be the sole basis for compassionate release, but they may be examined in combination with the defendant's other unique circumstances.<sup>119</sup>

### *C. A Little Help from the Supreme Court?*

In June 2022, in *Concepcion v. United States*, the Supreme Court addressed a defendant's motion for a sentence reduction based on a decrease in the penalty range for crack cocaine offenses that the First Step Act authorized to apply retroactively.<sup>120</sup> While lower courts had struggled to determine wheth-

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First Circuit noted that Congress's capacity to render a statute non-retroactive is not infringed upon by a district court accounting for all a defendant's "idiosyncratic circumstances" including that their mandatory minimum sentence would now be shorter under the First Step Act. *See Ruvalcaba*, 26 F.4th at 27 (reiterating that district courts examine motions for compassionate release on a case-by-case, individualized basis).

<sup>117</sup> Appellant's Opening Brief at 10–11, *United States v. Chen*, 2021 WL 6101525 (9th Cir. 2021) (No. 20-50333). The defendant discussed the racially discriminatory and draconian process of stacking mandatory sentences for firearms crimes, that increased his sentencing range by twenty years. *Id.* at 1.

<sup>118</sup> *See Chen* 48 F.4th at 1098 (reasoning that Congress could have imposed a categorical bar on one factor if it wished to do so). The court noted that the only limits Congress has placed on defining extraordinary and compelling are that rehabilitation alone is not sufficient and that "district courts are bound by the Sentencing Commission's policy statement . . ." *Id.* at 1098. The court also stated that allowing defendants to argue that non-retroactive changes in the statutes they were charged under present extraordinary and compelling reasons is different from allowing all defendants charged under that statute to be automatically resentenced. *Id.* at 1100.

<sup>119</sup> *See id.* at 1101 (requiring that non-retroactive law changes be considered in concert with other factors); *Ruvalcaba*, 26 F.4th at 28 (agreeing with the Tenth Circuit that a reformed sentence alone cannot serve as a basis for compassionate release); *McGee*, 992 F.3d at 1048 (stating that non-retroactive changes in the law must be accompanied by other unique factors to support a sentence reduction); *McCoy*, 981 F.3d at 286–87 (permitting the consideration of non-retroactive changes in sentencing law in concert with other factors).

<sup>120</sup> *See* 597 U.S. 481, 488–89 (2022) (restating the defendant's argument that due to the First Step Act's reforms, he would no longer be considered a career offender, which would reduce his sentence range significantly). The district court refused to consider the changes to the guidelines, and the Fifth Circuit agreed. *Id.* at 489. In 2009, *Concepcion* was sentenced to nineteen years in prison for selling crack cocaine. *Id.* at 487. At the time of *Concepcion*'s sentencing, it required one hundred times more powder cocaine to result in the same sentencing range for possession of crack cocaine. *See id.* (explaining the sentencing discrepancies associated with crack cocaine and powder cocaine). Although this specific charge was not at issue in *Concepcion*, the Fair Sentencing Act of 2010 remedied the

er intervening changes of law must, may, or may not be considered by district courts, the Court concluded that sentencing courts have great discretion to consider information and that the only limitations on this discretion are express congressional or Constitutional limits.<sup>121</sup> Thus, the Court determined that district courts need to consider the intervening changes made retroactive by the First Step Act, but they need not accept them.<sup>122</sup>

Although *Concepcion* deals with a retroactive change in the law, the Fourth and Ninth Circuits utilize the decision to argue that non-retroactive law changes may be considered extraordinary and compelling.<sup>123</sup> They emphasize that Congress has only limited motions for compassionate release by requiring extraordinary and compelling reasons and barring rehabilitation alone, so non-retroactive law changes should be ripe for consideration absent explicit congressional prohibition.<sup>124</sup> Other circuits insist that *Concepcion* is easily distinguishable from the issue confronting them, as *Concepcion* addressed a resentencing decision under the First Step Act and not a motion for compassionate release.<sup>125</sup> This is-

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harsh discrepancies in sentencing for crack cocaine versus powder cocaine. See *2015 Report to the Congress: Impact of the Fair Sentencing Act of 2010*, U.S. SENT’G COMM’N (Aug. 2015), <https://www.ussc.gov/research/congressional-reports/2015-report-congress-impact-fair-sentencing-act-2010> [<https://perma.cc/2GY2-L87S>] (describing how the Fair Sentencing Act reduced the one hundred-to-one crack to powder ratio to an eighteen-to-one crack-to-powder ratio).

<sup>121</sup> See *Concepcion*, 597 U.S. at 490, 494 (noting the disagreement among circuit courts regarding whether district courts could, could not, or must consider intervening changes of law and deciding that district courts had discretion to consider these changes). The Court traced the history of discretion in federal sentencing courts and discussed that the only limits to this discretion come from Congress or the Constitution. See *id.* at 490–91 (noting that federal judges have long enjoyed wide discretion in sentencing—including modifying sentences—and that Congress and the Constitution are the only bounds of this discretion).

<sup>122</sup> See *id.* at 502 (stating that the First Step Act doesn’t force district court judges to accept the argument that intervening law changes merit a sentence reduction, but that they must at least consider the arguments raised by defendants).

<sup>123</sup> See *United States v. Davis*, 99 F.4th 647, 657 (4th Cir. 2024) (citing *Concepcion* for support that non-retroactive law changes may be considered extraordinary and compelling reasons for compassionate release); *Chen*, 48 F.4th at 1099 (same).

<sup>124</sup> See *Davis*, 99 F.4th at 657 (stating that *Concepcion* makes it “fair game” for courts to examine changes in law for compassionate release motions); *Chen*, 48 F.4th at 1098–99 (reasoning that because Congress has not created a third limitation on compassionate release motions, the court will continue allowing courts to consider non-retroactive changes in the law). The court in *Chen* proceeded to note that Congress has demonstrated through the compassionate release statute and its delegation of powers to the Sentencing Commission that it can and will directly limit what may be considered extraordinary and compelling reasons. See 48 F.4th at 1099 (referencing the explicit limitations that Congress has imposed on compassionate release). It argued that absent this explicit action, there is no reason to infer a categorical ban on non-retroactive changes in the law as extraordinary and compelling. See *id.* (refusing to infer a categorical bar). The court in *Davis* further referenced the Court’s statement that Congress generally does not back away from imposing limits that it deems appropriate. See 99 F.4th at 657 (noting that Congress has taken action to limit certain considerations in the realm of compassionate release).

<sup>125</sup> See *United States v. McCall*, 56 F.4th 1048, 1061–62 (6th Cir. 2022) (distinguishing the statute at issue in *Concepcion* and the compassionate release statute on the grounds that discretion in

sue is somewhat less salient in the wake of the Sentencing Commission's 2023 policy statement amendments that have shifted the focus from *Concepcion*'s application to the Sentencing Commission's authority to resolve the issue.<sup>126</sup>

*D. The 2023 Policy Statement Amendments: The Sentencing Commission Enters the Fray*

In April 2023, after regaining its voting quorum, the Sentencing Commission issued an amendment to its policy statement designed to address this circuit split.<sup>127</sup> The Sentencing Commission's amendment states that a change in the law may be considered in the extraordinary and compelling analysis, if there is a gross disparity between the sentence imposed then and now, and after accounting for the defendant's individual circumstances.<sup>128</sup> The Sentencing Commission expressed its agreement with the First, Fourth, Ninth, and Tenth Circuits in allowing the consideration of non-retroactive laws.<sup>129</sup> The amend-

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resentencing factors is a separate issue from deciding if someone is eligible for resentencing in the first place); *United States v. Jenkins*, 50 F.4th 1185, 1200 (D.C. Cir. 2022) (contrasting the statute at issue in *Concepcion* with compassionate release and asserting that compassionate release imposes just the limit the Supreme Court identified in *Concepcion* by requiring extraordinary and compelling reasons); *United States v. Bledsoe*, No. 22-2022, 2022 WL 3536493, at \*2 (3d Cir. Aug. 18, 2022) (stating that its prior precedent barring the consideration of non-retroactive law changes survived *Concepcion*); *United States v. Peoples*, 41 F.4th 837, 842 (7th Cir. 2022) (stating that *Concepcion* does not alter the court's precedent that non-retroactive amendments to sentencing law cannot be extraordinary and compelling reasons).

<sup>126</sup> See *infra* notes 127–137 and accompanying text.

<sup>127</sup> See Sentencing Guidelines for United States Courts, 88 Fed. Reg. 28254, 28256, 28258 (May 3, 2023) (discussing the Sentencing Commission regaining its quorum and its intent to address the ongoing circuit split regarding non-retroactive changes in the law). The Sentencing Commission noted that in the absence of its quorum, courts stepped in to address extraordinary and compelling factors for defendant-filed motions for compassionate release but had largely remained faithful to the examples the Sentencing Commission had published in 2007. See *id.* at 28256 (discussing the approach of federal courts during the Sentencing Commission's period of silence from 2019 to 2022).

<sup>128</sup> See U.S.S.G. § 1B1.13(b)(6) (permitting the consideration of non-retroactive law changes when the defendant has received an unusually long sentence, has already served ten years of it, and there is a gross disparity between the sentence imposed and what would likely be imposed today). Another amendment made by the Sentencing Commission purports to address some of the factors courts considered during the COVID-19 pandemic; it notes that when individuals are at an increased risk of severe health complications or death due to public health crises and disease outbreaks, they may qualify for a sentence reduction. See Sentencing Guidelines for United States Courts, 88 Fed. Reg. at 28257 (adding factors to the "Medical Circumstances of the Defendant" section). The Sentencing Commission also added a new factor for courts to consider when deciding upon a motion for compassionate release when the defendant is a victim of sexual or physical abuse at the hands of BOP staff. See *id.* (adding in a new subsection entitled "Victim of Abuse" at (b)(4)).

<sup>129</sup> See Sentencing Guidelines for United States Courts, 88 Fed. Reg. at 28258 (noting the Sentencing Commission's agreement with circuits that allow district courts to consider non-retroactive changes in law but slightly limiting the application of this standard). The Sentencing Commission noted that it is typically up to itself or the Supreme Court to resolve these splits related to its guidance or policy statements. *Id.* The Sentencing Commission explained that on numerous occasions between

ment, however, narrows the application to unusually long sentences where ten years have already been served and where there is a gross disparity between the sentence being served and the sentence likely to be imposed today.<sup>130</sup>

Although the Sentencing Commission is no stranger to judicial resistance, federal courts' receptions of this amendment have varied.<sup>131</sup> In November 2024, in *United States v. Rutherford*, the Third Circuit strongly opposed the amended policy statement, stating that the Sentencing Commission lacked the authority to replace Congress's non-retroactivity directive by allowing the consideration of non-retroactive laws in the extraordinary and compelling analysis.<sup>132</sup> In January

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2021 and 2022, the Department of Justice was successful in opposing Supreme Court review of the circuit split by arguing the Sentencing Commission should address it first. *Id.*

<sup>130</sup> *See id.* at 28258–59 (imposing additional requirements beyond the First, Fourth, Ninth, and Tenth Circuits' extraordinary and compelling analysis). The policy amendment also states that once a defendant has demonstrated extraordinary and compelling reasons on a separate basis, a change in the law may be considered to help decide the breadth of the sentence reduction. U.S.S.G. § 1B1.13(c).

<sup>131</sup> *See* *United States v. Austin*, 125 F.4th 688, 692 (5th Cir. 2025) (regarding the policy statement amendments as conflicting with Congress's intent to make certain provisions of the First Step Act non-retroactive); *United States v. Rutherford*, 120 F.4th 360, 378–79 (3d Cir. 2024) (stating that the Sentencing Commission's policy statement amendments exceed its authority), *cert. granted*, 24-820, 2025 WL 1603603 (2025). *But see* *United States v. Barkley*, No. 04-cr-119-JDR-1, 2024 WL 5233183, at \*5 (N.D. Okla., Dec. 27, 2024) (stating that because the amendments to the policy statement are in line with the Tenth Circuit's precedent of allowing the consideration of non-retroactive changes in law, the court disagreed with the Government's position that the amendments are invalid); *United States v. Corbett*, 10 Cr. 184, 2023 WL 8073638, at \*3 (S.D.N.Y. Nov. 21, 2023) (noting that the Sentencing Commission's amendments now guide the analysis of motions for compassionate release). The Sentencing Commission has dealt with judicial resistance throughout its existence, although such challenges were generally aimed at the sentencing guidelines, rather than policy statements. *See* U.S. SENTENCING COMM'N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 85 (1991) (discussing considerable resistance from federal judges and opposition to the sentencing guidelines); G. Thomas Eisele, *The Sentencing Guidelines System? No. Sentencing Guidelines? Yes.*, 55 FED. PROBATION 16, 20–21 (1991) (collecting criticisms from federal judges regarding sentencing guidelines that they must work under). In 2005, in *United States v. Booker*, the U.S. Supreme Court mostly resolved tensions over sentencing guidelines, as it held that sentencing guidelines were advisory, but not mandatory for federal courts. 543 U.S. 220, 222 (2005).

<sup>132</sup> *See* 120 F.4th at 379–80 (declining to apply the Sentencing Commission's policy statement amendment allowing the consideration of non-retroactive laws as extraordinary and compelling reasons). The court emphasized that although the Sentencing Commission's policy statements are generally binding, the policy statement must still abide by congressional intent, which it does not. *See id.* at 375 (stating that courts generally are bound by the Sentencing Commission's policy statements, but that their binding nature is not unlimited). The court noted that its role is to ensure that the Sentencing Commission's amendments do not exceed Congress's intent. *See id.* at 376 (remarking upon the court's role in ensuring the Sentencing Commission does not overreach). The court cited the recent *Loper Bright Enterprises v. Raimondo* decision to support this premise, remarking that reviewing courts assist in effectuating Congress's will by ensuring agencies act within their delegated boundaries. *Id.* In 2024, in *Loper Bright Enterprises*, the Supreme Court overruled *Chevron* deference, holding that federal courts reviewing an agency's interpretation of an ambiguous statute need not defer to its interpretation, but should use their own independent judgment to determine if the agency acted

2025, in *United States v. Austin*, the U.S. Court of Appeals for the Fifth Circuit echoed this sentiment, asserting that the Sentencing Commission could not render retroactive something that Congress intended to be non-retroactive.<sup>133</sup> The Sixth and Seventh Circuits, both adherents to the no consideration of non-retroactive laws approach, have directly declined to address whether the Sentencing Commission possesses the authority to make this amendment.<sup>134</sup>

The circuit courts whose approach has been agreed with by the Sentencing Commission have been slower to address the policy statement amendments.<sup>135</sup> District courts in the First and Tenth circuits have noted that the new policy statement agrees with their stance, whereas some District Courts from the silent circuits—the Second and Eleventh—have determined that the amendments are reasonable and now control the analysis of motions for compassionate release.<sup>136</sup> In the absence of congressional guidance, federal courts continue to address and disagree upon the validity of these amendments.<sup>137</sup>

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within statutory constraints. *See* 603 U.S. 369, 412–13 (2024) (overturning *Chevron* deference for agencies' statutory interpretations).

<sup>133</sup> *See* 125 F.4th at 692 (stating that the Sentencing Commission's policy statements must follow Congress's directives). The court asserted that under Fifth Circuit precedent, the phrase extraordinary and compelling has a plain meaning, and the Sentencing Commission's amendments conflict with that definition. *See id.* at 691 (defending the court's decision to disregard the Sentencing Commission's amendments). The court goes on to note that the Sentencing Commission may not render a law retroactive when Congress intended it to be non-retroactive. *See id.* at 692 (issuing arguments for why the Sentencing Commission's new policy statement exceeded the agency's authority).

<sup>134</sup> *See United States v. Brooks*, No. 24-2207, 2024 WL 4970027, at \*2 (7th Cir. Dec. 4, 2024) (stating that the court would not comment on whether the Sentencing Commission had authority to issue its amendments); *United States v. Washington*, 122 F.4th 264, 267 n.1 (6th Cir. 2024) (noting that the court would not take a position on the question of whether the Sentencing Commission could issue an amendment defining extraordinary and compelling reasons in a manner inconsistent with the court's definition). Interestingly, the Eighth Circuit has interpreted the Sentencing Commission's policy statement amendments very differently, stating that the amendments *foreclose* the use of non-retroactive changes in law as a basis for compassionate release. *See United States v. Rodriguez-Mendez*, 65 F.4th 1000, 1004 (8th Cir. 2023) (issuing its own reading of the Sentencing Commission's policy statement amendments). The United States District Court for the Eastern District of Missouri refused to follow this path, regarding the Eighth Circuit's interpretation as nonbinding dicta that conflicted with the plain meaning of the amendment. *See United States v. Coleman*, No. 4:01-CR-296, 2024 WL 3372847, at \*6 (E.D. Mo. July 8, 2024) (declining to follow the Eighth Circuit's interpretation of the amendments). As a result, the Eastern District of Missouri determined that it was bound by the amendments. *Id.*

<sup>135</sup> *See United States v. Landeros-Valdez*, No. 1:11-cr-0096-BLW, 2025 WL 70124, at \*3 (D. Idaho Jan. 10, 2025) (applying the new policy statement but citing no cases in which the Ninth Circuit had addressed the policy statement's validity); *Barkley*, 2024 WL 5233183, at \*5 (acknowledging that the Tenth Circuit has yet to address the amended policy statement); *United States v. Colon-Nales*, No. 03-278 (RAM/BJM), 2024 WL 4783944, at \*3 (D. P.R. Nov. 14, 2024) (noting that the policy statement amendments agree with the First Circuit and other court's approach, but citing no cases in which the First Circuit had decided upon its validity).

<sup>136</sup> *Barkley*, 2024 WL 5233183, at \*5 (finding that the amendments are valid in light of their agreement with the Tenth Circuit's position); *Colon-Nales*, 2024 WL 4783944, at \*3 (noting that the policy statement amendments incorporate the First Circuit's determination that non-retroactive law changes may be considered in motions for compassionate release); *United States v. Ware*, 720 F.



### III. PICKING SIDES: NON-RETROACTIVE LAW CHANGES SHOULD BE CONSIDERED IN COMPASSIONATE RELEASE MOTIONS

Non-retroactive changes in the law, such as the sentencing reforms enacted by the First Step Act, merit treatment as extraordinary and compelling reasons for compassionate release.<sup>138</sup> This Part will address this argument in four segments.<sup>139</sup> Section A argues that the United States Sentencing Commission's policy statement amendments must bind district courts and that circuit courts who determine otherwise risk defying congressional intent and delegitimizing the Sentencing Commission.<sup>140</sup> Section B stresses the injustice of differential treatment of defendants across federal courts, which undermines the role of compassionate release as a safety valve to remedy sentences that are no longer equitable.<sup>141</sup> Section C describes how expanding compassionate release can be a tool to remedy the wrongs of poor inmate health and mass incarceration.<sup>142</sup> Section D proposes that Congress take action to clarify the Sentencing Commission's authority or provide its own definition of extraordinary and compelling reasons, indicating whether non-retroactive law changes may be extraordinary and compelling reasons.<sup>143</sup>

#### *A. The Policy Statement Amendments Are Binding Law*

The 2023 policy statement amendments issued by the Sentencing Commission must bind district courts to the Sentencing Commission's definition of extraordinary and compelling reasons, including its addition of non-retroactive changes in the law as extraordinary and compelling when combined with other

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Supp. 3d 1351, 1362 (N.D. Ga. 2024) (concluding that the Sentencing Commission exercised its authority lawfully in promulgating its amendments and that the Eleventh Circuit instructs District Courts to defer to the Sentencing Commission's interpretations); *Corbett*, 2023 WL 8073638, at \*3 (stating that the Sentencing Commission's amendments are now controlling on the court when analyzing motions for compassionate release).

<sup>137</sup> See Trevor Parkes, *After Third Circuit Decision, USSC Policy Statement Faces Uncertain Future*, NAT'L ASS'N CRIM. DEF. LAWS. (discussing the growing circuit split in how courts receive the policy statement amendments). The article goes on to note that without congressional guidance, this issue will likely go up to the Supreme Court. *Id.*

<sup>138</sup> See U.S.S.G. § 1B1.13(c) (allowing the consideration of non-retroactive laws when certain conditions are satisfied); *United States v. Chen*, 48 F.4th 1092, 1101 (9th Cir. 2022) (holding that the district court was incorrect to not consider the First Step Act's amendments to the defendant's stacked sentence); *United States v. Ruvalcaba*, 26 F.4th 14, 28 (1st Cir. 2022) (concluding that a court may consider the First Step Act's non-retroactive amendments to mandatory minimum penalties within their individual case as part of the extraordinary and compelling analysis); *United States v. McGee*, 992 F.3d 1035, 1047 (10th Cir. 2021) (same); *United States v. McCoy*, 981 F.3d 271, 288 (4th Cir. 2020) (same).

<sup>139</sup> See *infra* notes 144–184 and accompanying text.

<sup>140</sup> See *infra* notes 144–157 and accompanying text.

<sup>141</sup> See *infra* notes 158–165 and accompanying text.

<sup>142</sup> See *infra* notes 166–177 and accompanying text.

<sup>143</sup> See *infra* notes 178–184 and accompanying text.

factors.<sup>144</sup> In the Sentencing Commission's originating statutes, Congress directs the Sentencing Commission to define in its policy statements what constitute extraordinary and compelling reasons, including the applicable criteria and specific examples.<sup>145</sup> The only limitation Congress provides the Sentencing Commission is that rehabilitation alone may not constitute an extraordinary and compelling reason.<sup>146</sup> This provision indicates Congress's intent that the Sentencing Commission's policy statements should authoritatively guide district courts' analyses—otherwise, the section would be meaningless.<sup>147</sup> The Supreme Court has itself determined that a policy statement issued by the Sentencing Commission binds district courts.<sup>148</sup> In *Concepcion*, the Court also cautioned against limiting the information sentencing courts could appropriate-

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<sup>144</sup> See *United States v. Corbett*, 10 Cr. 184 (PAE), 2023 WL 8073638, at \*3 (S.D.N.Y. Nov. 21, 2023) (determining that the policy statement amendments now control the compassionate release analysis); Nathaniel Berry, *Droughts of Compassion: The Enduring Problem with Compassionate Release and How the Sentencing Commission Can Address It*, 90 U. CHI. L. REV. 1719, 1760 (2023) (arguing that respecting Congress's authority requires accepting the Sentencing Commission's power and obligation to resolve issues with the compassionate release system); Erica Zunkel & Jaden Lessnick, *Putting the "Compassion" in Compassionate Release: The Need for a Policy Statement Codifying Judicial Discretion*, 35 FED. SENT'G REP. 164, 171 (2023) (writing that the Sentencing Commission can create a standard for compassionate release that guides judicial discretion in the development of a compassionate release standard for defendant-initiated motions prior to the policy amendments).

<sup>145</sup> See 28 U.S.C. § 994(t) (tasking the Sentencing Commission with defining extraordinary and compelling reasons for release).

<sup>146</sup> See *id.* (excepting rehabilitation by itself as an extraordinary and compelling reason). Although rehabilitation is often a persuasive factor in a court's decision to grant compassionate release, it is always accompanied by other extraordinary and compelling reasons. See *United States Sentencing Commission Compassionate Release Data Report*, *supra* note 62 (noting that 15% of compassionate release motions were granted with rehabilitation and at least one other factor as the court's stated reason for release).

<sup>147</sup> See Berry, *supra* note 144, at 1746 (confirming that Congress intended the Sentencing Commission's definition of extraordinary and compelling reasons in its policy statements to be binding). The canons of statutory construction demand that courts interpret statutes to give effect to each word Congress uses and to avoid rendering parts of a statute meaningless. See *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 632 (2018) (rejecting a statutory interpretation that would render a subparagraph of an environmental statute meaningless); *Beck v. Prupis*, 529 U.S. 494, 506 (2000) (referencing the petitioner's reliance upon the longstanding canon of statutory interpretation that no statutory provisions should be rendered meaningless); *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (stating that it is the Court's duty to give effect to words in a statute, not to "emasculate" a whole section); *Mason v. United States*, 260 U.S. 545, 554 (1923) (stating that effect should be given to each word of a statute).

<sup>148</sup> See *Dillon v. United States*, 560 U.S. 817, 830 (2010) (stating that requiring courts to follow policy statement § 1B1.10(b)(2) does not raise constitutional concerns). In 2010, in *Dillon v. United States*, the U.S. Supreme Court reviewed a policy amendment that required district courts considering compassionate release motions to consider amended sentencing guidelines ranges made retroactive by the Sentencing Commission, but prohibited sentencing reductions below the minimum of that amended guideline range. *Id.* at 821–22. The Court concluded that this policy statement did not evoke the same constitutional issues as *United States v. Booker*, where the Court determined that the Sentencing Commission's sentencing guidelines could not be made mandatory for courts, instead adjusting them to be advisory. *Id.* at 830; see also 543 U.S. 220, 222 (2005) (holding parts of the sentencing guidelines unconstitutional).

ly consider, unless Congress or the Constitution explicitly prohibited such consideration.<sup>149</sup>

The compassionate release statute also states that courts may reduce a defendant's sentence only when a reduction would be consistent with the Sentencing Commission's policy statements.<sup>150</sup> Circuit courts—including those that now reject the Sentencing Commission's 2023 amendments—have stated that the Sentencing Commission's policy statements regarding compassionate release are binding upon district courts.<sup>151</sup> The Third and Fifth Circuits' rejections of the Sentencing Commission's authority conflict with their own precedent stating that the Sentencing Commission's policy statements are binding upon district courts in their circuits.<sup>152</sup> In *Rutherford*, the Third Circuit at-

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<sup>149</sup> See 597 U.S. 481, 491 (2022) (noting that the discretion of federal judges is bound only by Congress or the Constitution expressly limiting the type of information courts may consider when modifying a sentence). As some circuits have recognized, Congress has only expressly limited extraordinary and compelling reasons by stating that rehabilitation alone shall not suffice. See *United States v. Davis*, 99 F.4th 647, 657 (4th Cir. 2024) (stating that *Concepcion* allows courts to examine changes in law as extraordinary and compelling); *United States v. Chen*, 48 F.4th 1092, 1098–99 (9th Cir. 2022) (noting that rehabilitation alone is the only explicit congressional limit on extraordinary and compelling reasons and concluding that *Concepcion* supports a district court examining changes in the law). Without any explicit addition to this definition of extraordinary and compelling, judicial discretion to consider non-retroactive law changes remains available. See *Chen*, 48 F.4th at 1099 (reasoning that because Congress has not created a third limitation on compassionate release motions, the court will continue allowing lower courts to consider non-retroactive changes in the law).

<sup>150</sup> See 18 U.S.C. § 3582(c)(2) (stating that a sentence reduction must be consistent with the Sentencing Commission's applicable policy statements).

<sup>151</sup> See *Chen*, 48 F.4th at 1096 (describing applicable policy statements regarding extraordinary and compelling reasons as binding on district courts); *United States v. Ruvalcaba*, 26 F.4th 14, 23–24 (1st Cir. 2022) (noting that when the Sentencing Commission updates its policy statements defining extraordinary and compelling, district courts will be bound by that guidance); *United States v. Bryant*, 996 F.3d 1243, 1251–52 (10th Cir. 2021) (stating that it is clear that policy statements defining extraordinary and compelling reasons are binding on courts); *United States v. Taylor*, 743 F.3d 876, 879 (D.C. Cir. 2014) (noting that the language of the compassionate release statute renders the Sentencing Commission's policy statements binding); *United States v. Erskine*, 717 F.3d 131, 137 (2d Cir. 2013) (explaining that when the Sentencing Commission makes adjustments to compassionate release criteria, it does so with binding policy statements); *United States v. Berberena*, 694 F.3d 514, 521 (3d Cir. 2012) (describing the Sentencing Commission's policy statements around compassionate release as binding); *United States v. Horn*, 679 F.3d 397, 401–02 (6th Cir. 2012) (same); *United States v. Garcia*, 655 F.3d 426, 435 (5th Cir. 2011) (stating that Congress wished the Sentencing Commission's policy statements defining extraordinary and compelling reasons to be binding); *United States v. Melvin*, 556 F.3d 1190, 1190 (11th Cir. 2009) (concluding that policy statements pertaining to compassionate release are binding on district courts); *United States v. Dunphy*, 551 F.3d 247, 250 (4th Cir. 2009) (same).

<sup>152</sup> Compare *Berberena*, 694 F.3d at 521 (stating that Congress made the Sentencing Commission's policy statements regarding sentence reductions binding), with *United States v. Rutherford*, 120 F.4th 360, 375 (3d Cir. 2024) (noting that the Sentencing Commission's policy statements are generally binding, but stating that this authority is not unlimited), *cert. granted*, No. 24-820, 2025 WL 1603603 (2025); compare *Garcia*, 655 F.3d at 435 (stating that policy statements regarding compassionate release must bind district courts), with *United States v. Austin*, 125 F.4th 688, 692 (5th Cir. 2025) (asserting that the 2023 policy statement amendments change nothing and that the Sentencing Commission must follow Congress's directives about laws being non-retroactive).

tempted to justify its nonadherence to the policy statement by stating that it conflicts with Congress's non-retroactive directive, but by failing to apply the Sentencing Commission's authoritative policy, the court itself interferes with Congress's delegation of power to an agency.<sup>153</sup>

The Sentencing Commission is composed of a body of experts on sentencing, including sentencing reductions.<sup>154</sup> As such, Congress intended to delegate sufficient authority to the Sentencing Commission to allow it to provide fairness and predictability, and to avoid disparities in sentencing.<sup>155</sup> Creating binding policy statements is a part of that authority, and to deny these policies is to deny the will of a Congress that has expressly tasked the Sentencing Commission with defining extraordinary and compelling reasons.<sup>156</sup> Furthermore, in rejecting the

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<sup>153</sup> See 120 F.4th at 375–76 (noting that policy statements must abide by congressional intent). In support of this point, the Third Circuit cited a Supreme Court case in which the Court held that the Sentencing Commission must bow to the directives of Congress when formulating *sentencing guidelines*. *Id.* (citing *United States v. Labonte*, 520 U.S. 751, 757 (1997)); see *Labonte*, 520 U.S. at 757 (referring to limits on the Sentencing Commission's discretion to issue sentencing guidelines). Even accepting the Third Circuit's argument as true, however, by disputing the Sentencing Commission's authority to issue binding policy statements, the court interferes with Congress's authority to delegate this task to the Sentencing Commission via its statutory enactments. See 18 U.S.C. § 3582(c)(2) (stating that a sentence reduction must be consistent with the Sentencing Commission's applicable policy statements); 28 U.S.C. § 994(t) (assigning the Sentencing Commission with the responsibility of defining extraordinary and compelling reasons for release).

<sup>154</sup> See *Spears v. United States*, 555 U.S. 261, 266 (2009) (referencing the Sentencing Commission's expert judgment); *Mistretta v. United States*, 488 U.S. 361, 361 (1989) (referring to the United States Sentencing Commission as an expert body); *United States v. Osorto*, 995 F.3d 801, 819 (11th Cir. 2021) (noting the Sentencing Commission's expertise); *United States v. Alexander*, 556 F.3d 890, 893 (8th Cir. 2009) (same); *United States v. Kennedy*, 32 F.3d 876, 889 (4th Cir. 1994) (same).

<sup>155</sup> See 28 U.S.C. § 991(b)(1) (listing the purposes of the Sentencing Commission). The unambiguous language of this statute and the legislative history of the creation of the Sentencing Commission support the notion that Congress intended to enable the Sentencing Commission to carry out these purposes. See *id.* (providing the Sentencing Commission with broad purposes and goals to achieve); 129 CONG. REC. 2090 (1983) (statement of Sen. Kennedy) (describing the SRA's potential to create a system out of the then-existing "nonsystem" of federal sentencing).

<sup>156</sup> See 28 U.S.C. § 994(t) (stating that the Sentencing Commission "shall describe what should be considered extraordinary and compelling reasons"); Berry, *supra* note 144, at 1748 (arguing that given Congress's grant of authority to the Sentencing Commission, the Sentencing Commission's policy statements should supersede any court's conflicting understanding of extraordinary and compelling reasons). The Supreme Court appears to recognize the Sentencing Commission's authority to resolve this circuit split as evidenced by its denial of certiorari in cases where the Department of Justice argued that the Supreme Court should allow the Sentencing Commission to decide the matter rather than the Court. Compare Brief for the United States in Opposition to Grant of Certiorari, *Jarvis v. United States*, No. 21–568, 2021 WL 5864543, at \*12 (U.S. Dec. 8, 2021) (arguing that certiorari should be denied because the Sentencing Commission could update its policy statement and render any decision by the Court fruitless), with *Jarvis v. United States*, 142 S.Ct. 760, 760 (2022) (denying cert.); compare Memorandum for the United States in Opposition to Grant of Certiorari, *Thacker v. United States*, No. 21–877, 2022 WL 467984, at \*2 (U.S. Feb. 14, 2022) (noting that if the Sentencing Commission issues a policy statement addressing non-retroactive law changes, the Supreme Court may issue a decision depriving the policy statement of its significance), with *Thacker v. United States*, 142 S. Ct. 1363, 1363 (2022) (denying cert.).

Sentencing Commission's policy statement amendments, the Third and Fifth Circuits delegitimize the Sentencing Commission's authority, which could lead district courts to assume too much discretion in sentencing, one of the factors that led to the creation of the Sentencing Commission in the first place.<sup>157</sup>

*B. Compassionate Release Is a Safety Valve and Must Be Treated as Such*

As its analytical framework suggests, compassionate release is an extraordinary measure, far different from allowing every defendant who would receive a shorter sentence today under the First Step Act to challenge their sentence.<sup>158</sup> Between January and September of 2024, approximately 2,200 motions for compassionate release were filed, and over eighty percent of them were denied.<sup>159</sup> Of the 467 defendants receiving sentence reductions in this period, only ninety-two received sentence reductions due to unusually long sentences or a change in the law under the new policy statement.<sup>160</sup> Compare these ninety-two defendants to the roughly 2,700 defendants *a year* convicted of violating 18 U.S.C. § 924(c), one of the statutes amended by the First Step Act.<sup>161</sup> To equate these rare instances with usurping Congress's non-retroactive directive is to tremendously overstate the breadth of compassionate release in this country.<sup>162</sup> The Sentencing Commission also requires more than just a sen-

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<sup>157</sup> See 129 CONG. REC. 2090 (1983) (statement of Sen. Kennedy) (stating in his introduction of the Sentencing Reform Act that indeterminate sentencing was the direct result of too much judicial discretion); Gertner, *supra* note 35, at 698 (stating that it was in response to the indeterminate sentencing system—enabled by wide judicial discretion—that the Sentencing Commission and other sentencing reforms were promulgated).

<sup>158</sup> See S. REP. NO. 98-225, at 121 (1983) (calling different types of sentence modifications, including compassionate release, safety valves); *United States v. Davis*, 99 F.4th 647, 657 (4th Cir. 2024) (noting that compassionate release is a safety valve for when no statutory remedy exists but extraordinary and compelling reasons justify a reduction); *United States v. Ferguson*, 55 F.4th 262, 271 (4th Cir. 2022) (referring to compassionate release as a safety valve); *United States v. Chen*, 48 F.4th 1092, 1098 (9th Cir. 2022) (same); *United States v. Ruvalcaba*, 26 F.4th 14, 26 (1st Cir. 2022) (same). After the Sentencing Reform Act eliminated federal parole, Congress desired an alternative method of examining and potentially modifying sentences and compassionate release met this need. See Michael T. Hamilton, *Opening the Safety Valve: A Second Look at Compassionate Release Under the First Step Act*, 90 FORDHAM L. REV. 1743, 1751 (2022) (explaining the impetus behind making compassionate release available).

<sup>159</sup> *United States Sentencing Commission Compassionate Release Data Report*, *supra* note 62.

<sup>160</sup> *Id.* Often, the court pointed to multiple reasons, with rehabilitation as a reason in 15.2% of granted motions. *Id.* Terminal illness was a factor in 8% of granted motions. *Id.*

<sup>161</sup> *QuickFacts: 18 U.S.C. § 924(c) Firearms Offenses*, U.S. SENT'G COMM'N (2023), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Section\\_924c\\_FY23.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Section_924c_FY23.pdf) [<https://perma.cc/NA58-LKFU>]. As discussed in previous sections of this Note, § 403 of the First Step Act amended § 924(c), reducing mandatory minimums for certain drug crimes. See Pub. L. No. 115-391, § 403, 132 Stat. 5194, 5221 (2018) (amending § 924(c) to change mandatory minimums for drug-related felonies); *supra* note 84 and accompanying text.

<sup>162</sup> See *Chen*, 48 F.4th at 1100 (noting that compassionate release is not the same as automatic resentencing); *Ruvalcaba*, 26 F.4th at 27 (distinguishing between compassionate release and the automatic voiding and resentencing of an entire class of defendants); *United States v. McGee*, 992 F.3d

tencing disparity to warrant compassionate release, as defendants must still demonstrate additional extraordinary and compelling reasons and a gross disparity in their sentence to succeed.<sup>163</sup>

Considering the role of compassionate release as a remedy for no longer equitable sentences, it is hard to imagine a more inequitable sentence than one that the government itself no longer deems appropriate.<sup>164</sup> There is little justification for imprisoning one person in 1990 for forty-two years and imprisoning another person for twenty-seven years or less for the same crime today—compassionate release should rightly be used for these most grievous and inexplicable cases.<sup>165</sup>

### *C. Health Conditions in Prison and the Injustice of Mass Incarceration*

Poor conditions in prison have serious negative impacts on incarcerated individuals.<sup>166</sup> Overcrowding often contributes to mental health issues and the easier spread of infectious diseases, exemplified by the COVID-19 pandem-

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1035, 1047 (10th Cir. 2021) (agreeing with the Fourth Circuit's decision in *McCoy* that allowing non-retroactive changes in the law to be considered only affords relief in the most grievous cases); *United States v. McCoy*, 981 F.3d 271, 287 (4th Cir. 2020) (stating that only defendants who reach the heightened standard of extraordinary and compelling reasons will be eligible for sentence reductions).

<sup>163</sup> See U.S.S.G. § 1B1.13(b)(6) (requiring that a defendant have served ten years of their sentence, that there is a gross disparity between the sentence they received and one they might have received today, and that the court consider the defendant's individual circumstances before they can treat a non-retroactive change in the law as an extraordinary and compelling reason).

<sup>164</sup> See Pub. L. No. 115-391, § 401 (reducing the mandatory minimum sentence of twenty years for defendants who had a prior felony drug conviction to fifteen years); *id.* § 403 (amending § 924(c) to change mandatory minimums for drug-related felonies, stating that a twenty-five-year mandatory minimum for such offenses will only apply if the defendant has already received a final conviction for the same crime previously); see also *McCoy*, 981 F.3d at 285 (discussing the change in what Congress now deems an appropriate sentence for violations of § 924(c)).

<sup>165</sup> See *United States v. Rutherford*, 120 F.4th 360, 362 (3d Cir. 2024) (describing Rutherford's argument that he received a forty-two-year sentence and that if sentenced today, he would have received a sentence at least eighteen years less), *cert. granted*, No. 24-820, 2025 WL 1603603 (2025). The difference that eighteen years makes is incredibly consequential; although forty-two years is referred to as a de facto life sentence by the United States Sentencing Commission, twenty-seven years provides a greater opportunity for one to experience release from prison. See *Life Sentences in the Federal System* 10, U.S. SENT'G COMM'N (Feb. 2015), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226\\_Life\\_Sentences.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf) [<https://perma.cc/CDY9-JMBW>] (using 470 months—just under forty years—as a barometer for when a sentence becomes a de facto life sentence).

<sup>166</sup> See Morag MacDonald, *Overcrowding and Its Impact on Prison Conditions and Health*, 14 INT'L J. PRISONER HEALTH 65, 65 (2018) (discussing the negative impacts of prison overcrowding, including unsanitary conditions and violence that harm physical and mental health); A. Binswanger, P. M. Krueger & J. F. Steiner, *Prevalence of Chronic Medical Conditions Among Jail and Prison Inmates in the USA Compared With the General Population*, 63 J. EPIDEMIOLOGY & CMTY. HEALTH 912, 912 (2009) (concluding that compared to the general populations, inmates bore a greater burden of "most chronic medical conditions").

ic.<sup>167</sup> Prisoners often exhibit poorer physical and mental health than the general population, attributed to the poverty that many prisoners experience prior to their incarceration.<sup>168</sup> Compassionate release offers chronically or terminally ill inmates an opportunity to leave these conditions behind and begin to recover or be made more comfortable in their final days.<sup>169</sup> Chronically ill inmates, like Daniel Rutherford with obesity and hypertension, should be able to bolster their argument for release by drawing the court's attention to non-retroactive sentencing reforms that dramatically reduce penalties imposed for their crimes today.<sup>170</sup>

The crisis of mass incarceration and deep racial disparities in the American criminal justice system offer further impetus to permit defendants to utilize non-retroactive sentencing reforms in their motions for compassionate release.<sup>171</sup> By the end of 2023, more than a million people were incarcerated in

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<sup>167</sup> See MacDonald, *supra* note 166, at 65 (noting that overcrowding often leads to the spread of infectious diseases); *Key Insights: COVID-19 in Correctional and Detention Facilities*, PANDEMIC OVERSIGHT, <https://www.pandemicoversight.gov/oversight/our-publications-reports/key-covid-19-insights-in-correctional-and-detention-facilities> [<https://perma.cc/9PWA-KGNW>] (attributing higher COVID-19 deathrates in prisons to overcrowding, shared facilities, and close quarters). As mentioned earlier, prisoners died from COVID-19 at a rate three and a half times that of the general population. See Flagg, *supra* note 66 (describing COVID-19 death rates compared to the general population).

<sup>168</sup> See ROBERT B. GREIFINGER, PUBLIC HEALTH BEHIND BARS: FROM PRISONS TO COMMUNITIES 4 (2022) (attributing prisoners' high rates of transferrable diseases such as sexually transmitted diseases to poverty and drug abuse and attributing chronic diseases and mental illness to poverty). Greifinger notes that prison healthcare is often compromised by scarce resources, professional isolation, and pressure for providers to adhere to the punitive nature of prison environments. *Id.* at 5. Diabetes, asthma, and hypertension are a few of the chronic health conditions described as often afflicting inmates. *Id.* at 4.

<sup>169</sup> See U.S.S.G. § 1B1.13(b)(1) (listing that the medical conditions of a defendant can be considered extraordinary and compelling reasons). Medical conditions that may be extraordinary and compelling reasons include terminal illnesses, serious physical or medical conditions, cognitive impairments, deteriorating physical or mental health due to aging, or conditions that require specialized or long-term care that the prison facility is not providing. *Id.* In this section, the Sentencing Commission also identified that circumstances when a prisoner is at imminent risk of death or serious medical complications from an ongoing disease outbreak or declared public health may be considered extraordinary and compelling reasons. *Id.*

<sup>170</sup> See *Rutherford*, 120 F.4th at 369 (describing Rutherford's argument for compassionate release, including a combination of factors such as his obesity and hypertension, his susceptibility to COVID-19, and non-retroactive law changes). Had Rutherford been permitted to rely on the First Step Act's reforms to the penalty for his charged crime in concert with his health vulnerabilities, the district court may have come out differently on his motion. See *id.* at 380 (affirming the district court's denial of Rutherford's motion for compassionate release).

<sup>171</sup> See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 6 (2012) (noting that no other country imprisons more of their racial minorities than the United States). In her pathbreaking book, *The New Jim Crow*, Alexander argued that although we have abandoned the outright caste systems imposed by slavery and the Jim Crow era, mass incarceration has emerged as a new form of racial caste. See *id.* at 13 (comparing the current system of mass incarceration of Black people to slavery and the Jim Crow era). The War on Drugs, instituted under the Reagan administration through the 1980s, has been credited with beginning a system of control over specific racial groups, where the criminal justice system targets and punishes Black people disproportionately. See Michael L. Rosino & Matthew W. Hughey, *The War on Drugs, Racial*

U.S. prisons, giving the country the third highest rate of incarceration in the world.<sup>172</sup> Although Black people represent only 13.7% of the American population, they account for over 38% of the federal prison population.<sup>173</sup> Of the 153,746 total individuals in federal prisons, 65% are incarcerated for drug or weapons offenses—offenses for which Sections 401 and 403 of the First Step Act reduced penalties.<sup>174</sup> Nevertheless, because Congress made these reforms non-retroactive, federal prisoners sentenced before the Act are excluded from any relief.<sup>175</sup> When incarceration disproportionality punishes Black communities and perpetuates racial injustice, it is necessary to provide some avenue for relief.<sup>176</sup> Allowing courts to consider non-retroactive law changes like Sections 401 and 403 as a factor in the extraordinary and compelling analysis offers a modest but meaningful remedy for these wrongs.<sup>177</sup>

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*Meanings, and Structural Racism: A Holistic and Reproductive Approach*, 77 AM. J. ECON. & SOCIO. 849, 850–51 (2018) (describing the War on Drugs and its impacts on the criminal justice system). This system of racialized control perpetuates racial inequalities in criminal justice and has led to the mass incarceration of racial minorities. *See id.* at 851 (outlining the ramifications of the War on Drugs and the racialized system of social control it created).

<sup>172</sup> *See* Derek Mueller, *Prisons Report Series*, BUREAU JUST. STAT. (2024) (noting that the U.S. prison population was 1,254,200 by the end of 2023); *Mass Incarceration Trends*, SENT’G PROJECT (May 21, 2024), <https://www.sentencingproject.org/reports/mass-incarceration-trends/> [<https://perma.cc/4TEG-7YU2>] (comparing incarceration rates in the United States with other countries). The United States has an incarceration rate of 531 per one hundred thousand people, with only Cuba and Rwanda with higher rates of 794 and 637 respectively. *Mass Incarceration Trends*, *supra*.

<sup>173</sup> *Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/RHI225223> (on file with author); *Inmate Statistics: Inmate Race*, FED. BUREAU PRISONS, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_race.jsp](https://www.bop.gov/about/statistics/statistics_inmate_race.jsp) [<https://perma.cc/K2DT-D8T7>] (Mar. 22, 2025).

<sup>174</sup> *See* Pub. L. No. 115-391, § 401, 132 Stat. 5194, 5220 (2018) (reducing and restricting certain sentences for drug felonies); *id.* § 403 (amending § 924(c) to change mandatory minimums for drug-related felonies); *see also Quick Facts*, *supra* note 173 (reporting that 43.6% of inmates had been convicted of drug offenses and 22% of inmates had been convicted of weapons, explosive, and arson charges). These two classes of offenses compose the overwhelming majority of crimes resulting in federal imprisonment. *Id.*

<sup>175</sup> *See* Pub. L. No. 115-391, § 401 (stating that the section and its amendments would apply only to an offense committed before the Act if a sentence for it had not yet been imposed at the date of the section’s enactment); *id.* § 403 (employing the same statutory language as § 401 to exclude its application to already-sentenced defendants).

<sup>176</sup> *See Mass Incarceration*, ACLU, <https://www.aclu.org/issues/smart-justice/mass-incarceration> [<https://perma.cc/9H33-CZB9>] (noting that Black people are incarcerated for drug offenses at a rate ten times higher than white people despite similar amounts of drugs use across both races); *Racial Disparity*, NAT’L ASS’N CRIM. DEF. LAWS., <https://www.nacdl.org/Landing/RacialDisparity> [<https://perma.cc/GAS5-BB9S>] (discussing how the same criminal system created after the Civil War to maintain control over Black people still exists today).

<sup>177</sup> *See* U.S.S.G. § 1B1.13(b)(6) (permitting the consideration of non-retroactive changes in law as extraordinary and compelling reasons, provided other conditions are met). Of the compassionate release motions granted between October and December 2024, 47.6% were filed by Black inmates, and 21% of these motions were granted. *See United States Sentencing Commission Compassionate Release Data Report*, *supra* note 62. In the same period, white inmates filed 29.7% of motions, with 16% of them granted and Hispanic inmates filed 19.2% of motions with 21% of them granted. *Id.*



### *D. Congress Needs to Clarify the Sentencing Commission's Role*

A congressional amendment clarifying the scope of the Sentencing Commission's authority to define extraordinary and compelling reasons could help resolve this conflict.<sup>178</sup> For example, within the statute assigning the Sentencing Commission its responsibilities, 28 U.S.C. § 994(t), Congress could either insert that non-retroactive law changes may be considered along with other factors, or it could add that they may not be considered, similarly to the language barring rehabilitation alone from being an extraordinary and compelling reason.<sup>179</sup> Congress has clarified the role of the Sentencing Commission by amending Section 994 before, with a 2003 amendment requiring sentencing courts to report their imposed sentences to the Sentencing Commission and the Sentencing Commission to make this data available to Congress and other governmental bodies.<sup>180</sup>

On January 30, 2025, Daniel Rutherford filed a petition for certiorari with the Supreme Court, and the Court granted it on June 9, 2025.<sup>181</sup> In an ideal world, Congress, rather than the judiciary, would resolve this issue as Congress

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<sup>178</sup> See BENJAMIN M. BARCZEWSKI & JOHNATHAN M. GAFFNEY, CONG. RSCH. SERV., LRB11197, *CORNER POST AND THE STATUTE OF LIMITATIONS FOR ADMINISTRATIVE PROCEDURE ACT CLAIMS 5* (2024), <https://crsreports.congress.gov/product/pdf/LSB/LSB11197> [<https://perma.cc/PUR9-NPJL>] (stating that in the *Corner Post* decision, the Supreme Court left Congress with the opportunity to amend certain regulatory statutes to alter the statute of limitations for administrative claims). In 2024, in *Corner Post v. Board of Governors of the Federal Reserve System*, the Supreme Court held that civil suits against the government under the Administrative Procedure Act (APA) accrued once an injury to the plaintiff occurs, extending the statute of limitations for many plaintiffs seeking relief under the APA. *Id.* at 1; 144 S. Ct. 2440, 2450 (2024).

<sup>179</sup> See 28 U.S.C. § 994(t) (outlining the purpose and duties of the Sentencing Commission). Because the Sentencing Commission relies upon its authority designated under this statute, it would be the proper place for Congress to focus its action. See Sentencing Guidelines for United States Courts, 88 Fed. Reg. 28254, 28256 (May 3, 2023) (citing § 994(t) as authority for the Sentencing Commission's role of defining extraordinary and compelling reasons). Another potential source for authority to amend could be the compassionate release statute itself, but because Congress delegated the authority to define extraordinary and compelling reasons to the Sentencing Commission, the source of this authority in § 994 is likely a better place for clarification. See 18 U.S.C. § 3582(c)(1)(A) (providing that extraordinary and compelling reasons may warrant a sentence modification).

<sup>180</sup> See 28 U.S.C. § 994 (2003) (amending 28 U.S.C. § 994(w) (1994)). The 2003 amendment to the statute added to a provision requiring courts to report the sentences they imposed to include the judgment and commitment order, a statement of the reasons for the sentence imposed, plea agreements, the charging documents, presentence reports, or any other documents the Sentencing Commission deems appropriate. *Id.* § 994(w). Additionally, the amendments require the Sentencing Commission to make this data available to the House and Senate Committees on the Judiciary and the Attorney General. *Id.* The Sentencing Commission must compile an annual analysis of the documents it receives and submit it to Congress, including recommendations for laws that are warranted by the Sentencing Commission's analysis and any districts that have not provided all the required information. *Id.*

<sup>181</sup> See Notice from U.S. Supreme Court, *United States v. Rutherford*, 120 F.4th 360 (2024) (No. 23-1904) (noting that Rutherford had filed a petition for review with the Supreme Court); Notice of U.S. Supreme Court Disposition at No. 24-820, *United States v. Rutherford*, 120 F.4th 360 (2025) (granting certiorari).

created the Sentencing Commission and is in the best position to define its role.<sup>182</sup> Congress also enacted the First Step Act and is best situated to effectuate its intent regarding compassionate release.<sup>183</sup> Nevertheless, we now await the highest Court's decision on this matter and anticipate the reverberative effect it will have on future defendants seeking compassionate release.<sup>184</sup>

### CONCLUSION

The ongoing circuit split over whether non-retroactive changes in sentencing laws can constitute extraordinary and compelling reasons for compassionate release has created a fundamental inconsistency in the application of justice. The Sentencing Commission's 2023 policy statement amendments sought to clarify this issue, but resistance from certain circuit courts has only deepened the divide, raising serious questions about the Sentencing Commission's authority and the integrity of compassionate release as a mechanism for relief. Compassionate release was never meant to be a broad remedy, existing to correct the most egregious and inequitable sentences—precisely the kind created by sentencing reforms drastically changing the prescribed penalties for certain crimes. If a defendant's circumstances are otherwise extraordinary and compelling, courts should not be barred from considering whether their sentence is far longer than what they would receive today. Because the Supreme Court appears to have beaten Congress to the punch in resolving this issue, we will receive a hastened answer to the question of whether nonretroactive laws may be a factor in the extraordinary and compelling analysis. It unfortunately may not be the just answer.

KALLIE POLGREAN

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<sup>182</sup> See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2032 (1984) (codified as amended at 18 U.S.C. §§ 3551–3559, 3561–3566, 3571–3574, 3581–3586, & 28 U.S.C. §§ 991–998 (1988)) (creating the Sentencing Commission).

<sup>183</sup> See Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239 (2018) (permitting defendants to file their own motions for compassionate release).

<sup>184</sup> See Parkes, *supra* note 137 (noting that in the time between potential congressional action and Supreme Court review, representation is needed to develop good case law in the circuit courts). Many online platforms provide guidance to criminal defendants seeking to obtain sentence reductions that will likely adapt as case law develops. See, e.g., *Sentence Reductions for Federal Inmates and Defendants*, ROBERT M. HELFEND ATT'Y L., <https://criminaldefenselawventura.com/federal-defense/sentence-reductions/> [<https://perma.cc/Y75R-DH2W>] (advertising legal assistance in filing for compassionate release).