

# COMPELLING COMPASSION: NAVIGATING FEDERAL COMPASSIONATE RELEASE AFTER THE FIRST STEP ACT

**Abstract:** Prior to the First Step Act, compassionate release was rarely utilized in the federal criminal justice system. Upon the Act's passage, the federal judiciary took a more significant role in assessing motions for compassionate release. The number of motions for compassionate release swelled as the COVID-19 pandemic became a major public health crisis in the United States, especially in prisons. Many, but not all, federal district courts departed from prior administrative guidelines that were not consistent with the statutory language of the First Step Act. These differing levels of discretion have created an inconsistent patchwork of case law across the federal judiciary. This Note surveys the variety of district court rationales for granting or denying motions for compassionate release. Given the purpose and legislative intent of the First Step Act, this Note argues that district courts should continue to exercise broad discretion to determine whether compassionate release is appropriate. It also argues that future compassionate release administrative guidance should allow courts broad discretion on whether to grant compassionate release, subject to appellate review.

## INTRODUCTION

Does a blind man battling late-stage cancer with mere months to live sound like someone who belongs in a prison?<sup>1</sup> In Kevin Zeich's case, the federal Bureau of Prisons (BOP) thought so.<sup>2</sup> Zeich's life expectancy was less than half of his remaining prison sentence.<sup>3</sup> Zeich and his daughter had worked furiously to take advantage of compassionate release, which would allow Zeich to live his final days outside of federal prison.<sup>4</sup> Zeich's first three requests for release were denied or went unanswered.<sup>5</sup> After months of effort, the BOP granted Zeich's fourth request for release.<sup>6</sup> Zeich's daughter was told to

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<sup>1</sup> See Christie Thompson, *Frail, Old and Dying, but Their Only Way Out of Prison Is a Coffin*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/us/prisons-compassionate-release.html> [<https://perma.cc/ZYB2-T4FV>] [hereinafter Thompson, *Frail, Old and Dying*].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* Zeich was serving twenty-seven years for drug-related offenses. *Id.* At the time of his death, while petitioning for release, Zeich had less than three and a half years left of his sentence. *Id.*

<sup>4</sup> *Id.* In addition to his cancer and blindness, Zeich sought early release from prison due to his near-complete inability to eat. *Id.* Zeich was suffering from advanced bile duct cancer. Christie Thompson, *Old, Sick and Dying in Shackles*, THE MARSHALL PROJECT (Mar. 7, 2018), <https://www.themarshallproject.org/2018/03/07/old-sick-and-dying-in-shackles> [<https://perma.cc/4EGS-SQVL>] [hereinafter Thompson, *Old, Sick and Dying in Shackles*].

<sup>5</sup> Thompson, *Frail, Old and Dying*, *supra* note 1.

<sup>6</sup> *Id.*

expect her father home the next day.<sup>7</sup> But the following morning, Zeich's daughter received another phone call: her father had died.<sup>8</sup>

Stories like Zeich's are appallingly common.<sup>9</sup> Compassionate release, generally speaking, is the mechanism by which incarcerated persons are released from prison prior to the end of a sentence.<sup>10</sup> The layman's understanding of compassionate release is mostly accurate; persons granted compassionate release are usually very elderly or severely ill.<sup>11</sup> Compassionate release helps the government reduce the prison population and avoid the costs of housing elderly or ill inmates.<sup>12</sup> Furthermore, advocates for reform question the humanity of leaving elderly or ill inmates to die in jail, especially when they present a minimal recidivism risk.<sup>13</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* Thompson's article recounts the stories of several terminally ill and elderly inmates who died awaiting compassionate release. *Id.* In another example, Anthony Bell had one year left on a sixteen-year sentence for drug offenses. *Id.* Doctors informed Bell that he had less than six months to live due to lupus and liver failure. *Id.* Prison officials claimed this diagnosis was inaccurate, and that Bell had significantly longer to live. *Id.* Two days after the denial, which came six months after Bell made his request, Bell died in prison. *Id.*

<sup>10</sup> See 18 U.S.C. § 3582(c) (providing that a court can reduce a federal prison sentence for certain elderly inmates or inmates who present an "extraordinary and compelling" circumstance). The statutory language does not use the phrase "compassionate release." See *id.* (providing the statutory basis for sentence "modification"). Rather, the statutory title is "Modification of an Imposed Term of Imprisonment." *Id.* Therefore, the commonly used term "compassionate release" is technically a "misnomer." United States v. Brooker, 976 F.3d 228, 237 (2d Cir. 2020). Other common terms such as "reduction in sentence" and "sentence reduction" refer to the same mechanism. See BOP PROGRAM STATEMENT 5050.50, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582 AND 4205(G), U.S. DEP'T OF JUST. 1–2 (2019) [hereinafter BOP PROGRAM STATEMENT 5050.50] (noting the interchangeability of several terms that refer to the same early release mechanism).

<sup>11</sup> See 18 U.S.C. § 3582(c)(1)(A) (enabling a court to grant compassionate release to an inmate who presents an "extraordinary and compelling [circumstance] . . . or [who] . . . is at least 70 years of age, has severed at least 30 years in prison"); U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1 (U.S. SENT'G COMM'N 2018) [hereinafter 2018 GUIDELINES MANUAL] (mandating that compassionate release is appropriate for certain medical circumstances, for elderly inmates, for inmates with extraordinary family circumstances, or any other circumstance the BOP deems "extraordinary and compelling" (emphasis omitted)).

<sup>12</sup> See OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., THE IMPACT OF AN AGING INMATE POPULATION ON THE FEDERAL BUREAU OF PRISONS 10–11, 41 (2015), <https://oig.justice.gov/reports/2015/e1505.pdf> [<https://perma.cc/QE4J-JPEQ>] [hereinafter DOJ OIG 2015 AGING INMATES MEMO] (discussing the costs of housing elderly inmates, such as hiring more medical personnel or requiring more frequent supervision of inmates, and suggesting the use of compassionate release to reduce such costs); Jalila Jefferson-Bullock, *Quelling the Silver Tsunami: Compassionate Release of Elderly Offenders*, 79 OHIO ST. L.J. 937, 942 (2018) (discussing the "unsustainable fiscal and social costs" of incarcerating elderly offenders).

<sup>13</sup> See Jefferson-Bullock, *supra* note 12, at 974 (noting that recidivism risk "drops dramatically" from age twenty onward and continues to drop as individuals approach eighty (quoting KIDEUK KIM & BRYCE PETERSON, AGING BEHIND BARS: TRENDS AND IMPLICATIONS OF GRAYING PRISONERS IN THE FEDERAL PRISON SYSTEM 1, 5 (Apr. 5, 2014), <https://www.urban.org/sites/default/files/publication/>

Following the “tough on crime” politics of the 1980s, the federal prison population grew at breakneck speed.<sup>14</sup> Longer sentences led to an older prison population.<sup>15</sup> Despite these conditions, compassionate release was relatively rare until 2019.<sup>16</sup> Under the compassionate release system that existed until the end of 2018, wardens could hold up requests for months by simply refusing or neglecting to act on them.<sup>17</sup> Between 2013 and 2017, some 266 eligible inmates died while their requests collected dust.<sup>18</sup> Prison officials’ hesitance to grant compassionate release, especially to the ill and elderly, has significant consequences for the prison system.<sup>19</sup> Many prison facilities are populated well

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33801/413222-Aging-Behind-Bars-Trends-and-Implications-of-Graying-Prisoners-in-the-Federal-Prison-System.PDF [https://perma.cc/4B46-CHQ2]).

<sup>14</sup> *Statistics*, FED. BUREAU OF PRISONS, <https://www.bop.gov/about/statistics/> [https://perma.cc/H4FR-LZWD] [hereinafter *BOP Population Statistics*]. The federal prison population increased yearly starting in 1980 and did not decrease until 2014. *Id.* Often, these annual increases were in the thousands, with a peak increase of 11,447 persons in 2001. *Id.* Since Congress passed the Comprehensive Crime Control Act in 1984 through the end of 2019, the federal prison population increased at an average rate of 6,199 inmates per year. *Id.* Despite the intense political focus on criminal justice in the 1980s, mass incarceration was a pressing issue long before then. *See generally* Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949 (2019) (discussing how criminal law has historically taken up substantial space in American political discourse, and how this resulted in the growth of the scope of criminal law in the United States throughout the twentieth century).

<sup>15</sup> *See* Lindsey E. Wylie, *Extraordinary and Compelling: The Use of Compassionate Release Laws in the United States*, 24 PSYCH. PUB. POL’Y & L. 216, 217 (2018) (explaining that longer sentences drove the increase in the average age of the federal prison population). In addition to being literally older, prison conditions generally exacerbate health complications such that inmates are considered “old” at younger ages. *Id.* To illustrate by example, the health of a fifty-five-year-old member of the prison population is roughly equivalent to the health of a sixty-five-year-old member of the general population. *See id.* (providing comparisons of general health outlooks for similarly aged persons in and out of prison); *see also* *Public Hearing on Compassionate Release and Conditions of Supervision Before the U.S. Sent’g Comm’n* 3 (2016) (statement of Brie Williams, Associate Professor of Medicine, UC San Francisco), <https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160217/williams.pdf> [https://perma.cc/65NG-D5Y7] [hereinafter Williams, *Statement Before U.S. Sentencing Commission*] (summarizing the “accelerated aging” phenomenon in prison populations).

<sup>16</sup> OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., THE FEDERAL BUREAU OF PRISONS’ COMPASSIONATE RELEASE PROGRAM 11 (2013), <https://oig.justice.gov/reports/2013/e1306.pdf> [https://perma.cc/HZ2U-AGM7] [hereinafter DOJ OIG 2013 COMPASSIONATE RELEASE MEMO] (noting the BOP’s mismanagement of the compassionate release program, the lack of expediency in processing release requests, the inconsistent standards for evaluating release request across prisons, and the lack of resources informing potentially eligible inmates about the program).

<sup>17</sup> *Id.* at 27–28. Although BOP policy requires that the BOP “expedite” compassionate release requests, the OIG found that some requests took over five months to process, and there was no consistent timeliness standard across facilities to process such requests. *Id.* The report does not explicitly assess why these delays occur, but it notes that BOP staff feel that the individual circumstances underlying each request make uniform timeliness standards impracticable. *Id.* at 28.

<sup>18</sup> *See* Thompson, *Frail, Old and Dying*, *supra* note 1 (utilizing BOP data collected by *The New York Times* and The Marshall Project).

<sup>19</sup> *See* Wylie, *supra* note 15, at 217 (recounting a 330% increase in the number of elderly incarcerated persons in the federal system between 1994 and 2011, and summarizing factors like chronic health conditions which contribute to greater healthcare expenditures in the prison system).

over capacity as a result of harsh mandatory minimums and continuously shrinking prospects of early release.<sup>20</sup> Overcrowding can strain prison resources leading to horrid results, such as months- or years-long wait times for basic medical care.<sup>21</sup> This problem is only exacerbated by the increased age of inmates, as elderly inmates require more costly treatment and day-to-day supervision than younger inmates.<sup>22</sup>

Beyond these tangible concerns, incarcerating ill and elderly inmates until death serves no legitimate penological purpose.<sup>23</sup> Persons granted compassionate release tend to have significantly lower rates of recidivism compared to

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<sup>20</sup> See NATHAN JAMES, CONG. RSCH. SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OPTIONS FOR CONGRESS 1 (2016), <https://sgp.fas.org/crs/misc/R42937.pdf> [<https://perma.cc/XKH9-GYBF>] [hereinafter JAMES, THE FEDERAL PRISON POPULATION] (attributing the rise in the federal prison population to increasingly harsh federal criminal law and the elimination of federal parole); U.S. GOV'T ACCOUNTABILITY, BUREAU OF PRISONS: GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE 12–16 (2012), <https://www.gao.gov/assets/gao-12-743.pdf> [<https://perma.cc/QF2F-V2P9>] [hereinafter 2012 GAO REPORT] (finding that prison population growth consistently outpaces the growth of the capacity of BOP facilities).

<sup>21</sup> DOJ OIG 2013 COMPASSIONATE RELEASE MEMO, *supra* note 16, at 48. In addition to preventing timely access to medical care, a Government Accountability Office report discussed a number of other impacts of overcrowding, such as triple or quadruple bunking, long-term use of temporary beds, decreased rehabilitative program participation, and difficulty accommodating inmate visitation. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 20, at 18–21. The 2013 DOJ OIG memo notes that the degraded conditions have a profound negative impact on inmate rehabilitation. See DOJ OIG 2013 COMPASSIONATE RELEASE MEMO, *supra* note 16, at 48 (noting that rehabilitation outlooks decrease when inmates do not have access to comfortable facilities or meaningful participation in rehabilitative programs).

<sup>22</sup> See DOJ OIG 2015 AGING INMATES MEMO, *supra* note 12, at 10–11 (noting that the cost of housing an inmate increases up to \$5,000 per year as the inmate ages). In addition to understaffing problems, the 2015 DOJ OIG report found that the physical qualities of BOP facilities presented risks of harm to aging inmates, as prisons were not designed to accommodate the mobility and lifestyle of elderly prisoners. *Id.* at 23–24. The 2015 DOJ OIG memo also discussed issues with strict compassionate release criteria which only provided compassionate release for inmates aged seventy and above. See *id.* at 41 (discussing specifically how eligibility criteria excluded a large majority of the elderly prison population from pursuing compassionate release). The 2013 DOJ OIG memo further noted that despite efforts by the BOP to increase access to the efficiency of the compassionate release process, the use of compassionate release did not actually increase. *Id.* at 41–42.

<sup>23</sup> See generally Grace McCarten, *Jail While Frail: Examining Rationales for Incarcerating Aging and Infirm Criminals*, 27 ELDER L.J. 221 (2019) (noting that incarcerating elderly persons fails to deter criminal conduct, does not aid in reforming offenders, and serves no preventative or retributive role). In criminal law, “deterrence” refers to the process of discouraging certain acts or behaviors through punishment. See *Deterrence*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining deterrence as “the prevention of criminal behavior by fear of punishment”). See generally Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949 (2003) (providing a summary of how deterrence plays a role in criminal law by penalizing criminal conduct). “[S]pecific deterrence” pertains to disincentivizing an individual from engaging in criminal conduct and “general deterrence” aims to disincentivize the public at large from engaging in criminal conduct. *Deterrence*, BLACK’S LAW DICTIONARY, *supra*.

persons released from prison for other reasons.<sup>24</sup> Deterrence rationales, therefore, do not suffer when granting such release.<sup>25</sup> Congress appeared to recognize this when overhauling the compassionate release system with the First Step Act.<sup>26</sup> In light of these recent major changes to the federal compassionate release system and the rapidly increasing use of compassionate release due to COVID-19, this Note argues that a more liberal use of compassionate release is needed.<sup>27</sup> These “forces of law and nature” have presented judges with thousands of compassionate release motions.<sup>28</sup> Many judges have granted compassionate release for reasons unheard-of prior to the enactment of the First Step Act, such as sentencing inequities, and inmates’ extraordinary rehabilitation while incarcerated.<sup>29</sup>

Part I of this Note provides a brief history of the federal compassionate release system and an overview of how it functions.<sup>30</sup> Part II discusses how federal courts across the United States have interpreted the First Step Act’s

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<sup>24</sup> See DOJ OIG 2013 COMPASSIONATE RELEASE MEMO, *supra* note 16, at 49–51 (noting that persons granted compassionate release had a 3.5% recidivism rate, versus a 41% recidivism rate for the general population of federal inmates).

<sup>25</sup> See *id.* (indicating that compassionate release does not impede specific deterrence, as compassionately released offenders are not likely to reoffend). Upon review of the compassionate release program, the OIG found that of the 142 inmates who had been released between 2006 and 2011 only five were rearrested. DOJ OIG 2013 COMPASSIONATE RELEASE MEMO, *supra* note 16, at 49–50. Thus, the OIG data suggests that compassionate release does not undermine the deterrence of criminal conduct. See *id.*

<sup>26</sup> See *United States v. Brooker*, 976 F.3d 228, 234–35 (2d Cir. 2020) (finding that the First Step Act indicated congressional intent to increase the use of compassionate release).

<sup>27</sup> See Nicole Lewis, *Byron Miller’s Race Against Time*, THE MARSHALL PROJECT (Sept. 19, 2020), <https://www.themarshallproject.org/2020/09/19/byron-miller-s-race-against-time> [<https://perma.cc/45XR-R5C3>] (discussing former Attorney General Bill Barr’s order, issued in response to COVID-19, that eligible prisoners be released to home confinement).

<sup>28</sup> See *United States v. Jones*, 980 F.3d 1098, 1100–01 (6th Cir. 2020) (discussing how the COVID-19 pandemic resulted in a significant increase in the number of compassionate motions filed as inmates learned about compassionate release), *abrogated by* *United States v. Navarro*, 986 F.3d 668 (6th Cir. 2021). At the end of 2020, the BOP reported a 21,652 person decrease in the federal prison population. *BOP Population Statistics*, *supra* note 14. Although the BOP does not report why individuals are released, the massive number of compassionate release motions filed and decided in 2020 suggest that compassionate release played a significant role in this reduction. See *id.* (showing a downward trend in the federal prison population); *Jones*, 980 F.3d at 1100–01 (discussing the dramatic increase in the number of compassionate release motions filed since the First Step Act was enacted).

<sup>29</sup> See *Brooker*, 976 F.3d at 234–35 (holding that the First Step Act indicates congressional intent to broaden compassionate release criteria); see also *United States v. Vigneau*, 473 F. Supp. 3d 31, 36–38 (D.R.I. 2020) (finding that an “unusually long sentence” was one of several ““extraordinary and compelling” reasons” to grant the defendant’s request for compassionate release); *United States v. Perez*, No. 88-10094-1, 2020 WL 1180719, at \*3 (D. Kan. Mar. 11, 2020) (discussing how the defendant’s remarkably positive disciplinary record, although not dispositive, weighed heavily in favor of granting compassionate release); *United States v. Maumau*, No. 08-CR-00758-11, 2020 WL 806121, at \*7 (D. Utah Feb. 18, 2020) (granting compassionate release on the grounds that the defendant, if sentenced under a new criminal statutory regime, would face a lighter sentence).

<sup>30</sup> See *infra* notes 33–147 and accompanying text.

new compassionate release regime.<sup>31</sup> Part III argues that district courts should continue to exercise broad discretion to determine the circumstances that justify compassionate release, and that other branches of government should not limit this discretion.<sup>32</sup>

## I. THE EVOLUTION OF COMPASSIONATE RELEASE IN THE FEDERAL CRIMINAL SYSTEM

In general, federal courts do not have the power to modify a sentence once it is imposed.<sup>33</sup> Nevertheless, federal law has always provided mechanisms to reduce sentences.<sup>34</sup> The idea of “compassionate release” has existed for almost forty years.<sup>35</sup> Before compassionate release, federal inmates had access to parole that, in combination with “good time” credit, could result in a federal defendant serving only one-third of their imposed sentence.<sup>36</sup> Between

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<sup>31</sup> See *infra* notes 148–249 and accompanying text. Compare *Brooker*, 976 F.3d at 234 (holding that the First Step Act allows judges to consider a wider array of “extraordinary and compelling” circumstances to grant compassionate release), with *United States v. Bryant*, 996 F.3d 1243, 1247 (11th Cir. 2021) (disagreeing with the Second Circuit and holding instead that the First Step Act’s procedural changes did not affect substantive criteria for compassionate release).

<sup>32</sup> See *infra* notes 250–317 and accompanying text.

<sup>33</sup> See 18 U.S.C. § 3582(b)–(c) (indicating that the imposition of a sentence in a federal criminal proceeding is final except in extraordinary circumstances); *Dillon v. United States*, 560 U.S. 817, 819 (2010) (limiting a district court’s authority to reduce a sentence outside of sentencing guideline ranges).

<sup>34</sup> See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225–26 (1993) (providing a historical overview of judicial sentencing discretion and statutory parole regimes). Historically, courts had nearly unlimited discretion in sentencing matters, “a fact that proponents of mandatory [sentencing] guidelines have been reluctant to acknowledge.” *Id.* at 225. Although Congress curtailed this authority throughout the years with statutory constraints on sentencing discretion, incarcerated persons could still reasonably expect sentence reductions under the federal parole system. See *id.* at 226 (discussing how incarcerated persons became eligible for parole after serving a part of their sentence and exhibiting good behavior). In addition, “good time” credit could reduce the length of a sentence. *Id.* “Good time” refers to credit removed from an inmate’s sentence in recognition of good behavior while incarcerated. *Time*, BLACK’S LAW DICTIONARY *supra* note 23 (11th ed. 2019). Finally, and most rarely, the President may grant pardons in especially compelling circumstances. See generally Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Limits and, if Not, Should There Be?*, 51 ARIZ. ST. L.J. 71 (2019) (discussing the nearly-unlimited presidential pardon power).

<sup>35</sup> See 18 U.S.C. § 3582(c)(1) (providing the statutory basis for compassionate release sentence modification); Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 211, 98 Stat. 1837, 1987–99 (current version at 18 U.S.C. § 3553) (creating the federal early release system which would eventually become known as compassionate release).

<sup>36</sup> See Stith & Koh, *supra* note 34, at 225–27 (providing a brief overview of early release mechanisms in the federal criminal system); see also Act of June 25, 1910, ch. 387, § 1, 36 Stat. 819 (enacting the first federal parole system); Act of Mar. 3, 1875, ch. 145, § 1, 18 Stat. 479–80 (repealed 1984) (establishing the ability of federal inmates to receive good time credit). Good time still exists in the federal system, but in a different form than when it was first introduced. See 18 U.S.C. § 3624(b) (setting forth the system by which persons incarcerated for federal crimes periodically earn credit toward a reduction in their sentences for good behavior, but at a lower rate of accrual).

the creation of compassionate release and the passage of the First Step Act in 2018, however, federal prison authorities rarely pursued compassionate release, and courts rarely granted it.<sup>37</sup>

Section A of this Part provides an overview of the historic federal parole system, the predecessor to the compassionate release system.<sup>38</sup> Section B of this Part describes the compassionate release system that supplanted the federal parole system.<sup>39</sup> Section C outlines how the First Step Act, enacted in 2018, altered the federal compassionate release system and expanded the federal judiciary's role in determining the outcome of compassionate release motions.<sup>40</sup>

### A. The Pre-Compassionate Release Parole System

In the early days of the United States, the federal judiciary exercised near-unlimited discretion over sentencing matters, constrained only by maximum sentences codified in statute.<sup>41</sup> During the 1900s, sentence reductions and early release for federal inmates came solely in the form of presidential pardons and “‘good time’ credit.”<sup>42</sup> Starting in 1910, individual parole boards at each federal penitentiary controlled early release.<sup>43</sup> In 1930, Congress created a single

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<sup>37</sup> See DOJ OIG 2013 COMPASSIONATE RELEASE MEMO, *supra* note 16, at 11 (analyzing compassionate release data and finding that the BOP made very little use of compassionate release authority until 2018); *Hearing on Compassionate Release and the Conditions of Supervision Before the U.S. Sent’g Comm’n* (2016) (statement of Michael E. Horowitz, Inspector General, U.S. Dep’t of Just.), [https://oig.justice.gov/sites/default/files/2019-12/t160217\\_0.pdf](https://oig.justice.gov/sites/default/files/2019-12/t160217_0.pdf) [<https://perma.cc/KVQ3-L3UA>] (reiterating the findings in the 2013 DOJ OIG report in testimony to the Sentencing Commission).

<sup>38</sup> See *infra* notes 41–66 and accompanying text.

<sup>39</sup> See *infra* notes 67–117 and accompanying text.

<sup>40</sup> See *infra* notes 118–147 and accompanying text.

<sup>41</sup> See *Freeman v. United States*, 243 F. 353, 357 (9th Cir. 1917) (holding that the imposition of a sentence is solely within the discretion of trial courts and not reviewable on appeal). Appellate review of federal criminal sentences is almost nonexistent prior to the 1980s. See generally Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441 (1997) (discussing how the appellate courts’ role in sentencing issues has grown and shrunk alongside the role of a trial court’s discretion to make sentencing decisions).

<sup>42</sup> See Eckstein & Colby, *supra* note 34 (outlining sentence reductions via presidential pardons); Stith & Koh, *supra* note 34, at 225–27 (describing sentence reductions based on “‘good time’ credit”). Good time credit formally existed in the American legal system since the late 1800s. See Act of Mar. 3, 1875, ch. 145, 18 Stat. 479–80 (repealed 1984) (“An act to provide for deductions from the terms of sentence of United States prisoners.”). Good time credit effectively reduces a sentence for an incarcerated person if they demonstrate consistent good behavior while imprisoned. See *id.* (setting out the historic good time credit system); see also 18 U.S.C. § 3624(b) (providing the current good time credit system). Currently, federal inmates may earn up to 54 days of good time credit per year of their total sentence. *Id.*

<sup>43</sup> Act of June 25, 1910, ch. 387, 36 Stat. 819–21. This Act gave each parole board wide discretion to determine whether a defendant should be granted parole. *Id.* at 819. The key consideration was whether a potential parolee would reoffend or present a danger to American society at large. See *id.* (mandating a parole board prepare a report on whether a given inmate could “live and remain at liberty without violating the laws”).

unified Board of Parole, under the ambit of the Department of Justice.<sup>44</sup> Parole added uncertain variables to sentencing decisions.<sup>45</sup> Federal courts had the power to impose a sentence in accordance with statute, but with the option of parole, the judicially-imposed sentence essentially became the maximum possible sentence instead of the definite amount of time a defendant would serve.<sup>46</sup> After serving one-third of their sentence, a federal inmate became eligible for parole and, if granted, could avoid incarceration for the rest of their sentence.<sup>47</sup> Congress intended the system as a mechanism to incentivize rehabilitation, but some experts questioned the system's efficacy.<sup>48</sup>

Parole boards created a series of problems, one of which was inconsistency.<sup>49</sup> Similarly situated inmates often received different parole decisions because of the unchecked discretion afforded to parole decision-makers.<sup>50</sup> This disparity sabotaged incentives to behave well because inmates ultimately saw parole as a gamble.<sup>51</sup> Moreover, the proverbial parole deck seemed stacked

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<sup>44</sup> See Act of May 13, 1930, ch. 255, § 1, 46 Stat. 272 (establishing the Board of Parole).

<sup>45</sup> See Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 820–22 (1975) (discussing the “discretionary judgments of individual decisionmakers” that informed parole decisions, and the fact that parole decisions often came with no written explanations of a decision, which led to unchallenged discretion by parole officials).

<sup>46</sup> See Stith & Koh, *supra* note 34, at 227 (explaining that parole made federal prison sentences “partially indeterminate”).

<sup>47</sup> Act of June 25, 1910, ch. 387, § 1, 36 Stat. 819; see Act of May 13, 1930, ch. 255, § 2, 46 Stat. 272 (transferring powers of historic parole boards to new Board of Parole). In conjunction with good time credit, parole could effectively reduce a sentence by two-thirds. Stith & Koh, *supra* note 34, at 227. For example, an inmate serving a judicially imposed sentence of fifteen years could earn up to five years of good time credit, reducing the time served in prison to ten years. See *id.* (noting that two-thirds of a nominal sentence became the maximum sentence a given defendant would serve). The same inmate would become eligible for parole after five years. See *id.* (discussing how inmates became eligible for parole upon the completion of a third of a sentence). Thus, if that inmate were granted parole at five years, the inmate would serve only one third of their nominal fifteen-year sentence. See *id.* (noting that an inmate could be granted parole after a serving one-third of a nominal sentence, regardless of the total sentence imposed).

<sup>48</sup> Stith & Koh, *supra* note 34, at 227 (noting the conservative critique that parole is too lenient, and the liberal critique that parole is not implemented equitably). See generally Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22, 40–41 (1974) (collecting studies on the efficacy of parole, which provide differing viewpoints on whether parole incentivizes rehabilitation); Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011 (1991) (supporting the use of parole as incentive for rehabilitation because the possibility of reward incentivizes good conduct).

<sup>49</sup> See Stith & Koh, *supra* note 34, at 227 (discussing criticisms of parole based on “unwarranted disparity”—generally manifesting in the form of racial disparities—between similarly situated prisoners).

<sup>50</sup> See *id.* (discussing the problems that arise in criminal rehabilitation when sentences are inconsistent among similar persons, such as reduced incentive to rehabilitate and anxiety among inmates). See generally Joseph C. Howard, *Racial Discrimination in Sentencing*, 59 JUDICATURE 121 (1975) (recounting allegations of racial disparity in sentencing that resulted in harsher sentences for Black defendants).

<sup>51</sup> See Stith & Koh, *supra* note 34, at 227 (stating that inconsistent parole decisions “bred anxiety” among prisoners, who were ultimately unable to determine their chances of being granted parole).



against minority inmates.<sup>52</sup> The unchecked and unreviewable discretion afforded to parole officers exacerbated inequality in the criminal justice system.<sup>53</sup> Additionally, the parole system created perverse incentives for judges to impose extreme sentences.<sup>54</sup> Because the parole system could greatly reduce the amount of time a defendant served, judges compensated by inflating sentences to ensure adequate time served in prison.<sup>55</sup>

Without a meaningful system of review, parole officials were free to render sentencing and parole decisions as they pleased with little oversight.<sup>56</sup> Courts addressing federal parole cases were limited to discussing issues of conflicts of law, procedural concerns, or actionable gross errors in parole guideline applications.<sup>57</sup> The judiciary needed some guidance, or more precise-

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<sup>52</sup> *Id.* at 227 n.17 (citing Tom Wicker, *Judging the Judges*, N.Y. TIMES (Feb. 6, 1976), <https://www.nytimes.com/1976/02/06/archives/judging-the-judges-in-the-nation.html> [<https://perma.cc/JYR4-V39U>]); see Howard, *supra* note 50, at 121–22 (recounting the disproportionate use of the death penalty and harsh sentences against Black defendants).

<sup>53</sup> Stith & Koh, *supra* note 34, at 228 n.20 (first citing MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1973) [hereinafter FRANKEL, CRIMINAL SENTENCES] (providing an in-depth account of inconsistency in sentencing across the federal judiciary from a former federal district judge driven by the statutory capability to impose sentences within wide boundaries); and then citing Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972) [hereinafter Frankel, *Lawlessness in Sentencing*] (noting that historic criminal law did not impose a duty on judges to “refrain” from imposing vengeful punishments). Judge Marvin E. Frankel, a former federal district court judge for the Southern District of New York, described judicial sentencing authority as “almost wholly unchecked and sweeping,” which allowed parole officers to make decisions on unfair or discriminatory bases. FRANKEL, *supra*, at 5; see Zannino v. Arnold, 531 F.2d 687, 690 (3d Cir. 1976) (finding that the federal judiciary has limited discretion to review parole board decisions).

<sup>54</sup> See Project, *supra* note 45, at 812 (recounting the story of American soldier Eddie Slovik, who was executed after a court-martial sentenced him to death, even though members of the court-martial believed death was an extreme sentence and that Slovik would eventually be granted leniency).

<sup>55</sup> See *id.* (illustrating the phenomenon of “Slovik syndrome”—the artificial inflation of a sentence based on the expectation of future leniency—driving the inflation of sentences). For example, a judge might impose a thirty-year sentence, where parole is available after ten years, rather than a fifteen-year sentence, where parole is available after only five years. See *id.* (noting that judges tend to account for long-term prospects of early release in sentencing decisions).

<sup>56</sup> See Zannino, 531 F.2d at 690 (holding that federal parole decisions are not reviewable by courts); Criminal Procedure Project, *Sentencing, Probation, and Parole*, 75 GEO L.J. 1129, 1130–31 (1987) (discussing the lack of consistency and fairness in the parole system that motivated the creation of strict sentencing guidelines). Few, if any, examples of incarcerated persons successfully challenging sentencing and parole consistency exist. See *United States v. Addonizio*, 442 U.S. 178, 188–90 (1979), *superseded by statute*, 18 U.S.C. § 3624 (explaining that federal parole authorities were the in best position to determine when release was appropriate and minimizing the ability of judges to review parole decisions); *United States v. Grayson*, 438 U.S. 41, 47 (1978), *superseded by statute*, 18 U.S.C. § 3624 (holding that the Parole Commission may order release at almost any time if statutory requirements are met).

<sup>57</sup> See, e.g., *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 392–93 (1980) (outlining a class action claim that the government’s application of the Parole Release Guidelines to a class of federal inmates); *Morrissey v. Brewer*, 408 U.S. 471, 490 (1972) (holding that a federal parolee suffered an unconstitutional deprivation of freedom when the Board or Parole revoked his parole without an opportunity for a hearing or response to the revocation); *Garafola v. Wilkinson*, 721 F.2d 420, 426 (3d

ly, some guidelines, to better ensure consistency and equity across the federal criminal system.<sup>58</sup>

Congress attempted reform in the 1970s, when it passed the Parole Commission and Reorganization Act of 1976.<sup>59</sup> In addition to rebranding the Board of Parole as the Parole Commission, the Act authorized the Parole Commission to create parole eligibility guidelines.<sup>60</sup> These guidelines measured the severity of a defendant's offense against a "salient factor score," a number that estimated an inmate's risk of parole violation and recidivism.<sup>61</sup> Several variables determined a salient factor score, such as seriousness of the offense and the offender's criminal history.<sup>62</sup>

Critics were not satisfied with these reforms.<sup>63</sup> Throughout the remainder of the 1970s and into the 1980s, both houses of Congress hotly debated criminal justice reform, with each session of Congress leaving another dead bill strewn on the partisan battlefield.<sup>64</sup> Common to all of the proposed bills were

Cir. 1983) (concluding that a federal parolee's conviction under state law constituted a parole violation).

<sup>58</sup> See Stith & Koh, *supra* note 34, at 228 n.20 (citing FRANKEL, CRIMINAL SENTENCES, *supra* note 53, at 5) (recounting Judge Frankel's assertion that definitive sentencing guidelines could mitigate unfair sentencing practices).

<sup>59</sup> See Parole Commission and Reorganization Act of 1976, Pub. L. No. 94-233, § 2, 90 Stat. 219, 219-34 (providing for administrative and substantive reforms to federal parole, such as the creation of strict parole guidelines and the establishment of the Parole Commission as an agency under the Department of Justice).

<sup>60</sup> *Id.* § 2, 90 Stat. at 220.

<sup>61</sup> See Parole, Release, Supervision, and Recommitment of Prisoners, Youth Offenders, and Juvenile Delinquents, 42 Fed. Reg. 39,808, 39,809-22 (Aug. 5, 1977) (repealed 1984) (providing a "customary" amount of time an inmate should serve before release, dependent on the type of crime committed). Lower salient factor scores equated to higher recidivism risk. See *id.* (providing that inmates with lower salient factor scores must serve more time before becoming eligible for parole).

<sup>62</sup> *Id.* Parole regulations promulgated under the Parole Commission and Reorganization Act contained a salient factor worksheet. *Id.* The worksheet included a checklist indicating how many points should be added to someone's salient factor score based on criteria like recency of the offense. *Id.* In addition, age was considered as a proxy for recidivism risk, as older persons are less likely to reoffend than younger inmates. *Id.* The salient factor score also considered the number of prior offenses, with more prior offenses resulting in a lower salient factor score. See *id.* (providing up to three salient factor points for inmates with no prior offenses).

<sup>63</sup> See S. REP. NO. 98-225, at 38 (1983) ("[D]isparities . . . can be traced directly to the unfettered discretion the law confers on those judges and parole authorities."); Stith & Koh, *supra* note 34, at 229 (citing Tom Goldstein, *New Studies Insist on the Same Treatment for the Same Crimes: Inequities Common in Jail Sentences*, N.Y. TIMES (Dec. 19, 1976), <https://www.nytimes.com/1976/12/19/archives/new-studies-insist-on-the-same-treatment-for-the-same-crimes.html?searchResultPosition=1> [<https://perma.cc/Z2YG-7LMW>]) (noting that parole decisions could be arbitrarily motivated by an offender's characteristics, or by the general ideology of a judge or official rendering the parole decision).

<sup>64</sup> See Stith & Koh, *supra* note 34, at 230-68 (emphasizing the intense bipartisan efforts to amend the federal criminal code). The political turmoil of developing what eventually became the Comprehensive Crime Control Act of 1984 (CCCA) marked the end of an almost two-decades-long effort, spearheaded by U.S. Senator Ted Kennedy, to reform the federal criminal code, that is, to rewrite the entirety of title eighteen, the portion of federal law covering criminal law. *Id.*; see 18 U.S.C. §§ 1-6005. Congress debated at least six separate major criminal reform bills in the 96th, 97th, and 98th

two key priorities: the reduction or total elimination of federal parole and the creation of definitive sentencing guidelines.<sup>65</sup> Soon enough, one bill emerged that would finally meet Congress's exacting demands.<sup>66</sup>

### *B. Compassionate Release in the 1984 Comprehensive Crime Control Act: The Crawl*

As "tough on crime" politics became popular during the Reagan Administration, Congress once again entertained the idea of substantial federal criminal justice reform.<sup>67</sup> Congress's approach began as an effort to streamline the entire federal criminal code—beyond just parole and sentencing law—but quickly transformed into a bipartisan push for harsher federal criminal penalties.<sup>68</sup> Underlying this discussion was the familiar debate over whether to restrict or abolish federal parole.<sup>69</sup>

After a protracted political battle, the Comprehensive Crime Control Act (CCCA), as its name suggests, significantly revised the whole of the federal criminal code, including provisions pertinent to bail, sentencing, asset forfeiture, drug offenses, and more.<sup>70</sup> The Sentencing Reform Act of 1984 (SRA) was a

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Congresses before the 98th Congress passed the CCCA. *See* Stith & Koh, *supra* note 34, at 225 (providing a roadmap of criminal justice bills proposed and debated by Congress between 1975 and 1984).

<sup>65</sup> *See* Stith & Koh, *supra* note 34, at 259–61 (collecting and discussing various pieces of failed legislation addressing parole and sentencing guidelines).

<sup>66</sup> *See* Comprehensive Crime Control Act, Pub. L. No. 98-473, 98 Stat. 1837, 1976 (1984) (codified in scattered sections of 18 and 28 U.S.C.) (amending a significant amount of the federal criminal code).

<sup>67</sup> *See* Stith & Koh, *supra* note 34, at 258 (discussing growing public concern over crime in the 1980s); *see also* Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 532–38 (1996) (discussing how generally conservative politicians, including President Reagan, successfully deployed "tough on crime" and "law and order" political narratives as a means of garnering electoral support).

<sup>68</sup> *See* Stith & Koh, *supra* note 34, at 259–61 (recounting that U.S. Senator Ted Kennedy generally spearheaded efforts to reform federal criminal law). Congress's criminal justice reform goals were originally centered around entirely rewriting Title 18 of the United States Code. *Id.* This goal could not withstand the "tough on crime" politics of the 1970s and 1980s that eventually prevailed, which are apparent in the harshness of the CCCA. *See id.* (recounting how, during the Reagan Administration, Congress considered legislation on harsher penalties for drug offenses and violent crimes, as well as provisions to limit defendants' capability to pursue certain defenses or post-conviction relief).

<sup>69</sup> *See* United States *ex rel.* Forman v. McCall, 776 F.2d 1156, 1169 n.11 (3d Cir. 1985) (Higinbotham, J., concurring) (citing S. REP. NO. 98-225, at 38) (emphasizing the bipartisan calls to reduce or eliminate parole). The Senate passed its version of the CCCA, mainly authored by Senators Ted Kennedy, Strom Thurmond, and (then-Senator) Joe Biden in the early months of 1984. Stith & Koh, *supra* note 34, at 260–61. The bill met resistance in the House of Representatives, especially from Representative John Conyers Jr. *Id.* at 262. The House version of the bill would have preserved federal parole and did not prescribe strict sentencing guidelines. *Id.* at 262 n.233 (first citing H.R. 4827, 98th Cong. (1984), then citing H.R. REP. NO. 98-1017, at 34 (1984)).

<sup>70</sup> Comprehensive Crime Control Act, 98 Stat. at 1976. The legislation includes several pieces of constituent legislation, including the Bail Reform Act, the Armed Career Criminal Act, the Compre-

constituent piece of legislation within the CCCA that specifically addressed parole and sentence length.<sup>71</sup> The CCCA created the United States Sentencing Commission (the Sentencing Commission or the Commission) and abolished parole.<sup>72</sup> Congress intended these two provisions to achieve more consistent sentencing, satisfying the common goal of 1970s conservatives and liberals.<sup>73</sup>

The CCCA granted the Sentencing Commission the authority to create sentencing guidelines that federal courts must consider when determining an appropriate sentence length.<sup>74</sup> Using the authority granted by the CCCA, the Sentencing Commission promulgated the first United States Sentencing Guidelines Manual (Guidelines Manual) in 1987.<sup>75</sup> The Sentencing Guidelines set forth sentencing ranges, or the range between a minimum and maximum acceptable sentence, in a two-dimensional table, similar to the parole guidelines

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hensive Forfeiture Act, the Insanity Defense Reform Act, Controlled Substances Penalties Amendments Act, and the Sentencing Reform Act. *Id.* The bill passed with large majorities in both houses of Congress after it was packaged with appropriations (or government funding) legislation. Stith & Koh, *supra* note 34, at 265–66. Up to this point, some Democratic legislators questioned the implementation of sentencing guidelines, although some Republican legislators felt the bill was not harsh enough. *Id.* Because the final bill was packaged alongside an urgently needed appropriations bill, many legislators were convinced to vote for the final bill to fund the government. *Id.*

<sup>71</sup> See Comprehensive Crime Control Act § 211 (setting forth amendments to federal sentencing law, including the establishment of the United States Sentencing Commission to standardize sentencing and the implementation of harsher penalties for drug-related crimes).

<sup>72</sup> *Id.* §§ 211, 217, 233, 98 Stat. 1837, 2017, 2028. The Parole Commission retained limited jurisdiction over persons who committed offenses prior to November 1, 1987. *Id.* The CCCA intended to fully abolish the Parole Commission in 1992 as this group of parolees shrunk, but the Parole Commission continues to oversee pre-1987 offenders as well as people who violate the D.C. Code or the Uniform Code of Military Justice. See, e.g., United States Parole Commission Extension Act of 2018, Pub. L. No. 115-274, § 3, 132 Stat. 4160, 4161 (2018) (codified as amended at 18 U.S.C. § 3551) (extending the life of the Parole Commission until November 2021).

<sup>73</sup> See S. REP. NO. 98-225, at 38 (recounting the bipartisan support for legislative provisions to create greater consistency in federal sentencing); see also Comprehensive Crime Control Act §§ 211, 217, 233 (eliminating parole and establishing the authority for the Sentencing Commission to create definitive sentencing ranges, which Congress intended for sentencing consistency and finality).

<sup>74</sup> Comprehensive Crime Control Act § 217. The Sentencing Commission is comprised of seven voting members appointed by the President of the United States and confirmed by the Senate. 28 U.S.C. § 991. The Commission operates as an independent agency of the judicial branch of the federal government. *Id.* The Commission is bipartisan by mandate, and no more than four Commissioners may be members of the same political party. *Id.* The Commission is also statutorily required to have three federal judges as members. *Id.* The Attorney General of the United States, or someone designated by the Attorney General, and the chair of the Parole Commission sit on the Sentencing Commission as nonvoting *ex officio* members. *Id.* The Commission cannot conduct certain business, including the promulgation of Sentencing Guidelines, without the presence of a quorum of four voting members. *Id.* The Commission's duties, in addition to promulgating the Sentencing Guidelines, include writing policy statements regarding proper application of the Sentencing Guidelines, establishing factors for courts to consider in calculating a sentence, and continually collecting relevant data to inform future Sentencing Guidelines. See 28 U.S.C. § 994 (setting forth the Commission's duties).

<sup>75</sup> See 2018 GUIDELINES MANUAL, *supra* note 11, at ch. 5, pt. A. (setting forth ranges of sentences to be imposed for federal crimes).

from years earlier.<sup>76</sup> Two factors control the sentencing ranges generated by the Sentencing Guidelines: the severity of the crime committed and the defendant's criminal history.<sup>77</sup> A more severe crime or a more extensive criminal history will generate a higher Guidelines range.<sup>78</sup> The Guidelines were at first mandatory.<sup>79</sup> Today, they are advisory, meaning that a judge is not required to impose a sentence within a Guideline range if there are good reasons not to do so.<sup>80</sup> With the Guidelines in hand, sentencing became a straightforward exercise in the federal system and the notion of early release seemed to evaporate into thin air.<sup>81</sup>

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<sup>76</sup> *Id.*; see Parole, Release, Supervision, and Recommitment of Prisoners, Youth Offenders, and Juvenile Delinquents, 42 Fed. Reg. at 39,809–22 (providing a suggested time at which parole becomes appropriate for a given inmate based on two input variables).

<sup>77</sup> See 2018 GUIDELINES MANUAL, *supra* note 11, at ch. 5, pt. A. The severity of a crime for which the defendant has been convicted determines the Guidelines Manual “offense level.” *Id.* Offense levels range from a score of one, the least serious offense, to forty-three, the most serious offense. See *id.* (noting that an offense level of forty-three results in an automatic life sentence). A defendant's criminal history is assigned a point value based on the number of previous offenses and the severity of each offense. *Id.* § 4A1.1. This point value is then matched to a criminal history “category” of I through VI. *Id.* at ch. 5, pt. A. Defendants in category VI have the most extreme criminal histories and defendants in category I have the least serious criminal histories. *Id.* A judge determines the correct sentencing range by finding the range that matches with a defendant's offense level and criminal history category. See *id.* (providing a specific sentencing range for each possible combination of offense levels and criminal history categories).

<sup>78</sup> See *id.* (generating longer sentences for more severe crimes or for defendants with more serious criminal histories). The Sentencing Guidelines Table is further divided into four “zones.” *Id.* These zones, labeled A through D are determined by a defendant's offense level and criminal history category. See *id.* (setting forth “zones” in guidelines). Zones have no bearing on sentence imposition but are used instead in consideration of matters such as probation or supervised release. *Id.* § 5B1.1. Less harsh Guideline ranges are generally found in zones that provide more favorable probation or supervised release conditions to defendants. *Id.*

<sup>79</sup> See *United States v. Booker*, 543 U.S. 220, 233 (2005) (noting that Congress initially created the Guidelines system as a mandatory system).

<sup>80</sup> See *id.* at 264–65 (holding that mandatory Guidelines are unconstitutional under the Sixth Amendment). Although the Guidelines range must be calculated and considered by judges as advisory, judges are free to impose a sentence outside of the Guidelines range so long as the Guideline range is considered on the record and the judge states the reason for the departure. *Id.*

<sup>81</sup> See 2018 GUIDELINES MANUAL, *supra* note 11, at ch. 5, pt. A (failing to provide a mechanism for early release). The Sentencing Guidelines did have features built in to allow offenders to reduce their offense levels or criminal history points and thus receive less harsh sentences, such as a decrease in a defendant's offense level if they “demonstrate acceptance of responsibility” for the crime, generally by pleading guilty or otherwise admitting to certain conduct. *Id.* § 3E1.1. Additionally, after *Booker*, judges could depart from the Sentencing Guidelines entirely. See *Booker*, 543 U.S. at 265 (holding that, under the Sixth Amendment, facts which may have bearing on sentencing decisions, and which have been properly proven, must be considered as a means to properly tailor sentences). In 1989, in *Mistretta v. United States*, the United States Supreme Court separately rejected a challenge to the constitutionality of the Sentencing Guidelines in which a criminal defendant challenged the Guidelines as an improper delegation of congressional power to an executive branch body. See 488 U.S. 361, 371 (1989) (holding that the CCCA's grant of authority to the Sentencing Commission was not an unconstitutional delegation of Congressional power in violation of the United States Constitution).

In addition to abolishing federal parole, the CCCA severely limited the amount of good time credit a federal inmate could receive for good behavior while serving their sentence.<sup>82</sup> Additionally, the CCCA codified that terms of imprisonment generally cannot be modified, restricting a court's ability to modify a sentence after imposition.<sup>83</sup> These changes, however, did not completely erase the federal early release system.<sup>84</sup> Because of these new limitations, or perhaps in spite of them, Congress added a new section to the federal criminal code—the compassionate release statute.<sup>85</sup> Congress intended compassionate release act as a “safety valve” for the early release of eligible incarcerated persons now that parole was off the table.<sup>86</sup>

In contrast to the now-abolished federal parole, which worked passively in the background after sentencing, compassionate release under the CCCA, and later the First Step Act, requires defendants to engage actively with the criminal justice system to reduce their sentence.<sup>87</sup> Incarcerated persons were no longer automatically considered for compassionate release after a set period

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<sup>82</sup> See Comprehensive Crime Control Act, Pub. L. No. 98-473, § 211, 98 Stat. 1837, 1998–99 (1984) (codified in scattered sections of 18 and 28 U.S.C.) (amending the good time credit system to provide a lower good time credit accrual rate). The CCCA limited good time credits such that no more than fifty-four days' worth of credit could be accrued for each year of a sentence. 18 U.S.C. § 3624(b). For example, an inmate serving a two-year sentence could accrue a maximum of 108 days, an inmate serving a three year sentence a maximum of 162 days, and so on. See *id.* (setting forth the calculation for good time credits). This limitation remains in effect today. *Id.*

<sup>83</sup> See 18 U.S.C. § 3582(c)(1)(A) (noting that federal courts may not modify a term of imprisonment except for certain elderly defendants and those who have an “extraordinary and compelling reason[]” warranting release).

<sup>84</sup> See *id.* (providing a framework for early release in the form of compassionate release that supplanted the now-defunct parole system).

<sup>85</sup> *Id.* (setting out the system by which federal inmates can seek early release from prison, but only allowing early release in the presence of an “extraordinary and compelling” circumstance, not in the ordinary course).

<sup>86</sup> See Thompson, *Frail, Old and Dying*, *supra* note 1 (discussing the purpose of compassionate release with U.S. Senator Brian Schatz of Hawaii, who characterized the system as “the humane . . . and . . . fiscally responsible thing to do”). This section's title and statutory text speak in terms of “reduction” to a sentence, and not “compassionate release.” See 18 U.S.C. § 3582(c)(1)(A) (“Modification of an Imposed Term of Imprisonment”); *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020) (“It bears remembering that compassionate release is a misnomer. 18 U.S.C. § 3582(c)(1)(A) in fact speaks of *sentence reductions*.”) (emphasis added). Nevertheless, the term “compassionate release” stuck, and to this day remains in regular usage in the federal criminal justice system. See BOP PROGRAM STATEMENT 5050.50, *supra* note 10, at 1–2 (referring to the statutory provisions of 18 U.S.C. § 3582(c) as both “compassionate release” and “reduction in sentence”).

<sup>87</sup> Compare Parole Commission and Reorganization Act of 1976, Pub. L. No. 94-233, § 2, 90 Stat. 219, 222 (allowing incarcerated persons to become eligible for parole automatically after completing of one-third of their sentence), with 18 U.S.C. § 3582(c)(1)(A) (requiring that a defendant submit a motion for compassionate release to a defendant's sentencing court before compassionate release can be granted and requiring input from the defendant, the BOP, and the court).

of time; they had to actively solicit it.<sup>88</sup> In compassionate release cases, courts could only reduce a sentence for “extraordinary and compelling reasons.”<sup>89</sup> Rather than embarking on the tedious journey of defining “extraordinary and compelling” itself, Congress delegated this task to the Sentencing Commission.<sup>90</sup> Congress offered two pieces of affirmative guidance to the Sentencing Commission: first, an inmate’s rehabilitation is not “an extraordinary and compelling reason” by itself.<sup>91</sup> Second, judges granting compassionate release must act consistently with the Sentencing Commission’s regulations and policy statements.<sup>92</sup>

Despite these instructions from Congress, the Sentencing Commission did not define “extraordinary and compelling reasons” until 2006, when it simply stated that the BOP Director was responsible for determining qualifying circumstances.<sup>93</sup> Prior to 2006, the BOP granted compassionate release only to inmates with terminal illnesses, believing those inmates were the only group that did not present a recidivism or public safety risk.<sup>94</sup> In 2006, the Sentencing

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<sup>88</sup> See 18 U.S.C. § 3582(c)(1)(A) (noting that courts do not automatically grant sentence modifications to eligible inmates, but instead grant compassionate release only “upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant”).

<sup>89</sup> *Id.* § 3582(c)(1)(A)(i).

<sup>90</sup> See 28 U.S.C. § 994 (setting forth the duties of Sentencing Commission, including the promulgation of Sentencing Guidelines, which requires the Commission to create compassionate release guidance); Comprehensive Crime Control Act, Pub. L. No. 98-473, § 217, 98 Stat. 1837, 2017–25 (1984) (codified in scattered sections of 18 and 28 U.S.C.) (authorizing the Sentencing Commission to create guidelines and policy statements).

<sup>91</sup> 28 U.S.C. § 994(t) (“Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.”).

<sup>92</sup> See 18 U.S.C. § 3582(c)(1)(A) (obligating district courts to deny motions for compassionate release if granting the motion would be inconsistent with a Sentencing Commission policy statement). The Sentencing Guidelines Manual reiterates that “rehabilitation of the defendant is not, by itself, an extraordinary and compelling reason.” 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 cmt. n.3. Because courts cannot grant compassionate release for reasons inconsistent with the Sentencing Guidelines Manual, rehabilitation alone is an impermissible reason for granting early release based on the Sentencing Commission’s guidance as well as the statutory guidance. 18 U.S.C. § 3582(c)(1)(A); 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 cmt. n.3.

<sup>93</sup> See U.S. SENT’G GUIDELINES MANUAL § 1B1.13 cmt. n.1(A) (U.S. SENT’G COMM’N 2006) [hereinafter 2006 GUIDELINES MANUAL] (“A determination made by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such . . . .”) (emphasis omitted). It does not appear that this broadening prompted the BOP to increase its use of the compassionate release program. See DOJ OIG 2013 COMPASSIONATE RELEASE MEMO, *supra* note 16, at 46 (noting the average of twenty-four prisoners released annually via compassionate release between 2006 and 2011).

<sup>94</sup> See William W. Berry III, *Extraordinary and Compelling: A Re-examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 853 (2009) (citing FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, CHANGE NOTICE No. 5050.46, PROGRAM STATEMENT CONCERNING COMPASSIONATE RELEASE; PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. 3582(c)(1)(A) & 4205(g) (1998)) (explaining that the BOP, prior to November 2007, only granted compassionate release for defendants who were terminally ill, generally refusing other requests as contrary to the BOP’s goal to maintain public safety).

Commission began broadening its definition of “extraordinary and compelling.”<sup>95</sup> The 2006 Guidelines Manual stated that certain elderly incarcerated persons were eligible for release, in addition to those who were terminally ill.<sup>96</sup>

In 2007, the Sentencing Commission expanded “extraordinary and compelling” further, providing three specific instances in which compassionate release would be permissible: (1) defendants with terminal illnesses;<sup>97</sup> (2) defendants with serious permanent physical or medical conditions, or declining health;<sup>98</sup> and (3) defendants who are the only living and capable caregivers of a minor child.<sup>99</sup> The Sentencing Commission preserved a “catch all” provision that allowed for compassionate release in any other circumstances the BOP

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<sup>95</sup> See 2006 GUIDELINES MANUAL, *supra* note 93, § 1B1.13 cmt. background (noting the Sentencing Commission’s intent to provide broader compassionate release criteria, as well as a specific list of “extraordinary and compelling” circumstances in future iterations of the Guidelines Manual (emphasis omitted)).

<sup>96</sup> *Id.* § 1B1.13. Under this guidance, defendants at least seventy years old who had served at least thirty years were eligible for release. *Id.* Beyond this, the determination of what constituted an “extraordinary and compelling reason[]” remained solely in the discretion of the Director of the BOP. *Id.* cmt. 1.

<sup>97</sup> U.S. SENT’G GUIDELINES MANUAL § 1B1.13 cmt. n.1(A) (U.S. SENT’G COMM’N 2007) [hereinafter 2007 GUIDELINES MANUAL]. For the first circumstance, the Guidelines Manual’s Application Notes required that “[t]he defendant is suffering from a terminal illness” to be eligible for early release. *Id.* § 1B1.13 cmt. n.1(A)(i) (emphasis omitted). According to BOP guidance, an incarcerated person has a terminal medical condition if that person suffers from “a terminal, incurable disease [where] . . . life expectancy is eighteen (18) months or less.” BOP PROGRAM STATEMENT 5050.50, *supra* note 10, at 4. Usually, the Clinical Director of a federal prison facility makes the diagnosis. *Id.* The Guidelines Manual uses the term “defendant” to refer to incarcerated persons. 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13.

<sup>98</sup> 2007 GUIDELINES MANUAL, *supra* note 97, § 1B1.13 cmt. n.1(A). For the second circumstance, the Guidelines Manual required that:

[t]he defendant is suffering from a permanent physical or mental condition, or is experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement.

*Id.* § 1B1.13 cmt. n.1(A)(ii) (emphasis omitted). The BOP recommends compassionate release if an incarcerated person has “an incurable, progressive illness or . . . [if that person] ha[s] suffered a debilitating injury from which they will not recover.” BOP PROGRAM STATEMENT 5050.50, *supra* note 10, at 5. Furthermore, the BOP recommends consideration under this category if an incarcerated person is “[c]ompletely disabled, meaning the inmate cannot carry on any self-care and is totally confined to a bed or chair; or [is] [c]apable of only limited self-care and is confined to a bed or chair more than 50% of waking hours.” *Id.*

<sup>99</sup> 2007 GUIDELINES MANUAL, *supra* note 97, § 1B1.13 cmt. n.1. Prison officials will consider the best interests of the minor when dealing with a motion for compassionate release under this category. *Id.* These requirements were later adopted by the First Step Act to apply to an incarcerated person’s incapacitated spouse or registered partner as well. *Id.* at 9–10.



determined to be “extraordinary and compelling.”<sup>100</sup> Subsequent Sentencing Commission guidance has not deviated far from the 2007 criteria.<sup>101</sup>

The most recent Guidelines Manual—promulgated in 2018—provides slightly broader guidance regarding extraordinary circumstances, and organizes them more thematically.<sup>102</sup> First, it creates the category of “Medical Condition of the Defendant” as an “extraordinary and compelling reason[]”, including both terminal illness and physical, medical, or cognitive conditions that reduce the defendant’s ability to operate in a prison setting.<sup>103</sup> Second, and newly spelled out in the Guidelines Manual, an inmate’s advanced age is an “extraordinary and compelling” circumstance warranting release.<sup>104</sup> Third, the new “Family Circumstances” category includes not only situations in which a defendant is the only caregiver for their children, but also those in which a defendant is the only caregiver for a spouse.<sup>105</sup> Finally, the “catch all” provision remains exactly the same.<sup>106</sup>

<sup>100</sup> See 2007 GUIDELINES MANUAL, *supra* note 97, § 1B1.13 cmt. n.1(A)(iv). (“As determined by the Director of the Bureau of Prisons, there exists in the defendant’s case an extraordinary and compelling reason other than, or in combination with, the reasons described in [the preceding] subdivisions . . . .”) (emphasis omitted). The BOP does not provide any affirmative guidance in its Program Statement on what circumstances qualify under this “catch all” provision. See BOP PROGRAM STATEMENT 5050.50, *supra* note 10, at 12 (failing to identify specific circumstances that would fall in this category). The BOP does provide several factors to consider when determining whether or not release is appropriate for a given defendant. See *id.* (requiring consideration of factors such as the defendant’s criminal history, disciplinary infractions, and proposed release plan).

<sup>101</sup> 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 (providing mostly semantic changes to previous versions of compassionate release guidance).

<sup>102</sup> See *id.* § 1B1.13 cmt. n.1 (organizing criteria by medical circumstances, age-related circumstances, family circumstances, and other circumstances).

<sup>103</sup> *Id.* § 1B1.13 cmt. n.1, 1(A). The Guidelines list “metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia” as examples of qualifying terminal illnesses. *Id.* For further specific implementing information on medical compassionate release, see BOP PROGRAM STATEMENT 5050.50, *supra* note 10, at 4 (elaborating on the medical criteria outlined in the Guidelines Manual by providing specific diagnoses and prognoses to look for in implementing the compassionate release program).

<sup>104</sup> 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 cmt. n.1(B). The current Guidelines Manual now requires that to qualify for this category an inmate must be (1) at least sixty-five years old; (2) experiencing major deteriorations in health because of aging; and (3) served the lesser of ten years, or 75% of the term of imprisonment. *Id.* Additional BOP guidance clarifies and specifies the implementation of the Guidelines Manual. See BOP PROGRAM STATEMENT 5050.50, *supra* note 10, at 1–2 (discussing the scope of BOP guidance and providing additional information pertaining to compassionate release to aid in the implementation of the compassionate release program). The BOP guidance echoes the Guidelines Manual’s requirements and offers a less strict requirement for elderly incarcerated persons with certain debilitating medical conditions. BOP PROGRAM STATEMENT 5050.50, *supra* note 10, at 6.

<sup>105</sup> 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 cmt. n.1(C). Under this category, the Guidelines Manual recommends granting compassionate release if “[t]he incapacitation of the defendant’s spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.” *Id.* § 1B1.13 cmt. n.1(C)(ii).

<sup>106</sup> *Id.* § 1B1.13 cmt. n.1(D). After the First Step Act shifted compassionate release decision-making power to district courts, many courts relied on the spirit of this provision to grant compassion-

Despite the definitional thicket presented by the phrase “extraordinary and compelling,” the actual process of compassionate release under the CCCA was, and remains, relatively straightforward.<sup>107</sup> The BOP Director had the exclusive power to make motions for compassionate release on a defendant’s behalf.<sup>108</sup> Thus, under the CCCA, defendants first had to apply for release to the warden of the BOP facility in which they were incarcerated.<sup>109</sup> Then, the warden would review the application with other prison officials and make an initial determination of whether an “extraordinary or compelling circumstance” existed.<sup>110</sup> The warden referred approved applications to the Director of the BOP.<sup>111</sup> Even with the warden’s approval, the Director of the BOP could decline to bring a motion in the defendant’s sentencing court.<sup>112</sup> Some courts referred to this review as the BOP’s “gatekeeping” of motions.<sup>113</sup> If the BOP Director brought a compassionate release motion, the judge’s responsibilities were limited to granting or denying the motion.<sup>114</sup> If prison officials and the

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ate release for novel circumstances. *See United States v. Brooker*, 976 F.3d 228, 234 (2d Cir. 2020) (concluding that the inconsistency between the statute and the Sentencing Guidelines gives courts wide discretion to determine what reasons are “extraordinary and compelling” for granting compassionate release).

<sup>107</sup> *See* 28 C.F.R. §§ 571.61–.64 (2021) (providing the procedure by which an inmate submits a compassionate release request to a warden, who reviews the request and refers it to senior staff at the BOP, and eventually to the BOP Director).

<sup>108</sup> *See* 18 U.S.C. § 3582(c)(1)(A) (setting forth the BOP’s role in bringing compassionate release motions); 28 C.F.R. § 571.62 (discussing the responsibilities of BOP staff seeking to bring compassionate release motions, including the BOP Director’s authority to bring the motion to a court).

<sup>109</sup> *See* 28 C.F.R. § 571.61 (requiring inmates submit written requests for compassionate release to the warden of the facility in which they are incarcerated).

<sup>110</sup> *See id.* §§ 571.61, 571.62 (providing that the warden must review all requests for release with BOP General Counsel and either the BOP Medical Director or the BOP Assistant Director of the Correctional Programs Division, for compliance with Sentencing Commission and BOP guidance).

<sup>111</sup> *Id.* A warden would also provide the BOP Director with a wide array of supporting documentation, including information about the defendant’s criminal and disciplinary records, medical records, and presentence reports. *See* BOP PROGRAM STATEMENT 5050.50, *supra* note 10, at 13–14 (outlining all supporting documentation that must be submitted with a motion for compassionate release). Further, the warden was required to provide the BOP Director with information about the defendant’s release plan, which includes, among other things, information on where and with whom a defendant would reside upon release. *Id.* at 14.

<sup>112</sup> *See* 28 C.F.R. § 571.63 (providing that the warden, BOP General Counsel, or BOP Director can deny a request with written notice and a statement of reasons). The BOP Director’s decision not to bring a motion after a warden approved it was not judicially reviewable. *See, e.g., Crowe v. United States*, 430 F. App’x 484, 485 (6th Cir. 2011) (per curiam) (“[A] number of courts have determined that the BOP’s decision regarding whether or not to file a motion for compassionate release is judicially unreviewable.”); *Green v. Apker*, No. 13-HC-2159, 2014 WL 3487247, at \*2 (E.D.N.C. July 11, 2014) (“[P]etitioner may not seek review of the BOP’s decision.”).

<sup>113</sup> *See United States v. Jones*, 980 F.3d 1098, 1105 (6th Cir. 2020), *abrogated by United States v. Navarro*, 986 F.3d 668 (6th Cir. 2021) (noting that the BOP occupied a “preclusive gatekeeper position” for compassionate release motions).

<sup>114</sup> *See* 18 U.S.C. § 3582(c)(1)(A) (providing courts with the final authority to grant or deny compassionate release). The BOP Director would typically work with the U.S. Attorney of the district in which the defendant was sentenced when bringing such motions to get prosecutorial input about

BOP Director agreed that an “extraordinary and compelling reason[]” existed, then sentencing courts rarely, if ever, disagreed.<sup>115</sup>

Judges were also required to consider whether an inmate’s release was appropriate in light of the sentencing factors typically considered in the federal criminal justice system—commonly referred to as the “§ 3553(a) factors.”<sup>116</sup> A judge must consider the § 3553(a) factors when imposing the initial sentence, which are intended to measure the severity of the crime and the defendant’s recidivism risk.<sup>117</sup>

### *B And the First Step: Expansion of Compassionate Release in the Federal Criminal System*

Twenty-three years after passing the Comprehensive Crime Control Act, Congress revisited federal criminal justice reform.<sup>118</sup> Of particular concern this time around was mass incarceration; the sheer magnitude of people in the federal prison system required substantial action.<sup>119</sup> The federal prison population

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whether to file for release. *See* 28 C.F.R. § 571.62 (requiring that the BOP consult with a U.S. Attorney in the compassionate release process).

<sup>115</sup> *See, e.g.,* *Crowe*, 430 F. App’x at 485 (holding that the BOP’s decision not to bring a motion for compassionate release is not judicially reviewable); *United States v. DiMasi*, 220 F. Supp. 3d 173, 201 (D. Mass. 2016) (accepting without challenge the BOP’s motion to grant compassionate release to a severely ill inmate); *Sims v. Holencik*, No. CV 09-00978, 2009 U.S. Dist. LEXIS 133747, at \*6 (C.D. Cal. May 6, 2009) (emphasizing deference to BOP decisions regarding whether to bring compassionate release motions).

<sup>116</sup> *See* 18 U.S.C. § 3553(a). The seven sentencing factors include (1) the nature and circumstances of the offense and the characteristics of the defendant; (2) whether the sentence reflects the severity of the offense, affords adequate deterrence, and upholds respect for the law; (3) whether the sentence is reasonable given the available sentences; (4) the kind of sentence and the relevant guidelines; (5) pertinent policy statements from the Sentencing Commission; (6) the need to avoid unwanted sentencing disparities among similar defendants; and (7) the need to provide restitution to any victims of the offense. *Id.*

<sup>117</sup> *See id.* (requiring the court to consider the sentencing factors to impose a “sufficient, but not greater than necessary” sentence). Outside of the guidelines and policy statements discussed in the fourth and fifth sentencing factors, the § 3553(a) factors are not binding constraints on judges or definitive measures. *See id.* (failing to provide other constraints on judicial decision-making).

<sup>118</sup> *See* Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person (First Step) Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified in scattered sections of 18 and 34 U.S.C.) (amending significant portions of the federal criminal code to provide more lenient sentences, prevent crime, and reduce the prison population).

<sup>119</sup> *See* NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW I (2019), <https://crsreports.congress.gov/product/pdf/R/R45558> [<https://perma.cc/ZTF9-LGD6>] [hereinafter JAMES, THE FIRST STEP ACT] (discussing Congress’s concern with size of the federal prison population, which motivated much of the First Step Act’s substantive changes to the federal criminal code); Emily Tillett, *Sens. Cory Booker and Mike Lee on Putting Aside Politics to Reform Criminal Justice*, CBS (July 22, 2019), <https://www.cbsnews.com/news/senators-cory-booker-mike-lee-on-putting-aside-political-impasses-to-reform-criminal-justice/> [<https://perma.cc/C3BC-8565>] (recounting New Jersey Senator Cory Booker’s views on the First Step Act’s purpose of addressing mass incarceration). For a more robust discussion of the phenomenon of mass incarceration in the

grew steadily through the 1970s, but the CCCA's "tough on crime" approach caused the population to exponentially increase from 1984 onward.<sup>120</sup> Without a mechanism like parole to release inmates on the back end, the prison population increased more than six-fold in the thirty years since 1984.<sup>121</sup>

During the Obama Administration, a 2013 report from the Department of Justice's Office of the Inspector General (DOJ OIG) harshly criticized the BOP's handling of compassionate release since the passage of the CCCA in 1984.<sup>122</sup> The report highlights the BOP's inconsistent application of compassionate release criteria for medical reasons, the lack of a consistent timeline for processing applications, and the absence of procedures to inform potentially eligible inmates about the program.<sup>123</sup> In addition, the DOJ OIG found that between 2006 and 2011, an average of twenty-four inmates were released from custody each year; approximately one-one-hundredth of a percent of the total federal prison population.<sup>124</sup> Further study revealed significant hurdles for inmates seeking compassionate release, including the BOP's inability to expedite

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United States, see Ristroph, *supra* note 14 (discussing American criminal law's emphasis on carceral solutions to crime).

<sup>120</sup> See JAMES, THE FEDERAL PRISON POPULATION, *supra* note 20, at 2 (attributing the rise in the federal prison population to a harsher federal criminal code and the elimination of federal parole).

<sup>121</sup> See *id.* (noting the rapid and substantial growth of the federal prison population from the 1980s onward). In 1984, the BOP housed a total of 35,795 inmates. See *BOP Population Statistics*, *supra* note 14 (providing annual data on the federal prison population). In 2013, that number increased to 219,298 inmates, representing the peak volume of the federal prison population. *Id.* Since 2013, the federal prison population has decreased. *Id.* As of the end of 2020, when the BOP published its most recent official count, the current federal prison population stood at 152,164 inmates. *Id.*

<sup>122</sup> See generally DOJ OIG 2013 COMPASSIONATE RELEASE MEMO, *supra* note 16 (reviewing the compassionate release program and finding a minimal number of requests were granted, and that BOP institutions lacked uniform timelines for reviewing requests).

<sup>123</sup> *Id.* at 12. After interviews with twenty members of BOP institution staff, the OIG found that "the BOP failed to provide institution staff with adequate guidance regarding what an appropriate request for compassionate release is," and that there was no administrative guidance defining "extraordinary and compelling" circumstances. *Id.* Beyond calling for requests to be "expedite[d]," the BOP offered no affirmative guidance on how quickly compassionate release requests should be processed. BOP PROGRAM STATEMENT 5050.50, *supra* note 10, at 15; DOJ OIG 2013 COMPASSIONATE RELEASE MEMO, *supra* note 16, at 30–31. Only a third of the institutions surveyed set deadlines for processing requests, ranging in length from five to sixty-five days. DOJ OIG 2013 COMPASSIONATE RELEASE MEMO, *supra* note 16, at 28. In some instances, at institutions with no enforced processing timeline, requests for compassionate release went unanswered for over five months. *Id.* at 27–28. The BOP had no requirement that inmates be informed about the compassionate release program. *Id.* at 31. In addition, only seven percent of handbooks distributed to inmates in BOP custody contained any mention of compassionate release. *Id.* The information in those handbooks varied significantly because each institution independently creates its handbook. *Id.* at 32.

<sup>124</sup> *Id.* at 46; *BOP Population Statistics*, *supra* note 14. This percentage was calculated based on the release trends noted in the OIG memo and the publicly available population data provided by the BOP. See DOJ OIG 2013 COMPASSIONATE RELEASE MEMO, *supra* note 16, at 46 (noting the average of twenty-four prisoners released yearly); *BOP Population Statistics*, *supra* note 14 (noting a prison population of up to 217,768 persons in 2011).

the requests of terminally ill inmates.<sup>125</sup> Even after the BOP modified the compassionate release criteria to expand eligibility for elderly and terminally ill inmates, compassionate release remained a rarity.<sup>126</sup>

The dismal state of compassionate release was far from Congress's only motivation to pass the First Step Act in 2018.<sup>127</sup> Congress designed and marketed the bill as a substantial overhaul of the federal criminal system meant to address the scourge of mass incarceration.<sup>128</sup> The relevant portion of the legislation, titled "Increasing the Use and Transparency of Compassionate Release," adds approximately fifty words to the compassionate release statute.<sup>129</sup> This modification, although small, significantly decentralized the mechanisms

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<sup>125</sup> See DOJ OIG 2013 COMPASSIONATE RELEASE MEMO, *supra* note 16, at 27–28 (describing the BOP's failure to "consider the special circumstances of medical compassionate release requests" (emphasis omitted)). For example, one prisoner was given a six-month life expectancy upon a diagnosis of liver failure. Thompson, *Frail, Old and Dying*, *supra* note 1. That prisoner, Anthony Bell, applied for compassionate release. *Id.* It took six months for the BOP to render its decision, two days after which Mr. Bell died. *Id.*

<sup>126</sup> See DOJ OIG 2015 AGING INMATES MEMO, *supra* note 12, at 6 (noting that even with updated compassionate release criteria, few inmates who requested release were successful); Thompson, *Frail, Old and Dying*, *supra* note 1 (discussing the rarity of compassionate release). In its 2013 review of the compassionate release program, the DOJ OIG attributed the rarity of compassionate release to BOP staff's misunderstanding of the program's function, ineffective procedures to inform eligible inmates, and a lack of internal consistency on when to grant release. DOJ OIG 2013 COMPASSIONATE RELEASE MEMO, *supra* note 16, at i–iii.

<sup>127</sup> JAMES, THE FIRST STEP ACT, *supra* note 119, at 1.

<sup>128</sup> *Id.* The First Step Act made a number of other meaningful reforms to sentencing and criminal procedure, such as reducing certain mandatory minimums and improving access to rehabilitation programs. *Id.*; see Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person (First Step) Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018) (codified in scattered section of 18 and 34 U.S.C.) (amending significant portions of the federal criminal code). In 2018, Senators Brian Schatz of Hawai'i, Mike Lee of Utah, and Patrick Leahy of Vermont introduced a bill aimed at amending the compassionate release process. See Granting Release and Compassion Effectively (GRACE) Act of 2018, S. 2471, 115th Cong., § 2 (failed in committee) (permitting inmates to bring their own motions for compassionate release). Congress passed the GRACE Act as incorporated into the First Step Act. See First Step Act § 603(b) (setting out language nearly identical to the GRACE Act). In 2020, Senator Schatz and Senator Richard Durbin of Illinois introduced the Emergency GRACE Act, which further streamlined and expedited the compassionate release process in recognition of the COVID-19 pandemic; however, the Senate did not vote on it. See Emergency Grants of Release and Compassion Effectively (Emergency GRACE) Act of 2020, S. 3698, 116th Cong. § 3 (failed in committee) (providing for expedited review and approval of compassionate release motions).

<sup>129</sup> See First Step Act § 603(b), 132 Stat. at 5239 (amending 18 U.S.C. § 3582(c)(1)(A)). The Act amends 18 U.S.C. § 3582(c)(1)(A) to add the following words after "upon motion of the Director of the Bureau of Prisons":

or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier . . .

18 U.S.C. § 3582(c)(1)(A) (as amended by the First Step Act § 603(b)).

for obtaining compassionate release.<sup>130</sup> It allowed inmates to bring motions directly to their sentencing courts for a sentence reduction, after first attempting to have the BOP bring that motion on their behalf.<sup>131</sup>

In effect, the First Step Act's amendments to the compassionate release system meant prison wardens and the BOP Director no longer held exclusive authority to bring motions for compassionate release.<sup>132</sup> Many judges described this amendment as the removal of the BOP's gatekeeping function.<sup>133</sup> Sentencing judges became the key players in determining when to grant compassionate release.<sup>134</sup> As is the case with most judicial decisions, a district court's decision to grant or deny compassionate relief is reviewable by the appropriate circuit court on appeal.<sup>135</sup> The reviewability of compassionate release decisions was a notable departure from the historic parole system and the pre-First Step Act compassionate release system, neither of which were subject to appellate review.<sup>136</sup>

Despite this change in procedure, the Act does not purport to change the substantive criteria used to assess individual motions for compassionate re-

<sup>130</sup> 18 U.S.C. § 3582(c)(1)(A).

<sup>131</sup> *Id.* In other words, inmates are only entitled to bring a motion for compassionate release to their sentencing court (1) after pursuing and losing all appeals within the BOP's administrative framework, or (2) after thirty days have passed since a warden received the inmate's request. *Id.* Despite some contention among district courts, most courts have denied motions for compassionate release if the inmate has not first pursued administrative options within the BOP. *See, e.g.,* *United States v. Edwards*, 456 F. Supp. 3d 953, 966 (M.D. Tenn. 2020) (denying the compassionate release motion of an inmate who had not pursued administrative remedies first). This requirement is often referred to as the "exhaustion requirement." *Id.*

<sup>132</sup> *See* 18 U.S.C. § 3582(c)(1)(A) (allowing defendants seeking compassionate release to circumvent the BOP after meeting the exhaustion requirement).

<sup>133</sup> *See, e.g.,* *United States v. McCoy*, 981 F.3d 271, 274 (4th Cir. 2020) ("The First Step Act removed the BOP from that gatekeeping role, authorizing defendants themselves to file motions for sentence reductions."); *United States v. Jones*, 980 F.3d 1098, 1105 (6th Cir. 2020), *abrogated by* *United States v. Navarro*, 986 F.3d 668 (6th Cir. 2021) ("[T]he First Step Act . . . ousted the BOP from its preclusive gatekeeper position . . .").

<sup>134</sup> *See, e.g.,* *United States v. Aruda*, 993 F.3d 797, 801–02 (9th Cir. 2021) (per curiam) ("The Sentencing Commission's statements in U.S.S.G. § 1B1.13 may inform a district court's discretion for § 3582(c)(1)(A) motions filed by a defendant, but they are not binding."); *McCoy*, 981 F.3d at 281 (holding that courts retain the discretion to determine what constitutes an "extraordinary and compelling reason[]" justifying compassionate release).

<sup>135</sup> *See* *United States v. Gunn*, 980 F.3d 1178, 1181 (7th Cir. 2020) (holding that district court decisions regarding compassionate release are "subject to deferential appellate review"); *Jones*, 980 F.3d at 1109 ("[T]he passage of the First Step Act rendered § 1B1.13 'inapplicable' . . .").

<sup>136</sup> *Compare* *Crowe v. United States*, 430 F. App'x 484, 485 (6th Cir. 2011) (per curiam) (holding that federal courts do not have the authority to review the BOP's decision not to bring a motion for compassionate release to a defendant's sentencing court), *and* *Zannino v. Arnold*, 531 F.2d 687, 690 (3d Cir. 1976) (finding the federal judiciary has limited discretion to review parole board decisions), *with* *Gunn*, 980 F.3d at 1181 (stating that appellate courts may review compassionate release decisions).

lease.<sup>137</sup> Courts are still required to assess inmates moving for release against the sentencing factors outlined in § 3553(a), as they had prior to the First Step Act.<sup>138</sup> Just as before the First Step Act, defendants must present the court with an “extraordinary and compelling” circumstance for their release.<sup>139</sup> If a court’s reasoning does not conflict with the policy statements or the factors, the court may grant the motion and release the inmate.<sup>140</sup> As was the case in 1984, Congress left the task of defining “extraordinary and compelling” to the Sentencing Commission.<sup>141</sup> The problem, however, is that the First Step Act rewrote the compassionate release statute to be incompatible with the policy statements in the Guidelines Manual.<sup>142</sup>

This raises a confounding question of the Guideline Manual’s applicability.<sup>143</sup> The current 2018 Guidelines Manual still discusses compassionate release in a manner that implies only the BOP Director can bring release motions.<sup>144</sup> To make matters worse, as of 2021, the Sentencing Commission has

<sup>137</sup> See 18 U.S.C. § 3582(c)(1)(A) (requiring a defendant seeking compassionate release to proffer an “extraordinary and compelling reason[]” consistent with the applicable Sentencing Commission guidance).

<sup>138</sup> *Id.* § 3553(a). See *supra* note 116–117 for an overview of the sentencing factors, which generally provide the framework courts use to determine the severity of a crime and the need to punish certain conduct.

<sup>139</sup> See 18 U.S.C. § 3582(c)(1)(A)(i) (requiring the presence of an “extraordinary and compelling reason[]” to grant compassionate release).

<sup>140</sup> *Id.*; see also *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021) (“[C]ourts *must* apply any ‘applicable policy statements’ issued by the Sentencing Commission [to compassionate release motions].” (emphasis added)).

<sup>141</sup> See 18 U.S.C. § 3582(c)(1)(A) (requiring grants of compassionate release to be consistent with the Sentencing Commission’s policy statements); 28 U.S.C. § 994(t) (delegating the responsibility of promulgating policy statements to the Sentencing Commission).

<sup>142</sup> Compare 18 U.S.C. § 3582(c)(1)(A) (indicating the circumstances in which inmates can bring a motion for compassionate release on their own behalf), with 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 (implying that only the BOP Director can bring motions for compassionate release on a defendant’s behalf).

<sup>143</sup> See *Stinson v. United States*, 508 U.S. 36, 38 (1993) (“[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.”). Additionally, because decisions to grant compassionate release must be “consistent with applicable policy statements,” many courts now find that the Guidelines Manual, which was written when the BOP Director had exclusive authority to bring compassionate release motions, is no longer applicable. See 18 U.S.C. § 3582(c)(1)(A) (providing avenues for both the BOP Director and inmates to pursue motions for compassionate release); *United States v. Brooker*, 976 F.3d 228, 234 (2d Cir. 2020) (concluding that the inconsistency between the statute and the Sentencing Guidelines gives courts wide discretion to determine what reasons are “extraordinary and compelling” for granting compassionate release); 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 (discussing compassionate release in the context of only the BOP Director bringing such motions).

<sup>144</sup> See 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 (discussing the BOP Director’s exclusive authority to bring compassionate release motions).

only one active voting member.<sup>145</sup> This is three short of the quorum needed to update the Guidelines, and six short of a fully staffed Commission.<sup>146</sup> The task of resolving the conflict between statute and regulation thus falls to the judiciary, providing a prime opportunity for judges to be on the front lines of this change in law.<sup>147</sup>

## II. COMPASSION OR CONSISTENCY: THE COURTS DIVERGE ON APPROPRIATE GROUNDS FOR COMPASSIONATE RELEASE

As one might expect, the inconsistency between the compassionate release statute and relevant administrative guidance has led to inconsistent application of the law between jurisdictions.<sup>148</sup> From the time the First Step Act took effect in December 2018 through February 2020, the federal judiciary adjudicated only a few hundred compassionate release motions.<sup>149</sup> Then, starting in March 2020, when the severity of the COVID-19 pandemic became

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<sup>145</sup> See *About the Commissioners*, U.S. SENT’G COMM’N, <https://www.uscc.gov/commissioners> [<https://perma.cc/B84K-56N3>] [hereinafter *About the Commissioners*] (providing the biographies of current and past Commissioners). The sole voting member of the Sentencing Commission is Judge Charles R. Breyer, U.S. District Court Judge for the Northern District of California. *Id.* Judge Breyer has served on the Sentencing Commission since 2013, and his term expires on October 31, 2021. *Id.* As previous commissioners’ terms expired, Presidents Trump and Biden did not nominate new commissioners to replace them, slowly reducing the number of active commissioners to one. *Id.* The Sentencing Commission can only perform its duties when a quorum of commissioners is present, which is four out of seven members. 28 U.S.C. § 995(d). With just one member, it is impossible for the Commission to meet quorum and conduct business. See *id.* (requiring the presence of at least four commissioners for the Sentencing Commission to exercise its authority).

<sup>146</sup> See 28 U.S.C. § 995(d) (requiring the presence of at least four active Commissioners to promulgate new Guidelines).

<sup>147</sup> See *Stinson*, 508 U.S. at 38 (providing the statutory provisions in the CCCA and the Sentencing Reform Act of 1984 (SRA) for setting aside Guidelines Manual provisions that are inconsistent with the relevant statutes); *United States v. Cantu*, 423 F. Supp. 3d 345, 352 (S.D. Tex. 2019) (noting that the compassionate release “statute ‘does [not] define—or place any limits on—what “extraordinary and compelling reasons” might warrant such a reduction” in sentence length (alteration in original) (quoting *Crowe v. United States*, 430 F. App’x 484, 485 (6th Cir. 2011))). The problem of conflicting legislation and regulation in criminal law is not unique to compassionate release. See Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 540–75 (2020) (discussing the sometimes-conflicting roles and duties of democratically-elected legislators, appointed bureaucrats, and civil servants in matters of criminal justice, and how overlapping authority can make it unclear which bodies need to act on a given law). Elected legislators and appointed regulators often find themselves struggling to manage overlaps in authority, even when both sides are pursuing the same policy goals. *Id.* at 575–79.

<sup>148</sup> Compare *Brooker*, 976 F.3d at 234 (holding that the First Step Act allows judges to consider a wide array of “extraordinary [and compelling] circumstances” to grant compassionate release), with *United States v. Bryant*, 996 F.3d 1243, 1247 (11th Cir. 2021) (holding that the First Step Act’s procedural changes did not affect substantive criteria for compassionate release).

<sup>149</sup> See DOJ OIG 2013 COMPASSIONATE RELEASE MEMO, *supra* note 16, at 46 (stating that between 2006 and 2011 an average of twenty-four inmates per year were released via compassionate release).



widely known, the number of motions swelled to almost 11,000 in three months.<sup>150</sup>

This deluge of motions, driven by COVID-19, gave almost all federal courts ample opportunity to weigh in on how compassionate release ought to work in the First Step era.<sup>151</sup> Surveying 673 district court judges and 179 circuit court judges seemingly yields 852 differing opinions on the matter, with some decisions completely contradicting others.<sup>152</sup> At its core, the divergence of opinion regarding the definition of the two words “extraordinary” and “compelling” comes down to the definition of one other word: “applicable.”<sup>153</sup>

Section A summarizes the point of view of the majority of circuits that the Guidelines Manual is no longer authoritative following the First Step Act and provides examples of novel circumstances for which district judges have granted compassionate release.<sup>154</sup> Section B reviews relevant circuit court decisions upholding departures from the Guidelines Manual and provides insight into the new role of appellate courts in the compassionate release process.<sup>155</sup> Section C describes the minority camp of district judges who maintain that the Guidelines Manual is authoritative and binding after the First Step Act’s reforms.<sup>156</sup> Section D provides a summary of two opinions from the U.S. Court

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<sup>150</sup> See *United States v. Jones*, 980 F.3d 1098, 1100 & n.1 (6th Cir. 2020), *abrogated by* *United States v. Navarro*, 986 F.3d 668 (6th Cir. 2021) (citing Keri Blakinger & Joseph Neff, *Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent Were Denied.*, THE MARSHALL PROJECT (Oct. 7, 2020), <https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied> [<https://perma.cc/7ZS9-MMPW>] (characterizing the surge of compassionate release motions as a product of the “forces of law and nature”); U.S. SENT’G COMM’N, *THE FIRST STEP ACT OF 2018: ONE YEAR OF IMPLEMENTATION* 47 (2020) (noting a “five-fold increase” in the use of compassionate release after passage of the First Step Act).

<sup>151</sup> See, e.g., *United States v. Rodriguez*, 451 F. Supp. 3d 392, 401 (E.D. Pa. 2020) (discussing whether a defendant’s numerous health problems, which made him more susceptible to COVID-19, formed a sufficient basis for compassionate release under the First Step Act); *United States v. Cantu*, 423 F. Supp. 3d 345, 350–52 (S.D. Tex. 2019) (analyzing how the First Step Act impacted the function of the federal compassionate release system to determine whether a defendant’s family circumstances warranted release).

<sup>152</sup> Compare *Rodriguez*, 451 F. Supp. 3d at 401 (finding that a defendant’s increased risk of contracting COVID-19 constituted an “extraordinary and compelling reason[]” to grant compassionate release), and *United States v. Maumau*, No. 08-cr-00758-11, 2020 WL 806121, at \*5 (D. Utah Feb. 18, 2020) (granting compassionate release based on post-conviction changes in the law that meant the defendant would have faced a more lenient sentence today), with *United States v. Lynn*, No. 89-0072, 2019 WL 3805349, at \*5 (S.D. Ala. Aug. 13, 2019) (holding that increased susceptibility to COVID-19 is not an “extraordinary and compelling reason[]”), and *United States v. Watford*, No. 97-CR-26(2), 2021 WL 533555, at \*5 (N.D. Ind. Feb. 12, 2021) (declining to find that a post-conviction change in sentencing law qualifies as “an extraordinary and compelling reason”).

<sup>153</sup> See *Jones*, 980 F.3d at 1109 (questioning the applicability of the outdated Guidelines Manual and noting that “the policy statement does not wholly survive the First Step Act’s promulgation”).

<sup>154</sup> See *infra* notes 158–191 and accompanying text.

<sup>155</sup> See *infra* notes 192–217 and accompanying text.

<sup>156</sup> See *infra* notes 218–232 and accompanying text.

of Appeals for the Eleventh Circuit that support this minority viewpoint—the first by implication, and the second explicitly.<sup>157</sup>

*A. Compassion: District Courts Take Greater Liberty to  
Find Reasons to Grant Compassionate Release*

The current compassionate release statute, in addition to requiring the presence of an “extraordinary and compelling” circumstance, requires that the decision to reduce a sentence be consistent with *applicable* Sentencing Commission policy statements.<sup>158</sup> The current version of the Guidelines Manual refers only to “motion[s] of the Director of the Bureau of Prisons” for compassionate release.<sup>159</sup> The catch-all provision in the Application Notes also refers to “extraordinary and compelling reason[s]” not listed “[a]s determined by the Director of the Bureau of Prisons.”<sup>160</sup> In other words, despite the language of the First Step Act, the Guidelines Manual is written to imply that the BOP Director holds exclusive authority to bring compassionate release motions.<sup>161</sup>

Given this contradictory language, judges making compassionate release decisions that are inconsistent with the Guidelines Manual and policy statements may nevertheless be acting within the compassionate release statute’s boundaries.<sup>162</sup> In other words, if a policy statement applies only to the BOP Director, a district judge has the discretion under the First Step Act to disregard that policy statement for compassionate release motions brought directly by

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<sup>157</sup> See *infra* notes 233–249 and accompanying text.

<sup>158</sup> See 18 U.S.C. § 3582(c)(1)(A) (“[A] reduction [must be] consistent with *applicable* policy statements issued by the Sentencing Commission . . .” (emphasis added)); *Jones*, 980 F.3d at 1109 (“[T]he passage of the First Step Act rendered § 1B1.13 ‘inapplicable’ . . .”).

<sup>159</sup> See *United States v. Brooker*, 976 F.3d 228, 236 (2d Cir. 2020) (discussing the language in the Guidelines Manual that refers to the BOP Director’s capability to bring compassionate release motions, and the conflicting language in the compassionate release statute which also refers to a defendant’s ability to bring such a motion on their own behalf); 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 (“Upon motion of the *Director of the Bureau of Prisons* under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment . . .” (emphasis added)).

<sup>160</sup> 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 cmt. n.1(D) (“As determined by the Director of the Bureau of Prisons, there exists in the defendant’s case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).”); see *Brooker*, 976 F.3d at 236 (“[The catch-all provision] cannot constrain district courts’ discretion to consider whether any reasons are extraordinary and compelling.”).

<sup>161</sup> 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 (offering compassionate release guidance with reference to the BOP Director bringing such a motion); see *Brooker*, 976 F.3d at 234 (noting that “section 1B1.13 still refers in multiple places to the BOP having the exclusive authority to bring a compassionate release motion”).

<sup>162</sup> See *Brooker*, 976 F.3d at 234 (“[T]he First Step Act freed district courts to exercise their discretion in determining what are extraordinary circumstances.”); *United States v. Young*, 458 F. Supp. 3d 838, 850 (M.D. Tenn. 2020) (granting compassionate release for a model inmate who would have received a more lenient sentence under modern criminal law).

defendants.<sup>163</sup> Currently, a majority of district courts subscribe to this interpretation.<sup>164</sup> With the constraints of the Guidelines Manual removed, the only limitation on district courts' discretion is the statutory language requiring an "extraordinary and compelling" circumstance for release.<sup>165</sup> Needless to say, this is a lax constraint.<sup>166</sup>

Some novel reasons justifying release are clearly inspired by the Guidelines Manual, despite not following the Manual to the letter.<sup>167</sup> For example, in the 2019 case *United States v. Beck*, an earlier compassionate release decision, the U.S. District Court for the Middle District of North Carolina held that a federal prison facility's failure to provide adequate medical care to a severely ill defendant constituted an "extraordinary and compelling" circumstance.<sup>168</sup> Similarly, in 2020, in *United States v. Rodriguez*, the U.S. District Court for the Eastern District of Pennsylvania granted compassionate release on the grounds

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<sup>163</sup> See *Brooker*, 976 F.3d at 234 (requiring that a judge may only grant compassionate release for reasons consistent with Sentencing Commission policy statements); *United States v. Gunn*, 980 F.3d 1178, 1181 (7th Cir. 2020) (noting that, because the Sentencing Commission's policy statement is written in such a way to apply only to the BOP Director, the policy statement does not apply to motions for compassionate release brought directly by defendants).

<sup>164</sup> See, e.g., *United States v. Maumau*, No. 08-cr-00758-11, 2020 WL 806121, at \*5 (D. Utah Feb. 18, 2020) (finding that because the defendant would face a lighter sentence under current sentencing law than when the defendant was sentenced, the original sentence constituted an "extraordinary and compelling ground[]" warranting compassionate release); *United States v. Walker*, No. 11 CR 270, 2019 WL 5268752, at \*2–3 (N.D. Ohio Oct. 17, 2019) (granting compassionate release to an inmate with an excellent disciplinary record who was a veteran suffering from PTSD and had a terminally ill mother); *United States v. Cantu-Rivera*, No. CR H-89-204, 2019 WL 2578272, at \*2 (S.D. Tex. June 24, 2019) (granting release for an elderly defendant who demonstrated an "extraordinary degree of rehabilitation" during the thirty years he was incarcerated).

<sup>165</sup> See *United States v. Rodriguez*, 451 F. Supp. 3d 392, 397 (E.D. Pa. 2020) ("[R]estricting the Court to those reasons set forth in § 1B1.13 cmt. n.1(A)–(C) would effectively preserve to a large extent the BOP's role as exclusive gatekeeper . . ." (alteration in original) (quoting *United States v. Redd*, 444 F. Supp. 3d 717, 721, 725–26 (E.D. Va. 2020))).

<sup>166</sup> See 18 U.S.C. § 3582(c)(1)(A) (providing no specific guidance on what constitutes an "extraordinary and compelling reason[]" and delegating the task of defining those circumstances to the Sentencing Commission).

<sup>167</sup> See, e.g., *Rodriguez*, 451 F. Supp. 3d at 400–01 (holding that an inmate's increased risk of contracting COVID-19 due to underlying medical conditions constituted an "extraordinary and compelling reason[]" for compassionate release); *United States v. Lisi*, 440 F. Supp. 3d 246, 252 (S.D.N.Y. 2020) (finding that the defendant's status as the sole available caregiver for his severely ill mother was "extraordinary and compelling").

<sup>168</sup> 425 F. Supp. 3d 573, 580–82 (M.D.N.C. 2019). The defendant in *Beck* pleaded guilty to federal drug and firearm charges and received a 165-month sentence. *Id.* at 575. She had served approximately seventy-six months of that sentence at the time of her motion. *Id.* The defendant sought medical attention for potential breast cancer in 2017. *Id.* She received a diagnosis of metastatic breast cancer over a year later. *Id.* After surgery to remove tumors, physicians recommended additional chemotherapy, but seventeen months passed before the BOP allowed the defendant to see an oncologist. *Id.* at 576. By this point, too much time had elapsed since surgery for chemotherapy and radiation to be effective, and the defendant's cancer spread to her lymph nodes. *Id.* at 580. The court described the medical care provided by the BOP as "grossly inadequate" and "abysmal," further noting that "[a]bsent judicial oversight, [the defendant] is unlikely to receive better treatment." *Id.* at 580–81.

that a defendant's pre-existing health conditions made him particularly susceptible to contracting COVID-19.<sup>169</sup> The BOP facility housing the defendant had reported several cases of COVID-19 already, further exacerbating the inmate's risk.<sup>170</sup> Under the Guidelines Manual and Sentencing Commission guidance, these two cases do not necessarily fall into the "medical circumstances" category of "extraordinary and compelling reasons," but these sources laid the groundwork for the inferential steps the *Beck* and *Rodriguez* courts took to reach their ultimate decisions.<sup>171</sup>

Other courts that subscribe to this interpretation have gone even further to grant compassionate release, focusing on sentencing equity and consistency as the basis for relief.<sup>172</sup> In 2020, in *United States v. Maumau*, the U.S. District Court for the District of Utah compared an inmate's existing sentence to the sentence he would have received if sentenced today.<sup>173</sup> The *Maumau* court found that an unusually long sentence was one of several reasons that support-

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<sup>169</sup> *Rodriguez*, 451 F. Supp. 3d at 400–01. The defendant in *Rodriguez* was serving a twenty-year sentence for drug and firearm offenses. *Id.* at 394. He had diabetes, high blood pressure, and liver abnormalities. *Id.* The court noted that diabetes patients have COVID-19 mortality rates more than double the average rate, meaning the defendant was at an elevated risk of death if he contracted COVID. *Id.* (citing WORLD HEALTH ORG., REPORT OF THE WHO-CHINA JOINT MISSION ON CORONAVIRUS DISEASES 2019 (COVID-19) 12 (2020), <https://www.who.int/docs/default-source/coronavirus/who-china-joint-mission-on-covid-19-final-report.pdf> [<https://perma.cc/M3KP-XGJ9>]).

<sup>170</sup> *Id.* at 401–03. The defendant was housed at FCI Elkton, which at the time had the sixth-highest number of confirmed COVID-19 cases among inmates. *See COVID-19*, FED. BUREAU OF PRISONS, <https://www.bop.gov/coronavirus/index.jsp> [<https://perma.cc/ZW7B-7VJK>] (providing data on COVID-19 cases in federal prisons). In addition to the risk of COVID-19, the court concluded that the defendant's exemplary rehabilitative record and the fact that he was near the end of his sentence weighed in favor of finding "extraordinary and compelling reasons" for granting compassionate release. *Rodriguez*, 451 F. Supp. 3d at 405–06.

<sup>171</sup> *See Rodriguez*, 451 F. Supp. 3d at 400–05 (granting compassionate release to a defendant with a preexisting medical condition that made him especially vulnerable to contracting COVID-19); *Beck*, 425 F. Supp. 3d at 580–82 (granting compassionate release to a severely ill defendant who was receiving grossly inadequate medical care while incarcerated); 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 cmt. n.1 (providing that compassionate release may be granted for existing medical circumstances, but not explicitly listing the fear of contracting a serious illness or condition in the future).

<sup>172</sup> *See, e.g., United States v. Price*, 496 F. Supp. 3d 83, 88 (D.D.C. 2020) (granting compassionate release to a defendant who would have received only fifteen years, rather than a life sentence, under newly revised sentencing law); *United States v. Vigneau*, 473 F. Supp. 3d 31, 36–40 (D.R.I. 2020) (holding that the Sentencing Guidelines becoming advisory, rather than mandatory, was a "consider[ation] . . . in determining whether to grant compassionate release"); *United States v. Maumau*, No. 08-cr-00758-11, 2020 WL 806121, at \*5 (D. Utah Feb. 18, 2020) (finding that more lenient modern sentencing regimes justified granting compassionate release to defendants sentenced to longer sentences under older laws).

<sup>173</sup> 2020 WL 806121, at \*5. The defendant in *Maumau* was serving a fifty-five-year sentence for robbery and firearms offenses. *Id.* The judge presiding over the original sentencing proceedings had expressed "distaste" with the severity of the mandatory sentence that came with the defendant's charged crimes. *Id.*

ed granting the defendant's motion for compassionate release.<sup>174</sup> The court gave the defendant, who was convicted of a firearms offense, a harsh sentence due to a "stacking" provision.<sup>175</sup> The stacking provision added twenty-five years to the defendant's sentence due to a prior offense under the same law.<sup>176</sup> The First Step Act clarified the stacking provision to make it less severe.<sup>177</sup> Had the court sentenced the defendant after the First Step Act, his sentence would have been twenty-five years shorter.<sup>178</sup> Given this change in the law, the court concluded that the harshness of the sentence was "an extraordinary and compelling reason" warranting release.<sup>179</sup>

Back east, in 2020, the U.S. District Court for the District of Rhode Island took *Maumau* a step further in *United States v. Vigneau*.<sup>180</sup> In *Vigneau*, the defendant had been convicted of a marijuana conspiracy in the 1990s, when the Sentencing Guidelines were mandatory.<sup>181</sup> The *Vigneau* court discussed several reasons for granting the defendant's motion.<sup>182</sup> First, the court highlighted that because the defendant had been sentenced under mandatory, rather than advisory, guidelines, it was entirely possible that he would have received a significantly lighter sentence had he been sentenced today.<sup>183</sup> Second, the court compared the defendant's sentence of thirty years to the average sentence imposed

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<sup>174</sup> See *id.* at \*6 (noting that prosecutors were "incorrect in suggesting that courts have never provided compassionate release due to lengthy sentences" and providing examples).

<sup>175</sup> *Id.* at \*5. "Stacking" is triggered for certain federal firearms offenses when a defendant is convicted for that firearms offense a subsequent time; that is, when a defendant commits the same offense more than once. 18 U.S.C. § 924(c). The stacking provision automatically adds additional time to a prison sentence in this case. See *id.* (citing 18 U.S.C. § 924(c)) (recounting that the defendant's sentence was automatically increased due to the defendant's prior firearms offenses).

<sup>176</sup> See 18 U.S.C. § 924(c) (triggering an additional mandatory minimum sentence for repeat violations of this statute).

<sup>177</sup> See First Step Act, Pub. L. No. 115-391 § 403, 132 Stat. 5221 (2018) (clarifying the statutory stacking provision to provide a more lenient sentence).

<sup>178</sup> *Maumau*, 2020 WL 806121, at \*7 (citing *United States v. Urkevich*, No. 8:03CR37, 2019 WL 6037391, at \*2–4 (D. Neb. Nov. 14, 2019), *appeal dismissed*, No. 20-1603, 2020 WL 5642024 (8th Cir. Apr. 1, 2020)).

<sup>179</sup> See *id.* ("[T]his court concludes that the changes in how § 924(c) sentences are calculated is a compelling and extraordinary reason to provide relief on the facts here.").

<sup>180</sup> See 473 F. Supp. 3d 31, 36–40 (D.R.I. 2020) (holding that the defendant's unusually long sentence, changes in the sentencing guidelines, and changing attitudes toward marijuana constituted "extraordinary and compelling reasons" to grant compassionate release).

<sup>181</sup> *Id.* at 38. The Supreme Court found that requiring courts to impose mandatory sentences within Guideline ranges was unconstitutional in 2005. *United States v. Booker*, 543 U.S. 220, 264–65 (2005). The *Booker* decision rendered the Guidelines advisory, providing district court judges with wider discretion to consider how other sentencing factors, especially the § 3553(a) factors, could warrant a sentence above or below a calculated Guidelines range. See *id.* (holding that judges may impose a sentence outside of a Guidelines range if there is good reason to do so and the Guidelines range is calculated on the record).

<sup>182</sup> *Vigneau*, 473 F. Supp. 3d at 36–40.

<sup>183</sup> See *id.* at 38 ("The Court in sentencing Mr. Vigneau was not allowed to consider a sentence outside the [Guidelines] range.").

for marijuana conspiracies and the sentences imposed for “more heinous” crimes, such as murder.<sup>184</sup> The court stated that the defendant’s sentence was unusually and unjustifiably long given those comparisons.<sup>185</sup> Finally, and most interestingly, the court considered that marijuana was now legal or decriminalized in many states, despite its continued illegality at the federal level, a change since the time when this defendant was sentenced.<sup>186</sup> The court found that all of these circumstances constituted “extraordinary and compelling” reasons to grant compassionate release, despite the fact that none of these reasons are explicitly listed in the Guidelines Manual.<sup>187</sup>

Finally, and notably, in *United States v. Cantu*—decided in 2019 as one of the earliest compassionate release cases after the First Step Act—the U.S. District Court for the Southern District of Texas granted release because prosecutors agreed that the defendant should be released.<sup>188</sup> That court noted the novelty of its own decision stemmed from the authority the First Step Act granted to the court.<sup>189</sup> The court further noted that it would be illogical under the new statutory system to allow the BOP to continue to act as the gatekeeper for motions for compassionate release under the circumstances.<sup>190</sup> In sum, these courts are using their newfound discretion to enlarge the universe of “extraor-

<sup>184</sup> See *id.* at 37–38 (citing U.S. SENT’G COMM’N, 2019 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 64 (2020), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf> [<https://perma.cc/MYK5-UW8V>]) (providing the average length of sentences imposed in 2019 for a variety of crimes).

<sup>185</sup> See *id.* (finding that the defendant’s marijuana trafficking and money laundering convictions resulted in a sentence longer than the average sentences imposed for murder, sexual abuse, and kidnapping—a comparison the court found intolerable).

<sup>186</sup> See *id.* at 38 (noting that the court was entitled to take notice of the “changing legal landscape” with regard to marijuana, despite marijuana’s illegality at the federal level).

<sup>187</sup> See *id.* at 39 (“Reviewing all the information in front of the Court, the Court finds that the factors recounted above represent extraordinary and compelling circumstances supporting the need to reduce Mr. Vigneau’s sentence.”).

<sup>188</sup> See 423 F. Supp. 3d 345, 353 (S.D. Tex. 2019) (“For the Government to advocate that the Court issue an order that ‘would cause BOP to release the Defendant,’ is beyond what is usual, customary, regular, or common. And given the Government’s position, irreparable harm and injustice would result if the Court failed to craft such an order.” (citations omitted)). In *Cantu*, the defendant had previously pled guilty to racketeering and drug offenses and was serving a 210-month sentence. *Id.* at 347.

<sup>189</sup> See *id.* at 353 (discussing the prosecution’s agreement that the defendant should be released based on the defendant’s advanced age); 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 cmt. n.1 (failing to provide an avenue for prosecutors to advocate for a defendant’s release under the compassionate release program).

<sup>190</sup> See *Cantu*, 423 F. Supp. 3d at 351 (“[I]f the Director of the BOP were still the sole determiner of what constitutes an extraordinary and compelling reason, the amendment’s allowance of defendants’ own § 3582(c)(1)(A) motions for reduction of sentence would be to no avail.”).

dinary and compelling reasons” justifying compassionate release under the First Step Act, broadening the number of inmates who may be eligible.<sup>191</sup>

*B. Compassion, Continued: Circuit Courts Join the Majority Position*

In September 2020, courts taking a broad approach toward compassionate release in the First Step era gained a major ally.<sup>192</sup> The U.S. Court of Appeals for the Second Circuit in *United States v. Brooker* was the first circuit court to rule that the “extraordinary and compelling reasons” listed in the Guidelines Manual were neither exhaustive nor binding.<sup>193</sup> The defendant, Jeremy Zullo, sought compassionate release based on his positive rehabilitative record, and what he contended was an unjustly long sentence.<sup>194</sup> The trial court initially concluded that Zullo was ineligible for release because his reasons did not strictly fall into one of the three “extraordinary and compelling” categories listed in the Guidelines Manual.<sup>195</sup>

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<sup>191</sup> See, e.g., *United States v. Lisi*, 440 F. Supp. 3d 246, 252 (S.D.N.Y. 2020) (finding the defendant’s role as sole available caregiver for his severely ill mother was “extraordinary and compelling”); *United States v. Walker*, No 11 CR 270, 2019 WL 5268752, at \*2–3 (N.D. Ohio Oct. 17, 2019) (holding that the defendant, a veteran suffering from PTSD with a lengthy sentence, a perfect disciplinary record, and a terminally ill mother had “extraordinary and compelling reasons” for release); *United States v. Bucci*, 409 F. Supp. 3d 1, 2 (D. Mass. 2019) (granting compassionate release for a defendant who was the only capable caregiver for his parent, rather than a child or spouse); *United States v. Cantu-Rivera*, No. CR H-89-204, 2019 WL 2578272, at \*2 (S.D. Tex. June 24, 2019) (concluding that an elderly defendant who had served thirty years of his sentence and had shown an “extraordinary degree of rehabilitation” therefore had “extraordinary and compelling reasons” for release).

<sup>192</sup> See *United States v. Brooker*, 976 F.3d 228, 234 (2d Cir. 2020) (holding that the “extraordinary and compelling [reasons]” listed in the Guidelines Manual were not exhaustive and were not applicable to district courts deciding compassionate release motions).

<sup>193</sup> See *id.* at 236 (holding that the Guidelines Manual “cannot constrain district courts’ discretion” in compassionate release matters). The district court had previously denied the defendant’s request, stating that the proffered “extraordinary and compelling” reason was not consistent with the compassionate release criteria in the Guidelines Manual. See *id.* at 234, 236 (noting that the district court denied Zullo’s motion by “relying on Guideline § 1B1.13, which seemingly still required a motion by the BOP”).

<sup>194</sup> See *id.* at 238 (“Zullo does not rely *solely* on his (apparently extensive) rehabilitation. Zullo’s age at the time of his crime and the sentencing court’s statements about the injustice of his lengthy sentence might perhaps weigh in favor of a sentence reduction.”). The defendant was serving a mandatory minimum fifteen-year sentence for drug trafficking and firearm offenses. *Id.* at 230. The defendant was only seventeen at the time of his offense, and twenty-two at the time of his sentencing. *Id.* The judge presiding over the defendant’s sentence noted that, during a period of pre-trial release, he had expressed remorse for his actions and had begun taking steps toward rehabilitation, though the court did not elaborate on what those steps were. See *id.* at 230–31 (failing to discuss the defendant’s specific rehabilitative activities). Additionally, the court commented that at the time the sentencing judge expressed his remorse that the then-mandatory Sentencing Guidelines required a harsher sentence than he would have otherwise imposed. *Id.*

<sup>195</sup> See *id.* at 234 (recounting the district court’s denial of the motion because sentence harshness and extraordinary rehabilitation are not “extraordinary and compelling” reasons contemplated in the Guidelines Manual).

The Second Circuit remanded, holding that after the First Step Act, the Guidelines Manual no longer limited the reasons for which a court could grant compassionate release.<sup>196</sup> The court ruled that the BOP Director's approval of the "extraordinary and compelling reasons" underlying a compassionate release motion was no longer necessary.<sup>197</sup> This was true even when the defendant sought compassionate release for an "extraordinary and compelling reason" other than medical circumstances, family circumstances, or old age; only the independent discretion of a district judge was necessary to grant the motion.<sup>198</sup> In other words, because the Guidelines Manual was incompatible with the new compassionate release statute, it was inapplicable and therefore did not constrain a district judge's discretion.<sup>199</sup> The Second Circuit stated that the limitations in the Guidelines Manual applied as they always had to motions brought by the BOP Director, but not to those brought directly by the inmate.<sup>200</sup> As such, the guidance still effectively restrained the district court's discretion.<sup>201</sup>

Soon after, in 2020, the U.S. Court of Appeals for the Sixth Circuit mirrored this two-pronged approach in *United States v. Jones*.<sup>202</sup> The Sixth Circuit echoed many of the policy rationales discussed in the *Brooker* opinion.<sup>203</sup> In addition, the Sixth Circuit made explicit its aim to preserve as much of the

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<sup>196</sup> See *id.* at 235 (holding that the removal of the BOP Director's exclusive authority to bring compassionate release motions made the compassionate release criteria in the Guidelines Manual inapplicable, thus freeing up district courts to exercise their discretion).

<sup>197</sup> See *id.* at 237 (concluding that the First Step Act allows district courts "to consider the full slate of extraordinary and compelling reasons" that might justify compassionate release, not merely those listed in the Guidelines Manual).

<sup>198</sup> See *id.* (noting that the restrictions codified in the compassionate release statute are the only constraints on a judge deciding a compassionate release motion).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 236 (stating that the First Step Act and the Guidelines Manual can be logically reconciled with one another when the BOP Director brings a motion).

<sup>201</sup> See *id.* ("This reading not only saves as much of the existing Guideline as is possible, given the First Step Act, but it also aligns with Congress' intent in passing that Act."). The Government argued that the Guidelines Manual was severable. *Id.* In other words, the Government insisted that the court should remove any language from the Guideline that was inconsistent with the statute and faithfully apply whatever remained. See *id.* ("The government seeks to retain BOP power to define extraordinary and compelling circumstances by urging us to sever the explicitly conflicting portions of the Guideline . . ."). The court rejected this argument, concluding that trying to sever any part of the Guideline would contravene legislative intent to increase the use of compassionate release under the First Step Act. *Id.* at 236–37.

<sup>202</sup> See 980 F.3d 1098, 1109 (6th Cir. 2020), *abrogated by* *United States v. Navarro*, 986 F.3d 668 (6th Cir. 2021) ("We now join the majority of district courts and the Second Circuit in holding that the passage of the First Step Act rendered § 1B1.13 'inapplicable' to cases where an imprisoned person files a motion for compassionate release.").

<sup>203</sup> See *id.* at 1108–11 (citing *United States v. Brooker*, 976 F.3d 228, 235–36 (2d Cir. 2020)) (noting the court's decision to "follow[] the Second Circuit's lead" in analyzing the compassionate release statute and applicable guidance).



Guidelines Manual as possible.<sup>204</sup> The court explained that the Guidelines Manual restricted motions for compassionate release brought by the BOP Director, but not individual inmates.<sup>205</sup> The court then discussed a district courts' obligations to explain why it makes a given sentencing decision.<sup>206</sup> Citing Supreme Court precedent on sentence modification, the Sixth Circuit emphasized not only the district courts' obligations to explain, but appellate courts' duty to review district court decisions for abuse of discretion, providing a check on district courts.<sup>207</sup>

Later, in 2020 in *United States v. Gunn*, the U.S. Court of Appeals for the Seventh Circuit adopted the position of its sister circuits and emphasized that district court decisions on compassionate release were subject to appellate review.<sup>208</sup> Also in 2020, the U.S. Court of Appeals for the Fourth Circuit joined the *Brooker* camp in *United States v. McCoy*.<sup>209</sup> In 2021, the U.S. Court of Appeals for the Ninth Circuit followed suit in *United States v. Aruda*, followed by

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<sup>204</sup> See *id.* at 1111 (“By following the Second Circuit’s lead, we weave together three compatible aspirations: preserving as much of § 1B1.13 that can be saved, adhering to Congress’s intent, and respecting the Sentencing Commission’s thoughtful authorship of § 1B1.13’s commentary.”).

<sup>205</sup> *Id.* In 2020, in *United States v. Ruffin*, the Sixth Circuit addressed the question of the applicability of the Guidelines Manual to compassionate release for the first time, but declined to rule on the issue at that time. See 978 F.3d 1000, 1008 (6th Cir. 2020) (“At day’s end, we need not (and do not) pick a side in this debate.”). The *Ruffin* court found that regardless of whether the defendant had properly proffered an “extraordinary and compelling reason[]” warranting compassionate release, the § 3553(a) factors did not justify granting the motion. *Id.* The opinion provides a comprehensive summary of the debate over “extraordinary and compelling reasons,” and offers a robust collection of cases in both camps. See *id.* at 1006–08 (“It is easy to see why a conflict has emerged. For starters, courts have read the statutory text as cutting in both directions.”).

<sup>206</sup> See *Jones*, 980 F.3d at 1112 (discussing the statutory requirements that judges state the rationale for sentencing decisions in open court).

<sup>207</sup> *Id.*; see, e.g., *Chavez-Meza v. United States*, 138 S. Ct. 1959, 1963 (2018) (articulating that district courts have an “obligation to provide reasons” in sentencing modification decisions); *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 n.2 (2014) (holding that appellate courts are permitted to correct legal or factual errors if a district court’s decision hinged on the district court’s discretion); *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005) (“Discretion is not whim . . .”). The Sixth Circuit outlined three explanations that a district court must make on the record when ruling on a motion for compassionate release: (1) why the circumstances given are extraordinary and compelling, (2) why the extraordinary and compelling circumstance comport with requirements in the compassionate release statute and policy statements, and (3) how the § 3553(a) factors weigh in favor of release. See *Jones*, 980 F.3d at 1112–14 (discussing how thoughtful explanations from the judiciary reflect sound decision-making and improve public trust).

<sup>208</sup> 980 F.3d 1178, 1180–81 (7th Cir. 2020). The defendant in *Gunn* was charged with drug and firearms offenses. *Id.* at 1179. She sought compassionate release based on her advanced age and susceptibility to COVID-19. *Id.*

<sup>209</sup> 981 F.3d 271, 281 (4th Cir. 2020) (holding that district judges are bound only by statutory criteria when determining whether to grant compassionate release, and that the Sentencing Guidelines criteria do not apply to motions for compassionate release brought directly by a defendant). *McCoy* dealt with the consolidated appeals of defendants convicted of robbery and firearms offenses who faced an additional twenty-five year sentence due to the “stacking” provision of 18 U.S.C. § 924(c). *Id.* at 274. The defendants sought compassionate release based on amendments to 18 U.S.C. § 924(c), which provided for a lesser sentence. *Id.*

the U.S. Court of Appeals for the District of Columbia Circuit in *United States v. Long*, and lastly, the U.S. Court of Appeals for the Third Circuit in *United States v. Andrews*.<sup>210</sup>

Two other circuits initially hesitated to align with the Second Circuit's holding in *Brooker*, but later changed course to join the *Brooker* camp.<sup>211</sup> In March 2020, the U.S. Court of Appeals for the Tenth Circuit ruled in *United States v. Saldana* that post-sentencing developments in sentencing law are not an "extraordinary and compelling reason" warranting compassionate release, as such a reason was not explicitly written into the Guidelines Manual.<sup>212</sup> A

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<sup>210</sup> See *United States v. Andrews*, No. 20-2768, 2021 WL 3852617, at \*3 (3d Cir. Aug. 30, 2021) (agreeing with the *Brooker* court and sister circuits that have adopted the *Brooker* position based on a similar interpretation of the new compassionate release statute); *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021) (adopting the *Brooker* position to allow district courts to exercise discretion unconstrained by the Guidelines Manual in compassionate release decisions); *United States v. Aruda*, 993 F.3d 797, 801–02 (9th Cir. 2021) (per curiam) (holding similarly to *Brooker* and other circuits on the discretion afforded to district court judges on compassionate release motions). In *Aruda*, the defendant was serving a 130-month sentence after pleading guilty to drug charges. *Aruda*, 993 F.3d at 798. The defendant asserted that her hypothyroidism and other physical conditions made her more susceptible COVID-19. *Id.* The defendant proffered this concern as an "'extraordinary and compelling' reason[]" warranting compassionate release. *Id.* The district court denied the defendant's motion, finding that the criteria in the Guidelines Manual were binding and the reason provided did not fit any of the categories. *Id.* at 799. The Ninth Circuit vacated and remanded the case to the lower court to be reassessed without the constraints of the Guidelines Manual, holding that the Manual was no longer binding on the district court. *Id.* at 802. The defendant in *Long* had served thirteen years of a twenty-nine-year sentence for drug and racketeering charges and moved for compassionate release based on his susceptibility to contracting COVID-19 because of several debilitating medical conditions. *Long*, 997 F.3d at 349. The district court denied the defendant's motion. *Id.* The district court had assumed, for the sake of argument, that the defendant had presented "an 'extraordinary and compelling reason,'" but denied the defendant's motion on the grounds that the defendant was a danger to the community. *Id.* at 350. The D.C. Circuit did not rule on the merits of the defendant's claim or whether susceptibility to COVID-19 constituted an "extraordinary and compelling" reason but remanded to the lower court with the instruction that § 1B1.13 of the Sentencing Guidelines did not apply to the defendant's motion. *Id.* at 361. Finally, the defendant in *Andrews* was convicted of armed robbery and sentenced to 312 years. *Andrews*, 2021 WL 3852617, at \*1. The defendant sought compassionate release based on changes to the stacking provision in 18 U.S.C. § 924(c), which would have resulted in a lighter sentence for the defendant. *Id.* The district court had originally denied the defendant's motion on the grounds that he had failed to provide an "extraordinary and compelling reason[]." *Id.*

<sup>211</sup> See *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021) ("We conclude . . . , as have the Second, Fourth, Sixth, and Seventh Circuits, that the Sentencing Commission's existing policy statement is applicable only to motions for sentence reductions filed by the Director of the BOP, and not to motions filed directly by defendants."); *United States v. Shkambi*, 993 F.3d 388, 393 (5th Cir. 2021) ("[W]e conclude that neither the policy statement nor the commentary to it binds a district court addressing a prisoner's own motion under § 3582."); *United States v. Bell*, 823 F. App'x 283, 284 (5th Cir. 2020) (per curiam) (hesitating to depart from the compassionate release criteria in the Guidelines Manual); *United States v. Saldana*, 807 F. App'x 816, 819–20 (10th Cir. 2020) (implying that the compassionate release criteria in the Guidelines Manual is still binding, but declining to provide an explicit ruling on the issue).

<sup>212</sup> See 807 F. App'x at 819–20 (holding that retroactive sentencing relief must come from Congress); 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 cmt. n.1 (failing to list post-sentencing changes in sentencing law as an "extraordinary and compelling reason[]" warranting compassionate

year later, in March 2021, the Tenth Circuit changed course in *United States v. McGee*, concluding that a district court could properly consider post-conviction changes in sentencing law as an “extraordinary and compelling” circumstance for release.<sup>213</sup>

Similarly, in September 2020, the U.S. Court of Appeals for the Fifth Circuit, in *United States v. Bell*, implied that the Guidelines Manual and its list of “extraordinary and compelling reason[s]” was exhaustive and binding.<sup>214</sup> In April 2021, however, in *United States v. Shkambi* the Fifth Circuit changed course to align with *Brooker*.<sup>215</sup> In that case, the Fifth Circuit vacated and re-

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release); BOP PROGRAM STATEMENT 5050.50, *supra* note 10, at 1–2 (discussing compassionate release only with regard to the “extraordinary and compelling reasons” listed in the Guidelines Manual). *But see* *United States v. Maumau*, No. 08-CR-00758-11, 2020 WL 806121, at \*7 (D. Utah Feb. 18, 2020) (holding post-conviction changes in sentencing law could be an “extraordinary and compelling reason” to reduce a defendant’s sentence). In *Saldana*, the defendant had pled guilty to federal drug trafficking and firearms offenses. *Saldana*, 807 F. App’x at 817. He received a forty-six-month sentence, followed by a consecutive sixty-month sentence, and three years of supervised release. *Id.* at 818. The defendant’s prior state law conviction for assault of a police officer triggered a higher Guidelines sentence. *Id.* The defendant sought review of his sentence after the relevant state law recategorized his prior conviction. *Id.* The defendant argued that, had he been sentenced today, the recategorization would not have triggered a higher Guidelines sentence range. *Id.*

<sup>213</sup> See 992 F.3d at 1047, 1050 (adopting the interpretation set forth in *Brooker* and subsequent decisions by other circuits). The defendant in *McGee* was serving a mandatory life sentence for federal drug charges, triggered by his prior state law drug convictions. *Id.* The defendant sought compassionate release because the federal and state laws under which he was convicted were amended to provide for less harsh punishments, in addition to his exemplary rehabilitative record. *Id.* at 1039–40.

<sup>214</sup> See 823 F. App’x at 284 (noting that the Guidelines Manual suggests that its list of “extraordinary and compelling reason[s]” justifying compassionate release are exhaustive); 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 cmt. n.1 (setting forth a list of “extraordinary and compelling reasons” warranting compassionate release). The defendant in *Bell* was serving a 240-month federal sentence consecutively with several state prison sentences, although the opinion does not make clear for what crimes. *See Bell*, 823 F. App’x at 284 (failing to discuss the defendant’s criminal history). In addition to the harshness of his sentence, the defendant claimed that his guilty plea was not voluntary. *Id.* The court concluded that the harsh sentence and the defendant’s misgivings about the plea process together did not constitute “an extraordinary and compelling reason” warranting compassionate release. *Id.* The Fifth Circuit exhibited similar hesitance in its January 2021 decision in *United States v. Thompson*. See 984 F.3d 431, 434 (5th Cir. 2021), *cert. denied* *Thompson v. United States*, 210 L. Ed. 2d 843 (U.S. 2021) (“Although not dispositive, the commentary to . . . [the Sentencing Guidelines] § 1B1.13 informs our analysis . . .”). In *Thompson*, the court discussed a defendant seeking compassionate release on the grounds that he had an increased risk of contracting COVID-19 due to underlying medical conditions. *Id.* at 433. Unlike some district courts, the Fifth Circuit was not convinced that increased risk of contracting COVID-19 qualified as “extraordinary.” *Compare Thompson*, 984 F.3d at 434 (holding that increased susceptibility to COVID-19 because of hypertension and high-cholesterol is not “extraordinary”), *with United States v. Rodriguez*, 451 F. Supp. 3d 392, 400–01 (E.D. Pa. 2020) (holding that increased susceptibility to COVID-19 does qualify as an “extraordinary and compelling reason[.]”).

<sup>215</sup> See 993 F.3d 388, 392–93 (5th Cir. 2021) (holding that after the First Step Act’s enactment, district courts were free to consider any “extraordinary and compelling reason[.]” justifying compassionate release within statutory limits). The Fifth Circuit’s opinion in *Shkambi* did not explicitly list the crimes for which the defendant had been imprisoned, nor the length of his sentence, but it did note that the defendant sought compassionate release based on health complications that made him more

manded the lower court's denial of the defendant's compassionate release motion, noting that the lower court was no longer bound by the criteria in the Guidelines Manual.<sup>216</sup> With this change of heart from the Fifth and Tenth Circuits, nine circuits in total support the *Brooker* position, setting aside the Guideline Manual's limitations on compassionate release as applied to inmates pursuing motions on their own behalf.<sup>217</sup>

### *C. Consistency: Many District Judges Hesitate to Broaden Compassionate Release Criteria*

The entire federal judiciary is not keen, however, to exercise broad discretion in compassionate release matters.<sup>218</sup> A minority of district courts are hesitant to find "extraordinary and compelling" circumstances beyond the three reasons explicitly listed in the Guidelines Manual: medical circumstances, family circumstances, or old age.<sup>219</sup> Some courts in the minority camp have denied motions for compassionate release for circumstances where other courts

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susceptible to contracting COVID-19. *See id.* at 389 (failing to recount the defendant's criminal history).

<sup>216</sup> *See id.* 391–92 (identifying mass incarceration as a major rationale underlying the First Step Act's amendments to the compassionate release system and concluding that the First Step Act allows district courts to consider "extraordinary and compelling reasons" justifying compassionate release other than those in the Guidelines Manual to effectuate Congress's intent to address mass incarceration).

<sup>217</sup> *United States v. Andrews*, No. 20-2768, 2021 WL 3852617, at \*3 (3d Cir. Aug. 30, 2021); *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021); *United States v. Aruda*, 993 F.3d 797, 801–02 (9th Cir. 2021) (per curiam); *Shkambi*, 993 F.3d at 393; *McGee*, 992 F.3d at 1050; *United States v. McCoy*, 981 F.3d 271, 280–82 (4th Cir. 2020); *United States v. Jones*, 980 F.3d 1098, 1109 (6th Cir. 2020), *abrogated by* *United States v. Navarro*, 986 F.3d 668 (6th Cir. 2021); *United States v. Gunn*, 980 F.3d 1178, 1181 (7th Cir. 2020); *United States v. Brooker*, 976 F.3d 228, 234 (2d Cir. 2020).

<sup>218</sup> *See, e.g., United States v. Holley*, No. 96-CR-00208-SGC-1, 2021 WL 2867032 (N.D. Ala. July 8, 2021) (denying a motion for compassionate release because a defendant's health concerns did not strictly comply with Guidelines Manual); *United States v. Conyers*, No. 12-CR-016, 2020 WL 7480695, at \*2 (E.D. Tex. Dec. 18, 2020) (holding that the Guidelines Manual policy statement provides an exclusive list of "extraordinary and compelling reasons" for compassionate release); *United States v. Brummett*, No. 07-103, 2020 WL 6120457, at \*1 (E.D. Ky. Oct. 16, 2020) (characterizing district courts granting compassionate release for reasons not specifically articulated in the Guidelines Manual as an encroachment on the power of the Sentencing Commission).

<sup>219</sup> *See* 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 cmt. n.1 (setting forth only medical circumstances, family circumstances, and old age as explicit circumstances which constitute "extraordinary and compelling reasons" warranting compassionate release); *see also* *United States v. White*, No. 95-cr-179-Orl-22DCI, 2021 WL 2784325, at \*3 (M.D. Fla. July 2, 2021) (denying a motion for compassionate release because post-conviction changes in sentencing law are not an "extraordinary and compelling circumstance[]" in the Guidelines Manual); *United States v. Lynn*, No. CR 89-0072, 2019 WL 3805349, at \*1–2 (S.D. Ala. Aug. 13, 2019), *appeal dismissed*, No. 19-13239-F, 2019 WL 6273393 (11th Cir. Oct. 8, 2019) (finding that the Guidelines Manual's list of "extraordinary and compelling reasons" warranting compassionate release is exhaustive).

had granted release on nearly identical facts.<sup>220</sup> Courts which have adopted this position are reluctant to grant compassionate release for novel reasons until the Sentencing Commission updates the Guidelines Manual.<sup>221</sup>

This minority view asserts that the First Step Act is merely a procedural change to the compassionate release procedure, not a substantive change of compassionate release criteria.<sup>222</sup> In other words, the changes made by the First Step Act merely allow people other than the BOP Director to file compassionate release motions.<sup>223</sup> An early adopter of this position was the U.S. District Court for the Southern District of Alabama in the 2020 case *United States v. Lynn*.<sup>224</sup> In *Lynn*, the defendant asserted that his numerous health issues constituted “extraordinary and compelling reasons” warranting compassionate release.<sup>225</sup> The court disagreed with the Southern District of Texas’s ruling on similar facts in *United States v. Cantu*.<sup>226</sup> According to the *Lynn* court, it is improper to interpret inmates’ newfound capability to bring their own compassionate release motions as a substantive change in the law dictating when compassionate release is appropriate.<sup>227</sup>

Another minority opinion is notable for its author: Judge Danny C. Reeves, who previously sat on the Sentencing Commission.<sup>228</sup> In 2020, in

<sup>220</sup> Compare *United States v. Vigneau*, 473 F. Supp. 3d 31, 36–38 (D.R.I. 2020) (holding that changing sentencing regimes resulting in lighter sentences may be an “extraordinary and compelling reason[.]” for granting compassionate release to an inmate sentenced under the old regime), with *United States v. Arojoye*, 806 F. App’x 475, 477–78 (7th Cir. 2020) (characterizing the argument that sentencing reform could constitute a “‘compelling and extraordinary’ circumstance” as “dubious”).

<sup>221</sup> See *Brummett*, 2020 WL 6120457, at \*2 (“Until directed otherwise, this Court will continue to rely on Section 1B1.13 to determine whether a defendant has offered ‘extraordinary and compelling reasons’ to justify release.”).

<sup>222</sup> See *Conyers*, 2020 WL 7480695, at \*4 (“[W]hile the First Step Act expanded prisoners’ access to the courts to file compassionate-release motions under Section 3582(c)(1)(A), it did not alter the substantive standards governing such motions.”).

<sup>223</sup> See *id.* (characterizing the new capability of inmates to bring their own compassionate release motions as the expansion of compassionate release that Congress intended).

<sup>224</sup> See No. CR 89-0072, 2019 WL 3805349, at \*2 (S.D. Ala. Aug. 13, 2019), *appeal dismissed*, No. 19-13239-F, 2019 WL 6273393 (11th Cir. Oct. 8, 2019) (interpreting the compassionate release statute as amended by the First Step Act to effect no changes to the compassionate release criteria).

<sup>225</sup> See *Lynn*, 2019 WL 3805349, at \*1 (indicating that the defendant had a number of kidney and cardiovascular problems that were the basis of his motion).

<sup>226</sup> See *id.* at \*3–4 (acknowledging and recounting the rationale in the *Cantu* decision but finding “no comparable inherent incompatibility” between the amended compassionate release statute and the guidance in the Guidelines Manual, concluding that the Guidelines remain binding); *United States v. Cantu*, 423 F. Supp. 3d 345, 353 (S.D. Tex. 2019) (granting compassionate release to a defendant with numerous health issues which made the defendant more susceptible to COVID-19).

<sup>227</sup> See *Lynn*, 2019 WL 3805349, at \*2–4 (“The only change to this section made by the Act was to allow a defendant to file a compassionate release motion under certain circumstances.”).

<sup>228</sup> See *United States v. Brummett*, No. 07-103, 2020 WL 6120457, at \*1 (E.D. Ky. Oct. 16, 2020) (declining to find that the compassionate release criteria in the Guidelines Manual are no longer binding). Judge Reeves appears to have left the Sentencing Commission at some point in early 2021, as he is no longer listed as an active Commissioner on the Sentencing Commission’s website. *Former Commissioner Information*, U.S. SENT’G COMM’N, <https://www.ussc.gov/about/who-we-are/commissioners/former->

*United States v. Brummett*, a defendant in the U.S. District Court for the Eastern District of Kentucky moved for compassionate release on the grounds that he had an increased risk of contracting COVID-19.<sup>229</sup> The court denied the defendant's request for want of an "extraordinary and compelling" circumstance consistent with the Guidelines Manual.<sup>230</sup> The *Brummett* court openly disagreed with the *Brooker* holding, stating that the *Brooker* viewpoint allows the judiciary to usurp the Sentencing Commission's right to define "extraordinary and compelling reasons."<sup>231</sup> *Brummett*, in contrast to *Brooker*, concludes that district courts cannot grant compassionate release for novel reasons until the Sentencing Commission updates the Guidelines Manual, regardless of whether the Guidelines Manual is fairly applicable to compassionate release motions brought by inmates.<sup>232</sup>

#### *D. Consistency, Continued: The U.S. Court of Appeals for the Eleventh Circuit Supports the Minority Position*

To date, only one circuit court has adopted the minority position that the Guidelines Manual's compassionate release criteria remain binding on district court judges' ability to decide motions for compassionate release, regardless of who brings the motion.<sup>233</sup> In October 2020, the U.S. Court of Appeals for the Eleventh Circuit, in *United States v. Monaco*, denied a motion for compassionate release, reluctant to expand compassionate release criteria.<sup>234</sup> Although the

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commissioner-information [<https://perma.cc/SZJ6-M24G>]. Judge Reeves, however, was still an active Commissioner when the *Brummett* opinion was written in October 2020. *Id.*

<sup>229</sup> 2020 WL 6120457, at \*1.

<sup>230</sup> *See id.* at \*2 ("[T]he Court declines to expand the definition of 'extraordinary and compelling' broadly enough to include the risk of a future illness. *Brummett*'s motion will be denied on the merits.").

<sup>231</sup> *See id.* ("Brummett argues that the definitions in U.S.S.G. § 1B1.13 do not apply to compassionate-release motions brought [sic] directly by defendants. And some courts have made this determination . . . . [T]his Court will continue to rely on Section 1B1.13 . . . ." (citations omitted)); *see Brooker*, 976 F.3d at 234 (discussing the inapplicability of the Sentencing Guidelines to compassionate release motions brought directly by defendants, in opposition to the *Brummett* ruling).

<sup>232</sup> *See Brummett*, 2020 WL 6120457, at \*2 (noting the court's reluctance to depart from the compassionate release criteria provided in the Sentencing Guidelines until and unless the Sentencing Commission provides a new policy statement). Interestingly, *Brummett* may be moot following a contrary holding by the Sixth Circuit in 2020 in *United States v. Jones*. *See* 980 F.3d 1098, 1109 (6th Cir. 2020), *abrogated by* *United States v. Navarro*, 986 F.3d 668 (6th Cir. 2021) (holding that the Sentencing Guidelines do not limit a district court's discretion to find an "'extraordinary and compelling' reason" for compassionate release). The ruling in *Jones* enshrined the majority position as law in the Sixth Circuit, which includes the Eastern District of Kentucky. *See id.* (declining to address *Brummett* directly, but reaching the opposite conclusion).

<sup>233</sup> *See United States v. Bryant*, 996 F.3d 1243, 1247 (11th Cir. 2021) ("The [First Step Act] does not affect the [compassionate release] statute's or 1B1.13's substantive standards, specifically the definition of 'extraordinary and compelling reasons.'").

<sup>234</sup> *See* 832 F. App'x 623, 629–30 (11th Cir. 2020) (*per curiam*) (denying a motion for compassionate release because the defendant's proffered reasons did not strictly fit into the Guidelines Manu-

court did not explicitly rule on the issue, it implied that, even after the First Step Act, the Guidelines Manual's restrictions remained binding on motions for compassionate release because the task of defining "extraordinary and compelling reasons" traditionally fell to the Sentencing Commission, not the courts.<sup>235</sup>

Full endorsement of the minority position came in May 2021 in *United States v. Bryant*, when the Eleventh Circuit held that the First Step Act's allowance of defendant-filed compassionate release motions represented only a procedural change to compassionate release, leaving substantive criteria unchanged.<sup>236</sup> The defendant in *Bryant* sought compassionate release based on changes in sentencing law and his positive rehabilitative record.<sup>237</sup> The court held that because the Guidelines Manual was still "capable of being applied" to post-First Step Act motions for compassionate release, the Manual was, by dictionary definition, applicable to all motions for compassionate release.<sup>238</sup> The court stated that the broader role of the Guidelines Manual in the federal criminal justice system weighed in favor of greater restraint on judicial decision-making.<sup>239</sup> This decision, the court concluded, was in keeping with the

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al criteria). The defendant in *Monaco* was sentenced to 660 months for ten counts of assorted drug trafficking and firearms charges. *Id.* at 627. The defendant put forth his advanced age, long sentence, and rehabilitative record as "an extraordinary and compelling reason" for his release. *Id.* at 629–30. The Eleventh Circuit assessed the defendant's claim against only the old age criteria written out in the Manual, declining to invoke the "catch-all" provision. *Id.* Finding the defendant did not meet the criteria for compassionate release based on old age, the Eleventh Circuit upheld the lower court's denial of the motion. *See id.* (failing to discuss compassionate release criteria other than old age).

<sup>235</sup> *Id.* Although the absence of "an extraordinary and compelling reason" was sufficient to end the analysis, the Eleventh Circuit opted to further explain that the § 3553(a) factors weighed heavily against the defendant's release, regardless of whether he had proven the existence of "an extraordinary and compelling circumstance." *See id.* at 630 (noting that the severity of the defendant's crimes warranted a longer sentence). In addition to his firearms and drug charges, the defendant had also attempted to solicit the murders of several people, including a federal prosecutor. *Id.* at 627. Even so, other courts have acknowledged that the § 3553(a) factors can counsel against granting release despite the presence of "an extraordinary and compelling" circumstances. *See United States v. Chambliss*, 948 F.3d 691, 693–94 (5th Cir. 2020) (denying compassionate release based on the § 3553(a) factors despite the presence of "an extraordinary and compelling reason").

<sup>236</sup> *See* 996 F.3d 1243, 1247 (11th Cir. 2021) (holding that the First Step Act allowed defendants to file their own compassionate release motions, but because it contained no text exactly on point, it did not amend the substantive criteria for compassionate release).

<sup>237</sup> *Id.* at 1250–51. The defendant in *Bryant* was a police officer who utilized his position to traffic drugs and stolen weapons. *Id.* at 1248. After his conviction, the district court sentenced the defendant to 292-months, followed by a consecutive 300-month sentence, bringing his sentence to a total of almost fifty years. *Id.*

<sup>238</sup> *Id.* at 1252–53 (citing *Applicable*, BLACK'S LAW DICTIONARY, *supra* note 23). The court also relied on a second dictionary definition of "applicable"—defined as "'relating to' or 'relevant'"—to find that the Guidelines Manual remained "relevant" to the compassionate release statute, and thus could be properly applied to implement the statute. *Id.*

<sup>239</sup> *Id.* at 1255–56. In other words, the Eleventh Circuit concluded that it is preferable to retain some policy statement or administrative guidance to orient the implementation of a criminal justice statute, rather than leaving no guidance at all. *See id.* at 1257 (collecting cases discussing the Sentenc-

historic goal of the Comprehensive Crime Control Act of 1984 and the Sentencing Guidelines: consistency in sentencing.<sup>240</sup>

The Eleventh Circuit ended by criticizing the *Brooker* position on two grounds.<sup>241</sup> First, the court noted that any mention of motions by the BOP Director served only a “prefatory” role in the Guidelines Manual, rather than an operative one.<sup>242</sup> Said another way, the Eleventh Circuit stated that it was improper to discount the Guidelines Manual merely because its text still refers to the old compassionate release system.<sup>243</sup> Second, the Eleventh Circuit asserted that courts in the majority camp were legislating from the bench by creating new circumstances for compassionate release.<sup>244</sup> The *Brooker* camp, in the Eleventh Circuit’s view, improperly speculated what the Sentencing Commission and Congress *might* do rather than waiting for legislation.<sup>245</sup>

One judge on the *Bryant* court dissented, echoing the *Brooker* camp’s explanation of why the Guidelines Manual is no longer applicable to motions for compassionate release.<sup>246</sup> The dissent criticized the majority’s interpretation as an unlawful delegation of Sentencing Commission authority to the BOP, arguing that that interpretation empowers the BOP, without authorization from Congress, to limit the possible circumstances that could justify granting com-

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ing Commission’s role in promoting consistency in the federal criminal justice system by providing uniform guidance on sentencing matters).

<sup>240</sup> See *id.* at 1256–57 (identifying sentencing consistency, the main historic rationale behind the creation of the Sentencing Commission and the Sentencing Guidelines, as a motivating interest for the decision).

<sup>241</sup> See *id.* (acknowledging the *Brooker* position as originally articulated by the Second Circuit, and similar subsequent opinions from other circuits).

<sup>242</sup> See *id.* at 1260 (“The *prefatory* part of the policy statement orients the reader by paraphrasing the statute as it existed at the time the policy statement was enacted. But the important *operative* provisions of the policy statement are found in the application notes.” (emphasis added)). A prefatory statement is an introduction that helps orient a reader and provides scope and purpose. *Preface*, *DIC-TIONARY.COM*, <https://www.dictionary.com/browse/preface> [<https://perma.cc/X5PA-A3RD>]. An operative provision has some legal force or effect. *Operative*, *BLACK’S LAW DICTIONARY*, *supra* note 23.

<sup>243</sup> See *Bryant*, 996 F.3d at 1260 (criticizing courts in the *Brooker* camp for usurping the role of the Sentencing Commission imputing an operative meaning to the mention of motions brought by the BOP Director in the Guidelines Manual).

<sup>244</sup> See *id.* at 1261 (criticizing the courts in the *Brooker* camp’s “purposivist”—or intention-driven—approach for infringing upon the powers of the executive and legislative branches). The Eleventh Circuit, in other words, favors an interpretation of the compassionate release statute and the Guidelines Manual that preserves the status quo until the Sentencing Commission updates the Guidelines Manual, even though the update process can take several months, if not years. See *id.* (discussing the “lag time between a statutory change and guideline amendments” that prevent new Guidelines from taking immediate effect).

<sup>245</sup> See *id.* (“[I]t is not our role to predict what the Sentencing Commission will do or what Congress wants it to do. Our role is to interpret the relevant legal texts and apply them as they exist.”).

<sup>246</sup> See *id.* at 1268–69 (Martin, J., dissenting) (performing a textualist analysis of the guidance in the Guidelines Manual to conclude that, by its own terms, the compassionate release criteria in the Guidelines Manual can only be applied to motions filed by the BOP Director, not to motions filed directly by defendants).



passionate release.<sup>247</sup> Finally, the dissent denounced the majority's focus on the rationale underlying the 1984 CCCA to the detriment of the more recent First Step Act.<sup>248</sup> Though divided, the Eleventh Circuit remains the only federal appellate court that subscribes to this narrower interpretation of the First Step Act.<sup>249</sup>

### III. EFFECTUATING CONGRESSIONAL INTENT BY CONTINUING TO EXPAND THE USE OF COMPASSIONATE RELEASE

The combined forces of the First Step Act and the COVID-19 pandemic have thrust compassionate release into the spotlight.<sup>250</sup> Regrettably, this has sown division among federal courts about how to interpret now out-of-date and inconsistent administrative guidance on what constitutes “extraordinary and compelling” circumstances.<sup>251</sup> The resolution to this interpretive confusion, however, is straightforward.<sup>252</sup> Congress's explicit motivation for passing the First Step Act provides plenty of guidance for future action in all three branch-

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<sup>247</sup> See *id.* at 1272 (“[R]eading the Application Note in line with the majority’s interpretation, BOP is suddenly empowered to significantly restrain the universe of available ‘other reasons’ for defendants seeking compassionate release on their own behalf.” (emphasis omitted)). If Congress delegates certain powers and authority to a government agency, it is unlawful for that agency to in turn “sub-delegat[e]” that power to another agency. See *id.* (citing *Bayou Lawn & Landscape Servs. v. Sec’y of Labor*, 713 F.3d 1080, 1084–85 (11th Cir. 2013)) (explaining the process by which Congress can lawfully empower executive agencies with certain duties and capabilities).

<sup>248</sup> *Id.* at 1272–73. After *United States v. Long*, the D.C. Circuit expressed strong agreement with the dissent in *Bryant*. See 997 F.3d 342, 358 (D.C. Cir. 2021) (citing approvingly to Judge Martin’s dissent).

<sup>249</sup> See *Bryant*, 996 F.3d at 1247 (declining to adopt an interpretation of the First Step Act that would enable district courts to exercise wider discretion in compassionate release decisions); *id.* at 1272 (Martin, J., dissenting) (disagreeing with the majority opinion); see also *Long*, 997 F.3d at 358 (noting that all other circuits that have decided the issue disagree with the Eleventh Circuit).

<sup>250</sup> See *United States v. Jones*, 980 F.3d 1098, 1100 n.1 (6th Cir. 2020), *abrogated by* *United States v. Navarro*, 986 F.3d 668 (6th Cir. 2021) (citing Keri Blakinger & Joseph Neff, *Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent Were Denied.*, THE MARSHALL PROJECT (Oct. 7, 2020), <https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied> [<https://perma.cc/7ZS9-MMPW>]) (confirming that the COVID-19 pandemic drove an increase in compassionate release motions).

<sup>251</sup> Compare *United States v. Brooker*, 976 F.3d 228, 234 (2d Cir. 2020) (concluding that the First Step Act allows judges to consider a wider array of “extraordinary and compelling” circumstances to grant compassionate release), with *United States v. Bryant*, 996 F.3d 1243, 1247 (11th Cir. 2021) (holding that the First Step Act’s procedural changes did not affect substantive criteria of the Guidelines Manual for compassionate release).

<sup>252</sup> See 28 U.S.C. § 994(t) (authorizing the Sentencing Commission to promulgate new Sentencing Guidelines); Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person (First Step) Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239–41 (codified in scattered sections of 18 and 34 U.S.C.) (indicating Congressional intent to increase the use of compassionate release in the federal criminal justice system); *Brooker*, 976 F.3d at 235 (highlighting the importance of wide judicial discretion for district judges deciding on motions for compassionate release).

es of the federal government.<sup>253</sup> Section A of this Part advocates for all federal courts to join the majority position, accepting that the First Step Act empowered district courts to exercise wide discretion to grant compassionate release motions.<sup>254</sup> Section B cautions against future action by the Sentencing Commission that may encroach upon this discretion, noting that such action would subvert the goals of the First Step Act.<sup>255</sup>

*A. The Short-Term Fix: Courts Should Continue to Follow the  
Brooker Approach to Compassionate Release*

The most obvious fix for the inconsistency between the compassionate release statute as amended by the First Step Act and the Guidelines Manual is for the Sentencing Commission to issue an updated Guidelines Manual.<sup>256</sup> This is an obvious fix, but not an expedient one, because the Sentencing Commission is effectively paralyzed until the President nominates and the Senate confirms at least three voting members, allowing the Commission to have a quorum.<sup>257</sup> Even after the nomination process, newly appointed Commissioners may lock horns over amendments to a new Guidelines Manual.<sup>258</sup> If the new Commissioners were to submit an amended Guidelines Manual to Congress, there is a statutory lag time of six months before the amended Manual becomes effective.<sup>259</sup> Therefore, although a new Guidelines Manual is critical as a long-term solution, a quicker fix is necessary until then.<sup>260</sup>

<sup>253</sup> See First Step Act § 603(b) (indicating congressional intent to increase the use of compassionate release in the federal criminal justice system); JAMES, THE FIRST STEP ACT, *supra* note 119, at 1 (summarizing Congress's intent to overhaul the federal criminal justice system and address mass incarceration).

<sup>254</sup> See *infra* notes 256–290 and accompanying text.

<sup>255</sup> See *infra* notes 291–317 and accompanying text.

<sup>256</sup> See 18 U.S.C. § 3582(c)(1)(A) (stating that district courts cannot grant compassionate release for reasons inconsistent with applicable provisions in the Guidelines Manual); 28 U.S.C. § 994(t) (setting forth the Sentencing Commission's authority to promulgate new Sentencing Guidelines, which could reflect the more expansive post-First Step Act statutory framework).

<sup>257</sup> See 28 U.S.C. § 995(d) (mandating that the Sentencing Commission cannot promulgate new Guidelines without the presence of at least four voting members); *United States v. Bryant*, 996 F.3d 1243, 1261 (11th Cir. 2021) (discussing “lag time between” the issuance of Guidelines, and the time at which the new Guidelines actually take effect); *About the Commissioners*, *supra* note 145 (listing Judge Charles Breyer as the only active voting member of the Sentencing Commission). Currently, the Biden Administration has not announced any nominations to fill the vacancies on the Commission. Stewart Bishop, *Wide-Open Sentencing Commission Gives Biden Reform Path*, LAW360 (Jan. 21, 2021), <https://www.law360.com/articles/1347291/wide-open-sentencing-commission-gives-biden-reform-path> [https://perma.cc/9HNC-T6YS].

<sup>258</sup> See 28 U.S.C. § 995(a) (requiring that a majority of Commissioners agree to any changes to the Guidelines Manual).

<sup>259</sup> See 28 U.S.C. § 994(p) (setting out the process by which Guidelines Manual amendments become effective, including a delay period); *Bryant*, 996 F.3d at 1261 (citing *Dorsey v. United States*, 567 U.S. 260, 293 n.2 (2012) (Scalia, J., dissenting)) (noting a six-month delay between the time when the Sentencing Commission promulgates Guidelines Manual amendments and the time those

In the meantime, federal courts considering compassionate release motions should follow the dominant *Brooker* approach; exercising broad discretion to determine what constitutes an “extraordinary and compelling reason[.]”<sup>261</sup> A major motivation for Congress’s passage of the First Step Act was reducing the federal prison population.<sup>262</sup> It makes little sense for Congress to enact legislation intended to improve access to compassionate release only for courts to block that access because of antiquated Guideline language.<sup>263</sup> Further, as many judges in support of this position have stated, the compassionate release provisions in the First Step Act were a direct response to the BOP’s gross under-utilization of this mechanism.<sup>264</sup> Even the title of the applicable

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amendments become effective). Exacerbating the issue of timing is the fact that the Sentencing Commission, by statute, can only submit an amended Manual to Congress between the beginning of a regular Congressional session—typically a day in the first week of January—and the first day of May. *Id.* During this time, Congress is free to offer modifications or its disapproval. *Stinson v. United States*, 508 U.S. 36, 40 (1993).

<sup>260</sup> See *United States v. Gunn*, 980 F.3d 1178, 1181 (7th Cir. 2020) (“[W]e hope that the Sentencing Commission’s ability to revise its guidelines and policy statements will be restored by the appointment of additional members.”); *United States v. Brooker*, 976 F.3d 228, 234 (2d Cir. 2020) (noting that the Sentencing Commission has too few members to achieve a quorum); *United States v. Brummett*, No. 07-103, 2020 WL 6120457, at \*2 (E.D. Ky. Oct. 16, 2020) (“Until directed otherwise, this Court will continue to rely on Section 1B1.13 to determine whether a defendant has offered ‘extraordinary and compelling reasons’ to justify release.”).

<sup>261</sup> See *Brooker*, 976 F.3d at 235 (emphasis omitted) (determining that allowing courts to exercise greater discretion in deciding compassionate release motions aligns with the congressional intent behind the First Step Act); see also *United States v. Jones*, 980 F.3d 1098, 1110 (6th Cir. 2020), *abrogated by United States v. Navarro*, 986 F.3d 668 (6th Cir. 2021) (collecting legislative materials that indicate congressional intent to increase the use of compassionate release).

<sup>262</sup> See *Brooker*, 976 F.3d at 236 (discussing how, especially after the 2013 DOJ OIG Memo, Congress was motivated by the BOP’s consistent failure to bring compassionate release motions to sentencing courts when amending the federal compassionate release system with the First Step Act); DOJ OIG 2013 COMPASSIONATE RELEASE MEMO, *supra* note 16, at 27–28 (providing specific data on the BOP’s failure to bring compassionate release motions to sentencing courts); JAMES, THE FIRST STEP ACT, *supra* note 119, at 1 (noting congressional intent to increase use of the compassionate release mechanism); 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Ben Cardin) (recounting Senator Cardin’s assertion that the First Step Act would “expedite[]” and “expand[] compassionate release”); 164 Cong. Rec. H10362 (daily ed. Dec. 20, 2018) (statement of Rep. Jerrold Nadler) (noting Rep. Nadler’s hope that the First Step act would “improv[e] application of compassionate release”).

<sup>263</sup> See *Williams v. Taylor*, 529 U.S. 362, 404 (1999) (O’Connor, J., concurring) (“[G]ive effect, if possible, to every clause and word of a statute.”); *United States v. McCoy*, 981 F.3d 271, 274 (4th Cir. 2020) (“By creating an avenue for defendants to seek relief directly from the courts, Congress effectuated an ‘incremental’ change, expanding the ‘discretion [of the courts] to consider leniency.’” (alteration in the original)) (quoting *Brooker*, 976 F.3d at 230)).

<sup>264</sup> See *United States v. Marks*, 455 F. Supp. 3d 17, 23 (W.D.N.Y. 2020) (noting that the BOP’s failure to bring compassionate release motions was a major motivator in Congress’s decision to amend the compassionate release process); DOJ OIG 2013 COMPASSIONATE RELEASE MEMO, *supra* note 16, at 11 (summarizing the BOP’s under-utilization of compassionate release, such that an average of twenty-four inmates were released annually over the five-year period analyzed).

section of the First Step Act is a clear indication of Congress's intentions: "Increasing the Use and Transparency of Compassionate Release."<sup>265</sup>

Beyond titles, holistic statutory interpretation of the First Step Act weighs in favor of a *Brooker* reading as well.<sup>266</sup> In 2019, the U.S. District Court for the Southern District of Texas in *United States v. Cantu* held that the Guidelines Manual did not apply to defendant-initiated compassionate release motions.<sup>267</sup> In its thorough analysis of the new compassionate release statute—one of the first such judicial analyses undertaken—the *Cantu* court noted that it was illogical to require the BOP to make decisions on a defendant's motion for compassionate release under the First Step Act regime, which was specifically enacted to circumvent the BOP.<sup>268</sup> The dissent in the U.S. Court of Appeals for the Eleventh Circuit's 2020 case *United States v. Bryant* followed the same line of thinking.<sup>269</sup> Allowing the BOP to block defendant-filed compassionate release motions gives the BOP power that rightfully belongs to the Sentencing Commission.<sup>270</sup> Therefore, considering titles and practical application, the new statutory regime eclipses the pre-First Step Act system, and courts should prioritize the effectuation of that new regime.<sup>271</sup>

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<sup>265</sup> Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person (First Step) Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239 (codified in scattered sections of 18 and 34 U.S.C.). Scrutinizing titles of statutes, which legislatures consider carefully before adopting, is a crucial step of statutory interpretation. See *Brotherhood of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519, 528–29 (1947) (discussing the use of titles in statutory interpretation and noting that titles of legislation can “shed light on some ambiguous word or phrase”).

<sup>266</sup> See *United States v. Cantu*, 423 F. Supp. 3d 345, 350–52 (S.D. Tex. 2019) (applying principles of statutory interpretation to compassionate release under the First Step Act and supporting the *Brooker* principles of expanded judicial discretion).

<sup>267</sup> See *id.* at 350 (interpreting the First Step Act as Congress's manifest intent to increase the use of compassionate release). Although the *Cantu* court is not binding authority on any other court, the appellate courts discussed in this Note have adopted similar analyses. See *United States v. Aruda*, 993 F.3d 797, 801–02 (9th Cir. 2021) (per curiam) (undertaking a similar statutory analysis); *United States v. Brooker*, 976 F.3d 228, 234 (2d Cir. 2020) (same).

<sup>268</sup> See *Cantu*, 423 F. Supp. 3d at 351 (“[I]f the Director of the BOP were still the sole determiner of what constitutes an extraordinary and compelling reason, the amendment's allowance of defendants' own § 3582(c)(1)(A) motions for reduction of sentence would be to no avail.”).

<sup>269</sup> See *United States v. Bryant*, 996 F.3d 1243, 1272 (11th Cir. 2021) (Martin, J., dissenting) (positing that continued application of the out-of-date Guidelines Manual to compassionate release improperly gives BOP discretion over defendant-filed motions, and that the statutory changes to compassionate release stemmed from the BOP's mishandling of the compassionate release program).

<sup>270</sup> See *id.* (“But now, reading the Application Note in line with the majority's interpretation, BOP is suddenly empowered to significantly restrain the universe of available ‘other reasons’ for defendants seeking compassionate release on their own behalf.” (emphasis omitted)); *United States v. Jones*, 980 F.3d 1098, 1110 (6th Cir. 2020), *abrogated by* *United States v. Navarro*, 986 F.3d 668 (6th Cir. 2021) (“It would make little sense for the courts to operate as if the BOP remains the sole gatekeeper of compassionate release, which would reflect a bygone era that Congress intentionally amended in the First Step Act.”).

<sup>271</sup> See *Cantu*, 423 F. Supp. 3d at 350 (citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 327 (2012)) (stating that newer statutes take precedence over older ones).

Similarly, the Eleventh Circuit's articulation of the minority position on the appropriate reading of the compassionate release statute in *Bryant* is unduly rigid and over-exacting.<sup>272</sup> By hinging its interpretation on the dictionary definition of "applicable," the Eleventh Circuit attempts to retrofit out-of-date guidance into an incompatible statutory framework.<sup>273</sup> Furthermore, the Eleventh Circuit incorrectly assumed that because the out-of-date Guidelines Manual is *capable* of being applied after the First Step Act, it *must* be applied.<sup>274</sup> As a practical matter, the out-of-date Guidelines Manual can be a useful reference point for courts deciding compassionate release motions, as many courts have acknowledged, but mere usefulness does not require strict application.<sup>275</sup>

Instead, district courts should rely on their discretion under the First Step Act to determine if and when a defendant has proffered an "extraordinary and compelling reason[]" warranting compassionate release.<sup>276</sup> Doing so will best effectuate Congress's intent of increasing the use of compassionate release and reducing the enormous federal prison population.<sup>277</sup> Exercising this discretion

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<sup>272</sup> See *Bryant*, 996 F.3d at 1259 (focusing on the dictionary definition of the word "applicable" in order to determine that the Guidelines Manual is still binding on judges considering whether to grant compassionate release); *Brooker*, 976 F.3d at 234 (noting congressional intent to increase the use of compassionate release given that it was severely underutilized prior to the enactment of the First Step Act at the end of 2020).

<sup>273</sup> See 18 U.S.C. § 3582(c)(1)(A) (setting forth the statutory framework for compassionate release in which motions may be brought by either the BOP Director or by the defendant directly); *Bryant*, 996 F.3d at 1259 (holding that the compassionate release criteria in Guidelines Manual apply to motions brought by inmates despite conflicting language in compassionate release statute); 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 cmt. n.1 (providing criteria for compassionate release and exclusively referring to motions brought by the BOP Director).

<sup>274</sup> See *Bryant*, 996 F.3d at 1259 (holding the Guidelines Manual continues to provide binding guidance); *United States v. Long*, 997 F.3d 342, 358 (D.C. Cir. 2021) (criticizing the Eleventh Circuit's approach as out of step with statutory intent because it empowers the BOP to improperly exercise influence over the compassionate release process).

<sup>275</sup> See *United States v. McCoy*, 981 F.3d 271, 277–78 (4th Cir. 2020) (noting that the compassionate release criteria in the Guidelines Manual "remained informative" even if they are not compatible with the current statutory regime); *United States v. Lisi*, 440 F. Supp. 3d 246, 252 (S.D.N.Y. 2020) (considering the "animating principle" of releasing defendants to care for loved ones behind compassionate release for family circumstances in deciding whether to grant compassionate release for a reason that is similar to, but not exactly alike, the family circumstances in the Guidelines Manual).

<sup>276</sup> See Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person (First Step) Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239 (codified in scattered sections of 18 and 34 U.S.C.) (amending the federal compassionate release process to empower courts with more authority to decide compassionate release motions); *Brooker*, 976 F.3d at 236 (holding that the previously binding Sentencing Commission guidance is no longer binding following the new statutory framework for compassionate release); 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 cmt. n.4 (commenting that courts are in the best position to determine whether compassionate release is appropriate).

<sup>277</sup> See First Step Act § 603(b) (entitling the relevant portion of the Act "Increasing the Use and Transparency of Compassionate Release"); JAMES, THE FIRST STEP ACT, *supra* note 119, at 1 (identi-

also captures the spirit of the catch-all provision in the Guidelines Manual.<sup>278</sup> It would be nearly impossible for the Sentencing Commission to provide an exhaustive list of each and every circumstance constituting an “extraordinary and compelling reason[.]” meriting release, which was why Congress created the catch-all provision in the first place.<sup>279</sup> Further, the historic failure of the BOP Director to use his or her discretion does not mean the authority to exercise discretion is forfeited.<sup>280</sup>

Although the First Step Act grants district courts significant authority on compassionate release matters, Congress certainly did not intend to let the judiciary make decisions on a whim.<sup>281</sup> The minority camp raises concerns about unchecked judicial decision-making, but these concerns are not necessarily well founded.<sup>282</sup> District judges, unlike the BOP Director, are subject to reversal by circuit courts, an outcome most district courts seek to avoid.<sup>283</sup> Further, district courts have an obligation to explain their reasons for granting or denying compassionate release.<sup>284</sup> Circuit courts have made clear their willingness to reverse a district court’s decision should abuse of discretion occur.<sup>285</sup> In all

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fying Congress’s goal of using the First Step Act to address mass incarceration and an overlarge federal prison population).

<sup>278</sup> See 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 cmt. n.1 (providing specific scenarios in which to grant compassionate release, but also reserving the capacity to exercise discretion in other extraordinary circumstances beside those specifically written out).

<sup>279</sup> See *id.* § 1B1.13(1)(A) & cmt. n.4 (noting that “court[s] are] . . . in a unique position to determine whether the circumstances warrant a reduction”); see also *United States v. McCoy*, 981 F.3d 271, 288 (4th Cir. 2020) (concluding that the First Step Act conferred compassionate release decision-making authority to district courts).

<sup>280</sup> See *United States v. Marks*, 455 F. Supp. 3d 17, 23 (W.D.N.Y. 2020) (commenting that Congress granted courts the authority to decide compassionate release motions with the intention that courts assess each individual case on its merits utilizing the court’s reasonable discretion).

<sup>281</sup> See *United States v. Jones*, 980 F.3d 1098, 1112–14 (6th Cir. 2020), *abrogated by* *United States v. Navarro*, 986 F.3d 668 (6th Cir. 2021) (noting that the constraints in the compassionate release statute, as well as the court’s obligation to explain its decisions and the possibility of being overturned on appeal help ensure that district courts exercise discretion appropriately).

<sup>282</sup> See *id.* (observing that compassionate release decisions can be reversed on appeal); *United States v. Lynn*, No. 89-0072, 2019 WL 3805349, at \*3 (S.D. Ala. Aug. 13, 2019), *appeal dismissed*, No. 19-13239-F, 2019 WL 6273393 (11th Cir. Oct. 8, 2019) (indicating concern that sentencing courts will wield unchecked decision-making power to legislate from the bench).

<sup>283</sup> See *United States v. Gunn*, 980 F.3d 1178, 1181 (7th Cir. 2020) (holding that district court compassionate release decisions are reviewable for error and can be reversed by the circuit court).

<sup>284</sup> See *Jones*, 980 F.3d at 1112–14 (“District judges maintain an ‘obligation to provide reasons’ in . . . sentencing-modification decisions . . . .”); see also *Chavez-Meza v. United States*, 138 S. Ct. 1959, 1963 (2018) (requiring district courts to adequately explain sentencing modification decisions); *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 n.2 (2014) (holding that appellate courts can correct legal or factual errors made by district courts); *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005) (“Discretion is not whim . . . .”).

<sup>285</sup> See *Highmark*, 572 U.S. at 563 n.2 (discussing the abuse of discretion standard in the context of criminal proceedings and noting that discretion is not entirely unlimited); *Jones*, 980 F.3d at 1112–14 (emphasizing the district court’s obligation to explain its rationale for granting compassionate release); *Gunn*, 980 F.3d at 1181 (noting that district courts deciding compassionate release motions

respects, the reviewability of compassionate release decisions under the First Step Act is a marked improvement over the unreviewable “black box,” decision-making of the historic parole boards and the BOP.<sup>286</sup>

Finally, the presence of an “extraordinary and compelling reason[]” does not make compassionate release a foregone conclusion.<sup>287</sup> The compassionate release statute requires an analysis of the § 3553(a) factors in addition to a review of the defendant’s claimed “extraordinary and compelling” circumstances.<sup>288</sup> Furthermore, district judges are free to deny motions for compassionate release even if an “extraordinary and compelling” reason is present, and many have done so.<sup>289</sup> Judicial interpretation, however, will only go so far without statutory or administrative intervention.<sup>290</sup>

### *B. Future Action by the Sentencing Commission Should Allow District Judges Wide Discretion Over Compassionate Release Decisions*

If federal courts unanimously adopt the majority position, or if the Supreme Court endorses a position, then the issue of implementing compassionate release under the First Step Act would be solved.<sup>291</sup> The former is unlikely

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are subject to “deferential appellate review” and making clear appellate courts’ willingness to reverse decisions if appropriate).

<sup>286</sup> Compare *Gunn*, 980 F.3d at 1181 (holding that district court decisions on compassionate release are reviewable), with *Crowe v. United States*, 430 F. App’x 484, 485 (6th Cir. 2011) (per curiam) (holding that the BOP Director’s failure to bring a compassionate release motion is not reviewable), and *Zannino v. Arnold*, 531 F.2d 687, 690 (3d Cir. 1976) (finding the judiciary has limited discretion to review parole board decisions).

<sup>287</sup> See 18 U.S.C. § 3582(c)(1)(A) (listing the presence of “extraordinary and compelling reasons” as one of the necessary requirements to grant a motion for compassionate release alongside an analysis of the § 3553(a) sentencing factors).

<sup>288</sup> See *id.* (requiring that courts consider the § 3553(a) factors before granting a sentence reduction); *United States v. Chambliss*, 948 F.3d 691, 693–94 (5th Cir. 2020) (denying compassionate release based on the § 3553(a) factors despite the presence of “an extraordinary and compelling reason”); 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 (noting that compassionate release decisions require courts to consider the § 3553(a) factors).

<sup>289</sup> See, e.g., *United States v. Kibble*, 992 F.3d 326, 331–32 (4th Cir. 2021) (denying a motion for compassionate release because release was not warranted based on the need to deter criminal conduct similar to the defendant’s, and the need for the defendant’s sentence to be commensurate to his crime, which are two of the § 3553(a) factors); *United States v. Allen*, 819 F. App’x 418, 419 (6th Cir. 2020) (holding that the seriousness of the defendant’s firearms, drug trafficking, and obstruction of justice charges warranted denial of compassionate release despite the defendant’s major susceptibility to COVID); *Chambliss*, 948 F.3d at 693–94 (denying a terminally ill defendant’s motion for compassionate release due to the severity of the defendant’s crime and the need to deter similar conduct).

<sup>290</sup> See *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021) (despairing over the lack of a Sentencing Commission policy statement applicable to the First Step Act and the circuit split regarding the interpretation of the First Step Act’s amendments to compassionate release).

<sup>291</sup> See *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) (discussing how one district court’s decision can inform, but not bind, another district court, or even other judges on the same court); *United States v. Lopez-Velasquez*, 526 F.3d 804, 808 n.1 (5th Cir. 2008) (per curiam) (noting that Supreme Court precedent binds the decisions of lower courts).

to happen, but the latter is a long and arduous process.<sup>292</sup> In all likelihood, only Congress or the Sentencing Commission can permanently resolve this conflict.<sup>293</sup> No matter which body steps up first, it is important that they both take heed of the majority position.<sup>294</sup>

Once the Guidelines Manual is updated to be consistent with the First Step Act, it will once again become fully binding on district courts.<sup>295</sup> When the Sentencing Commission does promulgate new Guidelines, it should, in lockstep with Congress's intent to expand compassionate release, accept the *Brooker* rationale, preserving the ability of district courts to exercise wide discretion over compassionate release motions.<sup>296</sup> Admittedly, providing specific categories of "extraordinary and compelling reasons" may help guide judicial decision-making, but creating exhaustive and binding categories is not necessary.<sup>297</sup> To that end, the Sentencing Commission ought to make the adjustments to the existing "extraordinary and compelling reasons" presently outlined in the Guidelines Manual by broadening eligibility for compassionate

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<sup>292</sup> Compare *United States v. Brooker*, 976 F.3d 228, 234 (2d Cir. 2020) (holding that the Guidelines Manual's criteria for compassionate release are not applicable to defendant-initiated motions), with *United States v. Bryant*, 996 F.3d 1243, 1247 (11th Cir. 2021) (declining to agree with *Brooker* and establishing the opposite holding as law in the Eleventh Circuit). Currently, no appeals of compassionate release decisions are pending before the U.S. Supreme Court. See Chief Judge Colleen McMahon, Speech, *(Re)views from the Bench: A Judicial Perspective on Second-Look Sentencing in the Federal System*, 58 AM. CRIM. L. REV. 1617, 1620 (2021) (noting that the Supreme Court has not yet "[gotten] its hands on the *Brooker* decision").

<sup>293</sup> See 18 U.S.C. § 3582(c)(1)(A) (requiring that reductions in sentences be consistent with Sentencing Commission policy statements); 28 U.S.C. § 994(t) (empowering the Sentencing Commission to issue policy statements as needed, especially in response to new legislation).

<sup>294</sup> See *United States v. Andrews*, No. 20-2768, 2021 WL 3852617, at \*3 (3d Cir. Aug. 30, 2021) (endorsing the view that the Guidelines Manual is no longer binding); *Long*, 997 F.3d at 355 (same); *United States v. Aruda*, 993 F.3d 797, 801–02 (9th Cir. 2021) (per curiam) (same); *United States v. Shkambi*, 993 F.3d 388, 393 (5th Cir. 2021) (same); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021) (same); *United States v. McCoy*, 981 F.3d 271, 280–82 (4th Cir. 2020) (same); *United States v. Jones*, 980 F.3d 1098, 1111 (6th Cir. 2020), *abrogated by* *United States v. Navarro*, 986 F.3d 668 (6th Cir. 2021) (same); *Gunn*, 980 F.3d at 1180–81 (same); *Brooker*, 976 F.3d at 234 (same).

<sup>295</sup> See 18 U.S.C. § 3582(c) (stating that decisions to grant compassionate release must comport with any applicable policy statements from the Sentencing Commission, including the Guidelines Manual); 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 (echoing the statutory directive that compassionate release decisions must be compatible with Sentencing Commission guidance).

<sup>296</sup> See *Brooker*, 976 F.3d at 234 (holding that district courts have broad discretion in determining what constitutes an "extraordinary and compelling" reason warranting compassionate release); JAMES, THE FIRST STEP ACT, *supra* note 119, at 1 (identifying the under-utilization of compassionate release as Congress's motivation to amending the compassionate release system).

<sup>297</sup> See *McCoy*, 981 F.3d at 277–78 (stating that the Guidelines criteria for compassionate release are "no longer binding" after the First Step Act, but given that they reflect the judgment and expertise of the Sentencing Commission, the Guidelines Manual "remained informative").



release.<sup>298</sup> These adjustments should reflect the emerging case law consensus among district courts.<sup>299</sup>

Under the age-related umbrella of criteria, the Sentencing Commission should lower the age at which defendants become eligible for compassionate release.<sup>300</sup> Expanded access would more faithfully effectuate congressional intent to increase the use of compassionate release and specifically target defendants sentenced during the “tough on crime” era.<sup>301</sup> Additionally, because older inmates require more expensive and complex care than younger inmates, lowering the age for compassionate release would reduce expenses for the federal government—especially the BOP and DOJ.<sup>302</sup>

In the family circumstances category, the Sentencing Commission should consider inmates for compassionate release who are the sole living caregivers for other family members in addition to spouses and children.<sup>303</sup> This category could be expanded to allow compassionate release for defendants who are the sole living caregivers for a parent, for example, as at least one federal district court has done.<sup>304</sup>

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<sup>298</sup> See *id.* (noting that district courts can still refer to the Guidelines Manual to inform decisions on compassionate release); JAMES, THE FIRST STEP ACT, *supra* note 119, at 1 (revealing congressional intent to reduce federal prison population through the First Step Act).

<sup>299</sup> See, e.g., *United States v. Vigneau*, 473 F. Supp. 3d 31, 36–39 (D.R.I. 2020) (granting a motion for compassionate release for an “extraordinary and compelling reason[]” not explicitly listed in Guidelines Manual); *United States v. Beck*, 425 F. Supp. 3d 573, 580–82 (M.D.N.C. 2019) (same).

<sup>300</sup> See Williams, *Statement Before U.S. Sentencing Commission*, *supra* note 15, at 3 (arguing for the lowering of the compassionate release eligibility age because of the “accelerated aging” phenomenon, the cost savings the government could realize by incarcerating fewer elderly people, and the almost nonexistent likelihood of elderly persons to reoffend once they are released from prison (emphasis omitted)).

<sup>301</sup> See *United States v. Cantu*, 423 F. Supp. 3d 345, 350–52 (S.D. Tex. 2019) (applying principles of statutory interpretation to conclude that the First Step Act indicates congressional intent to reduce a massive prison population brought about by historically harsh criminal laws); JAMES, THE FEDERAL PRISON POPULATION, *supra* note 20, at 1 (discussing the use of compassionate release to help ameliorate mass incarceration by shortening sentences and providing a means for early release); JAMES, THE FIRST STEP ACT, *supra* note 119, at 1 (noting that the First Step Act is the result of extensive congressional debate on how to address the massive federal prison population).

<sup>302</sup> See DOJ OIG 2015 AGING INMATES MEMO, *supra* note 12, at 10–11 (enumerating the increased costs associated with incarcerating elderly persons due to the need to provide complex medical care and supervision); DOJ OIG 2013 COMPASSIONATE RELEASE MEMO, *supra* note 16, at 11 (identifying the potential cost savings to the federal government that could result from incarcerating fewer elderly persons in the realm of \$30,000 per person); Williams, *Statement Before U.S. Sentencing Commission*, *supra* note 15, *passim* (providing additional medical evidence explaining the increased costs associated with elderly inmates by analyzing the specific needs of elderly prisoners).

<sup>303</sup> See 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 cmt. n.1 (permitting compassionate release for defendants who are the only available caregiver for a child or spouse); *United States v. Bucci*, 409 F. Supp. 3d 1, 2 (D. Mass. 2019) (granting a compassionate release motion for a defendant who was the only capable caregiver for a parent, rather than a child or spouse, because the circumstances were similar enough to be “extraordinary and compelling”).

<sup>304</sup> See *Bucci*, 409 F. Supp. 3d at 2 (“When a defendant is the ‘only available caregiver’ for an incapacitated parent (perhaps a more unique occurrence given that inmates may have siblings or other

For compassionate release related to medical circumstances, a number of adjustments would prove beneficial.<sup>305</sup> For one, creating uniform criteria for qualifying medical conditions and embedding it into the Guidelines Manual and Program Statement would reduce disparate outcomes.<sup>306</sup> The revised criteria should also remove strict life expectancy requirements for defendants with terminal illnesses.<sup>307</sup> This requirement is too restrictive and it fails to account for defendants diagnosed as terminally ill without a specific life expectancy.<sup>308</sup> Finally, the criteria should explicitly include progressive ailments, especially those that impair cognitive function, as compelling circumstances.<sup>309</sup>

Even with expanded criteria, the Guidelines Manual could never capture every possible “extraordinary and compelling reason[.]” for release.<sup>310</sup> As many courts in the majority camp have pointed out, some reasons, such as massive sentencing reform, are “extraordinary and compelling” yet entirely unforeseeable.<sup>311</sup> Denying defendants a remedy based on a simple administrative techni-

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family members able to care for their parents), then, it is likewise an ‘extraordinary and compelling’ reason warranting compassionate release.”).

<sup>305</sup> See Williams, *Statement Before U.S. Sentencing Commission*, *supra* note 15, at 15–16 (providing ten recommended changes to compassionate release criteria based on medical circumstances); Jalila Jefferson-Bullock, *Are You (Still) My Great and Worthy Opponent?: Compassionate Release of Terminally Ill Offenders*, 83 UMKC L. REV. 521, 563 (2015) (arguing that judges are capable of understanding medical circumstances such that they should play a larger role than the BOP in making medical compassionate release determinations).

<sup>306</sup> See Williams, *Statement Before U.S. Sentencing Commission*, *supra* note 15, at 6–7 (proposing that prison officials approach medical compassionate release by examining individualized prognoses, rather than creating strictly defined categories).

<sup>307</sup> See *id.* at 7–8 (suggesting that eligibility for compassionate release for terminal illness should only require “a predictable end of life trajectory” rather than an exacting prognosis of an eighteen-month life expectancy in order to expand eligibility for compassionate release); see also Jefferson-Bullock, *supra* note 305, at 557 (commenting that prisons are ill-equipped to provide adequate end-of-life care given competing security and containment concerns).

<sup>308</sup> See Williams, *Statement Before U.S. Sentencing Commission*, *supra* note 15, at 8; Jefferson-Bullock, *supra* note 305, at 559 (asserting that reforms to medical compassionate release will afford greater dignity to terminally ill persons).

<sup>309</sup> See Williams, *Statement Before U.S. Sentencing Commission*, *supra* note 15, at 8 (suggesting that defendants “who have severe dementia, are in a persistent vegetative state or who suffer from another form of severe cognitive impairment” and defendants with severe cognitive or functionally debilitating injuries should be eligible for compassionate release (emphasis omitted)).

<sup>310</sup> See *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020) (discussing the court’s role in assessing proffered “extraordinary and compelling reasons” and determining whether that reason warrants granting compassionate release); 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 cmt. n.4 (“The court is in a unique position to determine whether the circumstances warrant a reduction . . .”).

<sup>311</sup> See *United States v. Redd*, 444 F. Supp. 3d 717, 727 (E.D. Va. 2020) (granting compassionate release to a defendant based on unforeseen changes in sentencing law); 2018 GUIDELINES MANUAL, *supra* note 11, § 1B1.13 cmt. n.2 (rejecting the notion that “an extraordinary and compassionate reason” for compassionate release must also be unforeseeable). *But see* 28 C.F.R. § 571.60 (2021) (implying that the BOP Director may only bring motions for compassionate release on a defendant’s behalf when an “extraordinary and compelling” reason was not foreseeable at the time a sentence was imposed).

cality would be grossly out of step with congressional intent.<sup>312</sup> The Sentencing Commission should, therefore, preserve the “catch-all provision” in any future Guidelines Manuals, as well as instruction that the specific criteria for compassionate release are not exhaustive.<sup>313</sup> Leaving space for judicial discretion, subject to appellate review, will enable district judges to meaningfully address issues such as sentencing inequity and changes in sentencing regimes as they arise.<sup>314</sup>

Finally, at a macro level, the Sentencing Commission should consistently look to compassionate release case law to inform future revisions to the Guidelines Manual.<sup>315</sup> The Sentencing Commission’s job is made significantly easier with this change, as it delegates the task of considering and explaining each case’s circumstances to district judges.<sup>316</sup> That said, by continuously adjusting the Guidelines Manual to reflect the consensus of the district courts, the Sentencing Commission can in turn guide the decisions of district judges to grant or deny compassionate release.<sup>317</sup>

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<sup>312</sup> See *United States v. Urkevich*, No. 03CR37, 2019 WL 6037391, at \*4 (D. Neb. Nov. 14, 2019), *appeal voluntarily dismissed*, No. 20-1603, 2020 WL 5642024 (8th Cir. Apr. 1, 2020) (holding that a reduction in sentence was warranted by the “injustice of [a defendant] facing a term of incarceration forty years longer than Congress now deems warranted”).

<sup>313</sup> See *United States v. McCoy*, 981 F.3d 271, 277–78 (4th Cir. 2020) (noting that the Guidelines, although no longer binding, are helpful as a reference); *United States v. Maumau*, No. 08-CR-00758-11, 2020 WL 806121, at \*2, 7 (D. Utah Feb. 18, 2020) (utilizing the “catch-all provision” to grant compassionate release for reasons not specifically listed in Guidelines Manual).

<sup>314</sup> See, e.g., *United States v. Vigneau*, 473 F. Supp. 3d 31, 36–39 (D.R.I. 2020) (granting compassionate release on the grounds that a defendant should benefit from the Sentencing Guidelines no longer being mandatory); *Maumau*, 2020 WL 806121, at \*7 (finding that more lenient modern sentencing law is an “extraordinary and compelling reason[.]” justifying compassionate release); JAMES, THE FIRST STEP ACT, *supra* note 119, at 1 (discussing Congress’s intent to use the First Step Act to reduce the massive federal prison population).

<sup>315</sup> See, e.g., *Vigneau*, 473 F. Supp. 3d at 36–39 (providing examples of “extraordinary and compelling reasons” not listed in Guidelines Manual based on criminal justice reform such as changes in sentencing law); *United States v. Bucci*, 409 F. Supp. 3d 1, 2 (D. Mass. 2019) (granting compassionate release for an inmate who was the sole available caregiver for an ill mother, an “extraordinary and compelling reason[.]” not specifically listed in Guidelines Manual’s family circumstances); *United States v. Beck*, 425 F. Supp. 3d 573, 580–82 (M.D.N.C. 2019) (finding a prison’s failure to provide adequate medical care constituted an “extraordinary and compelling reason” even though that exact reason was not listed in Guidelines Manual’s based on medical circumstances category).

<sup>316</sup> See 28 U.S.C. § 994(t) (empowering the Sentencing Commission with wide latitude to write policy statements that set forth criteria for when it is and is not appropriate for a sentencing court to grant compassionate release); *United States v. Jones*, 980 F.3d 1098, 1112–14 (6th Cir. 2020), *abrogated by* *United States v. Navarro*, 986 F.3d 668 (6th Cir. 2021) (reiterating the district court’s obligation to explain why compassionate release should be granted or denied).

<sup>317</sup> See *United States v. Rodriguez*, 451 F. Supp. 3d 392, 400 (E.D. Pa. 2020) (“[T]his policy statement remains informative in guiding [the court’s] determination.”).

## CONCLUSION

Compassionate release replaced the traditional mechanisms for reducing the sentences of persons incarcerated in the federal system. The mechanism was historically underutilized, prompting harsh criticism of federal criminal justice officials from the public and other government officials. The First Step Act directly addressed this problem by expanding access to compassionate release. It allowed defendants to petition their sentencing courts directly, reduced the gatekeeping role of the BOP, and allowed the courts to consider each unique circumstance individually. This statutory change, however, had the unintended consequence of making administrative guidance on compassionate release criteria inconsistent with the statute itself. To address this uncertainty, courts have exercised varying levels of discretion on motions for compassionate release. Most federal courts have moved beyond the BOP's guidance when considering defendant-initiated motions for compassionate release. A sizeable minority disagrees with this approach, concluding that the guidance remains binding and exhaustive in its explanations of what reasons warrant compassionate release. The majority approach best effectuates Congress's intent to keep sentencing power in the judiciary, and as such courts should continue to adopt that approach. Further, future administrative guidance should, in the spirit of the majority approach, allow courts to continue to exercise wide discretion in compassionate release decisions, subject to appellate review.

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