No. 19-14267

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

THOMAS BRYANT, JR.,

Appellant.

On Appeal from the United States District Court
for the Southern District of Georgia (No. 4:97-cr-182-JRH-BKE)
The Honorable J. Randal Hall, Chief Judge

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF APPELLANT THOMAS BRYANT, JR., SUPPORTING REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The National Association of Criminal Defense Lawyers ("NACDL") is a not-for-profit corporation operating under § 501(c)(3) of the Internal Revenue Code. NACDL has no parent corporation, outstanding stock shares, or other public securities. NACDL does not have any parent, subsidiary, or affiliate that has issued stock shares or other securities to the public. No publicly held corporation owns any stock in NACDL.

Counsel for NACDL certifies that, to his knowledge, the Certificate of Interested Persons filed with Mr. Bryant's brief is a complete list of all interested persons, with the following additions:

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To counsel's knowledge, no publicly traded company or corporation has any interest in the outcome of this case.

February 3, 2020

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STATEMENT OF *AMICUS CURIAE*'S IDENTITY, INTEREST, AND SOURCE OF AUTHORITY TO FILE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a voluntary, not-for-profit bar association. Its many thousands of members include private-sector criminal defense attorneys, public defense attorneys, military defense counsel, law professors, and judges. Since its founding in 1958, NACDL has worked to ensure the proper, efficient, and fair administration of justice for those accused of crime or misconduct. To this end, NACDL files dozens of *amicus* briefs each year in both state and federal courts to voice its position on issues important to criminal defendants, criminal defense attorneys, and the criminal justice system.

The issue presented in this case is one of nationwide importance, as some but not all federal district courts across the country have agreed (contrary to the decision below) that they have authority to modify sentences on grounds other than those identified by the Sentencing Commission, and this is an issue of first impression in this Circuit. NACDL has a particular interest in ensuring that federal courts understand the scope of their discretion when considering motions for compassionate release and their ability to grant relief in all meritorious cases.

[1] No counsel for a party wrote any portion of this brief, in whole or in part. Further, no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, and its counsel, made such a contribution. All parties consent to the filing of this brief.

STATEMENT OF THE ISSUE

Did the District Court err as a matter of law in concluding that it lacked authority to identify "extraordinary and compelling reasons" that warrant a sentence reduction under 18 U.S.C. § 3582(c)(1)(A) independent of those reasons identified by the Sentencing Commission and Director of the Bureau of Prisons?

SUMMARY OF THE ARGUMENT

Congress provided sentencing courts with substantial discretion to determine whether to modify a sentence based on the court's finding that a defendant's circumstances presented "extraordinary and compelling reasons" warranting a sentence reduction. 18 U.S.C. § 3582(c)(1)(A)(i). Congress required that "a reduction is consistent with applicable policy statements issued by the Sentencing Commission," *id.*, and instructed the Commission to "describe what should be considered extraordinary and compelling reasons for a sentence reduction, including the criteria to be applied and a list of specific examples"; only "[r]ehabilitation . . . alone" is not sufficient, 28 U.S.C. § 994(t). The Commission responded with a policy statement, Section 1B1.13, which outlines three examples of "extraordinary and compelling reasons" and allows the Director of the Bureau of Prisons ("BOP") to identify "other reasons." *See* USSG § 1B1.13 & comment. (n.1).

Initially, Section 3582(c)(1)(A) permitted courts to act only on compassionate release motions filed by the BOP Director, which prevented courts from exercising

their discretion to grant relief because the BOP Director almost never filed a motion. In 2018, Congress passed the First Step Act, which amended Section 3582(c)(1)(A) to permit courts to review motions filed directly by defendants. Section 1B1.13 has not been amended and continues to state that a sentence reduction is available *only* if sought by the BOP Director. USSG § 1B1.13 & comment. (n.4).

NACDL submits that courts reviewing compassionate release motions filed by defendants can grant a sentence reduction based on an "extraordinary and compelling" reason the Commission has not identified and still comply with Congress's mandate that the "reduction" be "consistent with" the Commission's "applicable policy statements." Four reasons support this conclusion.

First, nothing in the statutory text *limits* "extraordinary and compelling reasons" to those identified by the Commission. Congress delegated to the Commission only partially the authority to provide examples of "extraordinary and compelling reasons." Because the Commission does not possess exclusive authority to define what is "extraordinary and compelling," courts can base sentence reductions "consistent with" an applicable policy statement on other "extraordinary and compelling reasons." The "reduction" simply must satisfy any *other* criteria the Commission includes in its policy statement.

Second, even if Section 994(t) delegated exclusive authority to the Commission to describe an exhaustive list of "extraordinary and compelling

reasons" in a controlling policy statement, Section 1B1.13 would not be such a statement. Section 1B1.13 neither is "applicable" to, nor sets forth an "appropriate use" of, Section 3582 because, after enactment of the First Step Act, it directly conflicts with the statutory text. Accordingly, it cannot displace judicial determinations of "extraordinary and compelling reasons."

Third, even if Section 994(t) delegated exclusive authority to the Commission *and* Section 1B1.13 remained controlling, the Commission has not exercised its authority to issue an exhaustive list of "extraordinary and compelling reasons." Both the text and commentary to Section 1B1.13 reflect that it is an inexhaustive list of *examples,* leaving room for courts to supplement the Commission's list with other case-specific "extraordinary and compelling reasons."

Lastly, if Section 1B1.13 remains a controlling policy statement and the Court concludes that it sets forth an exhaustive list of reasons sentencing courts may consider, then the Court should read Section 1B1.13 as allowing *both* the courts and the BOP Director to identify "other reasons" under Application Note 1(D). After passage of the First Step Act, keeping courts tethered to the BOP Director's identification of "extraordinary and compelling reasons" would undermine Congress's intent to increase the use of compassionate release.

Sentencing courts possess substantial discretion under Section 3582(c)(1)(A)(i). That discretion simply is an extension of the judge's sentencing

role. Further, experience demonstrates that district courts employ appropriate restraint when identifying new "extraordinary and compelling reasons."

For all these reasons, the District Court erred in concluding that it lacked authority independently to determine whether Mr. Bryant has articulated "extraordinary and compelling reasons" warranting release. This Court should reverse the District Court's Order and remand for further proceedings.

ARGUMENT

I. SENTENCING COURTS HAVE BROAD DISCRETION TO MODIFY A SENTENCE UNDER SECTION 3582(c)(1)(A)(i).

Judges possess substantial discretion in selecting a sentence, and the sentences they select sometimes need to be revisited. Judges do not always choose the correct sentence, and, not infrequently, the sentence imposed does not remain warranted later.[2] Congress recognized this possibility and authorized district courts to modify sentences, as appropriate. *See* Pub. L. No. 98-473, § 212, 98 Stat. 1837, 1998–99 (1984) (codified at 18 U.S.C. § 3582(c)(1)(A)); S. Rep. No. 98-225, at 55–56 (1983).

The statutory framework provides for significant judicial discretion. Originally, a court could modify a sentence "in any case," as follows:

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[2] *See, e.g.*, Underhill, *Did the Man I Sentenced to 18 Years Deserve It?*, N.Y. TIMES, Jan. 23, 2016, https://www.nytimes.com/2016/01/24/opinion/sunday/did-i-sentence-a-murderer-or-a-cooperative-witness.html; Kopf, *Shon Hopwood and Kopf's terrible sentencing instincts*, HERCULES AND THE UMPIRE. (Aug. 8, 2013), https://herculesandtheumpire.com/2013/08/08/shon-hopwood-and-kopfs-terrible-sentencing-instincts/.

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

18 U.S.C. § 3582(c)(1)(A) (Supp. II 1985). By its plain language, Section 3582(c)(1)(A) authorized "the court" to identify *any* "extraordinary and compelling reasons" that warrant a sentence reduction and restricted judicial discretion only insofar as to require the court to consider the Section 3553(a) factors and find that "a reduction is consistent with" the Commission's policy statements. The Director of the Bureau of Prisons ("BOP"), however, served as gatekeeper before the court could exercise its discretion.

Congress directed the Commission to issue policy statements "regarding application of the guidelines . . . that in the view of the Commission would further the purposes set forth in section 3553(a)(2) . . . including the appropriate use of" Section 3582(c). 28 U.S.C. § 994(a)(2)(C). Congress also instructed the Commission that, in such a policy statement, it "shall describe what *should be* considered extraordinary and compelling reasons for a sentence reduction, including the criteria to be applied and a list of specific examples," but that "[r]ehabilitation . . . alone" is not "extraordinary and compelling." *Id.* § 994(t) (emphasis added).

Neither statute instructs the courts or the Commission that the Commission's description of what reasons, in its view, "should be" considered "extraordinary and compelling" would be the exclusive list of reasons a federal court could consider when reviewing a Section 3582(c)(1)(A) motion.

Decades later, the Commission issued Section 1B1.13, which contemplates a sentence reduction if, on motion of the BOP Director, the court finds that:

> (1) (A) extraordinary and compelling reasons warrant the reduction; . . .
>
> (2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and
>
> (3) the reduction is consistent with this policy statement.

USSG § 1B1.13.

Application Note 1 details four categories of "extraordinary and compelling reasons"—"(A) Medical Condition of the Defendant," "(B) Age of the Defendant," "(C) Family Circumstances," and "(D) Other Reasons" (to be identified by the BOP Director)—and explains: "Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the circumstances set forth below." USSG § 1B1.13 comment. (n.1). On its face, Section 1B1.13 neither sets forth an exhaustive list of "extraordinary and compelling

reasons" nor delegates to the BOP Director authority to establish an exhaustive list of "other reasons."

Despite the breadth of their discretion under Section 3582(c)(1)(A), until recently district courts had little ability to exercise that discretion. Although the Commission encouraged the BOP Director to file motions for courts to review because "[t]he court is in a unique position to determine whether the circumstances warrant a reduction," the BOP Director rarely did so. USSG § 1B1.13 & comment. (nn.1, 4); Sent'g Comm'n, Amend. 799 (Nov. 1, 2016); *see also* Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 103–04 (2019).

Members of Congress were concerned that the BOP Director was not making use of an important tool against overincarceration. *See, e.g.*, Letter from Twelve Senators to Dr. Thomas Kane and the Honorable Rod Rosenstein, at 2 (Aug. 3, 2017), https://famm.org/wp-content/uploads/2017.08.03-Letter-to-BOP-and-DAG-re.-Compassionate-Release.pdf; 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (Statement of Sen. Cardin) (the First Step Act "expands compassionate release . . . and expedites compassionate release applications"); *see also* Br. of Appellant at 29–32.

Congress acted on those concerns by enacting landmark criminal-justice-reform legislation. The First Step Act of 2018 amended Section 3582(c)(1)(A) to expand courts' authority to hear motions filed directly by defendants. Lest the

purpose of the bill go unnoticed, Congress titled the relevant provision: "*Increasing the Use* and Transparency of Compassionate Release." Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239 (2018) (codified at 18 U.S.C. § 3582(c)(1)(A)) (emphasis added); *see also United States v. Brown*, 411 F. Supp. 3d 446, 451 (S.D. Iowa 2019). It is not just legislative history, but a textual mandate passed by both Houses of Congress and signed by the President, that counsels courts to construe their authority expansively.

Today, the law provides that, "in any case":

> the court, upon motion of the Director of the Bureau of Prisons, *or upon motion of the defendant* after [administrative exhaustion] . . . may reduce the term of imprisonment . . . , after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—
>
> > (i) extraordinary and compelling reasons warrant such a reduction; . . .
>
> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

18 U.S.C. § 3582(c)(1)(A) (emphasis added).

With the First Step Act's amendment to Section 3582(c)(1)(A), a federal court finally can exercise its discretion to grant relief based on "extraordinary and compelling reasons" even where the BOP Director found no such "extraordinary and compelling reasons."

II. SENTENCING COURTS HAVE AUTHORITY TO GRANT MOTIONS FOR COMPASSIONATE RELEASE IF THE DEFENDANT DOES NOT MEET ONE OF THE "EXTRAORDINARY AND COMPELLING REASONS" DESCRIBED BY THE COMMISSION.

Several courts have misread Section 3582(c)(1)(A)(i) to restrict the "extraordinary and compelling reasons" a sentencing court may consider to only those the Commission and BOP have identified. *See, e.g.*, *United States v. Willingham*, 2019 WL 6733028, at *1–2 (S.D. Ga. Dec. 10, 2019), *appeal docketed*, No. 19-15070 (11th Cir. Dec. 20, 2019). Considering the question *de novo*, this Court should reach the contrary conclusion. *See United States v. Whyte*, 928 F.3d 1317, 1327 (11th Cir. 2019).

The Commission's policy statements and their commentary do presumptively bind sentencing courts. *See Stinson v. United States*, 508 U.S. 36, 42–43 (1993); *Williams v. United States*, 503 U.S. 193, 200–01 (1992). But it does not follow that the "extraordinary and compelling reasons" described in the Commission's policy statement are an exhaustive list of reasons courts may consider. Four reasons support allowing sentencing courts to grant compassionate release based on "extraordinary and compelling reasons" separate from those the Commission has identified, without running afoul of Congress's requirement that a sentence reduction be "consistent with" the Commission's applicable policy statements.

First, the plain language of Section 994 and Section 3582 reflects that Congress delegated to the Commission *partial* responsibility for describing and

identifying "extraordinary and compelling reasons." Because the task of defining "extraordinary and compelling" is shared between the courts and the Committee, courts can grant sentence reductions "consistent with" an applicable policy statement based on an "extraordinary and compelling" reason the Commission has not described. The court's decision to grant a sentence reduction simply must align with any other criteria the Commission includes in its policy statement.

Independently, even were the Court to conclude Congress gave the Commission exclusive authority to identify an exhaustive list of "extraordinary and compelling reasons" in a controlling policy statement, Section 1B1.13 is not controlling because it conflicts with Section 3582(c)(1)(A)(i). Thus, Section 1B1.13 cannot supplant courts' separate identification of "extraordinary and compelling reasons."

Third, even if the Commission has exclusive authority to identify "extraordinary and compelling reasons," it did not exercise its full authority when issuing Section 1B1.13. By its own terms, Section 1B1.13 is not an exhaustive list of "extraordinary and compelling reasons." Therefore, unless and until the Commission issues an exhaustive list of "extraordinary and compelling reasons," courts may grant compassionate release based on their own findings of "extraordinary and compelling reasons" while still being "consistent with" Section 1B1.13.

Finally, if Section 1B1.13 remains a controlling policy statement and sets out an exhaustive list of "extraordinary and compelling reasons" for courts to consider, the Court should read Application Note 1(D)'s contemplation that "other reasons" can support a reduction to allow sentencing courts to identify those other reasons on a case-by-case basis. Although the Commission anticipated that only the BOP Director would do so, continuing to tether compassionate release to the BOP Director's discretion is contrary to Congress's intent in passing the First Step Act.

A. The plain language of 18 U.S.C. § 3582 and 28 U.S.C. § 994 supports finding the Commission does not have exclusive authority to identify "extraordinary and compelling reasons."

Section 994(t) directs the Commission to "describe what *should* be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and list of specific examples," and precluded one reason—"rehabilitation," standing alone—from being "extraordinary and compelling." 28 U.S.C. § 994(t) (emphasis added). On its face, Section 994 delegates in part, not in whole, the responsibility of identifying "extraordinary and compelling reasons" warranting a sentence reduction. Therefore, the universe of "extraordinary and compelling reasons" is not limited to those described in the Commission's policy statements.

"Should" means "what is right or ought to be done." *Should*, PAPERBACK OXFORD ENGLISH DICTIONARY 671 (7th ed. 2012). Directing the Commission to

articulate what "ought to" qualify as an "extraordinary and compelling" reason, with an express exception, is an order for the Commission to set the presumptive floor, not the ceiling. It does not preclude reviewing courts from identifying *additional* "extraordinary and compelling reasons." Courts continue to possess authority to "find" "extraordinary and compelling reasons" in any given case. 18 U.S.C. § 3582(c)(1)(A)(i). Accordingly, the Commission and sentencing courts are each authorized to identify "extraordinary and compelling reasons."

That mandate aligns with Congress's textually expressed expectation that the Commission would issue policy statements that, in the Commission's view, reflect "appropriate use[s]" of Section 3582(c)(1)(A)(i). *See* 28 U.S.C. § 994(a)(2)(C). That the Commission envisions certain applications of Section 3582 as furthering the goals of Section 3553(a)(2), *see id.*, does not mean that the Commission alone has authority to define what is "appropriate." Congress knows how to delegate sole discretion to an administrative agency when it wants. *See, e.g.*, 34 U.S.C. § 60541(g)(5)(A)(iv) (granting BOP "sole discretion" under a particular program to determine whether an inmate has a "history of violence").

Missing from Section 994(t) is any similar indication that the Commission has sole discretion to identify "extraordinary and compelling reasons" for purposes of Section 3582(c)(1)(A)(i). Under standard principles of statutory interpretation, the difference in language compels a difference in interpretation. *See Russello v. United*

States, 464 U.S. 16, 23, 25 (1983); *United States v. Griffith*, 455 F.3d 1339, 1342–43 (11th Cir. 2006); *see also Whitfield v. United States*, 543 U.S. 209, 216 (2005).

Indeed, proximate provisions in both Sections 3582 and 994 curtail judicial discretion in ways absent from Sections 3582(c)(1)(A)(i) and 994(t). Under Section 3582(c)***(2)***, a court can reduce a sentence ***only*** if the Guidelines range "has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o)" and "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). Importantly, Section 994(u) provides that "*it* [the Commission] shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." 28 U.S.C. § 994(u) (emphasis added).

In combination, these statutory provisions give the Commission authority to define both *when* reductions occur and *by how much* a sentence may be reduced. By directing courts to reduce sentences only in a manner "consistent with" the Commission's "applicable policy statements," in the context of 18 U.S.C. § 3582(c)***(2)*** Congress made courts' resolutions of reduction motions depend entirely on the "Commission's decision not just to amend the Guidelines but to make the amendment retroactive" and "the Commission's statements dictating 'by what amount' the sentence of a prisoner serving a term of imprisonment affected by the

amendment 'may be reduced.'" *Dillon v. United States*, 560 U.S. 817, 826 (2010) (quoting 28 U.S.C. § 994(u)); *accord United States v. Colon*, 707 F.3d 1255, 1259–60 (11th Cir. 2013).

Motions under Section 3582(c)(1)(A)(i) are different. Because Section 994(t) delegates only in part the responsibility of defining "extraordinary and compelling reasons," courts reviewing motions brought under Section 3582(c)(1)(A) can impose sentence reductions "consistent with applicable policy statements" based on reasons not expressly contemplated by the Commission. The only thing the statutory language prohibits is contravening *other* express criteria the Commission sets forth in a policy statement concerning when a reduction is appropriate. *See, e.g.*, *United States v. Johns*, 2019 WL 2646663, at *3 (D. Ariz. June 27, 2019) ("[t]he requirement that the reduction is consistent with Sentencing Commission policy focuses on community safety" because Section 1B1.13 makes a sentencing modification contingent on finding "the 'defendant is not a danger to the safety of any other person or to the community'" (quoting USSG § 1B1.13(2)); *United States v. Willis*, 382 F. Supp. 3d 1185, 1188 (D.N.M. 2019) (same).

All statutory texts point in the same direction. Courts considering reductions in sentences under Section 3582(c)(1)(A)(i) are *not* limited to the mere examples of "extraordinary and compelling reasons" set out in policy statements.

B. Even if Congress delegated to the Commission exclusive authority to identify an exhaustive list of "extraordinary and compelling reasons" in a controlling policy statement, Section 1B1.13 is not such a statement.

Even if the Court were to read Section 994(t) as a wholesale delegation of authority to the Commission to identify the exclusive list of "extraordinary and compelling reasons"—and, in turn, that a sentence reduction could be "consistent with" a policy statement only if the court found one of the reasons the Commission identified—sentencing courts still would have discretion to identify additional "extraordinary and compelling reasons" independently because no controlling policy statement currently exists. Section 1B1.13 neither is "applicable" to, nor sets forth an "appropriate use" of, Section 3582 because it directly conflicts with the statutory text by stating that relief may be granted *only* on motion filed by the BOP Director. Either ground is a reason to set the statement aside in its entirety.

1. Section 1B1.13 is not an "applicable" policy statement.

Section 3582(c)(1)(A)(i) requires reviewing courts to consider "applicable" policy statements. "Applicable" statements are those that "fit." *See Applicable*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Capable of being applied; fit and right to be applied."). Section 1B1.13 no longer "fits" with Section 3582(c)(1)(A)(i) because, by continuing to provide for relief under Section 3582(c)(1)(A)(i) "*only* upon motion by the Director of the Bureau of Prisons," Section 1B1.13 directly conflicts with the newly amended statutory text. *Compare* 18 U.S.C.

§ 3582(c)(1)(A)(i) (relief available upon motion of BOP or defendant), *with* USSG § 1B1.13 & comment. (n.4) (emphasis added) (relief available *only* on motion by BOP Director).

That conflict pervades Section 1B1.13. It appears not only in an excisable application note, but also in the body of the provision itself. The policy statement, in its entirety, is therefore inapplicable to Section 3582(c)(1)(A)(i). *See Stinson*, 508 U.S. at 38 (Guidelines commentary is not controlling if "it violates the Constitution or a federal statute"); *United States v. Eggersdorf*, 126 F.3d 1318, 1320 (11th Cir. 1997) ("The statute controls in the event of a conflict between the guideline and the statute.").

Other courts have held that there is no "applicable policy statement" currently in effect. In *United States v. Beck*, the court wrote: "There is no policy statement applicable to motions for compassionate release filed by defendants under the First Step Act. By its terms, the old policy statement applies to motions for compassionate release filed by the BoP Director and makes no mention of motions filed by defendants." 2019 WL 2716505, at *5 (M.D.N.C. June 28, 2019). In *United States v. Bradshaw*, another court agreed: "The Sentencing Commission has not yet adopted a policy statement applicable to motions for compassionate release filed by defendants under the First Step Act." 2019 WL 7605447, at *2 & n.3 (M.D.N.C. Sept. 12, 2019).

2. Section 1B1.13 does not state an "appropriate use" of Section 3582(c)(1)(A)(i).

Congress limited the Commission's mandate to issuing "general policy statements regarding . . . aspect[s] of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in [18 U.S.C. § 3553(a)(2)], including the *appropriate use* of . . . the sentence modification provisions set forth in section[] . . . 3582(c)." 28 U.S.C. § 994(a)(2)(C) (emphasis added).

Section 1B1.13 expressly states that the "appropriate use" of Section 3582(c)(1)(A)(i) is to grant relief "*only* upon motion by the Director of the [BOP]." USSG § 1B1.13 & comment. (n.4) (emphasis added). Therefore, Section 1B1.13 runs afoul of Section 3582's amended text by precluding relief on a defendant's motion. *See Stinson*, 508 U.S. at 38; *Eggersdorf*, 126 F.3d at 1320.

"Given the changes to the statute, the policy-statement provision that was previously applicable to 18 U.S.C. § 3582(c)(1)(A) no longer fits with the statute and thus does not comply with the congressional mandate that the policy statement must provide guidance on the *appropriate use* of sentence-modification provisions under § 3582." *United States v. Cantu*, 2019 WL 2498923, *4 (S.D. Tex. June 17, 2019). "An interpretation of the old policy statement as binding on the new compassionate release procedure is likely inconsistent with the Commission's statutory role." *Beck*, 2019 WL 2716505, at *6.

In conflict with the correct holdings of other district courts, the Southern District of Alabama mistakenly concluded that Section 994(a)(2)(C) "leaves it to the Commission, not the judiciary, to determine what constitutes an appropriate use of [Section 3582], and Section 3582(c)(1)(A) 'requires courts to abide by those policy statements.'" *United States v. Lynn*, 2019 WL 3805349, at *4 (S.D. Ala. Aug. 13, 2019) (quoting *Colon*, 707 F.3d at 1259), *appeal dismissed*, 2019 WL 6273393 (11th Cir. Oct. 8, 2019). Section 994(a)(2)(C) simply instructs the Commission to issue a policy statement as to what "*in the view of the Commission* would further the purposes set forth in section 3553(a)(2) . . . including the appropriate use of" Section 3582. 28 U.S.C. § 994(a)(2)(C) (emphasis added). It is for this Court to determine what "appropriate use" in Section 994(a)(2)(C) means and whether the Commission's policy statement meets that definition. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

This Court's ruling in *United States v. Colon*, on which the *Lynn* court relied, does not indicate otherwise. This Court in *Colon* said no more about Section 994(a) than that it requires the Commission to issue policy statements. Section 3582(c)(1)(A)(i) was not at issue in that case. *See* 707 F.3d at 1259–60 ("To summarize, *§ 994(u)* requires the Commission to specify the circumstances in which and the amounts by which sentences may be reduced based on retroactive

amendments; § 994(a)(2)(C) requires that it do so in a policy statement; and *§ 3582(c)(2)* requires courts to follow those policy statements." (emphases added)).

C. Even if Congress delegated to the Commission exclusive authority to identify an exhaustive list of "extraordinary and compelling reasons" *and* Section 1B1.13 is a controlling policy statement, Section 1B1.13 is not an exhaustive list of reasons.

By its plain terms, Section 1B1.13 sets forth an intentionally incomplete list of reasons that qualify as "extraordinary and compelling" under Section 3582(c)(1)(A). Consequently, even were the Court to determine that Section 994(t) gave the Commission exclusive authority to define an exhaustive list of "extraordinary and compelling reasons," and that Section 1B1.13 remains a controlling policy statement, the Court should conclude that courts remain free to identify other "extraordinary and compelling reasons" because the Commission did not exercise all the authority it possesses. Accordingly, courts can reduce a defendant's sentence based on "extraordinary and compelling reasons" they identify on their own and still remain "consistent with" the Commission's policy statement.

On its face, Section 1B1.13 speaks affirmatively to what circumstances can give rise to "extraordinary and compelling reasons" warranting a sentence reduction. In alignment with Congress's mandate that the Commission identify what reasons *do* qualify as "extraordinary and compelling," rather than those that do not, *see* 28 U.S.C. § 994(t), Section 1B1.13 does not limit what may be an "extraordinary and compelling" reason, except to repeat that rehabilitation, "by itself," is not such a

reason. *See* USSG § 1B1.13 comment. (n.3). Simultaneously, no portion of Section 1B1.13 restricts the courts or BOP Director from identifying other reasons.

When amending Section 1B1.13 to identify categories of "extraordinary and compelling reasons," the Commission explained: "The amendment revises Application Note 1(A) of § 1B1.13 to provide four *examples* of circumstances that, provided the defendant is not a danger to the safety of any other person or to the community, would constitute 'extraordinary and compelling reasons' for purposes of 18 U.S.C. § 3582(c)(1)(A)." Sent'g Comm'n, Amend. 698 (Nov. 1, 2007) (emphasis added).

By the policy statement's express terms, then, the Commission left open the possibility of other "extraordinary and compelling reasons" beyond the examples it gave. *See United States v. Urkevich*, 2019 WL 6037391, at *3 (D. Neb. Nov. 14, 2019) ("The Commentary [to Section 1B1.13] describes certain circumstances under which 'extraordinary and compelling reasons' for a reduction in sentence are deemed to exist, but the Commentary does not suggest the list is exclusive.").

Because Section 1B1.13 gives the BOP Director unfettered discretion under Application Note 1(D) to determine what "other reasons" qualify as "extraordinary and compelling" when deciding whether to file a motion on a defendant's behalf, it follows that courts possess equally plenary discretion to identify "extraordinary and compelling reasons" when reviewing motions filed directly by defendants. The

BOP Director may exercise her discretion to determine whether a defendant presents "an extraordinary and compelling reason other than, or in combination with," the three categories the Commission described. *Id.* § 1B1.13 comment. (n.1(D)). Section 1B1.13 does not require that the BOP Director's reasons be "consistent with" those the Commission described. *See also* Sent'g Comm'n, Amend. 799 (Nov. 1, 2016) ("The Commission's policy statement is not legally binding on the [BOP][.]").[3] Instead, any sentence reduction made for "the reasons set forth in subdivisions (1) and (2) is consistent with this policy statement," USSG § 1B1.13 comment. (n.5)—meaning, any reduction made for an "extraordinary and compelling reason" identified by the BOP Director, *see id.* § 1B1.13 comment. (n.1(D)), is consistent with the policy statement.

Without some textual restriction, federal courts cannot be afforded *less* discretion than the BOP Director when reviewing motions filed by defendants. Accordingly, sentencing courts need not identify "extraordinary and compelling reasons" that are "consistent with" the categories the Commission has described. Instead, they can determine for themselves whether a defendant's case presents "an

[3] In fact, the BOP's current Policy Statement contradicts Section 1B1.13 because it will treat as "extraordinary and compelling" only those reasons "which could not reasonably have been foreseen by the court at the time of sentencing," while Section 1B1.13 expressly states that "an extraordinary and compelling reason need not have been unforeseen at the time of sentencing." *Compare* P.S. 5050.50, BUREAU OF PRISONS (Jan. 17, 2019), https://www.bop.gov/policy/progstat/5050_050_EN.pdf ("P.S. 5050.50"), at 3, *with* USSG § 1B1.13 comment. (n.2).

extraordinary and compelling reason other than, or in combination with," those categories the Commission described. *Cf. id.*

The BOP Director's policy statement, promulgated in response to Application Note 1(D) of Section 1B1.13, suggests nothing to the contrary. Policy Statement 5050.50 does not suggest that *its* reasons are required to be "consistent with" those the Commission described, nor does it indicate that its reasons should reflect all "extraordinary and compelling reasons" beyond those the Commission identified. Instead, the Statement says: "The criteria for a reduction in sentence (RIS) request *may* include the following" and lists examples of medical circumstances and non-medical circumstances. P.S. 5050.50 at 4, 6, 9 (emphasis added). Further, the factors the Statement lists "are neither exclusive nor weighted." *Id.* at 12.

Thus, even if Section 994(t) is a wholesale delegation of authority to the Commission, the Commission elected not to exercise all the authority it possesses. Unless and until the Commission sets forth an exhaustive list of "extraordinary and compelling reasons," courts may identify such reasons for themselves.

D. If Section 1B1.13 remains controlling and sets forth an exhaustive list of "extraordinary and compelling reasons," this Court should read Application Note 1(D) to permit sentencing courts to identify other "extraordinary and compelling reasons."

Section 1B1.13 expressly contemplates that "other reasons" can support a sentence reduction but leaves those determinations to the BOP Director. USSG § 1B1.13 comment. (n.1(D)). In light of the First Step Act's changes to Section

3582(c)(1)—specifically, expanding district courts' authority to allow defendants to file motions for compassionate release, given the BOP's decades-long failure to do so on their behalf, *see supra* at 8–9; Br. of Appellant at 6–10—that application note should be blue-penciled to allow district courts, not just the BOP, to find "other reasons." *See, e.g.*, *Urkevich*, 2019 WL 6037391, at *3–4; *Beck*, 2019 WL 2716505, at *9.

"[D]eference to the BOP no longer makes sense now that the First Step Act has reduced the BOP's role." *United States v. Fox*, 2019 WL 3046086, at *3 (D. Me. July 11, 2019), *appeal docketed*, No. 19-1785 (1st Cir.). Further, allowing the BOP to define the exclusive list of "other reasons" that support a sentence reduction would leave important sentencing decisions "to employees of the same Department of Justice that conducts the prosecution," an idea the Supreme Court has rejected. *See Setser v. United States*, 566 U.S. 231, 242 (2012) (rejecting argument that BOP, rather than courts, should possess discretion to determine whether a not-yet-imposed state sentence should run concurrently with or consecutively to a federal sentence).

III. VESTING SENTENCING COURTS WITH DISCRETION TO IDENTIFY "EXTRAORDINARY AND COMPELLING REASONS" IS CONSISTENT WITH THE JUDGE'S ROLE AT AN INITIAL SENTENCING AND DOES NOT OPEN ANY "FLOODGATES."

That district courts have discretion to identify "extraordinary and compelling reasons" for purposes of Section 3582(c)(1)(A)(i) accords with the substantial discretion judges possess when initially selecting a defendant's sentence.

Sentencing courts (not prosecutors, jailers, or appellate judges) are best equipped to engage in the fact-intensive review of the record that is required under Section 3553(a) when imposing an original sentence. *See United States v. Rosales-Bruno*, 789 F.3d 1249, 1255 (11th Cir. 2015). Identifying and evaluating "extraordinary and compelling reasons" in any particular case requires the same fact-intensive analysis and is best left to sentencing courts.

Indeed, individualized determination in considering sentence modification is what Congress envisioned when enacting Section 3582(c)(1)(A) in 1984, *see* S. Rep. No. 98-225 at 121, and when expanding its use through the First Step Act in 2018. "[T]he only way direct motions to district courts would increase the use of compassionate release is to allow district judges to consider the vast variety of circumstances that may constitute 'extraordinary and compelling [reasons].'" *Brown*, 411 F. Supp. 3d at 451.

Only when a *federal judge* identifies "extraordinary and compelling reasons" for the exercise of compassion will a prisoner benefit from Section 3582(c)(1)(A)(i). There are thus two important safeguards against any possible overuse of that provision. First, the Article III judiciary will make all relevant determinations. Second, a prisoner must meet the high bar of demonstrating that the reasons for release are both extraordinary and compelling. For these reasons alone, there is no

need to worry that recognizing expanded judicial discretion will open any "floodgates."

The opposite concern, however, is very real *and is what motivated Congress* to amend the law. Under-, not over-, use of the tools available to the judiciary to show compassion to the lowest members of our society led to passage of the First Step Act, with bipartisan majorities in both Houses of Congress and signature by President Trump. Expanding, not constricting, judicial authority shows proper judicial restraint by honoring the policy choice the political branches made to vest authority for sentence modification in the judiciary.

In any event, if this Court is concerned about "floodgates" or about unbounded judicial discretion, experience assuages the concern. In the absence of a statutory definition, the plain meaning of "extraordinary" and "compelling" guides judicial judgment. *See United States v. Vineyard*, 945 F.3d 1164, 1171–72 (11th Cir. 2019); *e.g.*, *United States v. Adams*, 2019 WL 3751745, at *3 (M.D.N.C. Aug. 8, 2019) (looking to Black's Law Dictionary for definitions of "extraordinary" and "compelling"); *Cantu*, 2019 WL 2498923, at *5 (same); *Beck*, 2019 WL 2716505, at *8 (same). Further, the Commission's policy statement and the BOP Director's policy statement provide guideposts for assessing whether any particular defendant

has presented "extraordinary and compelling reasons" within the meaning of the statute.[4]

With these tools in hand, district courts have conscientiously and carefully applied their discretion in recognizing new "extraordinary and compelling reasons." For example, courts have concluded that the following constitute "extraordinary and compelling reasons":

- BOP's abuse of the defendant, *see United States v. Rodriguez*, 2019 WL 6311388, at *8 (N.D. Cal. Nov. 25, 2019); *Beck*, 2019 WL 2716505, at *7–8;
- subsequent amendment of the statute under which the defendant was sentenced, causing the defendant's sentence to be substantially longer than it would be if imposed today, *see Urkevich*, 2019 WL 6037391, at *4;
- Government non-opposition to release, *see Cantu*, 2019 WL 2498923, at *5; and

[4] Multiple courts have relied on these resources even after finding that they were not binding. *See, e.g.*, *United States v. Schmitt*, 2020 WL 96904, at *3 (N.D. Iowa Jan. 8, 2020); *United States v. Allen*, 2019 WL 6529113, at *2 (E.D. Wash. Dec. 4, 2019); *United States v. Bucci*, 2019 WL 5075964, at *2 (D. Mass. Sept. 16, 2019); *Bradshaw*, 2019 WL 7605447, at *3; *Adams*, 2019 WL 3751745, at *3; *Fox*, 2019 WL 3046086, at *3.

- composite reasons specific to the defendant, *see United States v. Walker*, 2019 WL 5268752, at *3 (N.D. Ohio Oct. 17, 2019).

These cases reflect that, were this Court to reverse, that ruling would not open the proverbial floodgates. Although there are 174,963 federal inmates, courts have granted only 124 motions for compassionate release since passage of the First Step Act, resulting in release of less than 1% of the federal inmate population.[5] District courts can be trusted to engage in fact-bound, individualized determinations that result in sentence reductions in appropriate circumstances.

IV. THE DISTRICT COURT'S ORDER SHOULD BE REVERSED AND THE CASE REMANDED FOR FURTHER PROCEEDINGS.

The District Court erred in concluding that it lacked authority to identify "extraordinary and compelling reasons" other than those listed in the Sentencing Commission's policy statement or defined by the BOP. *See* Doc. 261 at 1. This Court owes no deference to the District Court's Order because it reviews questions of law concerning the interpretation of criminal statutes and the interpretation and application of the Guidelines *de novo*. *See Whyte*, 928 F.3d at 1327.

[5] *Total Federal Inmates*, FEDERAL BUREAU OF PRISONS (Jan. 30, 2020), https://www.bop.gov/about/statistics/population_statistics.jsp; *Dep't of Justice Announces Enhancements to the Risk Assessment System and Updates on First Step Act Implementation*, DEP'T OF JUSTICE (Jan. 15, 2020), https://www.justice.gov/opa/pr/department-justice-announces-enhancements-risk-assessment-system-and-updates-first-step-act.

The District Court's ruling rests on a misunderstanding of the scope of authority Section 3582(c)(1)(A) confers on sentencing courts. By cross-reference to the Government's opposition brief, the District Court reasoned that Section 994(t) makes the Commission's policy statements "binding" on reviewing courts and, because Section 1B1.13 is "binding," the "extraordinary and compelling reasons" identified in that statement and the BOP's policy statement constitute the exclusive "extraordinary and compelling reasons" the sentencing court may consider. *See* Doc. 261 at 1; Doc. 260 at 8. Respectfully, for the reasons articulated above and in Mr. Bryant's brief, that reading runs afoul of the plain meaning of Section 994(t) and Section 3582(c)(1)(A) and contravenes Congress's intent in passing the First Step Act.

As demonstrated above, regardless of this Court's interpretation of Section 994(t) and the continued viability of Section 1B1.13, this Court should hold that Section 3582(c)(1)(A)(i) grants sentencing courts authority to identify "extraordinary and compelling reasons" that support a sentence reduction. Because the District Court erroneously concluded that it lacks authority to identify "extraordinary and compelling reasons" other than those listed in the Commission's existing policy statement and described by the BOP, the District Court's judgment should be reversed and the case remanded for the District Court to determine

whether, in its independent judgment, Mr. Bryant has set forth "extraordinary and compelling reasons" that his sentence should be reduced.

CONCLUSION

This Court should reverse the District Court's judgment and remand for further proceedings.

February 3, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 3, 2020, this brief was filed and served on all parties by CM/ECF, and seven paper copies were mailed to the Clerk of the Court by overnight Federal Express.

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