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Before the United States Sentencing Commission
Public Hearing on Proposed Amendments to Compassionate Release
Policy Statement
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During the sentencing hearing, the lawyers and the judge discuss the appropriate sentence, often at great length, but after the judge announces a decision, that judge, the lawyers, and the staff move on to the next case; the hearing and outcome soon fade into distant memory. Meanwhile, for the defendant, the torture of a monotonous existence begins, while life for his family moves forward without him. For him, every day, month and year that was added to the ultimate sentence will matter. The difference between ten and fifteen years may determine whether a parent sees his young child graduate from high school; the difference between ten and fifteen months may determine whether a son sees his sick parent before that parent passes away; the difference between probation and fifteen days may determine whether the defendant is able to maintain his employment and support his family. Thus, it is crucial that judges give careful consideration to every minute that is added to a defendant's sentence. Liberty is the norm; every moment of incarceration should be justified.¹

– Hon. George J. Hazel, U.S. District Judge, District of Maryland

I. Introduction

Compassionate release occupies an important place in the federal criminal system as a narrow post-conviction mechanism that addresses extraordinary and compelling situations. It allows judges to ensure that “every moment of incarceration . . . [is] justified” and to grant relief when it is not.² This Commission has taken great strides to fulfill its congressionally mandated role to define “extraordinary and compelling” circumstances warranting a sentencing reduction under 18 U.S.C. § 3582(c)(1)(A).³ Commensurate with Congress’s intent, enshrined in the First Step Act of 2018 (FSA),⁴ to expand the use of compassionate release, this Commission’s proposed amendments to U.S.S.G. § 1B1.13 appropriately respond to the lessons of the past four years—including the global pandemic. These amendments also respond to the lessons learned from the Bureau of Prisons’ (BOP)

¹ United States v. Faison, 2020 WL 815699, at *1 (D. Md. Feb. 18, 2020).

² *Id.*

³ 28 U.S.C. § 994(t).

⁴ Pub. L. No. 115-391, 132 Stat. 5194 (2018) [hereinafter First Step Act].

multi-decade failure as the sole gatekeeper to compassionate release. Accordingly, this Commission should retain and strengthen the proposals as discussed below.

My views are based on my extensive experience litigating compassionate release motions in the Northern District of Illinois, the Seventh Circuit, and beyond. I am a Clinical Professor of Law and the Associate Director of the Federal Criminal Justice Clinic (FCJC) at the University of Chicago Law School. In that role, I have litigated numerous successful compassionate release motions that raised extraordinary and compelling circumstances not covered by the existing policy statement, including serious health risks from the COVID-19 pandemic, extreme and unwarranted sentencing disparities, and changed circumstances that result in fundamentally inequitable sentences.⁵

As a litigator, I have seen firsthand the negative effects of the absence of an updated policy statement from the Commission. Over the last two years, the Seventh Circuit has become especially unwelcoming toward compassionate release, in contravention of Congress's unmistakable intent that compassionate release be expanded. Without this Commission's guidance, the Seventh Circuit has erected several categorical bars, dramatically limiting what can constitute an extraordinary and compelling reason for a sentencing reduction pursuant to § 3582(c)(1)(A). For example, just months before the Delta and Omicron variants of the coronavirus, the Seventh Circuit barred COVID-based compassionate release unless an individual could show that they could not receive or benefit from the vaccine.⁶ As a consequence of my experience, I have spent considerable time contemplating how this Commission's proposals would impact litigants and courts alike.

Beyond direct client representation, I teach, study, and advise on federal compassionate release legal issues, which includes conducting trainings, authoring scholarly publications, directing student research, and consulting with attorneys around the country on compassionate release motions. Outside of the compassionate release context, I also litigate federal district court cases, federal appeals, and other post-conviction matters and teach, study, and advise on federal criminal issues. Prior to my employment at the University of Chicago Law School, I was a trial attorney at the Federal Defenders of San Diego, Inc. for approximately six years and litigated countless federal trials, motions, sentencings, and other proceedings. All in all, my two decades of experience as a federal criminal defense attorney and my eleven years as an academic have allowed me to thoughtfully consider this Commission's proposed amendments.⁷

⁵ See, e.g., *United States v. White*, 2021 WL 3418854 (N.D. Ill. Aug. 5, 2021); *United States v. Blich*, No. 06-CR-586-2, slip op. (N.D. Ill. Apr. 13, 2022), Dkt. 666; *United States v. Lewis*, No. 06-CR-50074, slip. op. (N.D. Ill. June 2, 2021), Dkt. 346; *United States v. Hinojosa*, 2021 WL 170791 (N.D. Ill. Jan. 19, 2021).

⁶ *United States v. Broadfield*, 5 F.4th 801, 803 (7th Cir. 2021).

⁷ Some ideas in this written statement are also found in a forthcoming article by me and FCJC student attorney Jaden Lessnick, *Putting the "Compassion" in Compassionate*

This written statement proceeds as follows. First, I describe compassionate release’s legal background and Congress’s changes in the FSA, and I provide an overview of what has happened in the last four years without an updated policy statement defining “extraordinary and compelling” reasons. Second, I explain why this Commission has the legal authority—and even the duty—to enact all of its proposed amendments. Third, I describe why this Commission should adopt proposal (b)(5) regarding “changes in the law” and why the existing circuit split necessitates this Commission’s resolution. Fourth, I make clear why judicial discretion is essential to a well-functioning compassionate release system and why proposal (b)(6)’s Option 3, with modest revisions, is the most workable solution. In this section, I provide several case studies, including from my experience litigating stash house sting compassionate release cases. Fifth, I explicate the need for proposal (b)(4) governing sexual assault. Drawing on my experience with a current client, I show why the proposal’s language has problematic unintended consequences. Sixth, I address “issue for comment” number 5 and explain why the proposed amendments do not conflict with § 1B1.10. Finally, I emphasize several guardrails built into the compassionate release process that ensure compassionate release remains administrable under the proposed amendments.

II. Congress Intended Compassionate Release to Be a Flexible Mechanism That Offers Relief in Extraordinary and Compelling Cases.

This Commission’s proposed amendments reflect Congress’s intent when it created, and later expanded, compassionate release to act as a safety valve for people facing extraordinary and compelling circumstances.

In the Sentencing Reform Act of 1984 (SRA),⁸ Congress abolished federal parole, but simultaneously recognized that courts needed a mechanism to reevaluate people’s sentences when situations warranted. Congress intended this “safety valve” to be used in cases where it would be “inequitable” to continue someone’s incarceration, such as when a prisoner suffers from a terminal illness.⁹ Crucially, though, federal compassionate release has never been limited to medical circumstances. Nothing in the statute or its legislative history disclosed an intent to cabin compassionate release to medical reasons. Rather, this mechanism was intended to cover any cases in which “other extraordinary and compelling circumstances justify a [sentence] reduction.”¹⁰ In fact, Congress specifically recognized that compassionate release could be used to remedy “an unusually long

Release: The Need for a Policy Statement Codifying Judicial Discretion, 35(3) FED. SENT’G REP. 164 (forthcoming Feb. 2023).

⁸ Pub. L. No. 98-473, 98 Stat. 1837 (1984).

⁹ S. REP. NO. 98-225, at 121 (1983).

¹⁰ S. REP. NO. 98-225, at 55.

sentence” with only one substantive limitation—rehabilitation alone could not be an extraordinary and compelling reason.¹¹

This new system of compassionate release stood in stark contrast to the system of federal parole that Congress abolished. Under federal parole, any person could seek early release as soon as they had completed one-third of their total sentence. Decisions regarding sentence reductions were made not by courts, but by the United States Parole Commission, an independent agency within the Department of Justice (DOJ).¹² Those decisions were made with a sole focus on the person’s rehabilitation.¹³ Unlike parole, the new compassionate release regime “would be employed on an individualized basis to correct fundamentally unfair sentences”—those that presented extraordinary and compelling circumstances.¹⁴ Unlike parole, compassionate release was intended to “keep[] the sentencing power in the judiciary where it belongs” instead of with the Parole Commission.¹⁵ And unlike parole, compassionate release was (and is) constrained by more than just a determination of the petitioner’s rehabilitation; instead, release must be consistent with all of the relevant § 3553(a) factors, including the need for the sentence to reflect the seriousness of the offense, the need for general deterrence, and so on.¹⁶ This created a narrow but flexible review mechanism that was meant to “assure the availability of specific review” based on “particularly compelling situations.”¹⁷

Congress, however, made a critical error: it put the BOP in charge of compassionate release, such that courts could only consider sentencing reductions “upon motion” of the BOP. There was no mechanism for prisoners to seek compassionate release directly with sentencing judges.

Consistent with Congress’s BOP-centric approach, the Commission’s policy statement—first promulgated in 2006, more than 20 years after the creation of compassionate release—granted the BOP broad discretion to identify “[o]ther” extraordinary and compelling reasons, in addition to the three enumerated categories.¹⁸ Although the BOP was central to compassionate release in 1984, Congress never intended the BOP to act as an overbearing gatekeeper. Instead, Congress sought to balance the BOP’s role with “court determination, subject to consideration of Sentencing Commission standards of the question whether there is sufficient justification for reducing a term of imprisonment.”¹⁹ But this judicial

¹¹ S. REP. NO. 98-225, at 55; 28 U.S.C. § 994(t).

¹² Peter B. Hoffman, *History of the Federal Parole System: Part 1 (1910-1972)*, 61 FED. PROB. 23, 23 (1997).

¹³ Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 102 (2019).

¹⁴ *Id.*

¹⁵ S. REP. NO. 98-225, at 121.

¹⁶ See 18 U.S.C. § 3582(c)(1)(A); 18 U.S.C. § 3553(a).

¹⁷ S. REP. NO. 98-225, at 121.

¹⁸ U.S. SENT’G GUIDELINES MANUAL § 1B1.13 cmt. n.1(A)–(D) [hereinafter Application Note 1].

¹⁹ S. REP. NO. 98-225, at 56.

review was contingent upon the BOP bringing a motion in the first place, which it did in only the rarest of circumstances.

This system with the BOP serving as gatekeeper was an unmitigated failure. The BOP almost *never* sought release. As the Office of the Inspector General candidly expressed in a 2013 report, “[the] BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered.”²⁰ In the four years prior to the FSA, BOP approved only *six percent* of applications for compassionate release—and more than 250 individuals whose motions for release were pending or denied died while in custody.²¹ Even though compassionate release was never intended to be solely about medical circumstances, the BOP *never* approved non-medical compassionate release motions before the Inspector General’s report. Once the Inspector General recommended that the BOP grant non-medical compassionate release, the BOP approved a lamentable two percent of non-medical applications.²²

The BOP’s unwillingness to manage compassionate release spurred bipartisan reform. In the FSA, Congress allowed defendants to seek compassionate release directly from courts, while making no other changes to the statute.²³ In so doing, Congress specifically sought to expand the use of compassionate release: the FSA titled its amendments to § 3582(c)(1)(A) “Increasing the Use and Transparency of Compassionate Release.”²⁴

Before it could update its policy statement to be consistent with defendant-initiated motions, this Commission lost its quorum. Consequently, every federal court of appeals but the Eleventh has concluded that the existing policy statement is not “applicable.”²⁵ Because § 1B1.13 is nonbinding in almost every circuit, judges have enjoyed varying levels of discretion to identify extraordinary and compelling reasons for a reduction that are not enumerated in the policy statement.

This expanded judicial discretion was fortuitous. As COVID-19 ravaged the country in general and prisons in particular, judges exercised their newfound discretion to grant relief for people at high risk for a severe or deadly infection when the BOP would not. At the peak of the pandemic, the BOP filed a motion in just 1.2% of cases.²⁶ During that same time period, judges granted a little over 25% of

²⁰ OFF. OF THE INSPECTOR GEN., U.S. DEP’T OF JUST., I-2013-006, THE FEDERAL BUREAU OF PRISONS’ COMPASSIONATE RELEASE PROGRAM 11 (2013).

²¹ Christie Thompson, *Old, Sick and Dying in Shackles*, MARSHALL PROJECT (Mar. 7, 2018), <https://www.themarshallproject.org/2018/03/07/old-sick-and-dying-in-shackles> [https://perma.cc/7VZW-DP68].

²² *Id.*

²³ *See* 18 U.S.C. § 3852(c)(1)(A).

²⁴ First Step Act § 603(b).

²⁵ U.S. SENT’G COMM’N, COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC 2 (Mar. 2022) [hereinafter U.S. SENT’G COMM’N COVID REPORT].

²⁶ *Id.* at 18. As of March 2022, an estimated 287 federal prisoners lost their lives to COVID—and at least 70 of those people had applied for compassionate release and their

compassionate release motions—70% of which were for COVID-19.²⁷ Although compassionate release grants were at their highest in the middle of the pandemic, the mechanism’s use was still limited, and has since nearly returned to pre-pandemic levels.²⁸

In this interim period, judges exercising their discretion to grant release for reasons outside of the enumerated categories has been the exception, not the rule. In the absence of an updated policy statement, about half of the federal circuits adopted very limited definitions of what can constitute an extraordinary and compelling reason. For example, the Seventh Circuit (like several others) precludes district courts from considering sentence-related reasons for relief, such as nonretroactive law changes or the excessive length of a person’s sentence.²⁹

Compounding this problem is that judges rarely encountered compassionate release motions prior to the FSA because of the BOP’s obstinance. As a result, many district judges believed that compassionate release is primarily for medical circumstances³⁰ and have been understandably reticent to exercise their discretion to recognize reasons outside of the enumerated categories without an express recognition that their discretion can—and does—go further.

The result, as the data corroborate, is a compassionate release regime that is too constrained, contrary to Congress’s intent in amending § 3582(c)(1)(A) that compassionate release be expanded. During COVID, 92% of compassionate release grants were for reasons enumerated in, or analogous to those enumerated in, § 1B1.13³¹—even though every circuit but the Eleventh agrees that § 1B1.13 is inapplicable to defendant-initiated motions. Judges cited sentence-related reasons

motions were denied or were awaiting a decision. See Meg Anderson & Huo Jingnan, *As COVID Spread in Federal Prisons, Many At-Risk Inmates Tried and Failed to Get Out*, NPR (Mar. 7, 2022), <https://perma.cc/XM82-ENK6>; Casey Tolan, *Compassionate Release Became a Life-or-Death Lottery for Thousands of Federal Inmates During the Pandemic*, CNN (Sept. 30, 2021), <https://perma.cc/YTD4-XV2J>. The number of deaths is almost certainly an undercount due to the BOP’s death reporting being “[i]naccurate and [u]nverifiable.” See *The First Step Act, The Pandemic, and Compassionate Release: What Are the Next Steps for the Federal Bureau of Prisons?: Hearing Before the Subcomm. of the H. Comm. on the Judiciary, on Crime, Terrorism, and Homeland Security*, 117th Cong. 1–6 (Jan. 21, 2022) (written statement of Alison K. Guernsey, Prof. & Dir. of Fed. Crim. Def. Clinic, Univ. of Iowa), <https://www.congress.gov/117/meeting/house/114349/witnesses/HHRG-117-JU08-Wstate-GuernseyA-20220121.pdf>.

²⁷ See U.S. SENT’G COMM’N COVID REPORT, *supra* note 25, at 3.

²⁸ U.S. SENT’G COMM’N, COMPASSIONATE RELEASE DATA REPORT: FISCAL YEARS 2020 TO 2022 at fig.1. (Dec. 2022) [hereinafter U.S. SENT’G COMM’N REPORT].

²⁹ See *United States v. Brock*, 39 F.4th 462, 465 (7th Cir. 2022).

³⁰ See, e.g., *United States v. Crandall*, 2020 WL 7080309 at *6 (N.D. Iowa 2020) (“[C]ourts should not stray from the categories explicitly listed; health, age, and familial circumstances.”).

³¹ U.S. SENT’G COMM’N COVID REPORT, *supra* note 25, at 31 fig.17.

(such as excessive sentence length or changes in the guidelines) in only 3.2% of sentencing reductions.³²

That said, many judges have embraced their discretion to grant compassionate release for a variety of extraordinary and compelling reasons, including extreme sentencing disparities,³³ draconian sentences,³⁴ nonretroactive sentencing changes,³⁵ problematic government charging decisions,³⁶ and sexual abuse in prisons.³⁷

These situations illustrate the need for the Commission's proposals: more enumerated reasons, as well as a catch-all category clarifying that judicial discretion is not constrained by the listed circumstances. Both components are necessary. Enumerating more categories raises the floor of compassionate release and encourages even reticent judges to grant motions for reasons that are expressly defined by this Commission as extraordinary and compelling. But without making explicit that judicial discretion can go beyond the enumerated categories, judges may treat the enumerated categories as overly authoritative. If a defendant presents circumstances not analogous in kind to the enumerated categories, judges may hesitate to grant relief—even if those circumstances are truly extraordinary and compelling.

III. The Commission Has the Clear Legal Authority to Enact All of Its Compassionate Release Proposals.

The Commission has requested comment on whether it has authority to enact its proposed amendments, in particular (b)(5) (changes in the law resulting in an inequitable sentence) and (b)(6) (the catch-all category).³⁸ This question invokes several interrelated issues: (1) the Commission's threshold authority to define extraordinary and compelling reasons; (2) the Commission's authority to define "changes in the law" as extraordinary and compelling reasons, an issue that has divided circuit courts in the absence of guidance from the Commission;³⁹ and (3) the

³² *Id.* at 33.

³³ *See, e.g.*, United States v. DeFoggi, 2022 WL 1785435, at *4 (D. Neb. June 1, 2022).

³⁴ *See, e.g.*, United States v. Kissi, 469 F. Supp. 3d 21, 33 (E.D.N.Y. 2020).

³⁵ *See, e.g.*, United States v. Evans, 2020 WL 6391173 (N.D. Ga. Oct. 13, 2020).

³⁶ *See, e.g.*, United States v. Rollins, 540 F. Supp. 3d 804, 811 (N.D. Ill. 2021).

³⁷ *See, e.g.*, United States v. Brice, No. 13-CR-206-2, 2022 WL 17721031, at *6–9 (E.D. Penn. Dec. 15, 2022).

³⁸ U.S. SENT'G COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES 8 (PRELIMINARY) (Jan. 12, 2023), www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230112_prelim_RF.pdf [<https://perma.cc/FG9L-NFM9>] [hereinafter PROPOSED AMENDMENTS].

³⁹ *See* United States v. Chen, 48 F.4th 1092, 1096–97 (9th Cir. 2022) (outlining the circuit split).

Commission’s authority to codify judicial discretion to define “other” extraordinary and compelling reasons.

This Commission has the clear statutory authority to promulgate all of its proposals. Congress directed the Commission to define “extraordinary and compelling reasons” for a sentence reduction, with the only limitation being that rehabilitation—alone—cannot be such a reason.⁴⁰ Although courts have been forced to define the scope of extraordinary and compelling reasons in the absence of the Commission’s guidance, those opinions anticipate that they will eventually be replaced by this Commission’s impending policy statement. Indeed, once the Commission speaks, its amendments will bind federal judges and override contrary caselaw.⁴¹

A. Congress expressly granted the Commission the authority to define extraordinary and compelling reasons.

On the threshold authority question, the answer is clear: the Commission can—and must—promulgate all of its proposals because Congress *expressly directed* this Commission to define “extraordinary and compelling reasons” for compassionate release.⁴² In particular, 28 U.S.C. § 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 a list of specific examples.”⁴³

The only limitations on the scope of this Commission’s ability to define extraordinary and compelling reasons are those explicitly stated in the statute (barring any constitutional limitations).⁴⁴ Congress has imposed *only one* limitation on the substance of the Commission’s definition of extraordinary and compelling reasons: “Rehabilitation of the defendant *alone* shall not be considered an extraordinary and compelling reason.”⁴⁵ Had Congress intended to prohibit this Commission from defining other circumstances as extraordinary and compelling, it would have included further limitations in the statute. “Congress is not shy about placing such limits where it deems them appropriate.”⁴⁶

Under well-settled principles of statutory interpretation, the Commission should interpret Congress’s choice not to limit the Commission’s authority as intentional. This is true both for Congress’s enactment of the original compassionate release statute in 1984 and its recent changes to the statute in the FSA. As the Supreme Court has observed, “[w]hen Congress amends one statutory

⁴⁰ 28 U.S.C. § 994(t).

⁴¹ See *generally* United States v. Dillon, 560 U.S. 817 (2010).

⁴² See 28 U.S.C. § 994(t).

⁴³ 28 U.S.C. § 994(t).

⁴⁴ United States v. Concepcion, 142 S. Ct. 2839, 2400 (2022).

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

⁴⁶ *Concepcion*, 142 S Ct. at 2400.

provision but not another, it is presumed to have acted intentionally.”⁴⁷ When Congress recently amended § 3582(c) to authorize defendant-initiated motions, it did not in any way limit or circumscribe this Commission’s authority to define extraordinary and compelling reasons. It could have forbidden nonretroactive sentencing changes from constituting an extraordinary and compelling reason for a sentencing reduction. It could have restricted compassionate release to medical circumstances. It did not make any of these changes. Those choices carry weight. Here, they further underscore the Commission’s express statutory authority to define extraordinary and compelling reasons.

B. This Commission has the legal authority to implement (b)(5), the “changes in the law” provision.

The Commission has the clear authority to implement proposal (b)(5), which defines “changes in law” that result in an “inequitable” sentence as an extraordinary and compelling reason for a sentencing reduction.⁴⁸ As discussed above, Congress expressly delegated the authority to “describe what should be considered extraordinary and compelling reasons”⁴⁹ to the Commission—not courts. Congress has also vested this Commission with the explicit authority to issue policy statements, which (unlike the Guidelines) are binding on judges.⁵⁰

As a necessary effect of Congress’s broad grant of authority, the Commission can issue a policy statement that defines extraordinary and compelling reasons differently from how some circuit courts have interpreted that phrase. If this Commission chooses to issue a new definition, as it has done with proposal (b)(5), its definition must prevail.⁵¹ *See* Part IV, *infra*. To assert otherwise would subvert the role Congress envisioned this Commission playing in the compassionate release system as a centralized body intended to promote uniformity, even—and especially—when the circuits are in disagreement.

Circuit courts acknowledged that their interim authority to fill the Commission’s void is not indefinite but rather a stop-gap measure until this Commission promulgates an updated policy statement. For example, the Seventh Circuit has explained that “*until* the Sentencing Commission updates its policy statement,” district courts’ discretion “only goes so far.”⁵² The Fourth Circuit has similarly elaborated that, “*where the Commission fails to act*, [] courts make their own independent determinations of what constitutes an ‘extraordinary and

⁴⁷ *Gross v. FBL Financial Servs., Inc.*, 557 U.S. 167, 175 (2009).

⁴⁸ PROPOSED AMENDMENTS, *supra* note 38, at 6.

⁴⁹ 28 U.S.C. § 944(t).

⁵⁰ *See generally Dillon*, 560 U.S. 817.

⁵¹ *See National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 982–83 (2005).

⁵² *United States v. Thacker*, 4 F.4th 569, 573–74 (7th Cir. 2021) (emphasis added).

compelling reason.”⁵³ Likewise, the Sixth Circuit en banc recently acknowledged explicitly that “[a]s for what qualifie[s] as ‘extraordinary and compelling,’ Congress delegated the task to the Sentencing Commission.”⁵⁴

The government itself has endorsed the Commission’s authority to resolve the circuits’ diverging caselaw by promulgating an updated policy statement. In opposing Supreme Court review of the nonretroactive sentencing changes question, the government made its position clear: an updated policy statement will render obsolete any contrary opinions by other circuits or the Supreme Court.⁵⁵ The government is right. By promulgating an updated policy statement that answers the nonretroactive sentencing changes question, this Commission will render the existing circuit split moot. *See* Part IV, *infra*.

C. This Commission has the legal authority to implement its catch-all provision.

This Commission also has clear authority to grant sentencing judges discretion to define “other circumstances” for release beyond the enumerated categories.⁵⁶ As part of the Commission’s broad power to define extraordinary and compelling reasons,⁵⁷ it can delegate that power to other entities. Indeed, that delegation of discretion has defined the compassionate release regime for nearly two decades. In 2006, the Commission promulgated its first compassionate release policy statement, which granted the BOP the discretion to decide for itself whether extraordinary and compelling reasons existed “other than” or in “combination with” the enumerated reasons, discretion that the BOP maintains today.⁵⁸ While there has been widespread frustration over the BOP’s failure to exercise its discretion, the underlying grant of discretion from the Commission to the BOP *to do so* has not been challenged.

By granting judges discretion to identify “other circumstances” warranting a sentencing reduction, the Commission is simply giving judges the same discretion that the BOP has enjoyed—unchallenged—for nearly two decades. If the BOP, the behemoth bureaucracy that oversees our federal prisons, can define extraordinary and compelling reasons, surely district court judges, who since “the beginning of the

⁵³ *United States v. McCoy*, 981 F.3d 271, 284 (4th Cir. 2020) (emphasis added).

⁵⁴ *United States v. McCall*, 56 F.4th 1048, 1053 (6th Cir. 2022) (en banc).

⁵⁵ Memorandum for the United States in Opposition at 2, *Thacker v. United States*, 142 S.Ct. 1363 (2022) (Mem) (No. 21-877), 2022 WL 467984 (Feb. 14, 2022) (“[T]he practical importance of the disagreement is limited, and the Sentencing Commission could promulgate a new policy statement that deprives a decision by [the Supreme Court] of any practical importance.”).

⁵⁶ PROPOSED AMENDMENTS, *supra* note 38, at 6.

⁵⁷ 28 U.S.C. § 994(t).

⁵⁸ *See* Amendment 683, <https://guidelines.ussc.gov/ac/683>.

Republic” have been “entrusted with wide sentencing discretion” can also be trusted to faithfully exercise this discretion.⁵⁹ *See* Part V, *infra*.

IV. The Commission Can and Should Enact Proposal (b)(5).

The Commission should adopt proposal (b)(5) in its final amendments. Subsection (b)(5) is unique among the Commission’s proposed amendments because it addresses a legal question courts have confronted in the absence of an applicable policy statement, specifically whether nonretroactive changes in the law can constitute an extraordinary and compelling reason for a sentence reduction.

The fact that some courts have taken a different position than the Commission’s proposal does not limit this Commission’s ability to resolve the issue. To the contrary, the deep circuit split actually *compels* this Commission to moot the circuits’ disagreement by deciding the question itself, even if its resolution conflicts with the opinion of some circuits. Moreover, subsection (b)(5) correctly resolves the diverging caselaw and includes an effective narrowing mechanism—a requirement that the changes result in an “inequitable sentence”—that provides for administrability.

A. The Commission has the obligation to issue amendments that resolve diverging circuit court caselaw.

The Commission has an obligation to resolve the diverging circuit court caselaw that has arisen in the last four years.⁶⁰ That obligation arises from (1) the Commission’s statutory duty to remedy unwarranted sentencing disparities⁶¹ and (2) the Supreme Court’s expectation that the Commission will review and revise the Guidelines and policy statements.⁶² More generally, the Supreme Court has also recently confirmed, in no uncertain terms, the power of agencies such as the Commission to resolve conflicting caselaw.

First, the current system has created troubling and unwarranted sentencing disparities of the precise sort that Congress has instructed this Commission to resolve. Congress specifically established this Commission to “provide certainty and fairness in meeting the purposes of sentencing” while “avoiding unwarranted sentencing disparities.”⁶³ The diverging caselaw on nonretroactive sentencing changes—among other factors—has meant that sentencing judges grant

⁵⁹ *Concepcion*, 142 S. Ct. at 2398 (quoting K. STITH & J. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9 (1998)).

⁶⁰ *See generally* Nathaniel Berry, Droughts of Compassion: The Enduring Problem with Compassionate Release and How the Sentencing Commission Can Address It (Jan. 21, 2023) (draft Law Review comment) (on file with author).

⁶¹ 28 U.S.C. § 991(b)(1)(B).

⁶² *United States v. Braxton*, 500 U.S. 344, 347–48 (1991).

⁶³ 28 U.S.C. § 991(b)(1)(B).

compassionate release motions at widely varying rates, and relief hinges on the geography of the circuit in which an individual was convicted, not the merits of the motion. The Commission’s 2022 report highlighted that “[i]n the absence of an amended policy statement to provide guidance,” whether a compassionate release motion would be successful “substantially varied by circuit.”⁶⁴

Second, the Supreme Court has found that the Commission has a “duty” to resolve conflicting caselaw in situations like these.⁶⁵ In *Braxton v. United States*,⁶⁶ the Court was asked to interpret a specific Guideline promulgated by this Commission. The Court declined to decide the issue. The Court reasoned that “in charging the Commission periodically to review and revise the Guidelines, Congress necessarily contemplated that this Commission would periodically review the work of the courts and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest.”⁶⁷ Likewise, in *Stinson v. United States*, the Court found that “*prior judicial constructions* of a particular guideline cannot prevent the Commission from adopting *a conflicting* interpretation.”⁶⁸ With regard to the nonretroactivity circuit split in particular, the Supreme Court appears to be relying on the Commission to moot the circuit split; it has repeatedly rejected certiorari petitions to clarify the law.⁶⁹

⁶⁴ U.S. SENT’G COMM’N COVID REPORT, *supra* note 25, at 4. According to the most recent data released by this Commission, an individual’s likelihood of securing compassionate release varies from a grant-rate high of 28.8 percent in the First and D.C. Circuits to a low a low of 9.6 percent in the Fifth Circuit. U.S. SENT’G COMM’N REPORT, *supra* note 28, at 7–8.

⁶⁵ *Braxton*, 500 U.S. at 348. Members of the Supreme Court recently highlighted the Commission’s unique role in resolving circuit splits over the Guidelines. In a statement regarding the denial of certiorari in *Guerrant v. United States*, which “implicate[d] a split among the Courts of Appeals over . . . which defendants qualify as career offenders,” Justice Sotomayor, joined by Justice Barrett, wrote that “[i]t is the responsibility of the Sentencing Commission to address this division to ensure fair and uniform application of the Guidelines” and cited to *Braxton* for authority. 142 S.Ct. 640 (2022) (statement of Sotomayor, J., joined by Barrett, J.).

⁶⁶ 500 U.S. 344 (1991).

⁶⁷ *Id.* at 348.

⁶⁸ 508 U.S. 36, 46 (1993) (emphasis added). The Supreme Court’s reasoning has particular import for the compassionate release policy statement which, when updated, will be binding on courts. *See generally Dillon*, 560 U.S. 817; *United States v. Ruvalcaba*, 26 F.4th 14, 19 (1st Cir. 2022) (“[A]pplicable policy statements’ issued by the Sentencing Commission are binding on courts reviewing compassionate-release motions.”).

⁶⁹ *See Andrews v. United States*, 142 S.Ct. 1446 (2022) (denying cert); *Jarvis v. United States*, 142 S.Ct. 760 (2022) (denying cert); *Crandall v. United States*, 142 S.Ct. 2781 (2022) (denying cert); *Thacker v. United States*, 142 S.Ct. 1363 (2022) (denying cert); *see also Braxton*, 500 U.S. at 348 (“Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest. This congressional expectation

Finally, the Supreme Court has recently confirmed the power of an agency such as the Commission to act in the face of conflicting caselaw. The Supreme Court’s decision in *Brand X* establishes that agency action requires a court to “review[] the agency’s construction on a blank slate”⁷⁰ and to grant the agency’s interpretation deference—even if the court previously interpreted the statute to the contrary. *Brand X* applies unless “the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill.”⁷¹

Here, the statute quite literally and intentionally codifies an interpretive gap such that *Brand X* applies. In § 994(t), Congress plainly instructed this Commission to define § 3582(c)(1)(A)’s term of art “extraordinary and compelling.” Congress therefore intentionally left that term of art ambiguous and directed the Commission to fill the gap.⁷² Concluding that the phrase “extraordinary and compelling” is unambiguous and that there is “no gap for the agency to fill”⁷³ would render § 994(t) superfluous, contrary to well-established canons of statutory interpretation.⁷⁴ Accordingly, under *Brand X*, the Commission’s definition of extraordinary and compelling must be afforded significant deference and overrides intervening circuit court caselaw.

B. The Commission’s “changes in law” proposal correctly resolves the diverging circuit caselaw.

The fractured caselaw about nonretroactive sentencing amendments that has emerged in the absence of the Commission’s guidance has limited compassionate release for many individuals based solely on the geographic accident of where their

alone might induce us to be more restrained and circumspect in using our certiorari power as the primary means of resolving such conflicts.”).

⁷⁰ *Brand X*, 545 U.S. at 982.

⁷¹ *Id.* at 982–83.

⁷² If extraordinary and compelling was unambiguous, courts—endeavoring to faithfully interpret the statute—would not have repeatedly reached different interpretations of its meaning. Circuit splits as to the meaning of “extraordinary and compelling reasons” highlight the phrase’s ambiguity.

⁷³ *Brand X*, 545 U.S. at 983.

⁷⁴ See *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1058 (2019) (“[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.” (quotation marks and citation omitted)). Every circuit to have held that nonretroactive changes in the law are not extraordinary and compelling have recently and affirmatively relied on *Brand X*. See, e.g., *Mejia-Castanon v. Att’y Gen. of the United States of Am.*, 931 F.3d 224, 236 (3d Cir. 2019); *Tennessee Hosp. Ass’n v. Azar*, 908 F.3d 1029, 1042 (6th Cir. 2018); *Chicago Bd. Options Exch., Inc. v. Sec. & Exch. Comm’n*, 889 F.3d 837, 841 (7th Cir. 2018); *Unity HealthCare v. Azar*, 918 F.3d 571, 578 (8th Cir. 2019); *Am. Fed’n of Gov’t Emps., AFL-CIO, Loc. 1929 v. Fed. Lab. Rels. Auth.*, 961 F.3d 452, 458 n.2 (D.C. Cir. 2020).

case originated. *See* Part IV.A, *supra*. Proposal (b)(5) correctly resolves this situation.

Two individuals who served prison sentences together at FCI Butner in North Carolina highlight the injustice created by the current regime.⁷⁵ Jose Ruvalcaba was convicted of conspiracy to distribute methamphetamine in Massachusetts and received a mandatory life sentence pursuant to 21 U.S.C. § 841’s three strikes law.⁷⁶ Barton Crandall was convicted of two bank robberies and related § 924(c) firearms charges in Iowa and received a 46-year sentence (25 of which was for the stacked § 924(c) charges).⁷⁷ The FSA dramatically changed the law governing each man’s sentence but did not make those changes retroactive. Mr. Ruvalcaba and Mr. Crandall each filed for compassionate release based on these sentencing changes. Because of the First and Eighth Circuits’ opposite approaches to whether nonretroactive sentencing amendments can serve as extraordinary and compelling reasons, only Mr. Ruvalcaba could raise the changes in his sentence in his motion.⁷⁸ Mr. Ruvalcaba’s motion was successful and he was released from prison in January 2023.⁷⁹ Mr. Crandall remains behind bars.⁸⁰

Proposal (b)(5) will prevent similar injustices from occurring in the future by correctly resolving the diverging caselaw. Rules of statutory interpretation and unequivocal evidence of Congress’s intent make clear that changes in the law that result in inequitable sentences are extraordinary and compelling.

First, the Commission’s proposal comports with the § 3582(c)(1)(A)’s plain text. The statute places just one limitation on the Commission’s ability to define extraordinary and compelling reasons—rehabilitation *alone* cannot serve as a reason for release.⁸¹ *See* Part III.A, *supra*. In contravention of the statute’s language, the circuits that preclude changes in the law from serving as extraordinary and compelling reasons have created “a categorical bar against a particular factor, which Congress itself has not done.”⁸² The Supreme Court has cautioned that courts should avoid reading extratextual limitations into a statute

⁷⁵ Berry, *supra* note 60, at 2–3.

⁷⁶ United States v. Ruvalcaba, 2021 WL 66706, at *1 (D. Mass. Jan. 7, 2021).

⁷⁷ Crandall, 2020 WL 7080309, at *1.

⁷⁸ The Eighth Circuit prohibits nonretroactive sentencing changes from serving as an extraordinary and compelling reason for relief, either alone or in combination with other reasons. *See* United States v. Crandall, 25 F.4th 582, 585–86 (8th Cir. 2022).

⁷⁹ Order, United States v. Ruvalcaba, No. 05-CR10037 (D. Mass. Oct. 3, 2022), Dkt. 538; BOP Inmate Locator, <https://www.bop.gov/inmateloc/> (result using register number 32884-112 for Jose Ruvalcaba) (last visited Feb. 12, 2023).

⁸⁰ BOP Inmate Locator, <https://www.bop.gov/inmateloc/> (result using register number 06397-209 for Barton Crandall) (last visited Feb. 12, 2023).

⁸¹ 28 U.S.C. § 994(t); *see also* Chen, 48 F.4th at 1098 (“To hold that district courts cannot consider non-retroactive changes in sentencing law would be to create a categorical bar against a particular factor, which Congress itself has not done.”).

⁸² Chen, 48 F.4th at 1098.

and should instead read “silence as exactly that: silence.”⁸³ The absence of express statutory limitations is especially probative in the sentence modification context. Last term, in *Concepcion*, the Court made clear that sentencing judges’ discretion to modify sentences under another provision of § 3582 is “bounded only when Congress or the Constitution expressly limits.”⁸⁴

Congress’s pronouncement on rehabilitation further demonstrates that the circuits that categorically bar changes in the law have misinterpreted § 3582(c)(1)(A). When Congress intends to exempt circumstances from serving as a basis for relief, it does so explicitly—as it did in § 994(t) with rehabilitation.⁸⁵ See Part III.A, *supra*. That also means that no other circumstances are beyond the authority of this Commission to recognize. Again, this is straightforward matter of statutory construction: “Where Congress explicitly enumerates certain exceptions . . . , additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”⁸⁶

The Commission’s proposal is also supported by the statute’s legislative history. The Senate Judiciary Committee’s report on the SRA explicitly mentions as examples of extraordinary and compelling circumstances “cases in which the sentencing guidelines . . . have been later amended to provide a shorter term.”⁸⁷ In these cases, “it would be inequitable to continue the confinement of the prisoner.”⁸⁸ Proposal (b)(5) ensures that individuals are eligible for relief for the kinds of extraordinary and compelling circumstances Congress envisioned when it passed the statute in the first place.

Congress’s decision to make certain law changes prospective only in no way undermines this conclusion. That choice by Congress implies that certain changes in the law should not *automatically* lead to a reduced sentence. Proposal (b)(5) is entirely consistent with that choice. A change in the law does not automatically entitle a person to relief under proposal (b)(5)—far from it. He must demonstrate that the change in law renders his sentence “inequitable” to establish an extraordinary and compelling reason in the first place. The individual must then establish that a sentencing reduction is consistent with the § 3553(a) factors *and* must satisfy the Commission’s dangerousness standard. See Part VIII, *infra*. As several circuits have explained, “There is a salient ‘difference between automatic vacatur . . .’ on the one hand, ‘and allowing for the provision of individual relief in the most grievous cases.’”⁸⁹ “Congress’s judgment to prevent the former is not sullied by a district court’s determination, on a case-by-case basis, that a particular

⁸³ *Id.*

⁸⁴ *Concepcion*, 142 S. Ct. at 2398.

⁸⁵ 28 U.S.C. § 994(t).

⁸⁶ *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001).

⁸⁷ S. REP. NO. 98-225, at 55–56.

⁸⁸ S. REP. NO. 98-225, at 121.

⁸⁹ *Ruvalcaba*, 26 F.4th at 27 (citation omitted).

defendant has presented an extraordinary and compelling reason due to his idiosyncratic circumstances.”⁹⁰

C. The Commission’s “changes in the law” proposal is carefully limited and administrable.

Congress has crafted its “changes in the law” proposal narrowly, thus making the proposal administrable. The Commission’s proposal includes a new requirement above what many circuits already require—the changes in the law must render the individual’s sentence “inequitable.” And even if the petitioner satisfies that high standard, they must still comply with compassionate release’s other guardrails. *See* Part VIII, *infra*.

The central narrowing mechanism is the Commission’s requirement that the changes in law result in an “inequitable” sentence. This is more than a routine change that alters a sentence on the margins. Individuals must demonstrate that changes in the law render *their individualized sentence inequitable*.⁹¹ *United States v. Liscano*, a Seventh Circuit case described at length in Part V.C, *infra*, demonstrates how sentencing judges are in the best position to evaluate whether an individual’s circumstances are inequitable. Mr. Liscano’s situation was highly unusual: He was sentenced to *life* in prison based on § 851 enhancements that could not be imposed today. Even worse, the government admitted that it had not been forthcoming about its intent to seek a life sentence in the formal notice it filed to seek the enhancements.⁹² The sentencing judge identified numerous extraordinary and compelling circumstances, concluding that in combination, they produced an “intolerable result.”⁹³

The experiences of the circuits where nonretroactive sentencing amendments can constitute extraordinary and compelling reasons make clear that the Commission’s proposal is administrable. The First, Fourth, Ninth, and Tenth Circuits permit sentencing judges to consider changes in law in the extraordinary and compelling reasons analysis. Even without the limiting mechanism that the Commission has proposed, the sky has not fallen. Sentencing judges have proceeded carefully, and on a case-by-case basis, to determine whether a nonretroactive change in the law justifies “provision of individual relief in the most grievous cases.”⁹⁴

⁹⁰ *Id.*

⁹¹ *Cf.* *United States v. Liscano*, No. 02-CR-719-16, 2021 WL 4413320, at *8 (N.D. Ill. Sept. 27, 2021) (“Changes in the law do occur with some frequency. . . . But that does not preclude a finding that Liscano’s particular circumstances are extraordinary.”).

⁹² *Liscano*, 2021 WL 4413320, at *2.

⁹³ *Id.* at *5.

⁹⁴ *McCoy*, 981 F.3d at 286–87.

V. The Commission Must Retain Judicial Discretion to Identify Extraordinary and Compelling Circumstances in Its Final Amendments.

The Commission must codify judicial discretion to identify extraordinary and circumstances beyond those enumerated in the policy statement if compassionate release is to function as Congress intended. The last four years have demonstrated that the enumerated categories will inevitably be underinclusive of all cases presenting extraordinary and compelling circumstances. Indeed, that is why this Commission conferred broad discretion upon the BOP in its original policy statement. Conferring that same discretion upon judges ensures that compassionate release following the FSA's amendments will be flexible enough to adapt to the uncertainties of the future.

A. Judges are experts at exercising discretion.

Judges are much better suited than the BOP to exercise discretion to identify unenumerated extraordinary and compelling reasons for a sentencing reduction. Exercising discretion is at the very core of the judicial role across all areas of law, and especially within federal sentencing. As the Supreme Court recently observed, “From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion.”⁹⁵ As a result of this discretion, our system tolerates some disparities between defendants at the margins.⁹⁶ But this “is a feature of our sentencing law that different judges may respond differently to the same sentencing arguments.”⁹⁷

The same is true in the compassionate release context. Especially because this Commission's amendments address the most severe and central disparities among circuits in its enumerated categories, judicial variation that might result from proposal (b)(6) is a feature, not a bug, of compassionate release.

The post-*Booker* sentencing regime provides a useful example of the administrability of a discretionary system like the Commission has proposed and that has already been operating well in the absence of an applicable policy statement. Following *United States v. Booker*, the guidelines “guide district courts in exercising their discretion”⁹⁸ when sentencing defendants, but they “do not constrain th[at] discretion.”⁹⁹ Like judicial discretion under proposal (b)(6), judges applying the guidelines “must make an *individualized assessment* based on the facts presented. If he decides that an outside-Guidelines sentence is warranted, he

⁹⁵ *Id.* (quoting STITH & J. CABRANES, *supra* note 59, at 9).

⁹⁶ *Id.* at 2403 n.8.

⁹⁷ *Id.*

⁹⁸ *Beckles v. United States*, 137 S. Ct. 886, 894 (2017).

⁹⁹ *Id.* (quoting *Peugh v. United States*, 569 U.S. 530, 552 (2013) (Thomas, J., dissenting)).

must consider the extent of the deviation and ensure that the justification is *sufficiently compelling*.”¹⁰⁰

Beyond being prudent, expanded judicial discretion comports with Congress’s intent. Congress specifically recognized the need for “*court determination*, subject to consideration of Sentencing Commission standards” in evaluating compassionate release motions.¹⁰¹ Legal scholars opining on compassionate release have concluded that “Congress thus intended to give federal sentencing courts an equitable power . . . employed on an individualized basis to correct fundamentally unfair sentences.”¹⁰²

In the absence of an applicable policy statement, judges have exercised their discretion thoughtfully. They carefully examine whether a person has presented extraordinary and compelling reasons in light of the totality of the circumstances. The FCJC’s successful compassionate release litigation in the Chicago stash house sting cases, as well as two other cases, illustrates the necessity of broad judicial discretion that exists independently from any of the enumerated categories, and allows judges to consider the totality of one’s circumstances.

B. The Chicago stash house cases illustrate the need for a catch-all category that codifies broad judicial discretion.

In 2009, FCJC client Dwayne White—who was just 22 at the time—was ensnared in the ATF’s now-repudiated stash house sting operation.¹⁰³ In these cases, the ATF followed a standard playbook: A confidential informant (often himself facing criminal charges or being paid) would target someone for the operation, pretending to be a courier with inside knowledge of a drug stash house.¹⁰⁴ When meeting with the target, the informant would declare that a large quantity of drugs would be in the stash house. Of course, the drugs and the stash house did not exist—it was all a ruse.¹⁰⁵ This allowed the informant to fabricate

¹⁰⁰ Gall v. United States, 552 U.S. 38 (2007).

¹⁰¹ S. REP. NO. 98-225, at 56 (emphasis added).

¹⁰² Hopwood, *supra* note 13, at 117.

¹⁰³ Sweeney & Jason Meisner, ‘Stash House’ Stings Have Been Discredited. Now, the Convicted See a Chance for Redemption., CHI. TRIB. (Mar. 5, 2021), <https://www.chicagotribune.com/news/criminal-justice/ct-stash-house-defendants-compassionate-release-20210305-qiwa4codkzabhpsalorsns35ae-story.html> [https://perma.cc/EU3Z-ASXG].

¹⁰⁴ See Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 NW. L. REV. 987, 989–90 (2021).

¹⁰⁵ *Id.*

drug quantities that triggered colossal mandatory minimums.¹⁰⁶ These stings overwhelmingly targeted Black men like Mr. White.¹⁰⁷

This tactic cast such a wide net that even people with negligible involvement—such as Mr. White—were swept up. The true target of the operation, Leslie Mayfield, asked Mr. White to participate at the last minute. In fact, the very first time Mr. White heard the words “stash house robbery” was from an undercover ATF agent on the same day he was ultimately arrested.¹⁰⁸

Even though Mr. White played no role in planning the supposed robbery, the government aggressively charged the case. After Mr. White declined a 15-year offer and before he went to trial, the government filed a 21 U.S.C. § 851 enhancement, doubling the potential mandatory minimum to 20 years.¹⁰⁹ (This § 851 enhancement was based on a simple marijuana possession conviction from when Mr. White was 18 years old and could not be imposed today due to the FSA’s changes.) So when Mr. White was convicted and sentenced, the judge had no choice but to impose a 25-year mandatory minimum given the drug quantity fabricated by the government, plus a consecutive five-year mandatory sentence because Mr. White’s codefendants possessed guns when they were arrested.¹¹⁰

Years after Mr. White was sentenced, courts across the country began scrutinizing the fake stash house sting tactic. A consensus emerged that the operation was “disreputable,”¹¹¹ “tawdry,”¹¹² “outrageous,”¹¹³ and “arbitrary and discriminate.”¹¹⁴ One judge even went so far as to say, “I find the concept of these ‘stash house sting’ operations at odds with the pride we take in presenting American criminal justice as a system that treats defendants fairly and equally

¹⁰⁶ *Id.*

¹⁰⁷ Jason Meisner, *Under Pressure by Judges, Prosecutors to Offer Plea Deals in Controversial Drug Stash House Cases*, CHI. TRIB. (Feb. 21, 2018), <https://www.chicagotribune.com/news/breaking/ct-met-atf-stash-house-prosecutions-20180221-story.html>.

¹⁰⁸ Dwayne White’s Motion for Compassionate Release Under 18 U.S.C. § 3582(c)(1)(A)(i) at 4, *United States v. White*, No. 09-CR-687-4 (N.D. Ill. Mar. 1, 2021), Dkt. 372.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *United States v. Kindle*, 698 F.3d 401, 414 (7th Cir. 2012) (Posner, J., concurring in part and dissenting in part), *opinion vacated on reh’g en banc sub nom.*, *United States v. Mayfield*, 771 F.3d 417 (7th Cir. 2014).

¹¹² *United States v. Conley*, 875 F.3d 391, 402 (7th Cir. 2017).

¹¹³ *United States v. Conley*, 2021 WL 825669, at *4 (N.D. Ill. Mar. 4, 2021).

¹¹⁴ *United States v. McLean*, 199 F. Supp. 3d 926, 934 (E.D. Pa. 2016).

under the law.”¹¹⁵ Another judge compared the operation to something out of “George Orwell’s *1984* or Philip K. Dick’s *The Minority Report*.”¹¹⁶

In the face of this blistering criticism—as well as race discrimination litigation¹¹⁷—the Chicago U.S. Attorney’s Office took several remarkable steps. First, prosecutors dismissed the most severe mandatory minimum charges in pending stash house cases.¹¹⁸ The categorical dismissal of major charges in these high-profile cases was “highly unusual.”¹¹⁹ This move “suggest[ed] that the government [wa]s trying to make these cases less troubling to judges and others.”¹²⁰ Second, just a few years later, Chicago prosecutors offered unprecedented, favorable plea deals to all 43 pending stash house defendants—including to Mr. White’s codefendant Mr. Mayfield, who was released in 2018. All 43 accepted the pleas. The average sentence was just *three years*—decades shorter than the potential sentence the relevant mandatory minimums would have required.¹²¹ This amounted to a sentence of time served for almost all of the defendants. Third, the Chicago U.S. Attorney’s Office stopped charging fake stash house cases altogether.¹²²

Because Mr. White was sentenced almost a decade prior, he was could not benefit from the government’s repudiation of the stash house operation. Instead, he was left behind bars to serve the remainder of his 25-year sentence. When the FSA allowed for defendant-initiated compassionate release motions, however, Mr. White

¹¹⁵ *United States v. Flowers*, 712 F.App’x 492, 511 (6th Cir. 2017) (Stranch, J., concurring); *see also* *United States v. Washington*, 869 F.3d 193, 213 (3d Cir. 2017) (“[W]e remind the government that we have expressed misgivings in the past about the wisdom and viability of reverse stash house stings.”); *United States v. Black*, 750 F.3d 1053, 1057 (Reinhardt, J., dissenting from denial of rehearing en banc) (“[S]uch tactics create a relationship between government and governed at odds with the premises of our democracy.”).

¹¹⁶ *Black*, 750 F.3d at 1057 (Reinhardt, J., dissenting from denial of rehearing en banc).

¹¹⁷ Under the leadership of Professors Alison Siegler and Judith Miller, the FCJC litigated on behalf of forty-three stash house clients, building on “groundbreaking racial discrimination litigation” that was begun by the Chicago Federal Defender’s Office and Chicago Criminal Justice Act Panel members. Alison Siegler, *Shift the Paradigm on Mandatory Minimums*, AM. BAR ASS’N (Jan. 12, 2022), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2022/winter/shift-paradigm-mandatory-minimums/.

¹¹⁸ Erik Eckholm, *Prosecutors Drop Toughest Charges in Chicago Stings That Used Fake Drugs*, N.Y. TIMES (Jan. 30, 2015), <https://www.nytimes.com/2015/01/31/us/toughest-charges-dropped-in-chicago-drug-stings.html> [https://perma.cc/SP8Z-QJQ7].

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *See* Christopher Blich’s Motion for Compassionate Release Under 18 U.S.C. § 3582(c)(1)(A)(i) at Ex. M, *United States v. Blich*, No. 06-CR-586-2 (N.D. Ill. May 10, 2021), Dkt. 635.

¹²² Alison Siegler, *Racially Selective Law Enforcement Litigation in Federal Stash House Cases*, 26 THE CIRCUIT RIDER 45, 47 (2019).

had the opportunity to ask the court to reconsider his sentence in light of these dramatic changed circumstances.

The judge ultimately granted Mr. White’s motion, concluding that there were several extraordinary and compelling reasons for release—reasons that were not enumerated in the policy statement: (1) that Mr. White was unable to benefit from the favorable pleas offered to other Chicago stash house defendants after the U.S. Attorney’s Office disavowed the reverse sting cases; (2) that there were significant and unjustified sentencing disparities between Mr. White and codefendant Leslie Mayfield given these plea deals and the fact that Mr. White was the “least culpable” of all four defendants; and (3) 20 years of Mr. White’s mandatory sentence was “based solely on fictitious circumstances described by the undercover ATF agent.”¹²³ The judge also concluded that release was consistent with the § 3553(a) factors, recognizing Mr. White’s spotless record in prison and his robust release plan in granting release.¹²⁴ Over the government’s objection, Mr. White was released from prison in August 2021.

Broad judicial discretion was essential to this just outcome. Mr. White had initially argued that one reason his case was extraordinary and compelling was because the government could no longer seek to enhance his sentence under § 851. But before his motion was decided, the Seventh Circuit held that sentencing changes like these could not constitute extraordinary and compelling reasons.¹²⁵ Had Mr. White been in one of the many other circuits that allow nonretroactive changes in sentencing law to support release, the judge would not have needed to artificially confine his analysis to the other extraordinary and compelling circumstances identified by Mr. White. Thankfully, the judge exercised his discretion to identify other extraordinary and compelling reasons. Otherwise, Mr. White would still be incarcerated—instead of testifying before this Commission.

Judicial discretion was likewise foundational in the case of FCJC client Chris Blich, who was granted release in April 2022. The judge identified additional extraordinary and compelling reasons for relief, including the fact that the Government no longer charges individuals [in these stash house cases] . . . and the practice has been disavowed.”¹²⁶ The judge also recognized the “excessive charging” practices endemic to the stash house cases—namely, that the ATF could inflate Mr. Blich’s sentence by arbitrarily setting a made-up drug quantity.¹²⁷

Mr. Blich’s circumstances were even more extraordinary than the court’s opinion suggested, thus highlighting the dangers of cabining judicial discretion. Mr.

¹²³ *White*, 2021 WL 3418854, at *3–4; *see also generally Blich*, No. 06-CR-586-2, slip op. (granting compassionate release to a Chicago stash house client); *Conley*, 2021 WL 825669 (same).

¹²⁴ *White*, 2021 WL 3418854, at *4–5.

¹²⁵ *See Thacker*, 4 F.4th at 574–76.

¹²⁶ *Blich*, No. 06-CR-586-2, slip op. at 3.

¹²⁷ *Id.* at 4.

Blicht's sentence was enhanced using a § 851 enhancement that could not be imposed today, but the judge could not consider this change under the Seventh Circuit's restrictive caselaw. Even more troubling, Mr. Blicht's § 851 enhancement was *illegally imposed* at the time he was sentenced. As a matter of law, and separately from the changes in the law, the § 851 enhancement could not have applied to Mr. Blicht in the first place.¹²⁸ Nonetheless, the Seventh Circuit has held that "[j]udicial decisions, whether characterized as announcing new law or otherwise, cannot alone amount to an extraordinary and compelling circumstance."¹²⁹ Those limitations meant the judge was foreclosed from considering the totality of Mr. Blicht's extraordinary and compelling circumstances.

Although the judge ultimately granted release for other reasons, Mr. Blicht's case demonstrates how precluding judges from considering a totality of circumstances can erroneously deprive judges of the information needed to determine whether someone has presented extraordinary and compelling reasons. Judges may get only half the picture of a person's unique situation. The result is a compassionate release regime that is underinclusive: when their discretion is limited, judges are more likely to deny relief even in cases involving truly extraordinary and compelling circumstances. That is not what Congress intended when it created a safety valve to be applied on a case-by-case basis.

Mr. White and Mr. Blicht are not the only Chicago stash house clients to benefit from judicial discretion in compassionate release. Tracy Conley was similarly ensnared in the operation because he "did not have enough money to purchase gas for his car ride home, so he agreed to help his acquaintance Adams clean his apartment."¹³⁰ Before driving Mr. Conley home, Mr. Adams brought him to a meeting where others were planning to rob a (fake) stash house. Mr. Conley—who had not seen Mr. Adams in years—had no idea when he accepted a ride from Mr. Adams that he would be brought to such a meeting, and he was not involved in planning the robbery in any way.¹³¹ But Mr. Conley was ultimately convicted of conspiracy, and sentenced to a mandatory 15 years given the fake drug amount concocted by the government.¹³² That sentence was "the longest prison sentence by

¹²⁸ See Brief and Required Short Appendix of Petitioner-Appellant Christopher Blicht, Jr. at 16–21, *Blicht v. United States*, 39 F.4th 827 (7th Cir. 2022), Dkt. 16; see also Order Issuing Certificate of Appealability at 4, *United States v. Blicht*, No. 16-CV-7813 (N.D. Ill. Nov. 8, 2020), Dkt. 58 ("Despite the perceived merit of Blicht's § 841(b) enhancement claim, the case's procedural posture bars relief in this Court."). The Seventh Circuit ultimately denied habeas corpus relief on procedural grounds. *Blicht v. United States*, 39 F.4th 827, 833–34 (7th Cir. 2022).

¹²⁹ *Brock*, 39 F.4th at 466.

¹³⁰ *Conley*, 2021 WL 825669, at *1.

¹³¹ *Id.* at *1, *4.

¹³² *Id.* at *1.

double” out of all seven defendants, even though Mr. Conley was one of the least culpable.¹³³

Mr. Conley successfully sought compassionate release. The judge emphasized that his “sentence was driven by the government’s decisions in fabricating a false stash house and not the court’s consideration of what punishment was appropriate under the circumstances.”¹³⁴ The judge put it bluntly: “If there ever was a situation where compassionate release was warranted based on the injustice and unfairness of a prosecution and resultant sentence, this is it.”¹³⁵

Mr. Conley’s case clarifies the need for broad judicial discretion, but in a different way than Mr. White and Mr. Blich’s cases. Unlike Mr. White and Mr. Blich, Mr. Conley was not subject to a § 851 enhancement that is illegal today; the judge relied on a combination of other extraordinary and compelling circumstances. Although the Commission’s proposed amendments enumerate “changes in the law” as an extraordinary and compelling reason for release,¹³⁶ Mr. Conley’s case would not qualify under that provision because the law surrounding stash house operations has not changed despite the derisive critiques; the stings remain legal to this day. Without a carve-out for judicial discretion, Mr. Conley would not be eligible for release. That result would be nonsensical; Mr. Conley’s case involved many of the same extraordinary and compelling reasons as Mr. White’s and Mr. Blich’s.

Without broad judicial discretion to grant release for reasons not enumerated in the policy statement, Mr. White, Mr. Blich, and Mr. Conley would still be in prison—contrary to Congress’s intent that compassionate release operate as a safety valve in extraordinary and compelling cases. All three men today are successful and contributing to their communities. One of the first things Mr. White did as a free man was walk his daughter to her first day of middle school.¹³⁷ He has also lent his voice to advocate for criminal justice reform,¹³⁸ as evidenced by his testimony before this Commission on its proposed amendments.

¹³³ *Id.* at *4.

¹³⁴ *Id.*

¹³⁵ *Id.* The judge also considered Mr. Conley’s serious health risks in her analysis: “Conley’s hypertension, along with testing positive for coronavirus, in combination with the injustice of his conviction and sentence, constitute extraordinary and compelling reasons for his compassionate release.” *Id.*

¹³⁶ PROPOSED AMENDMENTS, *supra* note 38, at 6.

¹³⁷ *See, e.g., Annie Sweeney & Jason Meisner, ‘Like Seeing in Color After Being Colorblind’: After 12 Years in Prison for Controversial Stash-house Conviction, Mr. White Tastes Freedom*, CHI. TRIB. (Aug. 20, 2021), <https://www.chicagotribune.com/news/criminal-justice/ct-stash-house-defendant-released-20210820-jwezyi6ovjhtlowowzbzryednq-story.html> [https://perma.cc/2ZCW-3QYP].

¹³⁸ *See Second Chances Symposium*, FED. CRIM. JUST. CLINIC & ILLINOIS PRISON PROJECT (Feb. 2022), <https://perma.cc/N5RR-5E23>.

C. Judges need discretion to consider a combination of circumstances.

The Commission’s catch-all category must make clear that judges have broad discretion to consider whether the totality of circumstances presented by an individual are extraordinary and compelling. Option 3, with the revisions below, is the most sensible solution, as illustrated by *United States v. Liscano*,¹³⁹ another Northern District of Illinois case.

When Steve Liscano was 18 years old, police found a baggie of cocaine in his pocket, for which he served just four months in prison. A few years later, officers discovered “a residual amount of cocaine” when searching his home.¹⁴⁰ The drug quantity was so miniscule that he spent just three months behind bars.¹⁴¹ But when Mr. Liscano was indicted on federal drug conspiracy charges a few years later, the government filed a § 851 enhancement based on those prior convictions.¹⁴² As a result, at sentencing, the judge was required to sentence Mr. Liscano to life in prison even though the convictions “involved possession of small amounts of cocaine as a young adult, both were unrelated to violence, and both resulted in no more than a few months spent in prison.”¹⁴³

Several years into Mr. Liscano’s life sentence, the Supreme Court narrowed the offenses that could serve as predicates for § 851 enhancements.¹⁴⁴ Mr. Liscano sought § 2255 relief, contending that his life sentence was illegally imposed because his baggie conviction was not a predicate offense. Even the government conceded that Mr. Liscano’s life sentence was erroneously imposed, but the Seventh Circuit denied Mr. Liscano’s § 2255 petition on procedural grounds.¹⁴⁵

Mr. Liscano then successfully sought compassionate release due in part to this error. The judge explained, “The government rarely admits that any sentence is legally flawed. . . . [But] it is the government’s admission concerning Liscano’s *life* sentence that makes this situation exceptional.”¹⁴⁶ It was not just the fact of Mr. Liscano’s illegal life sentence that constituted extraordinary and compelling reasons. Instead, the court also considered the government’s admission that its § 851 notice was not forthcoming as to whether the prosecutors were seeking a life sentence. The judge concluded that this “contribute[d] to the extraordinary grounds for relief.”¹⁴⁷

¹³⁹ No. 02-CR-719-16, 2021 WL 4413320 (N.D. Ill. Sept. 27, 2021).

¹⁴⁰ *Id.* at *1.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at *5.

¹⁴⁴ *See generally* Mathis v. United States, 136 S. Ct. 2243 (2016).

¹⁴⁵ *See generally* Liscano v. Entzel, 839 F.App’x 15, 16 (7th Cir. 2021).

¹⁴⁶ *Liscano*, 2021 WL 4413320, at *4.

¹⁴⁷ *Id.* at *6.

Importantly, the judge recognized that not all changes in the law rise to the level of extraordinary and compelling. “Changes in the law do occur with some frequency, and there are other defendants whose sentences were enhanced based on prior convictions that no longer qualify as predicates under *Mathis*. But that does not preclude a finding that Liscano’s particular circumstances are extraordinary. Unlike the vast majority of criminal defendants, Liscano was sentenced to life imprisonment.”¹⁴⁸ In particular, the judge relied on his nine years of experience on the bench, the 20 years he spent as a criminal defense attorney, and the 13 years he practiced as a federal prosecutor.¹⁴⁹ In all that time, the judge had “never seen a set of facts that resemble those involved here.”¹⁵⁰

The court ultimately found that the confluence of factors in aggregate constituted extraordinary and compelling circumstances: “Between the predicate offenses involving such minimal amounts of drugs, the admission that the offenses no longer support a life sentence, and the recognition that the § 851 notice should have but did not inform Liscano of the government’s intent to seek a term of life imprisonment, this case—by definition—is ‘beyond what is usual, customary, regular, or customary.’”¹⁵¹ To top it off, the judge found that Mr. Liscano’s rehabilitation supported the other reasons for release.¹⁵²

Mr. Liscano’s case demonstrates that even when individual circumstances considered in isolation may not be extraordinary and compelling, the sum of the totality of the circumstances may very well cross that threshold. Judges are well positioned to make that determination; indeed, that is the very core of judging. The government’s less-than-forthcoming § 851 notice may not alone have constituted an extraordinary and compelling circumstance. The length of Mr. Liscano’s life sentence may not alone have constituted an extraordinary and compelling circumstance. And, by statute, rehabilitation could not alone have constituted an extraordinary and compelling reason. But the court judiciously exercised its discretion to consider these reasons for relief holistically, illustrating the administrability and necessity of a catch-all category that codifies judicial discretion.

United States v. Eccleston,¹⁵³ which involved a sentence disparity that emerged after the defendant was sentenced, offers a similar illuminating example of how judges have used their discretion to consider a totality of circumstances with forbearance and should be able to continue doing so under an updated policy statement.

¹⁴⁸ *Id.* at *7.

¹⁴⁹ *Id.* at *8.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ 573 F. Supp. 3d 1013 (D. Md. 2021).

Xavier Eccleston was a minor player in a conspiracy involving the sale of cocaine. He was not a major contributor to the conspiracy, let alone a leader. His guidelines called for a sentence of about 19.5 to 24.5 years, but the judge granted a downward variance to 15 years “on the basis that Eccleston’s crimes were nonviolent and that he was not a supervisor in the conspiracy.”¹⁵⁴

At sentencing, the judge expressed concern that even the 15-year sentence was still too long given the likely sentences of Mr. Eccleston’s more culpable codefendants. The prosecutor assuaged the judge’s concerns, stating, “we think in terms of people coming down the pike . . . their sentences . . . will be higher than this.”¹⁵⁵ Whether by bad faith or inadvertence, the prosecutor was wrong. All told, Mr. Eccleston’s sentence was the second longest of the whole group—second only to the leader of the conspiracy. His sentence was far longer than that given to the “lieutenant” of the conspiracy, or a codefendant “who had a managerial role” in the conspiracy.¹⁵⁶

By the time Mr. Eccleston sought compassionate release, he and the leader of the conspiracy were the only two who remained incarcerated.¹⁵⁷ The judge who sentenced Mr. Eccleston—since retired from the bench—filed a letter supporting Mr. Eccleston’s motion for release. The sentencing judge’s letter to the court explained, “Given Mr. Eccleston’s periodic role in the conspiracy,” the divergence in sentence length between Mr. Eccleston’s sentence and those of his more culpable codefendants “[is] at odds with my stated desire to avoid sentencing disparity in this case.”¹⁵⁸

The court found that Mr. Eccleston had presented extraordinary and compelling reasons for relief given the totality of the circumstances—both the sentencing disparity itself and the misrepresentations made by the prosecutor at sentencing.¹⁵⁹ The judge who granted Mr. Eccleston’s motion acknowledged that sentence disparities are often a common fixture in the federal system, but that, “in limited circumstances, [may] constitute an extraordinary and compelling reason.”¹⁶⁰ This was one such circumstances, given the “striking” magnitude of the disparities and the “particularly concerning . . . Government[] representation at sentencing . . . that comparatively high sentences were expected for other more culpable defendants.”¹⁶¹

Although sentence disparities were not (and are not) enumerated in the policy statement, the judge carefully exercised his discretion by considering the totality of Mr. Eccleston’s individualized reasons for relief. Adopting Option 3 with

¹⁵⁴ *Id.* at 1015.

¹⁵⁵ *Id.* at 1018 (citation and internal quotation marks omitted).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1017.

¹⁵⁸ *Id.* at 1018 (citation and internal quotation marks omitted).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1017.

¹⁶¹ *Id.* at 1019.

the minor revisions suggested below ensures that judges can continuing exercising their reasoned judgment on an individualized basis and effectuate just resolutions of the cases before them—even when each circumstance taken in isolation may not independently warrant relief. That makes certain that compassionate release will be a tailored remedy that is neither under nor overinclusive.

D. This Commission should adopt Option 3 with minor revisions.

Option 3 with minor revisions is the best route forward for judicial discretion. The foregoing cases illustrate that any successful conferral of judicial discretion must contain at least three elements. First, it must expressly allow judges to identify circumstances that are different from those enumerated in the policy statement. Otherwise, judges will be left powerless to address circumstances that cannot be foreseen at this time. Second, it must recognize that judges may exercise their discretion for reasons that are similar, but not identical, to those enumerated. Many cases may be even *more* extraordinary and compelling than the enumerated reasons but may not fit the enumerated categories to a tee. Without such an explicit recognition, judges may mistakenly conclude that this Commission considered and rejected highly analogous circumstances, ultimately denying relief to the people who most deserve it. Third, a grant of discretion must make clear that judges can and should consider the reasons identified by an incarcerated individual in combination when determining whether there are extraordinary and compelling circumstances for a sentence reduction. In fact, many judges already have experience doing just that: in the pre-*Booker* era, judges deciding whether to depart from a guidelines sentence could consider a totality of factors in aggregate—they weren't confined to considering those factors in isolation from each other.¹⁶²

To that end, Option 3, with slight modifications, would best codify judicial discretion. As it currently stands, Option 3 reads:

OTHER CIRCUMSTANCES.—The Defendant presents an extraordinary and compelling reason other than, or in combination with, the circumstances described in paragraphs (1) through (5).

This phrasing matches the phrasing in the outdated policy statement, which grants discretion to the BOP.

Two small changes would ensure that this option provides courts with sufficient flexibility to identify extraordinary and compelling reasons that do not fall squarely within the enumerated categories. First, the Commission should make clear that a totality of different circumstances can together constitute extraordinary and compelling reasons. Judges should not be limited to identifying one extraordinary and compelling reason that, standing alone, justifies a sentence reduction. Second, the Commission should explicitly state that circumstances

¹⁶² See *Koon v. United States*, 518 U.S. 81, 106–09 (1996).

similar, but not identical, to subsections (1) through (5) can be considered by judges in exercising their discretion. Otherwise, judges may deny relief in cases that do not meet an enumerated category under the assumption that this Commission intended to foreclose relief—resulting in the denial of motions even in the presence of extraordinary and compelling circumstances.

A modified (b)(6) should read:

OTHER CIRCUMSTANCES.—The Defendant presents any other extraordinary and compelling circumstance, or a combination of circumstances that are cumulatively extraordinary and compelling, other than, similar to, or in conjunction with the circumstances described in paragraphs (1) through (5).

This phrasing is superior to the other options. Both Option 1 and 2 unnecessarily limit judicial discretion to identify non-enumerated extraordinary and compelling reasons. Option 1 restricts “other circumstances” to those “similar in nature and consequence” to the enumerated categories. But as the stash house cases make clear, there may be circumstances that are arguably not “similar” to an enumerated category, therefore rendering the individual ineligible for relief. *See* Part V.B, *supra*. Similarly, Option 2 cabins other reasons justifying a sentence reduction to “changes in the defendant’s circumstances.” This is far narrower than the current discretion afforded to the BOP, as the existing policy statement makes clear that “an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment.”¹⁶³ Although many compassionate release cases will involve changed circumstances, there is no need for the Commission to impose this limit *ex ante*. There may be extraordinary and compelling reasons that do not involve changed circumstances, and judges should not be prohibited from considering them.

Relatedly, the Commission should retain Application Note 2 in the amended policy statement or amend proposal (b)(6) to incorporate the language currently in Note 2. Application Note 2 clarifies that extraordinary and compelling reasons need not have been unforeseen by the court during the defendant’s initial sentencing. In the last four years without an applicable policy statement, district judges in many circuits have had broad judicial discretion to identify extraordinary and compelling reasons known and unknown at sentencing, as well as reasons raising changed circumstances. These circuits have managed compassionate release successfully, demonstrating that retaining Application Note 2 is an administrable and necessary component of compassionate release.

¹⁶³ Application Note 2.

VI. This Commission Should Adopt Proposal (b)(4) Governing Sexual Assault, With Revisions.

This Commission appropriately recognized that sexual assault by correctional officers is an extraordinary and compelling circumstance warranting a sentencing reduction for victims. As one district judge recently explained in his grant of compassionate release to a survivor of sexual abuse, “sexual assault . . . is far beyond the ordinary ‘derelictions on the part [of] prison officials’ that a defendant (or the sentencing judge) can anticipate at the time of sentencing.”¹⁶⁴

That said, the Commission’s proposal is overly stringent and narrow, which will result in the denial of compassionate release to precisely those people who need it most, as the following case study illustrates.

A. Sexual abuse is extraordinary and compelling.

My Clinic represents Aimee Chavira in her forthcoming compassionate release motion, which will seek a sentencing reduction based principally on the sexual abuse she suffered at the hands of multiple BOP guards. Ms. Chavira is one of the survivors of FCI Dublin’s “Rape Club”¹⁶⁵—a group of women who were subjected to rampant sexual abuse over a number of years at the federal prison. More than three dozen women have come forward to recount this relentless environment of sexual abuse and harassment, perpetrated by the very people entrusted to protect them.¹⁶⁶ Five BOP officers—the former warden of FCI Dublin among them—are currently facing criminal charges; two dozen more are being investigated.¹⁶⁷ This abuse was so pervasive that it galvanized a Senate investigation into the prison.¹⁶⁸

Women who have come forward to report the abuse have suffered from retaliation by other correctional officers: “For the last year, KTVU has communicated with nearly 40 women who have said the same thing—they were locked in special housing units, transferred away from their families and got ‘shots’ against their good behavior time after they spoke out about sexual and physical

¹⁶⁴ *Brice*, 2022 WL 17721031, at *4.

¹⁶⁵ Michel R. Sisak & Michael Balsamo, *AP Investigation: Women’s Prison Fostered Culture of Abuse*, ASSOC. PRESS (Feb. 6, 2022), <https://apnews.com/article/coronavirus-pandemic-health-california-united-states-prisons-00a711766f5f3d2bd3fe6402af1e0ff8>.

¹⁶⁶ Lisa Fernandez, *Dozens of Women Detail Rape and Retaliation at Dublin Prison, Real Reform is Questioned*, FOX KTVU (Sept. 23, 2022), <https://www.ktvu.com/news/dozens-of-women-detail-rape-and-retaliation-at-dublin-prison-real-reform-is-questioned> [<https://perma.cc/Y5UW-MMYK>].

¹⁶⁷ *Id.*

¹⁶⁸ *See generally* STAFF OF PERMANENT S. SUBCOMM. ON INVESTIGATIONS, 117TH CONG., REP. ON SEXUAL ABUSE OF FEMALE INMATES IN FEDERAL PRISONS (Comm. Print 2022) [hereinafter REPORT ON SEXUAL ABUSE].

abuse.”¹⁶⁹ John Kostelnik, the Western region vice president for the correctional workers union, stated, “[W]hat’s happening to whistleblowers at Dublin is endemic of a coverup culture deeply ingrained in Bureau of Prisons leadership—aimed more at preserving what’s left of the bureau’s tattered reputation than sweeping away any employee’s transgressions.”¹⁷⁰

Ms. Chavira survived the abuse of multiple officers. One guard stalked and harassed her, including locking her in her cell for hours on numerous occasions until she bared her breasts or pulled down her pants. One time he entered Ms. Chavira’s cell, asked her if she wanted him to lock the door, and then touched her breast with his hand and started laughing when she tried to leave. When Ms. Chavira pled with him to leave her alone, he scoffed, “You have no semen, you have no charge. You need my cum to prove it, and you don’t have it.” Another officer would force her to do humiliating things in front of him, such as purposefully dropping items and demanding she pick them up, and making her walk laps around the prison while he walked behind her and watched. This officer would also come to Ms. Chavira’s cell under false pretenses and rummage through her belongings. He once demanded her earrings, and whispered in her ear, “You know I can have a lot of fun in your room.”

The day after Ms. Chavira reported this abuse, this officer brought a coworker with him to tear Ms. Chavira’s cell apart. They poured shampoo and oil all over her clothing. They stole her personal property—everything her family had sent, her letters, notebooks—and forced her to undergo an invasive strip search. This officer took his life as a result of the pending sexual abuse allegations against him.¹⁷¹ As such, he will never be held accountable for his actions. Still another officer would repeatedly and intentionally open Ms. Chavira’s cell door when Ms. Chavira was naked. When Ms. Chavira objected, the officer asserted that she could see Ms. Chavira naked “whenever [she] want[ed].”

Ms. Chavira’s repeated attempts to stop this egregious behavior were met with belittlement and retaliation. She meticulously documented records of her abuse in notebooks, the very same ones which were seized during the encounter described above where officers ransacked Ms. Chavira’s cell. Ms. Chavira reported the abuse to a BOP Psychologist, who told her she was “crazy.” She even went to the

¹⁶⁹ Lisa Fernandez, *Retaliation is Real, FCI Dublin Prison Psychologist Testifies at Warden Sex Trial*, KTVU (Nov. 30, 2022), <https://www.ktvu.com/news/retaliation-is-real-fci-dublin-prison-psychologist-testifies-at-warden-sex-trial>.

¹⁷⁰ Michael Balsamo & Michael R. Sisak, *Whistleblowers Say they’re Bullied for Exposing Prison Abuse*, ASSOC. PRESS (Feb. 24, 2022), <https://apnews.com/article/coronavirus-pandemic-health-prisons-california-congress-66990dfe50f91fbd3e499b197b590bd9> [<https://perma.cc/V78G-E97B>].

¹⁷¹ Jeanita Lyman, *Dublin Prison Worker Dies by Suicide Amid Investigation Into Inmate Abuse*, PLEASANTON WEEKLY (Sept. 11, 2022), <https://www.pleasantonweekly.com/news/2022/09/11/dublin-prison-worker-dies-by-suicide-amid-investigation-into-inmate-abuse>.

then-Warden Ray Garcia—who was recently convicted at trial for sexually abusing several women¹⁷²—to put an end to the abuse. Once claims of sexual abuse in Dublin were finally taken seriously, she met with agents and prosecutors about the abuse to try to help bring the perpetrators to justice. Even so, she was transferred to another prison and branded as one of the “Dublin troublemakers,” which has resulted in retaliation against her in various forms.

Contributing to the myriad compelling circumstances in this case, Ms. Chavira was particularly vulnerable to this abuse given her life history. Prior to her incarceration, Ms. Chavira fell prey to romantic relationships with men who physically abused her. Thus, the abuse she experienced at Dublin exacerbated old wounds while creating new ones. The officers’ abuse has significantly impacted Ms. Chavira: she feels depressed, anxious, paranoid, unsafe, and has trouble sleeping. Given the BOP’s role in perpetrating these abuses and Ms. Chavira’s understandable distrust of the BOP, Ms. Chavira cannot heal while in prison.

Ms. Chavira’s story is just one among an “epidemic of assaults against female prisoners in federal custody.”¹⁷³ In light of the deluge of cases of sexual abuse in federal prison, Deputy Attorney General Lisa Monaco has publicly urged BOP officials to consider survivors of sexual abuse for compassionate release.¹⁷⁴

Despite DOJ’s public statements in support of compassionate release for survivors of sexual abuse, the BOP continues to privately deny relief in those cases—including Ms. Chavira’s. After Ms. Chavira petitioned the BOP for compassionate release, the BOP denied her request.¹⁷⁵ While acknowledging that Ms. Chavira’s claims are “extremely concerning,” the BOP asserted that “the Office of General Counsel has not been notified of a final adjudication of Ms. Chavira’s allegations,” and as a result, that it “currently lacks sufficient documentation to determine whether her circumstances are ‘extraordinary and compelling.’” Ms. Chavira has already sought to avail herself of all other BOP remedies—contrary to the BOP’s suggestion, she is not aware of any pending adjudication whatsoever. Yet no one disputes that Ms. Chavira was actually subjected to this abuse; nor could they. Ms. Chavira repeatedly reported her abuse over several months, abuse that was part and parcel of Dublin’s “Rape Club.”¹⁷⁶

The totality of Ms. Chavira’s circumstances is inarguably extraordinary and compelling. But under the Commission’s current construction of the enumerated

¹⁷² Lisa Fernandez, *Former Dublin Prison Warden Found Guilty of Sexual Abuse Charges*, KTVU (Dec. 8, 2022), <https://www.ktvu.com/news/former-fci-dublin-prison-warden-found-guilty-of-sex-abuse-charges>.

¹⁷³ Glenn Thrush, *Justice Dept. Considers Early Release for Female Inmates Sexually Abused Behind Bars*, NY TIMES (Dec. 13, 2022), <https://www.nytimes.com/2022/12/13/us/politics/federal-prison-sexual-abuse.html> [https://perma.cc/2KFS-6748].

¹⁷⁴ *Id.*

¹⁷⁵ The BOP’s denial is on file with the Federal Criminal Justice Clinic.

¹⁷⁶ Fernandez, *supra* note 166 (describing very similar patterns of abuse at FCI Dublin).

category, Ms. Chavira would likely be unable to obtain relief under Proposed Amendment 4 because of the narrow federal definition of “sexual assault.” As explained below, the proposed amendment should be broadened.

B. This Commission should adopt proposal (b)(4) with revisions.

Although proposed (b)(4) moves compassionate release in the right direction, this Commission should revise the amendment further.

First, the amendment should be expanded to include cases like Ms. Chavira’s, which involve sexual abuse and harassment that is not necessarily penetrative or assaultive, but that nevertheless causes emotional or psychological harm. In particular, the Commission should recognize that sexual *abuse*, which encompasses behavior that results in emotional and psychological harm, is also extraordinary and compelling. For example, the Senate’s investigation into sexual abuse in prisons revealed that one guard at FCI Dublin forced two women to “strip naked for him during rounds and took photos, and stored a ‘large volume of sexually graphic photographs’ on his BOP issued cellphone.”¹⁷⁷ That sexual abuse would not be covered by the current language.

Second, the Commission should resolve the grammatical uncertainty over whether “serious bodily injury” qualifies just “physical abuse,” or whether it also extends to “sexual assault.” A serious bodily injury requirement applied to sexual assault would make it nearly impossible for survivors of sexual assault to establish extraordinary and compelling circumstances. Many forms of sexual assault might not result in documentable, serious bodily injury—even from penetrative assault. Courts may misconstrue this qualifier as applying to sexual assault, thereby barring from relief the overwhelming majority of people subjected to sexual assault.

Third, as explained elsewhere, this Commission should make clear that judges may exercise their discretion in cases involving circumstances *similar*—but not *identical*—to the enumerated categories.¹⁷⁸ This ensures the availability of relief in extraordinary and compelling cases, even when a person’s circumstances are not a carbon copy of those listed in the enumerated categories. Otherwise, judges may hesitate to grant relief in extraordinary and compelling cases on the mistaken assumption that this Commission intended to foreclose relief in similar cases that did not meet its stringent definition of sexual assault.

VII. This Commission’s Proposals Are Not in Tension With § 1B1.10.

This Commission’s proposed amendments—including proposal (b)(5) and (b)(6)—are not in tension with the retroactivity provisions in § 1B1.10.

First, proposal (b)(5) and § 1B1.10 are not tension for two reasons: (1) they provide relief for different reasons; and (2) they employ different standards.

¹⁷⁷ REPORT ON SEXUAL ABUSE, *supra* note 168, at 16.

¹⁷⁸ See Part V.C, *supra*.

Section 1B1.10 provides broad relief to individuals whose guideline range has been retroactively reduced by the Commission.¹⁷⁹ By contrast, proposal (b)(5) would provide relief only when “changes in the law” render an individual’s sentence “inequitable.” Such “changes in the law” would include but are not limited to guideline amendments. They would also include statutory, legislative, or judicial changes. Additionally, these “changes in the law” could constitute an extraordinary and compelling reason for a sentencing reduction only if they make the sentence “inequitable.” Section 1B1.10 has no similar narrowing provision—if a person’s guideline range has been retroactively reduced by the Commission, they are eligible to seek relief.¹⁸⁰

Any overlap between the two mechanisms would be rare and could be easily resolved by judges. Several examples illustrate this point. If a person is eligible for and receives a reduced sentence under § 1B1.10, any subsequent compassionate release motion on that same basis would surely be denied. A judge would be obliged to conclude that the reduced guideline range did not render the sentence inequitable. Likewise, if a sentencing reduction is inconsistent with § 1B1.10 because, for example, the retroactive amendment does not have the effect of lowering the applicable guideline range,¹⁸¹ a judge would be hard pressed to conclude that the sentence is inequitable under (b)(5).

Other examples of overlap that judges can address in their discretion are (1) if the Commission chooses not to make a guideline amendment retroactive after considering—among other factors—“the magnitude of the change in the guideline made by the amendment”;¹⁸² and (2) if a court grants relief pursuant to § 1B1.10, but indicates it would have reduced the sentence further if not for the policy statement’s limits. In both examples, proposal (b)(5) could provide a needed safety valve—consistent with Congress’s intent—for a person to show why the change in law nonetheless renders their *individual* sentence “inequitable.”¹⁸³ Congress specifically contemplated that changes to a sentencing guideline could constitute extraordinary and compelling circumstances in particular cases.¹⁸⁴

Second, the Commission’s (b)(6) proposal is not in tension with § 1B1.10 because they similarly provide different relief and they employ different standards. In theory, a petitioner *could* raise an amended guideline range as an extraordinary and compelling reason for release under the catch-all category. If that was the sole reason proffered for a sentencing reduction and the person already received relief under § 1B1.10 (or the person did not meet § 1B1.10’s requirements for relief), it is

¹⁷⁹ U.S.S.G. § 1B1.10.

¹⁸⁰ *Id.*

¹⁸¹ U.S.S.G. § 1B1.10(a)(2)(B).

¹⁸² U.S.S.G. § 1B1.10, Background Notes.

¹⁸³ S. REP. NO. 98-225, at 121.

¹⁸⁴ S. REP. NO. 98-225, at 55–56 (highlighting as an example of extraordinary and compelling circumstances “cases in which the sentencing guidelines . . . have been later amended to provide a shorter term of imprisonment.”).

hard to imagine a judge concluding that those circumstances are extraordinary and compelling. If an individual raises this in conjunction with other compelling reasons, a judge can employ their discretion to determine if a sentencing reduction is warranted *in that case*.

Regardless, the guardrails built into the § 3582(c)(1)(A) and § 1B1.13 remain. To secure relief, a compassionate release petitioner would also have to show that a sentence reduction is consistent with § 3553(a) and that they will not pose a danger to the community under § 1B1.13(2). *See* Part VIII, *infra*.

VIII. Notwithstanding This Commission’s Proposals, Several Guardrails Effectively Moderate Compassionate Release.

The last four years have shown that a more expansive compassionate release system—as Congress originally intended—is administrable in light of the guardrails thoughtfully incorporated into the statute and policy statement by Congress and this Commission.

The “extraordinary and compelling reasons” requirement at issue before this Commission is merely one of several requirements a person must satisfy to obtain compassionate release. A sentence reduction must also be consistent with the § 3553(a) factors, no matter how extraordinary or compelling the reasons for release.¹⁸⁵ And even then, the statute requires that release be consistent with this Commission’s applicable policy statements. This Commission has indicated its intent to retain its requirement that courts may grant a reduction only if “the defendant is not a danger to the safety of any other person or to the community.”¹⁸⁶ Even in circuits that recognize the broadest judicial discretion—such as those that allow changes in the law to constitute extraordinary and compelling circumstances—courts have judiciously managed compassionate release in light of these other guardrails, which ensures that compassionate release does not become overused.

A. 18 U.S.C. § 3553(a)

The most robust guardrail on compassionate release is § 3553(a). Regardless of what circumstances this Commission defines as extraordinary and compelling, sentencing judges must still consider whether a sentence reduction comports with the § 3553(a) factors and if so, the appropriate reduction.¹⁸⁷ This requires, in essence, an individualized resentencing in which courts must determine whether a reduction undermines “the seriousness of the offense,” “respect for the law,” or “just

¹⁸⁵ *See* 18 U.S.C. § 3582(c)(1)(A).

¹⁸⁶ U.S.S.G. § 1B1.13(2); *see* PROPOSED AMENDMENTS, *supra* note 38, at 4 (proposed U.S.S.G. § 1B1.13(a)(2)).

¹⁸⁷ *See* 18 U.S.C. § 3582(c)(1)(A).

punishment for the offense.”¹⁸⁸ Courts must also consider “the nature and circumstances of the offense and the history and characteristics of the defendant,”¹⁸⁹ as well as “the need to avoid unwarranted sentence disparities.”¹⁹⁰ And they cannot grant release if doing so would be inconsistent with the need “to protect the public from further crimes of the defendant” or “afford adequate deterrence to criminal conduct.”¹⁹¹ This Commission’s own data show that the § 3553(a) factors serve as robust limits on compassionate release. In the Commission’s recent study, the § 3553(a) factors were largely dispositive in nearly half of the unsuccessful compassionate release motions.¹⁹²

Moreover, the last four years have demonstrated that the § 3553(a) factors function as a significant statutory guardrail, even in cases that present uniquely extraordinary and compelling circumstances. For example, in *United States v. Brice*,¹⁹³ Rashidah Brice sought compassionate release on the grounds that she was sexually assaulted several times by a correctional officer and later provided substantial assistance to convict the officer (but received no sentencing credit).¹⁹⁴ Despite these horrific circumstances, the judge did not release Ms. Brice immediately, and instead reduced her sentence by 30 months. The judge focused heavily on the fact that Ms. Brice had been convicted of an extremely serious offense—sex trafficking. The judge thus concluded that “[t]he need to protect the public and promote respect for the law require that Brice continue to serve a significant period of incarceration.”¹⁹⁵ In *United States v. Lewis*, another one of my Clinic’s successful stash house compassionate release cases, the sentencing judge acknowledged that Mr. Lewis had presented “one or more” extraordinary and compelling reasons for release, including serious health risks from COVID.¹⁹⁶ However, the judge declined to reduce Mr. Lewis’s sentence to time-served after analyzing the § 3553(a) factors, noting that he still “ha[d] concerns about recidivism.”¹⁹⁷

During COVID, judges declined to grant relief after considering the § 3553(a) factors, even when the movant was at considerable medical risk.¹⁹⁸ In *United States*

¹⁸⁸ 18 U.S.C. § 3553(a)(2)(A).

¹⁸⁹ 18 U.S.C. § 3553(a)(1).

¹⁹⁰ 18 U.S.C. § 3553(a)(6).

¹⁹¹ 18 U.S.C. §§ 3553(a)(1)(C), (B).

¹⁹² See U.S. SENT’G COMM’N COVID REPORT, *supra* note 25, at 41.

¹⁹³ No. 13-CR-206-2, 2022 WL 17721031 (E.D. Pa. Dec. 15, 2022).

¹⁹⁴ *Id.* at *2.

¹⁹⁵ *Id.* at *6.

¹⁹⁶ *Lewis*, No. 06-CR-50074, slip. op. at 3–4.

¹⁹⁷ *Id.* at 8 (reducing Mr. Lewis’s sentence from 241 months (20 years) to 228 months (19 years)).

¹⁹⁸ See generally, e.g., *United States v. Bibbs*, No. 12-20332-03, 2021 WL 1165604 (E.D. Mich. Mar. 26, 2021); *United States v. Adkins*, No. 19-CR-00651-BAS-1, 2020 WL 3058097 (S.D. Cal. June 9, 2020); *United States v. Weinberger*, No. 3:18-CR-00026-BLW, 2021 WL

v. Bell,¹⁹⁹ for example, the district court concluded that there were extraordinary and compelling reasons for release based on the Mr. Bell’s hypertension and increased susceptibility to a severe COVID-19 infection.²⁰⁰ But the court ultimately denied relief under the § 3553(a) factors. Mr. Bell’s conviction stemmed from a kidnapping; the judge determined that a lengthy sentence was necessary to reflect the seriousness of the offense.²⁰¹ Mr. Bell also “had an unusually long and severe criminal history,”²⁰² and had incurred several recent disciplinary infractions while incarcerated.²⁰³

B. § 1B1.13(a)(2)

Another important guardrail is § 1B1.13’s requirement that “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).”²⁰⁴ This requirement currently exists in the inapplicable policy statement, and this Commission’s proposed amendments retain it.²⁰⁵ In addition to the 40% of denials on the basis of the § 3553(a) factors, this “danger to the public” standard comprised more than 20% of denials of compassionate release motions in 2020.²⁰⁶ Notably, this is despite the fact that this requirement is housed in the currently inapplicable policy statement. In other words, even though every circuit but the Eleventh agrees that the existing policy statement is inapplicable, judges still invoked this factor in more than 20% of compassionate release denials. Once this Commission updates the policy statement, this “dangerousness” factor will be an even more stringent guardrail.

In sum, this Commission’s proposals are not at all “equivalent to a clemency or parole power.”²⁰⁷ Compassionate release imposes a “dramatically higher bar for success” even when an individual establishes extraordinary and compelling circumstances, including: (1) “a threshold exhaustion requirement,” (2) the § 3553(a) factors, and (3) showing that the defendant is not a danger to the safety of

5500462 (D. Idaho Nov. 22, 2021), *aff’d*, No. 21-30262, 2022 WL 17494733 (9th Cir. Sept. 16, 2022); *United States v. Hendon*, No. CR 17-20469, 2021 WL 869652 (E.D. Mich. Mar. 9, 2021).

¹⁹⁹ *United States v. Bell*, No. 04-CR-202, 2020 WL 7698372 (N.D. Ill. Dec. 28, 2020).

²⁰⁰ *Id.* at *3.

²⁰¹ *Id.*

²⁰² *Id.* at *1.

²⁰³ *Id.* at *3.

²⁰⁴ U.S.S.G. § 1B1.13(a)(2).

²⁰⁵ U.S.S.G. § 1B1.13(2); PROPOSED AMENDMENTS, *supra* note 38, at 4 (proposed U.S.S.G § 1B1.13(a)(2)).

²⁰⁶ U.S. SENT’G COMM’N COVID REPORT, *supra* note 25, at 41.

²⁰⁷ Brief and Required Short Appendix of Defendant-Appellant Robert Rollins at 25, *United States v. Rollins*, 2020 WL 4805777 (7th Cir. Aug. 7, 2020).

any person or the community.²⁰⁸ Indeed, even though many circuits recognize broad judicial discretion to identify extraordinary and compelling circumstances, they have shown the efficacy of constraints on the overuse of compassionate release. Should this Commission adopt its broadest proposals, as I urge it to do, compassionate release will remain an administrable system.

IX. Conclusion

This Commission’s proposed amendments are a laudable step toward a reinvigorated compassionate release system as Congress intended. The proposals contain all of the essential elements to ensure that compassionate release is an administrable, flexible, and sustainable mechanism for people presenting truly extraordinary and compelling circumstances. The revisions suggested above will strengthen compassionate release without rendering the system unwieldy.

For someone sentenced to prison, “every day, month and year that was added to the ultimate sentence will matter.”²⁰⁹ As Mr. White explained in his written testimony, “If I had served my full sentence . . . I know my mother would not be here anymore . . . I would have missed my daughter’s 8th grade graduation to high school graduation and the first few college years.”²¹⁰ This Commission’s proposals ensure that, in extraordinary and compelling situations, judges will be able to “give careful consideration to every minute . . . of a defendant’s sentence.”²¹¹ The proposed amendments thus give substance to the simple premise that the federal system needs more compassion, not less.

²⁰⁸ Reply Brief of Defendant-Appellant Robert Rollins at 12, *United States v. Rollins*, 2020 WL 4805777 (7th Cir. Oct. 1, 2020).

²⁰⁹ *Faison*, 2020 WL 815699, at *1.

²¹⁰ *Public Hearing on Proposed Amendments to Compassionate Release Policy Statement: Hearing Before U.S. Sent’g Comm’n* (Feb. 15, 2023) (written statement of Dwayne White).

²¹¹ *Faison*, 2020 WL 815699, at *1.