KAPLAN HECKER & FINK LLP

350 FIFTH AVENUE | 63RD FLOOR
NEW YORK, NEW YORK 10118

1050 K STREET NW | SUITE 1040
WASHINGTON, DC 20001

TEL (212) 763-0883 | FAX (212) 564-0883

WWW.KAPLANHECKER.COM

DIRECT EMAIL jmatz@kaplanhecker.com

February 15, 2023

Honorable Judge Carlton W. Reeves
Chair, United States Sentencing Commission
One Columbus Circle, NE, Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Legality of proposed USSG § 1B1.13(b)(6)

Dear Judge Reeves:

Along with Professor Laurence H. Tribe of Harvard Law School, as well as my colleagues Sean Hecker and Amit Jain of Kaplan Hecker & Fink LLP, I am grateful for the opportunity you have afforded to comment on the United States Sentencing Commission's proposed amendments to USSG § 1B1.13. This letter responds specifically to the Commission's invitation for comment on whether proposed § 1B1.13(b)(6) "exceeds the Commission's authority under 28 U.S.C. § 994(a) and (t), or any other provision of federal law." We have carefully studied the issue. In our view, all three versions of proposed subsection (b)(6) are fully consistent with 28 U.S.C. § 994(a) and (t), and we do not discern any other applicable statutory or constitutional limitation.

To explain that conclusion, we first consider the statutory text and structure of § 994(t). We conclude that § 994(t) requires the Commission to issue general policy statements that offer meaningful guidance about the characteristic or significant qualities of what ought to satisfy the "extraordinary and compelling reasons" standard under 18 U.S.C. § 3582(c)(1)(A). That guidance, in turn, must reflect principles by which a defendant's circumstances may be judged and a list of specific examples that meet or demonstrate the standard (and it may also include other provisions). However, the Commission is not required to attempt any comprehensive or preclusive accounting of what reasons may conceivably qualify; instead, it can provide the meaningful guidance just described and rely upon courts to exercise reasoned judgment in assessing the facts of each case. This is precisely what proposed subsection (b)(6) accomplishes, as we establish through a detailed analysis of the text and structure of each of the options proposed for this subsection.

The remainder of our comment—Parts II through IV—surveys judicial precedent, legislative history, and prior practice by the Commission itself. We demonstrate that each of these sources of authority supports our plain-text interpretation of § 994(t). We further demonstrate that these sources are fully consistent with the adoption of any version of proposed subsection (b)(6), and that they confirm the importance and wisdom of incorporating such language into § 1B1.13(b).

I. Proposed Subsection (b)(6) Is Consistent with the Text of 28 U.S.C. § 994

Under 28 U.S.C. § 994(a)(2)(C), the Commission is authorized to promulgate general policy statements regarding "the appropriate use" of certain sentence modification provisions, including 18 U.S.C. § 3582(c)(1)(A). As amended by the First Step Act of 2018, § 3582(c)(1)(A) allows a defendant to seek a sentence reduction based on "extraordinary and compelling reasons" if he meets certain other requirements. In promulgating policy statements to address the appropriate use of such sentence reductions under § 3582(c)(1)(A), the Commission must adhere to 28 U.S.C. § 994(t), which provides (in part) that the Commission "shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." Historically, the Commission's policy statements concerning sentence reductions under § 3582(c)(1)(A) have appeared at § 1B1.13.

Accordingly, any potential amendments to § 1B1.13 must comply with § 994(t). That is the standard against which proposed subsection (b)(6) must be tested.

On its face, § 994(t) suggests breadth rather than narrowness: it uses words like "describe," "should," "including," and "criteria." But even a broad statute must have its limits. So the question is really one of degree: in carrying out its obligations under § 994(t), how precisely must the Commission itself describe "the criteria to be applied" and the "list of specific examples"?

One potential interpretation—we'll call it the *restrictive view*—is that the Commission is statutorily obligated to provide highly explicit criteria and examples, leaving hardly any room for courts applying § 1B1.13 to exercise judgment or discretion in identifying where "extraordinary and compelling reasons" exist under § 3582(c)(1)(A). Another potential interpretation—we'll call this one the *moderate view*—is that the Commission must provide meaningful criteria and specific examples, but it can properly leave a measure of reasoned judgment and discretion to courts in identifying where "extraordinary and compelling reasons" exist. A final potential reading—the *permissive view*—is that the Commission need not provide any significant interpretive guidance, leaving courts to essentially decide on their own whether "extraordinary and compelling reasons" exist under § 3582(c)(1)(A).

Based on our careful study, we believe the *moderate view* is the best reading of § 994(t), and we believe that proposed subsection (b)(6) reflects a statutorily permissible exercise of the Commission's authority to describe extraordinary and compelling reasons for sentence reduction.

A. Section 994(t) requires the Commission to provide meaningful criteria and specific examples, but permits it to vest courts with a measure of reasoned judgment in identifying "extraordinary and compelling reasons"

As in all questions of statutory construction, "we begin by analyzing the statutory language, assuming that the ordinary meaning of that language accurately expresses the legislative purpose." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (internal quotation marks and alteration omitted); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) ("The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means."). We will first consider separately each of the key words and phrases in § 994(t). We will then consider the statute as a whole, guided by our

understanding of its component parts. As we will show, the best reading of § 994(t) is the *moderate view*: it does not allow the Commission to effectuate a complete transfer of interpretive authority to courts (the *permissive view*), nor does it require the Commission to provide highly explicit and unduly rigid criteria and examples that preclude judicial discretion (the *restrictive view*).

The first key term in § 994(t) is "describe." Specifically, § 994(t) directs the Commission to "describe" what should be considered extraordinary and compelling reasons for sentence reduction. The ordinary meaning of "describe" is "to use words to convey a mental image or impression of [a thing] by referring to characteristic or significant qualities, features, or details."[1] Thus, the statutory language describing the Commission's role contemplates that the Commission must guide courts in assessing sentence reduction motions by conveying an impression of the characteristic or significant qualities of "extraordinary and compelling reasons." Of course, that role is most consistent with general policy statements that describe criteria and examples while still contemplating a reasoned, structured role for federal courts to play in reducing sentences.

This understanding is confirmed by context. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (cleaned up). Section 994 elsewhere directs the Commission to "establish" or "specify" certain sentencing ranges or outcomes.[2] Unlike the word "describe," the words "specify" and "establish" strongly indicate that the Commission's role is meant to be conclusive and definite.[3] Yet § 994(t) conspicuously refrains from directing the Commission to act in such a fixed or categorical manner and instead directs it only to "describe" what should qualify as extraordinary and compelling reasons. Because differences in language presumptively convey differences in meaning, the word "describe" should not be read as imposing an unduly restrictive obligation on the Commission to specify *ex ante* every possible "extraordinary and compelling reason[]." Rather, the word "describe" suggests the Commission is required only to offer *description* or *guidance*.

That conclusion is bolstered by application of the separate interpretive principle that courts and agencies should not rewrite statutes. Here, interpreting "describe" as though it means "define" or "specify" or "establish"—terms connoting a more rigid and preclusive understanding of the role the Commission is meant to play—would defeat Congress's choice of language. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493, 534 (2011) (rejecting interpretation that "would depart from the statute's text by replacing" one word with another). Indeed, the Tenth Circuit applied that very principle while holding that the restrictive interpretation of § 994 is mistaken: "Turning first to § 994(t), we note that Congress, in outlining the Sentencing Commission's duties, chose to employ the word

---

[1] *Describe*, Oxford English Dictionary Online, https://www.oed.com/view/Entry/50732 (last accessed Feb. 3, 2023).

[2] *See, e.g.*, § 994(b)(1) (directing Commission to "establish" sentencing ranges "for each category of offense involving each category of defendant"); § 994(h) (directing Commission to ensure that guidelines "specify" a prison sentence near the maximum term under certain enumerated circumstances); § 994(u) (directing Commission to "specify in what circumstances and by what amount" reductions in sentencing guidelines may apply retroactively).

[3] To "establish" something is "[t]o fix, settle, institute or ordain [it] permanently," whereas to "specify" is "[t]o mention, speak of, or name (something) definitely or explicitly; to set down or state categorically or particularly." See *Establish*, Oxford English Dictionary Online, https://www.oed.com/view/Entry/64530 (last accessed Feb. 3, 2023); *Specify*, Oxford English Dictionary Online, https://www.oed.com/view/Entry/186017 (last accessed Feb. 3, 2023).

'describe' rather than the word 'define.' . . . We presume that Congress was aware of the difference between these two words and knowingly chose to use the word 'describe,' rather than the word 'define,' in setting forth its statutory directive to the Sentencing Commission in § 994(t)." *United States v. McGee*, 992 F.3d 1035, 1044 (10th Cir. 2021) (concluding that "Congress intended to afford district courts with discretion . . . to independently determine the existence of 'extraordinary and compelling reasons'" when analyzing motions under § 3582(c)(1)(A)).[4]

This leads us to the next key phrase: the Commission shall describe "what *should* be considered" as "extraordinary and compelling reasons" (emphasis added). Use of the word "should" is important. Rather than direct the Commission to say what "shall" or "must" qualify as "extraordinary and compelling reasons," § 994 directs it to say what "should" qualify. "[T]he common meaning of 'should' suggests or recommends a course of action, while the ordinary understanding of 'shall' describes a course of action that is mandatory." *United States v. Maria*, 186 F.3d 65, 70 (2d Cir. 1999). The contrast is especially stark here because § 994(t) uses both words: In the sentence immediately following the Commission's charge to describe "what *should* be considered" as extraordinary and compelling reasons, the statute more pointedly specifies that "rehabilitation alone *shall* not be considered" such a reason. § 994(t) (emphasis added). Thus, the statute not only directs the Commission to "describe" rather than "define" what reasons qualify as "extraordinary and compelling," but it also directs the Commission to describe what "should" rather than what "shall" qualify. Here, too, Congress used language suggesting a more moderate view of the Commission's role: the Commission is required to describe "extraordinary and compelling reasons," and its description must cover what "should" qualify, but there is no textual indication that it is expected to offer a comprehensive or preclusive accounting of such reasons.

That reading is bolstered by the next (and most important) statutory phrase: "extraordinary and compelling reasons." By definition, this term refers to reasons that are "[o]ut of the usual or regular course of order" or "[o]f a kind not usually met with; exceptional; unusual; singular" and "irresistible; demanding attention, respect, etc."[5] Courts have characterized this language—as used in both § 994(t) and 18 U.S.C. § 3582(c)(1)(A)(i)—as "open-ended . . . to capture the truly exceptional cases that fall within no other statutory category,"[6] "flexible,"[7] "amorphous,"[8] and "broad."[9] Given these characteristics, it would be quite strange for Congress to require that the Commission conclusively define or account for every conceivable such reason: by their nature, "extraordinary and compelling reasons" necessarily resist any such advance enumeration. It is

---

[4] Other subsections of § 994 refer to items "described in" specific federal statutes. *See, e.g.*, § 994(h) (referring twice to "an offense described in" certain statutes). In context, that is a more restrictive usage of the word "described." But whereas in these other subsections it was Congress that "described" the relevant items, here alone it is the Commission itself that must "describe" what ranks as "extraordinary and compelling reasons," and the prospective obligation to "describe" is very different in context than a reference to what has already elsewhere been "described."

[5] *Extraordinary*, Oxford English Dictionary Online, https://www.oed.com/view/Entry/67124 (last accessed Feb. 3, 2023); *Compelling*, Oxford English Dictionary Online, https://www.oed.com/view/Entry/37525 (last accessed Feb. 3, 2023).

[6] *United States v. McCoy*, 981 F.3d 271, 287 (4th Cir. 2020).

[7] *United States v. Bridgewater*, 995 F.3d 591, 601 (7th Cir. 2021).

[8] *United States v. Andrews*, 12 F.4th 255, 260 (3d Cir. 2021).

[9] *United States v. Johnson*, ___ F. Supp. 3d ___, 2022 WL 2866722, at *6 (D.D.C. July 21, 2022).

more natural to conclude that Congress charged the Commission with providing meaningful guidance but also permitted the Commission to leave a measure of reasoned judgment and discretion for courts in ascertaining where extraordinary and compelling reasons exist.

Indeed, this inference is further supported by the final key phrase: "including the criteria to be applied and a list of specific examples." Absent evidence to the contrary, "[t]he verb *to include* introduces examples, not an exhaustive list." Scalia & Garner 132; *see also, e.g.*, *Samantar v. Yousuf*, 560 U.S. 305, 317 n.10 (2010) ("The word 'includes' is usually a term of enlargement, and not of limitation." (quoting 2A Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 47.7, p. 305 (7th ed. 2007)) (cleaned up)). Here, § 994(t) mandates that the Commission's description must include (1) "criteria," meaning "test[s], principle[s], rule[s], canon[s], or standard[s], by which" extraordinary and compelling reasons are to be "judged or estimated," and (2) a list of specific examples, meaning "thing[s] which [are] typical or characteristic of" the "category" or "class."[10] Read in combination, this language makes clear that the Commission's core obligation—namely, to "describe" what "should" qualify as "extraordinary and compelling reasons"—expansively includes broad principles, canons, and standards, as well as more specific examples that may illuminate or represent the application of those criteria.

Pulling this all together, the plain language of § 994(t) is inconsistent with any restrictive view of the Commission's authority, which would treat the statute as requiring the Commission to provide a highly detailed specification of reasons that rank as "extraordinary and compelling." Instead, the statutory language suggests breadth rather than narrowness: the Commission's obligation under § 994(t) contemplates that it must offer meaningful guidance about what reasons qualify as "extraordinary and compelling," and that it may also properly describe such reasons in ways that leave room for a measure of reasoned judgment by courts in applying that standard. *See Consumer Elecs. Ass'n v. F.C.C.*, 347 F.3d 291, 298 (D.C. Cir. 2003) ("[T]he Supreme Court has consistently instructed that statutes written in broad, sweeping language should be given broad, sweeping application."). This approach makes perfect sense here. "[I]t is possible and useful to formulate categories . . . without knowing all the items that may fit—or may later, once invented, come to fit—within those categories." Scalia & Garner 101. Recognizing the need for such categories here, Congress required the Commission to describe what reasons should qualify, but did so in broad language allowing the Commission itself to establish frameworks and guidance that will structure judicial discretion in truly unusual cases. *See, e.g.*, *United States v. Ruvalcaba*, 26 F.4th 14, 27 (1st Cir. 2022) ("Judges do not have crystal balls, and courts cannot predict how th[e] mix of factors . . . will play out in every [compassionate release] case."); *McCoy*, 981 F.3d at 287 ("[T]he very purpose of § 3582(c)(1)(A) is to provide a 'safety valve' that allows for sentence reductions when there is *not* a specific statute that already affords relief but 'extraordinary and compelling reasons' nevertheless justify a reduction." (emphasis in original)); *cf. United States v. Kappes*, 782 F.3d 828, 838 (7th Cir. 2015) ("A defendant may change substantially during a long prison sentence, and the world outside the prison walls may change even more.").

Simply put, § 994(t) requires the Commission to issue general policy statements that offer meaningful guidance about the characteristic or significant qualities of what ought to satisfy an inherently forward-looking "extraordinary and compelling reasons" standard. That guidance, in

[10] *Criterion*, Oxford English Dictionary Online, https://www.oed.com/view/Entry/44581 (last accessed Feb. 3, 2023); *Example*, Oxford English Dictionary Online, https://www.oed.com/view/Entry/65593 (last accessed Feb. 10, 2023).

turn, must reflect principles by which a defendant's circumstances may be judged and a list of specific examples that meet or demonstrate the standard (and it may also include other provisions). The Commission is not required to attempt a comprehensive or highly specific accounting of what reasons may qualify; instead, it can provide the meaningful guidance that we have just described and rely upon courts to exercise reasoned judgment in assessing the facts of each case.

B. Each of the proposed versions of subsection (b)(6) complies with Section 994(t)

Under the interpretation of § 994(t) set forth above, each of the proposed versions of subsection (b)(6) is consistent with the statute's requirements for the Commission.

For ease of reference, here are the three options for proposed subsection (b)(6):

> **Option 1**: (6) OTHER CIRCUMSTANCES.—The defendant presents any other circumstance or a combination of circumstances similar in nature and consequence to any of the circumstances described in paragraphs (1) through [(3)][(4)][(5)].
>
> **Option 2**: (6) OTHER CIRCUMSTANCES.—As a result of changes in the defendant's circumstances [or intervening events that occurred after the defendant's sentence was imposed], it would be inequitable to continue the defendant's imprisonment or require the defendant to serve the full length of the sentence.
>
> **Option 3**: (6) OTHER CIRCUMSTANCES.—The defendant presents an extraordinary and compelling reason other than, or in combination with, the circumstances described in paragraphs (1) through [(3)][(4)][(5)].

Option 1 satisfies § 994(t) because it expressly provides meaningful criteria in describing what should qualify as extraordinary and compelling reasons: namely, circumstances "similar in nature and consequence" to the other circumstances described in § 1B1.13(b). In applying this criterion, courts would operate with reasoned and well-structured judgment in identifying whether the circumstances of a particular case fall within the guidance provided by the Commission, which (if the rest of the proposed amendment is adopted) would ask it to reason by analogy to specified medical, age-related, family, victim-based, and legal circumstances. Indeed, it is commonplace for courts to assess whether one set of factual circumstances is analogous to another in "nature and consequence"—that is inherent in the task of common law judging, it often occurs in sentencing proceedings, and it is the basis on which cases are cited and distinguished in many areas of law. *See, e.g.*, Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 741 (1993) ("Reasoning by analogy is the most familiar form of legal reasoning."); Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. Chi. L. Rev. 501, 501 (1948) ("The basic pattern of legal reasoning is reasoning by example."); *see also* 18 U.S.C. § 3553(a)(6) (directing sentencing courts to avoid unwarranted disparities "among defendants with similar records who have been found guilty of similar conduct"); USSG § 2X5.1 ("If the offense is a felony for which no guideline expressly has been promulgated, apply the most analogous offense guideline.").

Options 2 and 3 also satisfy § 994(t), though the analysis here is different. Unlike Option 1, neither of these options provides an explicit meaningful criterion for sentence reductions: Option 2 refers broadly to changed circumstances or intervening events that would make the original sentence "inequitable," and Option 3 simply restates the underlying "extraordinary and compelling reason[s]" standard. On their face, Options 2 and 3 may thus appear objectionable under § 994(t), since it could be asserted that they fail to provide any criteria or guidance to courts, and that they instead amount to a total delegation of unstructured discretion in sentence reduction proceedings.

Any such argument, however, would lack merit because ordinary interpretive methods confirm that Options 2 and 3 do provide meaningful criteria. This conclusion follows from the whole-text canon, which "calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." Scalia & Garner 167; *accord K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Here, proposed Options 2 and 3 would not appear in a vacuum, but rather would appear as part of the broader framework of § 1B1.13(b). As a result, their meaning would be informed by the structure and relation of the provisions within that section, and it would be clear to any reasonable interpreter that they encompass "extraordinary and compelling reasons" of similar gravity to those set forth in the preceding subsections of § 1B1.13(b). In that respect, Options 2 and 3 are similar to Option 1, and they would provide meaningful guidance to courts while properly structuring judicial discretion in this field. *See, e.g.*, *United States v. Pinto-Thomaz*, 454 F. Supp. 3d 327, 329 (S.D.N.Y. 2020) (collecting cases and reasoning that current Application Note 1(D), which is materially identical to proposed Option 3, necessarily authorizes a finding of extraordinary and compelling reasons "on grounds that are distinct from, but of similar magnitude and importance to, those specifically enumerated").

Indeed, there is another interpretive canon that speaks directly to this situation: *ejusdem generis*, which provides that "[w]here general words follow an enumeration of two or more things, they apply only to . . . things of the same general kind or class specifically mentioned." Scalia & Garner 199. Put differently, where a legal provision sets forth a list of things and then includes a catch-all provision at the end, the catch-all is understood to cover things like those elsewhere on the list. Here, § 1B1.13(b) sets forth a list meant to describe circumstances that should qualify as "extraordinary and compelling reasons," and Options 2 and 3 would be interpreted as covering only additional circumstances similar in kind to the rest of the list. (Indeed, reading Options 2 and 3 without that limitation would make a mess of § 1B1.13(b), since the rest of the provision could be rendered superfluous if proposed § 1B1.13(b)(6) were not properly limited.)

Accordingly, Options 2 and 3 would be understood in the full context of § 1B1.13(b). And each of them—with different emphasis—would capture only circumstances that reasonably rank alongside the other enumerated criteria and examples as "extraordinary and compelling reasons" for sentence reductions. In applying these options if subsection (b)(6) were adopted, a district court that "strikes off on a different path" by finding extraordinary and compelling circumstances in situations wholly unlike the enumerated examples would "risk[] an appellate holding that judicial discretion has been abused." *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020).

For these reasons, all three versions of proposed subsection (b)(6) are consistent with the requirements of § 994(t). Each of them would satisfy the Commission's statutory obligation to describe what should qualify as "extraordinary and compelling reasons" for a sentence reduction (since each of them would provide meaningful criteria to courts engaged in such analysis), and

each of them would appropriately vest courts with a measure of reasoned judgment in identifying "extraordinary and compelling reasons" based on the diverse factual records they encounter.

There are two separate potential objections to proposed subsection (b)(6) that bear mention, though we believe that both are mistaken. *First*, it may be argued that if this proposed subsection gives courts *carte blanche* to define "extraordinary and compelling reasons," then there will be no independent force to the separate statutory requirement in § 3582(c)(1)(A) that a sentence reduction also be "consistent with applicable policy statements issued by the . . . Commission." This is essentially an anti-superfluity point: the concern is that if the Commission's policy statement achieves a complete delegation of decision-making power to courts, then there is no real meaning to the requirement that courts must act consistent with the Commission's policy statement, since the policy statement will necessarily allow anything that a court chooses to do. But that concern has no force here because all three versions of proposed subsection (b)(6) in fact constrain judicial discretion when it comes to identifying "extraordinary and compelling reasons." As a result, the requirements under § 3582(c)(1)(A) each do separate work under the proposed subsection—and so § 3582(c)(1)(A) can be read harmoniously with itself and § 994(t).

Second, along similar lines, it may be objected that proposed subsection (b)(6) wrongly delegates the Commission's policymaking authority to the federal courts. *See* 28 U.S.C. § 995(b) (authorizing Commission to "delegate . . . such powers as may be appropriate *other than* the power to establish general policy statements and guidelines" (emphasis added)). Here, too, the essential concern is that the Commission cannot abdicate its role to the courts in describing "extraordinary and compelling reasons." But that concern hinges entirely on the meaning of § 994(t). And as we have demonstrated, the best reading of that statute—which defines the proper role of courts and the Commission—is that the Commission is fully authorized to describe what should qualify as "extraordinary and compelling" in ways that leave room for courts to make reasoned judgments. Because Congress has written a statute that contemplates precisely this dynamic, there is nothing improper about adopting the proposed subsection to effectuate that legitimate judicial role.

Therefore, we conclude that all three options for proposed subsection (b)(6) are consistent with the requirements of § 994(t), and we believe that adopting a version of this proposed subsection is both statutorily authorized and most consistent with the evident statutory plan.

II. Judicial Precedent Supports This Interpretation of Section 994(t)

The textual analysis set forth above is supported by opinions from the Sixth and Tenth Circuits, which have held that § 994(t)'s text does not direct the Sentencing Commission "to prescribe an *exhaustive* list of examples of extraordinary and compelling reasons." *United States v. Jones*, 980 F.3d 1098, 1111 n.18 (6th Cir. 2020) (emphasis in original); *accord McGee*, 992 F.3d at 1045 ("[W]e conclude that Congress did not, by way of § 994(t), intend for the Sentencing Commission to exclusively define the phrase 'extraordinary and compelling reasons' . . . .").

Jones and *McGee* both arose in a similar and familiar context: disputes over whether § 1B1.13 was "applicable" under § 3582(c)(1)(A) to compassionate release motions filed by defendants. The Commission is undoubtedly aware of this background, so we will not reprise it.

In *Jones*, the Sixth Circuit reasoned that in view of the policy statement's textual focus on motions filed by the Bureau of Prisons—as well as Congress's intent to expand compassionate release in the First Step Act and the Commission's own efforts to broaden the range of circumstances that could constitute extraordinary and compelling reasons—the policy statement was "inapplicable" to defendant-filed motions. *See* 980 F.3d at 1108–11. The court further held that district courts had discretion to find "extraordinary and compelling reasons" beyond the specific examples therein. *See id.* In support of this conclusion, the court explained that § 994(t)'s text "commands the Sentencing Commission to provide a 'list of specific examples' of 'what should be considered extraordinary and compelling circumstances'" but does not "allow[] the Sentencing Commission to prescribe an *exhaustive* list of examples," as would effectively result if § 1B1.13 were deemed applicable to defendant-filed motions. *Id.* at 1110 n.18.

The Tenth Circuit followed a similar path in *McGee* and a related case, *United States v. Maumau*, 993 F.3d 821 (10th Cir. 2021), where it held that courts may determine "extraordinary and compelling reasons" in defendant-filed motions. In *Maumau*, the Government had argued that under § 994 and § 3582(c)(1)(A), "it is the . . . Commission, not the courts, that is empowered to determine what qualifies as an 'extraordinary and compelling reason.'"[11] But the Tenth Circuit disagreed. It noted that "Congress, in outlining the . . . Commission's duties [in § 994(t)], chose to employ the word 'describe' rather than the word 'define.'" *McGee*, 992 F.3d at 1044; *Maumau*, 993 F.3d at 832–33. And it found further support in the fact that § 994 directed the Commission to issue its description by means of a general policy statement. *McGee*, 992 F.3d at 1044–45; *Maumau*, 993 F.3d at 833–34. The court also looked to the structure of § 3582(c)(1)(A), noting that if the Commission had total control over defining "extraordinary and compelling reasons," then the separate requirement that courts consider "applicable" policy statements would truly be superfluous. *See id.* The Tenth Circuit therefore held that § 994(t) directed the Commission only "to describe those characteristic or significant qualities or features that typically constitute 'extraordinary and compelling reasons,' and for those guideposts . . . to be considered by district courts under . . . § 3582(c)(1)(A)." *McGee*, 992 F.3d at 1045; *Maumau*, 993 F.3d at 834.

No court of appeals has disagreed with the Sixth or Tenth Circuits on this interpretation of § 994(t), which most clearly aligns with the moderate view we have described rather than the restrictive view, and which supports the Commission's authority to adopt proposed subsection (b)(6). The absence of contrary appellate authority is particularly notable in light of the extraordinary amount of litigation over these provisions since 2018: while courts, defendants, and Government lawyers have vigorously debated the bounds of § 1B1.13 and the meaning of § 994(t) since Congress enacted the First Step Act, no appellate court has embraced the Government's view in *Maumau* that § 994(t) requires the Commission to promulgate an exclusive prior definition of extraordinary and compelling reasons. Nor has any court of appeals found anything inherently improper about courts retaining some discretion to identify extraordinary and compelling reasons. To the contrary, courts have emphasized the propriety and importance of such measured discretion.

---

[11] Brief for the United States at 17–18, *Maumau*, 993 F.3d 821 (No. 20-4056), 2020 WL 3447848, at *17–*18; *see also* Reply for the United States at 5, *Maumau*, 993 F.3d 821 (No. 20-4056), 2020 WL 4932465, at *5 (Section 994(t) "delegates th[e] authority" to "ultimately decide what kind of reason can legally qualify . . . to the Commission," not to courts); *Maumau*, 993 F.3d at 831–32 ("The premise of the government's first argument is that . . . the Sentencing Commission possesses the exclusive authority to define what constitutes 'extraordinary and compelling reasons.'").

The court that has come closest to suggesting otherwise is the Eleventh Circuit, though even that court has never interpreted § 994(t) in a manner at odds with our analysis. Instead, in a divided opinion that split from other circuits and held that § 1B1.13 was "applicable" to defendant-filed motions, the Eleventh Circuit raised a policy concern about allowing too much judicial discretion in this field. *See United States v. Bryant*, 996 F.3d 1243, 1257, 1262 (11th Cir. 2021). In the view of that panel majority, the Sentencing Reform Act's "purpose was to limit discretion and to bring certainty and uniformity to sentencing," and allowing courts too much discretion to define extraordinary and compelling reasons would undercut that purpose, causing "[d]isparity and uncertainty." *Id.* at 1257.

Bryant's policy concerns do not support adopting a restrictive interpretation of § 994(t) meant to effectively limit judicial discretion. That is true, first and foremost, because the best reading of the statutory text (as shown above) supports a more moderate reading of the statute.

Moreover, *Bryant*'s discussion betrays an unduly cramped understanding of the SRA, which sought "to increase transparency, uniformity, and proportionality in sentencing." *Dorsey v. United States*, 567 U.S. 260, 265 (2012). These goals are sometimes in conflict: there is an inherent "tension . . . between the mandate of uniformity and the mandate of proportionality." USSG ch. 1, pt. A, intro. cmt.; *see also Concepcion v. United States*, 142 S. Ct. 2389, 2403 n.8 (2022) ("[I]t is a feature of our sentencing law that different judges may respond differently to the same sentencing arguments."). But the norm in our sentencing scheme is to seek to accommodate both principles, rather than to allow either of them to drive us to an extreme.

In any event, four years of experience under the First Step Act have largely put the Eleventh Circuit's uniformity concerns to rest. As the Commission found last year, even after most courts of appeals held that judges could ascertain "extraordinary and compelling reasons" independent of § 1B1.13 in cases involving defendant-filed motions, "the overwhelming majority of grants of compassionate release were based on a reason specifically described in the policy statement or a reason comparable to those specifically described reasons."[12] Thus, there is a substantial basis to believe that when the Commission provides meaningful guidance about the characteristic or significant qualities of what ought to satisfy the "extraordinary and compelling reasons" standard, courts can be trusted to exercise reasoned judgment in ascertaining additional cases that rank as comparably "extraordinary and compelling" with reference to the Commission's policy.

This is unsurprising. As Judge Easterbrook remarked in concluding that courts could look beyond the examples enumerated in § 1B1.13, "[W]e do not see the absence of an applicable policy statement as creating a sort of Wild West in court, with every district judge having an idiosyncratic release policy. The statute itself sets the standard: only 'extraordinary and compelling reasons' justify the release of a prisoner who is outside the scope of § 3582(c)(1)(A)(ii). The substantive aspects of the Sentencing Commission's analysis in § 1B1.13 and its Application Notes provide a working definition of 'extraordinary and compelling reasons'; a judge who strikes off on a different path risks an appellate holding that judicial discretion has been abused. In this way the Commission's analysis can guide discretion without being conclusive." *Gunn*, 980 F.3d at 1180.

[12] U.S. Sent'g Comm'n, *Compassionate Release: The Impact of the First Step Act and COVID-19 Pandemic* at 2 (Mar. 2022).

Of course, in the unusual cases over the past few years when judges departed from the Commission's policy as set forth in § 1B1.13, their discretion proved pivotal to appropriately effectuating compassionate release's purpose as a safety valve. For example, courts exercised their newly-recognized discretion to find that "extraordinary and compelling reasons" existed where (a) defendants' health conditions, the conditions of their confinement, and any COVID-19 outbreaks at their prisons rendered them exceptionally vulnerable to death or severe illness;[13] (b) defendants' individualized circumstances, combined with non-retroactive changes in law, rendered their continued incarceration inequitable;[14] or (c) defendants raised certain compelling family or medical concerns beyond those expressly specified in § 1B1.13.[15] The Commission seems to agree that these types of reasons, though unforeseen when the Commission amended § 1B1.13 in 2016, satisfy the statutory standard; thus, the Commission now proposes incorporating them into the policy statement. *See* proposed § 1B1.13(b)(1)(C), (b)(1)(D), (b)(3)(C), (b)(5). But were it not for district courts' discretion, not one of these defendants, despite their extraordinary and compelling reasons for sentence reduction, would have been granted compassionate release in a timely

[13] *See, e.g.*, *United States v. Jackson*, No. 2:18-cr-86-PPS, 2020 WL 3396901, at *6 (N.D. Ind. June 19, 2020) ("In sum, Jackson's medical risk factors, combined with the continued and widespread presence of COVID-19 in FCI Elkton, create[] a circumstance that is extraordinary and compelling."); *United States v. Cardena*, 461 F. Supp. 3d 798, 803 (N.D. Ill. 2020) ("Here, Cardena's diagnosed medical conditions combined with the real threat of exposure to COVID-19 and the fact that he is close to the end of his sentence create extraordinary and compelling circumstances."); *see also* U.S. Sent'g Comm'n, *supra* note 12, at 3 (in FY 2020, "[c]ourts cited the health risks associated with COVID-19 as at least one reason for granting relief for 71.5 percent of Offenders Granted Relief").

[14] *See, e.g.*, *United States v. Ledezma-Rodriguez*, 472 F. Supp. 3d 498, 504–06 (S.D. Iowa 2020) (holding that defendant who had received "life sentence for low-level, non-violent drug trafficking" demonstrated exceptional and compelling reasons for sentence reduction in view of "drastic changes to the law," "objectiv[e] inhuman[ity]" of life sentence, and defendant's rehabilitation); *United States v. Haynes*, 456 F. Supp. 3d 496, 514 (E.D.N.Y. 2020) ("readily conclud[ing]" that "brutal impact" of defendant's original sentence, "drastic severity" as compared to codefendant's sentence, "extent to which that brutal sentence was a" trial penalty, and First Step Act's elimination of § 924(c) stacking that enabled original sentence constituted extraordinary and compelling reasons); *United States v. Hope*, No. 90-cr-06108-KMW-2, 2020 WL 2477523, at *3–*4 (S.D. Fla. Apr. 10, 2020) (finding that combination of defendant's "serious medical issue requiring surgery," his "original, mandatory life sentence [that] represents the type of sentencing disparity that the First Step Act was enacted to redress," and his "impressive record of rehabilitation and good behavior" combined to constitute extraordinary and compelling reasons); *United States v. Young*, 458 F. Supp. 3d 838, 848 (M.D. Tenn. 2020) (finding extraordinary and compelling reasons where defendant had been subject to 92-year mandatory minimum on stacked § 924(c) counts, but would have been subject to 25-year minimum under current law, and was 72 years old and had served nineteen years with several health issues); *United States v. Owens*, 996 F.3d 755, 762–63 (6th Cir. 2021) (collecting similar district court decisions), *abrogated by United States v. McCall*, 56 F.4th 1048, 1066 (6th Cir. 2022) (en banc).

[15] *See, e.g.*, *United States v. McCauley*, No. 07-cr-04009-SRB-1, 2021 WL 2584383, at *2–*3 & n.7 (W.D. Mo. June 23, 2021) (holding that although existing § 1B1.13's "family circumstances provision is not directly on point," defendant nevertheless showed extraordinary and compelling reasons because his elderly parents "ha[d] various debilitating and progressive health conditions" that required his caretaking assistance, in combination with defendant's rehabilitation); *United States v. Walker*, No. 1:11 CR 270, 2019 WL 5268752, at *2–*3 (N.D. Ohio Oct. 17, 2019) (finding that defendant's mother's failing health and need for caregiving—in combination with defendant's veteran status and mental health history, circumstances of his crime, acceptance of responsibility, extraordinary job opportunity, and limited time remaining on his sentence—constituted extraordinary and compelling reasons); *United States v. Beck*, 425 F. Supp. 3d 573, 583 (M.D.N.C. 2019) (holding that although "a standard case of properly-treated breast cancer may not qualify as a 'terminal illness'" under existing § 1B1.13, defendant nevertheless showed extraordinary and compelling reasons because she "ha[d] not received proper treatment, and it is questionable that BoP will provide appropriate medical care for this life-threatening disease going forward").

manner.[16] That result is simply irreconcilable with the statutory text and framework and speaks to the importance and wisdom of allowing a measure of reasoned judicial discretion in this context.

Finally, any concerns about such an approach are further mitigated by the Commission's ability to revise its description in § 1B1.13 and promote greater uniformity where appropriate. Circuit splits may well arise. *See, e.g.*, *McCall*, 56 F.4th at 1065 (citing conflicting circuit authority over whether changes in law may be considered in the extraordinary-and-compelling-reasons analysis). If that occurs, the Commission may well step in to resolve them. *See, e.g.*, proposed § 1B1.13(b)(5) (permitting consideration of changes in law). Similarly, if courts unexpectedly depart from an appropriate understanding of "extraordinary and compelling reasons," the Commission can refine its policy statement within statutory and constitutional bounds. *See, e.g.*, *Rita v. United States*, 551 U.S. 338, 350 (2007) ("The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals . . . ."). This interbranch engagement is a bedrock principle of the Commission's work and is fully applicable here, particularly now that the Commission has a quorum and is able to fulfill the crucial role envisioned for it. *See* USSG ch. 1, pt. A, intro. cmt. (Commission's mandate "rest[s] on congressional awareness that sentencing is a dynamic field that requires continuing review by an expert body to revise sentencing policies[] in light of application experience").

III. Legislative History Supports This Interpretation of Section 994(t)

Statutory text must be interpreted "not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'" *Abramski v. United States*, 573 U.S. 169, 179 (2014). Here, indicators of the purpose underlying § 3582(c)(1)(A) and § 994(t) confirm our conclusion that the Commission must issue general policy statements that offer meaningful guidance about the characteristic or significant qualities of "extraordinary and compelling reasons," and that in so doing it may leave room for reasoned judicial discretion in addressing the facts of each case.

Start with the Sentencing Reform Act, in which Congress enacted both § 3582(c)(1)(A) and § 994(t).[17] The Senate Judiciary Committee report on the Act described § 3582(c)(1)(A) as a "safety valve" for "unusual case[s]."[18] The report continued: "The value of the forms of 'safety valves' contained in this subsection lies in the fact that they assure the availability of specific review and reduction of a term of imprisonment for 'extraordinary and compelling reasons' . . . ."[19] Congress thus enacted the relevant statutory provisions to remedy potentially serious injustices that might not be anticipated in advance—and it sought to ensure the availability of a "safety valve" achieved through "specific review" in unusual cases. These purposes would not be well served by a requirement that the Commission define "extraordinary and compelling reasons" *ex ante* in

[16] *See, e.g.*, *United States v. Saldana*, No. 95-cr-00605, 2021 WL 9828395, at *1 n.2 (S.D. Fla. Dec. 23, 2021) ("The Court would have been inclined to find sentence reduction appropriate . . . based upon changes in the law since [defendant's] sentencing under unduly severe sentence enhancements that required a life sentence," but Eleventh Circuit's ruling in *Bryant*, which held that § 1B1.13's list of examples is binding and exhaustive as to defendant-filed motions, required denial of motion).

[17] Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (1984).

[18] S. Rep. No. 98-225, at 121 (1983); *see also, e.g.*, *United States v. Chen*, 48 F.4th 1092, 1098–99 (9th Cir. 2022); *Ruvalcaba*, 26 F.4th at 26; *McCoy*, 981 F.3d at 286 n.8, 287.

[19] S. Rep. No. 98-225, at 121.

comprehensive and preclusive terms (or with highly explicit, rigid criteria), leaving hardly any room for courts applying § 1B1.13 to exercise judgment or discretion in identifying where "extraordinary and compelling reasons" require use of the safety valve in § 3582(c)(1)(A). *See Shapiro v. United States*, 335 U.S. 1, 31 (1948) (invoking the "well-settled doctrine of this Court to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen").

Since 1984, the trend has been clear: Congress has only broadened the scope of permissible sentence modifications under § 3582(c)(1)(A) and moved toward a more expansive and context-sensitive view of sentence reductions. In 1994, it enacted the Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, § 70002, 108 Stat. 1796, 1984, which established § 3582(c)(1)(A)(ii) as an alternative ground for compassionate release. Then, in 2002, it enacted the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 3006, 116 Stat. 1758, 1806, which added language to § 3582(c)(1)(A)(i) expressly authorizing courts to impose probation or supervised release in lieu of imprisonment.

Most recently, Congress fundamentally transformed the sentence reduction framework in 2018 by authorizing defendants to file compassionate release motions.[20] Restoring a measure of judicial discretion in sentencing was central to the First Step Act.[21] And the First Step Act's changes to compassionate release reflected deep concern—fully shared by the Commission—that compassionate release was being grossly underutilized. One year before the Act's passage, several of its eventual co-sponsors signed a bipartisan letter to the Acting Director of the Bureau of Prisons, agreeing with the Commission's view that "it is the appropriate purview of the sentencing court to determine if a defendant's circumstances warrant" compassionate release and urging the Acting Director "to take a hard look at expanding the use of compassionate release."[22] The following year, after the Bureau of Prisons failed to take initiative on the issue, a dissatisfied Congress authorized defendant-filed motions in a section of the First Step Act entitled "Increasing the Use and Transparency of Compassionate Release." § 603(b), 132 Stat. at 5239. A Senate co-sponsor described this provision as "expand[ing] compassionate release . . . and expedit[ing] compassionate release applications"; similarly, a House member explained that it "improv[ed]

[20] First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239.

[21] *See, e.g.*, 164 Cong. Rec. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Cory Booker, co-sponsor: "[T]his bill includes critical sentencing reforms that will reduce mandatory minimums and give judges discretion back—not legislators but judges who sit and see the totality of the facts."); 164 Cong. Rec. S7649 (daily ed. Dec. 17, 2018) (statement of Sen. Chuck Grassley, sponsor: "The bill also makes sentencing fairer by returning some discretion to judges during sentencing.").

[22] Letter from Brian Schatz et al., U.S. Senators, to Thomas R. Kane, Acting Dir., Bureau of Prisons, and Rod Rosenstein, Deputy Att'y General, U.S. Dep't of Justice (Aug. 3, 2017), available at https://www.schatz.senate.gov/imo/media/doc/2017.08.03%20Letter%20to%20BOP%20and%20DAG%20re.%20Compassionate%20Release%20FINAL.pdf.

application of compassionate release."[23] Since the Act's passage, too, at least one of its authors has urged a broad understanding of the extraordinary-and-compelling-reasons standard.[24]

The plain lesson from this history is that Congress has sought to broaden the availability of (and grounds for) compassionate release; it has sought to ensure that this safety valve is *in fact* available where needed; it has authorized defendants to seek relief in order to avoid the injustices that occurred when extraordinary and compelling reasons went unaddressed under the historical sentence reduction framework; and it has thereby expressly recognized the importance of the judicial role (and judicial discretion) in sentence reductions. Given this background, it is difficult to credit any suggestion that § 994(t) requires the Commission to set forth a highly comprehensive account of "extraordinary and compelling reasons" that would preemptively eliminate judicial discretion to address new injustices that may arise (even if those injustices are of equal force and severity to those separately addressed by § 1B1.13(b)). The far more natural conclusion—which also squares with the statutory text and judicial precedent—is that the Commission must provide meaningful guidance in its description of "extraordinary and compelling reasons" and, in so doing, may fairly rely upon courts to exercise reasoned judgment in assessing the facts of each case.

IV. The Commission's Prior Practice in Describing "Extraordinary and Compelling Reasons" Supports This Interpretation of Section 994(t)

The Commission's own longstanding practice in this field is consistent with the moderate view (rather than the restrictive view) of § 994(t). *See, e.g.*, *Council Tree Commc'ns, Inc. v. F.C.C.*, 503 F.3d 284, 289 (3d Cir. 2007) ("[C]ourts give considerable weight to a consistent and longstanding interpretation by the agency responsible for administering a statute." (cleaned up)).

That story begins in 2006, when the Commission set forth its initial proposal for this policy statement. That proposal included no examples and no specifics; instead, it provided only that a defendant could not pose a danger to the community and that "[a] determination made by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such."[25] Commenters from a wide range of backgrounds rightly objected that this "d[id] not comply with the statutory directives to describe what should be considered extraordinary and compelling reasons."[26] Since 2018, moreover, numerous courts

---

[23] 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Ben Cardin); 164 Cong. Rec. H10362 (daily ed. Dec. 20, 2018) (statement of Rep. Jerrold Nadler).

[24] *See* Dick Durbin, *Durbin Meets with U.S. Sentencing Commission on Implementing Provisions in First Step Act into Sentencing Guidelines* (Dec. 7, 2022) ("Durbin . . . advocated for the Commission to ensure that" extraordinary and compelling reasons "are defined broadly enough to include post-sentencing changes to the law."), https://www.durbin.senate.gov/newsroom/press-releases/durbin-meets-with-us-sentencing-commission-on-implementing-provisions-in-first-step-act-into-sentencing-guidelines.

[25] USSG § 1B1.13 cmt. n.1(A) (2006); U.S. Sent'g Comm'n, Notice of Proposed Amendments, Request for Public Comment, Notice of Public Hearings at 128 (Jan. 2006), available at https://www.ussc.gov/sites/default/files/Fedreg0106.pdf.

[26] U.S. Sent'g Comm'n, Comment from Federal Public and Community Defenders (Mar. 13, 2006), at 96, available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/200603/200603_PCpt2.pdf; *see also* U.S. Sent'g Comm'n, Comment from Practitioners' Advisory Group (Mar. 15, 2006), at 46, available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/200603/200603_PCpt2.pdf ("[T]he Commission's new policy statement . . . does not respond to the directive in § 994(t) that the Commission

have similarly deemed the 2006 version of § 1B1.13 to be deficient.[27] Simply put, it was widely agreed that the Commission cannot merely declare that "extraordinary and compelling reasons" are whatever the Bureau of Prison decides. Instead, § 994(t) requires the Commission to actually describe—and provide meaningful guidance about—the meaning of this standard. Importantly, unlike the 2006 proposal, proposed subsection (b)(6) meets this requirement because it has not been suggested as a standalone policy statement, but rather as part of an overarching plan, and so (for the reasons given above) it in fact provides meaningful guidance for courts to apply.

In 2007, the Commission announced that implementation of § 994(t) would remain a priority and invited comment on (among other things) whether § 1B1.13 should "provide that the Bureau of Prisons may determine that, in any particular defendant's case, an extraordinary and compelling reason *other than a reason identified by the Commission* warrants a reduction" (emphasis added).[28] Stakeholders from varied backgrounds expressed their support for such a catch-all in testimony and comments.[29] Ultimately, the Commission voted to adopt an amendment to § 1B1.13 featuring a structure much like the one currently under consideration: a list of examples followed by a catch-all provision. Indeed, that catch-all used language identical to that proposed in Option 3, providing that the Director of the Bureau of Prisons could identify "an extraordinary and compelling reason other than, or in combination with, the reasons described" in the Commission's enumerated list.[30] Upon adopting the 2007 amendment with this language, Vice

describe what should be considered extraordinary and compelling reasons."); U.S. Sent'g Comm'n, Public Hearing Testimony (Mar. 20, 2007), at 247, available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20070320/20070320_Testimony.pdf (American Bar Association: "USSG § 1B1.13 does little more than recite the statutory bases for reduction of sentence . . . and does not include 'the criteria to be applied and a list of specific examples' that are required by § 994(t).").

[27] *See Jones*, 980 F.3d at 1104 ("Despite the command of Congress in 1984, the 2006 policy statement did not define 'extraordinary and compelling reasons.'"); *United States v. Brooker*, 976 F.3d 228, 232 (2d Cir. 2020) ("Despite the seeming statutory command, this policy statement did not define 'extraordinary and compelling reasons.'").

[28] U.S. Sent'g Comm'n, Notice of Proposed Amendments to Sentencing Guidelines, Policy Statements, and Commentary (Jan. 2007), at 150, available at https://www.ussc.gov/sites/default/files/JanFRPropAmd2007.pdf.

[29] *See, e.g.*, U.S. Sent'g Comm'n, Public Hearing Testimony (Mar. 20, 2007), at 237–38, available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20070320/20070320_Testimony.pdf (Families Against Mandatory Minimums: "The Commission should not limit the Bureau to the reasons identified by the Commission in its policy statement. A condition that is extraordinary and compelling may also not be apparent to the Commission at this time, and the better course would be to ensure that the Bureau and the courts have flexibility to address such circumstances."); U.S. Sent'g Comm'n, Comment from Federal Public and Community Defenders (Mar. 13, 2007), at 186, available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/200703/200703_PCpt10.pdf ("[T]he policy statement should allow a BOP motion based on an extraordinary and compelling reason not specifically identified by the Commission. This is an area which, by its nature, does not allow listing of all possible reasons. Any list of examples is necessarily non-exclusive and should so state."); U.S. Sent'g Comm'n, Index to Public Comment (Apr. 6, 2007), available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/200703/200703_PCpt5.pdf (summarizing Practitioners' Advisory Group's comment in support of "permit[ting] the BOP to determine, in a particular case, that an extraordinary and compelling reason exists for reducing the defendant's sentence, even if the reason is not covered by the examples provided").

[30] USSG § 1B1.13 cmt. n.1(A)(iv) (2007).

Chair Judge Ruben Castillo voiced the Commission's determination "that the Commission has met its statutory mandate."[31]

Two aspects of the 2007 policy statement merit special emphasis. *First*, the structure that the Commission adopted in 2007 (and that it has maintained through its current proposal) was no accident; rather, it resulted from a considered process. And stakeholders in that process broadly agreed on the propriety and importance of preserving a measure of reasoned discretion to allow for the identification of "extraordinary and compelling reasons" apart from those enumerated by the Commission. As Judge Harris has aptly explained, "the Commission included a catch-all provision" in § 1B1.13 specifically because it recognized "that it could not definitively predict every 'extraordinary and compelling' reason that might arise," given the "open-ended" nature of the statutory standard. *McCoy*, 981 F.3d at 283, 287.

Second, in contrast to the widespread recognition that the 2006 policy statement was too indeterminate in describing "extraordinary and compelling reasons," virtually nobody has opined that the 2007 version suffered from such a flaw or violated § 994(t). Our research does not disclose any appellate opinion or authoritative commentary that treats the 2007 version of the policy statement (or any subsequent version) as deficient in this respect, even though that version included a catch-all provision much like Option 3 for proposed subsection (b)(6). The absence of any such concern is notable because the policy statement has since been studied and amended three times—most notably in 2016, when the Commission "broaden[ed] certain eligibility criteria," "encourage[d] the Director of the Bureau of Prisons to file" more motions for compassionate release, and stressed that the sentencing court was "in a unique position to determine whether the circumstances warrant" compassionate release.[32] Yet appellate criticisms of the post-2007 policy statement have questioned mainly its placement of examples in commentary and its overreliance on the Bureau of Prisons in derogation of the judicial role—flaws that are both corrected in the Commission's pending proposal. *See, e.g.*, *Jones*, 980 F.3d at 1111 n.21 (noting that § 1B1.13's placement of its examples "only in the . . . application notes . . . raises sundry administrative-law questions about deference"); *United States v. Ruffin*, 978 F.3d 1000, 1008 (6th Cir. 2020) (questioning wisdom of current catch-all, but only as applied to Director of Bureau of Prisons: "Yet where does the text of the statute or the policy statement give the *Bureau of Prisons* . . . authority to identify other reasons? Both § 3582(c)(1)(A) and § 1B1.13 instead indicate that *courts* should 'find[]' or 'determine[]' that those reasons exist." (emphasis and alterations in original)). The fact that the 2007 policy statement included a catch-all highly analogous to proposed subsection (b)(6)—a choice that did not attract any notable criticism—is itself revealing of how the Commission and its stakeholders have understood the requirements set forth in § 994(t).

Most recently, Congress fundamentally transformed the compassionate release framework in 2018 by authorizing defendants to file motions. In doing so, it did not reject the Commission's prior practice in describing "extraordinary and compelling reasons" with a policy statement that included a catch-all provision. Courts have explained that because the First Step Act "did not

---

[31] U.S. Sent'g Comm'n, Public Meeting Minutes (Apr. 18, 2007), https://www.ussc.gov/policymaking/meetings-hearings/notice-april-18-2007 (last visited Feb. 4, 2023).

[32] USSG App. C, amend. 799 (effective Nov. 1, 2016); USSG § 1B1.13 cmt. n.4; *see also* USSG App. C, amends. 746 (effective Nov. 1, 2010), 813 (effective Nov. 1, 2018).

undermine the Commission's interpretation of" the "extraordinary-and-compelling-reasons standard," *United States v. Jenkins*, 50 F.4th 1185, 1196 (D.C. Cir. 2022), it is "reasonable . . . to conclude that the phrase largely retain[s] the meaning it had under the previous version of the statute," *Andrews*, 12 F.4th at 260; *see* Scalia & Garner 322 ("If a word or phrase . . . has been given a uniform interpretation by inferior courts or the responsible agency, a later version of that act perpetuating the wording is presumed to carry forward that interpretation."). As discussed above, that meaning has (from the very outset) included a broad catch-all provision designed to allow reasoned discretion for identifying additional circumstances not covered by the enumerated examples set forth by the Commission itself. That position thus remains on firm footing.[33]

Finally, as described in Part II, experience since enactment of the First Step Act has only underscored the importance of affording district courts reasoned discretion to ascertain "extraordinary and compelling reasons" for compassionate release. Following enactment of the Act, the Commission was unable to amend § 1B1.13 because it lacked a quorum. In the interim, the equivalent of the Commission's post-2007 approach—providing a list of non-exclusive examples but allowing courts to identify reasons of comparable gravity—proved not only workable but also vitally necessary. Notably, several courts framed this approach as applying the Bureau of Prisons catch-all in current Application Note 1(D) to the courts, in effect implementing what has now been proposed for subsection (b)(6) as Option 3.[34] As the years went on, and the courts of appeals weighed in, many courts described the scope of judicial discretion in this field even more broadly. *See, e.g.*, *Brooker*, 976 F.3d at 237 ("Neither Application Note 1(D), nor anything else in the now-outdated version of Guideline § 1B1.13, limits the district court's discretion."). Yet as noted above, this discretion did not result in untoward consequences. Instead,

---

[33] In *McCall*, a majority of the Sixth Circuit cited this prior-construction canon in support of its view that the extraordinary-and-compelling-reasons standard "never covered nonretroactive changes in sentencing law." 56 F.4th at 1060. The court's logic appeared to be that because the catch-all in § 1B1.13 applied to "other circumstances approved by the Bureau of Prisons," *id.*, and the Bureau of Prisons program statement on compassionate release did not cover non-retroactive changes in law, Congress carried forward the *Bureau of Prisons'* view of extraordinary and compelling reasons in the First Step Act. But that does not follow. Congress tasked the Commission, not the Bureau of Prisons, with describing extraordinary and compelling reasons. *See* § 994(t); *United States v. Rodriguez*, 451 F. Supp. 3d 392, 400 n.12 (E.D. Pa. 2020) ("Congress never delegated any authority to the BOP to define the term 'extraordinary and compelling,' nor did it ever instruct courts to act consistently with the BOP's internal guidance."); *cf. Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 7 (D.C. Cir. 2003) (noting that courts "do not generally accord deference to one agency's interpretation of a regulation issued and administered by another agency"). And when the Commission last substantively amended § 1B1.13, it rejected the Department of Justice's explicit invitation to align the policy statement with the narrower grounds in the Bureau of Prisons program statement, *see* U.S. Dep't of Justice, Comment on Proposed Amendments at 3–4, 8 (Feb. 12, 2016), and instead expressed concern that the Bureau of Prisons was defining extraordinary and compelling reasons much too narrowly, *see, e.g.*, USSG § 1B1.13 cmt. n.4 ("encourag[ing] the Director of the Bureau of Prisons to file" a compassionate release motion "if the defendant meets any of the circumstances set forth" by the Commission, not just those in the Bureau of Prisons program statement).

[34] *See, e.g.*, *Pinto-Thomaz*, 454 F. Supp. 3d at 329 (holding that under Application Note 1(D)'s "residual category," courts have "discretion to grant compassionate release motions on grounds that are distinct from . . . those specifically enumerated"); *United States v. Rodriguez*, 424 F. Supp. 3d 674, 682 (N.D. Cal. 2019) (evaluating defendant-filed motion for compassionate release "under the 'other reasons' catch-all provision in Subdivision (D)"); *United States v. Garcia Aguirre*, No. 10-cr-10169-KHV, 2021 WL 843239, at *3 (D. Kan. Mar. 5, 2021) ("[T]he district court, rather than the BOP exclusively (as the commentary suggests), can determine under the catchall provision[] whether 'other' extraordinary and compelling reasons exist."); *United States v. Fox*, No. 2:14-cr-03-DBH, 2019 WL 3046086, at *3 (D. Me. July 11, 2019) ("I treat the previous BOP discretion to identify other extraordinary and compelling reasons as assigned now to the courts.").

as courts interpreted the relevant statutes amid a public health crisis and looked to § 1B1.13 as non-binding guidance, the result was a model of measured and responsive judicial engagement.

The Commission could draw one of two diametrically opposed lessons from this post-2018 experience. On the one hand, it could conclude that the Commission alone should define "extraordinary and compelling reasons" (and should do so with criteria and examples that all but preclude any judicial discretion in sentence modification proceedings). Under this view, revisiting the Commission's definition every decade or so—if and when there is a quorum present—could be seen as sufficient to address any new injustices that may arise. Alternatively, the Commission might conclude from the post-2018 experience that a more moderate position is both authorized and desirable. On this view, it remains important for the Commission to offer meaningful guidance and specific examples concerning "extraordinary and compelling reasons," but it remains equally important to recognize that courts may identify unforeseen circumstances of comparable gravity warranting a sentence reduction to avoid injustice. In that vision, federal courts (with their vast range of case-by-case experiences) could help to effectuate the Commission's goals and identify new circumstances that warrant express inclusion in § 1B1.13; the Commission, in turn, could respond with approval or disapproval to trends in judicial practice; and the Commission's potential inability to act in the absence of a quorum (or to respond with sufficient alacrity to developments like the recent pandemic) would not risk the perpetuation of widespread injustice, since courts would remain properly available to continue effectuating Congress's "safety valve."

We think the better lesson is the latter one—and we hope the Commission agrees.

* * *

In conclusion, following our careful study of the issue, we are confident that any of the Commission's proposed versions of § 1B1.13(b)(6) complies with the applicable statutory requirements under § 994.

We appreciate the opportunity to comment.

Sincerely,

Joshua Matz
Partner | Kaplan Hecker & Fink LLP
Adjunct Professor | Georgetown Law