

Drougths of Compassion: The Enduring Problem with Compassionate Release and How the Sentencing Commission Can Address It

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Compassionate release, guided by 18 U.S.C. § 3582(c)(1)(A), allows a district court to reduce a previously imposed criminal sentence if “extraordinary and compelling reasons” warrant a reduction. Congress delegated the task of describing what constitutes an extraordinary and compelling reason to the U.S. Sentencing Commission. Following the passage of the First Step Act of 2018, most circuit courts held the Commission’s policy statement describing extraordinary and compelling reasons inapplicable, and that until the Commission updated its policy statement, courts enjoyed the discretion to determine what circumstances justify compassionate release.

Many have celebrated this newfound discretion and its potential to expand individuals’ ability to receive compassionate release. However, judicial discretion, though valuable in many ways, inevitably leads to disagreement and disparity. Perhaps unsurprisingly, circuit courts have disagreed on whether certain circumstances could, as a matter of law, justify a grant of compassionate release, causing geographic disparity in individuals’ ability to receive compassion. In April 2023, the Commission updated its policy statement and included a catchall provision codifying judicial discretion and, unless the Commission acts, the disparity that discretion invites.

This Comment argues that for judicial discretion to improve compassionate release, the Commission must take an active role in overseeing judicial discretion so that compassionate release can enjoy the benefits of that discretion without accepting the disparity discretion often creates. Specifically, it argues the Commission, through its statutory authority to describe what should be considered an extraordinary and compelling reason, can resolve current and future circuit splits over what constitutes an extraordinary and compelling reason by promulgating amended policy statements expressly including, or excluding, the disputed circumstance in its

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description of extraordinary and compelling reasons. In doing so, the Commission would effectively erase circuit courts' contrary interpretations of extraordinary and compelling reasons and thereby end the regional "droughts of compassion" the current approach to judicial discretion allows.

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INTRODUCTION

In 1989, Barton Crandall was convicted of several offenses relating to two bank robberies.¹ At sentencing, the court concluded the law required Mr. Crandall serve his sentences consecutively and, therefore, “stacked” his various sentences to reach a sentence of 562 months—or forty-six years and ten months—imprisonment.² Twenty years later, in an unrelated case, Jose Ruvalcaba was convicted of conspiracy to distribute methamphetamine for his part in a drug-distribution conspiracy.³ Mr. Ruvalcaba had two prior felony drug offenses, triggering a mandatory minimum sentence of life imprisonment.⁴

The laws under which Mr. Crandall and Mr. Ruvalcaba were sentenced changed in 2018 when Congress passed the First Step Act⁵ (FSA). Celebrated as “the most important criminal justice reform law[] in a generation,”⁶ the FSA included several meaningful sentencing reforms. It allowed sentences for certain crimes to be served concurrently rather than consecutively,⁷ as was required of Mr. Crandall, and lowered the mandatory minimums under which Mr. Ruvalcaba was sentenced.⁸ The FSA also expanded the use of compassionate release, a provision of the U.S. Code that allows courts to reduce an individual’s sentence upon a showing of “extraordinary and compelling reasons,” by allowing individuals to petition courts directly for a sentence reduction.⁹ Prior to the FSA, only the Bureau of Prisons (BOP) could bring such motions, and it rarely did so—prompting one court to describe the pre-FSA system of compassionate release as a “drought of compassion.”¹⁰

Both Mr. Crandall and Mr. Ruvalcaba took advantage of the FSA’s compassionate release reforms and filed motions with their respective courts seeking sentencing reductions. They argued

¹ United States v. Crandall, 25 F.4th 582, 583 (8th Cir. 2022).

² *Id.*

³ United States v. Ruvalcaba, 2021 WL 66706, at *1 (D. Mass. Jan. 7, 2021).

⁴ See 21 U.S.C. § 841(b)(1)(A) (2006); see also *Ruvalcaba*, 2021 WL 66706, at *1.

⁵ Pub. L. No. 115-391, §§ 402–404, 132 Stat. 5221–22.

⁶ *Durbin, Grassley Introduce Bipartisan Legislation to Advance the First Step Act’s Goals*, U.S. SEN. COMM. ON THE JUDICIARY (Mar. 26, 2021), <https://perma.cc/6VEY-E3KS>.

⁷ First Step Act § 403, 132 Stat. at 5221–22 (limiting the “stacking” of 21 U.S.C. § 924(c) convictions).

⁸ First Step Act § 401, 132 Stat. at 5220–21 (reducing the mandatory minimum associated with 21 U.S.C. § 841(b) violations).

⁹ 18 U.S.C. § 3582(c)(1)(A)(i).

¹⁰ United States v. Jones, 980 F.3d 1098, 1100 (6th Cir. 2020).

that, given the reforms to mandatory minimums and sentence stacking contained in the FSA, their sentences would be significantly shorter had they been sentenced today.¹¹ Nonretroactive sentencing reforms, both argued, constitute extraordinary and compelling reasons justifying a sentence reduction.¹² Neither successfully persuaded their district court; both compassionate release motions were denied.¹³

Both appealed. The Eighth Circuit affirmed the lower court's denial of Mr. Crandall's compassionate release motion.¹⁴ It held that "a non-retroactive change in law, whether offered alone or in combination with other factors, cannot contribute to a finding of 'extraordinary and compelling reasons.'"¹⁵ In contrast, Mr. Ruvalcaba presented his appeal to the First Circuit and won.¹⁶ As a result, Mr. Ruvalcaba, and all individuals bringing motions for compassionate release within the First Circuit, can argue that nonretroactive sentencing reforms constitute extraordinary and compelling reasons.¹⁷ In short, two individuals raised identical arguments as they pleaded for compassion in the face of a sentence Congress had now acknowledged as unjustifiably long. Two courts disagreed on whether such an argument could prevail.

When they sought compassionate release, Mr. Crandall and Mr. Ruvalcaba were both incarcerated at the Butner Federal Corrections Complex in Butner, North Carolina.¹⁸ They may have crossed paths while in Butner. They may even have considered one another friends. Like incarcerated individuals often do, they may have spoken to each other about their long sentences and their desire to reunite with their friends and families. They may have even discussed their compassionate release motions. Mr. Ruvalcaba may have had to inform his friend that he won his appeal—that he was able to make an argument in support of his

¹¹ *United States v. Crandall*, 2020 WL 7080309, at *6 (N.D. Iowa Dec. 3, 2020) ("[Mr. Crandall] argues that an extraordinary and compelling reason for release is present because his term of incarceration would be significantly shorter if he were sentenced today."); *United States v. Ruvalcaba*, 26 F.4th 14, 17 (1st Cir. 2022) ("Marshalling his case for compassionate release, [Mr. Ruvalcaba] emphasized that had he been sentenced after the enactment of the FSA, he would have had just one qualifying prior offense and would have been subject to a mandatory prison term of only fifteen years.").

¹² *Crandall*, 2020 WL 7080309, at *6; *Ruvalcaba*, 2021 WL 66706, at *3.

¹³ *Crandall*, 2020 WL 7080309, at *7; *Ruvalcaba*, 2021 WL 66706, at *3.

¹⁴ *Crandall*, 25 F.4th at 585–86.

¹⁵ *Id.* at 586.

¹⁶ *Ruvalcaba*, 26 F.4th at 16.

¹⁷ *See id.*

¹⁸ *See Ruvalcaba*, 2021 WL 66706, at *3; *Crandall*, 2020 WL 7080309, at *3.

deservingness of compassion that Mr. Crandall could not make. One can imagine the complicated mix of emotions Mr. Crandall might have felt, had he heard this news: joy that a friend may receive compassionate release, yet anger that his own ability to receive compassion was limited because of the place in which he happened to commit his crime and the court that happened to hear his appeal.

This Comment begins with the experiences of Mr. Crandall and Mr. Ruvalcaba not to discuss the specific legal dispute at play in their cases, but rather to challenge the emerging consensus among scholars and criminal justice reform advocates that courts should continue to have the last word on such questions.¹⁹ The judges in Mr. Crandall’s and Mr. Ruvalcaba’s cases only enjoyed the discretion to decide whether nonretroactive sentencing changes constitute extraordinary and compelling reasons deserving of a sentence reduction because of a legal fluke. At the time, the U.S. Sentencing Commission—the body charged with describing under what circumstances extraordinary and compelling reasons exist—had not updated its compassionate release policy statement in light of the FSA’s reforms, rendering its preexisting policy statement inapplicable.²⁰ Most appellate courts concluded that, lacking an applicable policy statement, courts had discretion to determine whether an individual’s circumstances constituted extraordinary and compelling reasons.²¹

¹⁹ See *infra* Part I.E; see, e.g., Michael T. Hamilton, Note, *Opening the Safety Valve: A Second Look at Compassionate Release Under the First Step Act*, 90 *FORDHAM L. REV.* 1743, 1754, 1771–74, 1776 (2022) (arguing for continued judicial discretion to describe what constitutes “extraordinary and compelling reasons”); Mary Price, *The United States Sentencing Commission, Compassionate Release, and Judicial Discretion*, 35 *FED. SENT’G REP.* 175 (2023).

²⁰ See *infra* text accompanying notes 73–77.

²¹ See *Ruvalcaba*, 26 F.4th at 20–21 (holding that “a district court is not constrained by the existing policy statement on compassionate release when adjudicating a motion brought by a prisoner”); *United States v. Andrews*, 12 F.4th 255, 259 (3d Cir. 2021) (same); *United States v. McCoy*, 981 F.3d 271, 284 (4th Cir. 2020) (same); *United States v. Shkambi*, 993 F.3d 388, 393 (5th Cir. 2021) (same); *United States v. Jones*, 980 F.3d at 1109 (same); *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020) (same); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021) (same); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021); *United States v. Long*, 997 F.3d 342, 360 (D.C. Cir. 2021) (same). *But see* *United States v. Bryant*, 996 F.3d 1243, 1247 (11th Cir. 2021) (holding that the current policy statement applies to both BOP and prisoner initiated compassionate release motions given “[t]he Commission’s standards are still capable of being applied”). The Eighth Circuit has not decided the question. See, e.g., *United States v. Marcussen*, 15 F.4th 855, 859 (8th Cir. 2021) (declining to speak on the authority of the Commission’s unamended policy statement because “[s]o long as a district court does not explicitly limit its discretion to the factors identified in USSG [U.S. Sentencing Guidelines] § 1B1.13 and

Since the conclusion of Mr. Crandall's and Mr. Ruvalcaba's appeals, however, the Commission has promulgated amendments updating its compassionate release policy statement.²² Based on the experiences of individuals like Mr. Ruvalcaba, a consensus is emerging among criminal justice reform advocates that the key to future progress in compassionate release is to retain and advance judicial discretion to determine the meaning of extraordinary and compelling reasons. Discretion, they argue, is key to achieving more outcomes like Mr. Ruvalcaba's.²³ The Commission seems to agree. On April 5, 2023, the Commission released its amendments to the compassionate release policy statement.²⁴ As many advocates suggested, the Commission included a "catchall" provision that grants judges the discretion to consider circumstances other than those explicitly included in the policy statement as extraordinary and compelling reasons.²⁵ However, the case of Mr. Crandall, whose ability to receive compassionate release was unjustifiably hamstrung—not advanced—by judicial discretion, makes clear the problem with this approach.

The current system of compassionate release—defined by judicial discretion—is far better than the "drought of compassion" that existed prior to the FSA, yet it remains fundamentally flawed. A system that privileges judicial discretion allows appellate courts to interpret differently the meaning of extraordinary and compelling reasons. A system that allows the location of an individual's crime and therefore the court that hears their motion to play an outsized role in determining an individual's worthiness of compassion is fundamentally flawed. True, the current system of compassionate release remedies the drought of compassion that previously existed; however, it has replaced the nationwide drought with several regional ones.

Unchecked judicial discretion is not the best way forward. Whenever circuit courts—exercising their discretion under the

its commentary, it is appropriate for this court to ignore what is, in substance, no more than an academic debate").

²² U.S. SENT'G COMM'N, AMENDMENTS TO SENTENCING GUIDELINES (PRELIMINARY) 178–82 (2023). These amendments will take effect November 1, 2023, unless Congress objects to them.

²³ See *infra* Part I.E; see also Price, *supra* note 19, at 176.

²⁴ U.S. SENT'G COMM'N, *supra* note 22, at 178–82.

²⁵ *Id.* at 181. The specific amendment reads: "(5) OTHER REASONS.—The defendant presents any other circumstance or combination of circumstances that, when considered by themselves or together with any of the reasons described in paragraphs (1) through (4), are similar in gravity to those described in paragraphs (1) through (4)."

policy statement's catchall provision—disagree about whether a given circumstance constitutes an extraordinary and compelling reason, the Commission should amend the compassionate release policy statement to explicitly resolve the circuits' dispute. The Commission appears willing to do so. The amendments to the policy statement establish that, under certain circumstances, “a change in the law” that “produce[s] a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed”—as arguably occurred in Mr. Crandall's and Mr. Ruvalcaba's cases—constitutes an extraordinary and compelling reason.²⁶ Adopting this amendment would resolve the circuit split illustrated by Mr. Crandall's and Mr. Ruvalcaba's cases.

But resolving this one split is not enough. Judicial discretion, though valuable in many ways, will inevitably lead to disagreement and disparity. Eliminating disparities in compassionate release will require repeated action by the Commission. Without such action, the amended policy statement will neither resolve the current regional droughts of compassion nor prevent future ones.

This Comment advances three main arguments. Part I details the history of compassionate release, ultimately concluding that while the FSA's reforms improved compassionate release, the current system remains critically flawed. Specifically, it argues that circuit courts' discretion to determine what constitutes extraordinary and compelling reasons without Commission oversight—which the Commission retained via the catchall provision—allows courts hostile to compassionate release to inequitably limit individuals' ability to receive sentence reductions. Doing so creates a system in which an individual's ability to receive compassion depends on which court (and what binding precedent) decides their claim. Part II argues the Commission has statutory authority to resolve circuit splits that arise from judicial discretion. Part III argues that the Commission should exercise this authority because it is the institution best suited to determine what circumstances constitute extraordinary and compelling reasons, and it is more likely than circuit courts to create a progressive system of compassionate release.

²⁶ *Id.*

I. EVOLUTION OF COMPASSIONATE RELEASE

This Part charts the creation and evolution of federal compassionate release. It begins by discussing the conditions that prompted Congress to establish compassionate release in the Sentencing Reform Act of 1984²⁷ (SRA). It continues to discuss the problems with that system, congressional reforms enacted in the FSA, and the impact those reforms had on judges' discretion to determine the meaning of extraordinary and compelling reasons. Finally, it discusses the Commission's potentially problematic embrace of judicial discretion included in its amendments to the compassionate release policy statement.

A. Before the Sentencing Reform Act of 1984

For most of the twentieth century, the federal criminal justice system employed "a system of indeterminate sentencing."²⁸ District court judges enjoyed near total discretion to decide the sentence for each person convicted in their courtroom.²⁹ Judges were only bound by the statutory minimums and maximums that Congress set for a given crime.³⁰ These outer bounds created permissible sentencing ranges that were notoriously broad.³¹ Painted in the most charitable light, this system allowed a judge to impose a targeted and individualized sentence that achieved the purposes of criminal punishment after considering the whole person before her. In practice, however, this indeterminate system allowed for "sentences to be 'individualized' not so much in terms of defendants but mainly in terms of the wide spectrums of character, bias, neurosis, and daily vagary encountered among occupants of the trial bench."³² Judges disagreed on how much punishment was necessary and sufficient for similar conduct; some imposed harsh sentences for conduct that their fellow judges sentenced lightly. In his seminal work advocating for the abandonment of the indeterminate sentencing regime, Judge Marvin Frankel illustrated these disparities through an anecdote of two men convicted of cashing a bad check: despite no indication of "material differ-

²⁷ Pub. L. No. 98-473, 98 Stat. 1998.

²⁸ *Mistretta v. United States*, 488 U.S. 361, 363 (1989).

²⁹ *Id.*

³⁰ *Id.* at 364.

³¹ *Id.*

³² MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 21 (1973).

ences” between the two cases, one individual was sentenced to fifteen years in prison, and the other served a sentence of just thirty days.³³ Under the system of indeterminate sentencing, the judge, not the defendant’s conduct, was often the deciding sentencing factor.³⁴

Further, during this time, sentencing was, in practice, a two-step process. District court judges, of course, imposed sentences, but parole boards had the discretion to decide how much of that sentence an individual actually served.³⁵ After serving one-third of their sentence, individuals could petition the parole boards for early release.³⁶ Similar to judges, parole boards enjoyed wide discretion and lacked clear guidelines for when to grant parole.³⁷ Just as discretion ruled when deciding what sentence to impose, it ruled in deciding how long a person would remain incarcerated. Unsurprisingly, this system of near-complete discretion created intolerable disparities and uncertainty in sentencing.³⁸

B. The Sentencing Reform Act

Congress passed the SRA to eliminate the indeterminacy and disparities that pervaded the prior sentencing regime.³⁹ The SRA established the U.S. Sentencing Commission,⁴⁰ authorized it to develop sentencing guidelines,⁴¹ and charged it with “provid[ing] certainty and fairness in meeting the purposes of sentencing, [by] avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.”⁴² The Sentencing Guidelines limited judicial discretion by requiring judges to impose sentences within a range of

³³ *Id.* at 21–22.

³⁴ *Id.*

³⁵ *Mistretta*, 488 U.S. at 364–65.

³⁶ Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985–1987*, 45 HOFSTRA L. REV. 1167, 1171 (2017) (“By statute, most federal prisoners became eligible to be paroled after they had served one-third of the prison sentence imposed by a federal district court.”).

³⁷ *Id.* at 1173 (“Despite Congress’s intent to reduce disparities through the creation of parole guidelines, the interplay between a district judge’s original sentencing decision and the Parole Commission’s application of its guidelines injected arbitrariness into the sentencing process.”).

³⁸ *Mistretta*, 488 U.S. at 365.

³⁹ *Id.* at 365–66.

⁴⁰ See 28 U.S.C. § 991(a).

⁴¹ See 28 U.S.C. § 994(a)(1).

⁴² 28 U.S.C. § 991(b)(1)(B).

time calculated under the Guidelines.⁴³ This change sought to eliminate the indeterminacy that allowed judges to impose disparate sentences.⁴⁴

However, limiting judicial discretion over sentencing would fail to create sentencing uniformity and equity if parole boards retained their broad discretion to grant parole and effectively reduce an individual's sentence. Thus, the SRA also eliminated the parole system and generally prohibited courts from modifying sentences once imposed.⁴⁵ However, Congress still recognized that there may be circumstances in which an exception to sentence finality would be appropriate and even desired, such as when an individual suffers a serious medical issue while incarcerated. To accommodate such circumstances, Congress included § 3582(c)(1) in the SRA. This provision, known as the compassionate release provision, stated that

[t]he court may not modify a term of imprisonment once it has been imposed except that in any case the court, upon motion of the Director of the Bureau of Prisons . . . may reduce the term of imprisonment . . . after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.⁴⁶

Section 3582(c) effectively replaced parole with a new system of compassionate release. This new system divided the authority previously held by parole boards among three distinct parties. First, Congress tasked the Commission with “promulgating general policy statements” that “describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.”⁴⁷

⁴³ 28 U.S.C. § 994(a).

⁴⁴ *Mistretta*, 488 U.S. at 366.

⁴⁵ See 18 U.S.C. § 3582(b).

⁴⁶ 18 U.S.C. § 3582(c). The § 3553(a) factors include the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence to (1) reflect the seriousness of the offense, (2) to promote respect for the law, (3) to provide just punishment for the offense, (4) to afford adequate deterrence, and (5) to protect the public from further crimes of the defendant; the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and the need to provide restitution to any victims of the offense. See 18 U.S.C. § 3553(a).

⁴⁷ 28 U.S.C. § 994(t).

In empowering the Commission to describe this critical phrase, Congress's only limitation was that rehabilitation of the defendant alone cannot be considered an extraordinary and compelling reason.⁴⁸ Next, Congress granted the BOP the sole authority to bring motions for compassionate release before a district court.⁴⁹ Finally, rather than a parole board, Congress granted district courts the authority to decide whether compassionate release should be granted.⁵⁰

While this system could have worked in theory, in practice it failed to provide the sentencing "safety valve" Congress envisioned.⁵¹ Despite a clear instruction from Congress to describe what should be considered extraordinary and compelling reasons, the Commission failed to do so for over twenty years.⁵² Finally, in 2007 the Commission promulgated a policy statement, housed in § 1B1.13 of the Sentencing Guidelines, defining four categories of extraordinary and compelling reasons.⁵³ Under this policy statement, "extraordinary and compelling reasons" existed when (1) an individual was suffering from a "terminal illness," (2) when they were "suffering from a permanent physical or medical condition . . . that substantially diminishes [their ability] to provide self-care," and (3) upon "[t]he death or incapacitation of the defendant's only family member capable of caring for the defendant's minor child or minor children."⁵⁴ The Commission also included a catchall provision that defined extraordinary and compelling reasons as anything determined by the BOP, allowing the BOP to bring a motion for compassionate release based on *any* reason, including reasons beyond those enumerated in the policy statement.⁵⁵

⁴⁸ *Id.*

⁴⁹ *See* 28 U.S.C. § 3582(c)(1)(A).

⁵⁰ *Id.*

⁵¹ *United States v. McCall*, 56 F.4th 1048, 1052 (6th Cir. 2022) (en banc) ("Most agree that these goals, though noble in theory, failed in fact.")

⁵² *See United States v. Bryant*, 996 F.3d 1243, 1249 (11th Cir. 2021) ("It took the Commission over twenty years to publish its substantive definition of 'extraordinary and compelling reasons.'" (quoting U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2007))).

⁵³ *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1 (U.S. SENT'G COMM'N 2007). This policy statement was originally promulgated in 2006 and amended in 2007. The 2006 version did not expand upon the definition of extraordinary and compelling beyond what was already contained in the SRA.

⁵⁴ *Id.*

⁵⁵ U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.(A)(iv) (U.S. SENT'G COMM'N 2007). This provision is now located at n.(1)(D) in the 2021 version of the manual. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.(1)(D) (U.S. SENT'G COMM'N 2021).

While the Commission's inaction hampered compassionate release, it was the BOP that ensured its failure. Under the SRA, the BOP enjoyed an "absolute gatekeeping authority."⁵⁶ No individual could receive compassionate release unless the BOP brought a motion before a district court. The BOP rarely did so, and individuals had no judicial recourse when the BOP declined to bring such a motion. According to a report from the Department of Justice Office of Inspector General, between 2006 and 2011 the BOP brought only 142 motions for compassionate release.⁵⁷ Each petition was supported by the relevant U.S. Attorney's Office and ultimately approved by the court.⁵⁸ During this time, the BOP was responsible for the custody of approximately 218,000 federal inmates.⁵⁹ Based on these statistics, the DOJ concluded that "[t]he BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered." Judge Colleen McMahon recently noted that, over the course of more than twenty years on the federal bench, she had never heard a single compassionate release motion initiated by the BOP.⁶⁰ The Commission's failure to promulgate a policy statement defining extraordinary and compelling reasons coupled with the BOP's complete disinterest in bringing compassionate release motions effectively rendered § 3582(c)(1) dead-letter law. As one appellate court succinctly put it, this caused a "drought of compassion."⁶¹

C. The First Step Act of 2018

Dissatisfied with the existing compassionate release regime, Congress reformed it in the FSA. Hailed as "the most significant criminal justice reform bill in a generation,"⁶² the FSA represented Congress's intention to address mass incarceration and the excessive harshness of the federal criminal justice system.⁶³

⁵⁶ *United States v. Brooker*, 976 F.3d 228, 232 (2d Cir. 2020).

⁵⁷ EVALUATION & INSPECTIONS DIV., OFF. OF INSPECTOR GEN., U.S. DEP'T OF JUST., THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM 72 (2013).

⁵⁸ *Id.* at 1, 6.

⁵⁹ *Id.* at 1.

⁶⁰ Colleen McMahon, Speech, *(Re)Views from the Bench: A Judicial Perspective on Second-Look Sentencing in the Federal System*, 58 AM. CRIM. L. REV. 1617, 1618 (2021).

⁶¹ *United States v. Jones*, 980 F.3d 1098, 1100 (6th Cir. 2020).

⁶² 164 CONG. REC. S7649 (daily ed. Dec. 17, 2018) (statement of Sen. Chuck Grassley).

⁶³ 164 CONG. REC. H10362 (daily ed. Dec. 20, 2018) (statement of Rep. Jerrold Nadler) ("Critically, this bill . . . also takes a crucial first step toward addressing grave

To advance that end, the FSA contained a subtle yet significant reform to the compassionate release system. Section 603(b) of the FSA—Increasing the Use and Transparency of Compassionate Release—amended § 3582(c)(1) and stripped the BOP of its gate-keeping role over compassionate release motions.⁶⁴ Given “the BOP[s] fail[ure] to act, Congress made the courts the decision makers as to compassionate release.”⁶⁵ After exhausting certain administrative remedies,⁶⁶ defendants can now directly petition district courts for compassionate release.⁶⁷

This change was celebrated as a major shift in compassionate release policy because it allowed greater access to compassionate release.⁶⁸ Before the FSA, on average, only twenty-four motions for compassionate release were granted each year.⁶⁹ In the years since the FSA’s passage, the number of compassionate release motions filed and granted has skyrocketed. According to data compiled by the Commission, between October 2019 and September 2022, 4,502 compassionate release motions were granted.⁷⁰ Many, if not most, of these motions were brought by defendants at high risk of contracting and getting very sick from COVID-19.⁷¹ Given the threat of COVID-19, the FSA’s compassionate release reforms undoubtedly saved lives. Even in the first year following the FSA’s passage—a period that avoids the noise caused by COVID-19 related motions—145 motions seeking compassionate release were granted, a five-fold increase from the yearly average before the FSA.⁷²

concerns about our sentencing laws, which have for years fed a national crisis of mass incarceration.”).

⁶⁴ First Step Act § 603, 132 Stat. at 5238.

⁶⁵ *Brooker*, 976 F.3d at 236.

⁶⁶ Under § 3582, before an individual can bring a motion for compassionate release she must first petition the BOP to bring such a motion on her behalf. If the BOP declines to do so, or does not render an answer within thirty days, the individual can bring a motion on her own behalf. *See* 18 U.S.C. § 3582(c)(1)(A).

⁶⁷ 18 U.S.C. § 3582(c)(1).

⁶⁸ *See, e.g.*, Hamilton, *supra* note 19, at 1754 (noting that the “FSA was met with widespread approval and optimism”).

⁶⁹ EVALUATION & INSPECTIONS DIV., *supra* note 57, at 46.

⁷⁰ U.S. SENT’G COMM’N, U.S. SENTENCING COMMISSION COMPASSIONATE RELEASE DATA REPORT 4 (2022) [hereinafter U.S. SENT’G COMM’N, COMPASSIONATE RELEASE DATA REPORT].

⁷¹ U.S. SENT’G COMM’N, COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC 2 (2021) [hereinafter U.S. SENT’G COMM’N, IMPACT OF FSA] (“Although facilitated by the First Step Act’s legal changes, the dramatic increase in both motions for, and grants of, compassionate release was a direct consequence of the [COVID-19] pandemic.”).

⁷² U.S. SENT’G COMM’N, THE FIRST STEP ACT: ONE YEAR OF IMPLEMENTATION 47 (2018).

D. Judicial Discretion's Impact on Compassionate Release

While the FSA undoubtedly improved the compassionate release system, it also caused several unintended consequences, including introducing judicial discretion to grant compassionate release in circumstances beyond those enumerated in the Commission's policy statement. As a reminder, § 3582(c)(1)(A) requires that any grant of compassionate release be "consistent with applicable policy statements issued by the Sentencing Commission."⁷³ The current policy statement—originally promulgated by the Commission in 2007—begins with "[u]pon motion of the Director of the Bureau of Prisons."⁷⁴ It has not been updated to reflect the FSA's reforms, specifically individuals' ability to directly petition district courts. Until recently, the Commission has been legally unable to promulgate an updated policy statement. To conduct any business—such as approving an updated policy statement—the Commission must have a quorum defined as at least four voting members.⁷⁵ In January 2019—only a few weeks after the passage of the FSA—a Commissioner's term ended, causing the Commission to lose its quorum, and with it the ability to respond to the FSA's reforms.⁷⁶

In the absence of an updated policy statement, litigants and judges began to question whether courts remained bound by the existing compassionate release policy statement⁷⁷ and thus only able to grant compassionate release if defendants fell into one of the four narrow categories that the Commission had previously defined as constituting extraordinary and compelling reasons. The stakes of this question were high. If district courts remained bound by the current policy statement, they would be forced to deny motions for compassionate release articulating novel arguments such as those raised by Mr. Crandall and Mr. Ruvalcaba.

⁷³ 18 U.S.C. § 3582(c)(1)(A).

⁷⁴ U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2007).

⁷⁵ See 28 U.S.C. § 994(a); *Quorum*, U.S. SENT'G COMM'N, <https://perma.cc/4WY5-3EBA>.

⁷⁶ Madison Alder, *Near-Vacant Sentencing Panel Gives Biden Chance for Fresh Start*, BLOOMBERG L. (June 28, 2021), <https://perma.cc/SJR7-GUD9>. Commissioners serve set terms ranging from two to six years. See 28 U.S.C. § 992(a).

⁷⁷ See *United States v. Young*, 458 F.Supp. 3d 838, 844–45 (M.D. Tenn. 2020) (discussing whether district courts are not bound by the policy statement, and collecting similar cases).

In *United States v. Brooker*,⁷⁸ the Second Circuit became the first appellate court to “decide whether the First Step Act empowered district courts evaluating motions for compassionate release to consider *any* extraordinary and compelling reason for release that a defendant might raise, or whether courts remain[ed] bound by” the unamended compassionate release policy statement.⁷⁹ Because § 3582(c)(1)(a)(i) requires only that a sentence reduction be consistent with *applicable* policy statements, the court framed the question as “whether Guideline § 1B1.13, and specifically Application Note 1(D), remain[ed] ‘applicable’ after the changes made in the First Step Act.”⁸⁰ The court held that, until amended, § 1B1.13 was inapplicable and as such district courts are not bound by the Commission’s unupdated policy statement when considering compassionate release motions brought by defendants.⁸¹ With one exception, every circuit court to address the question has adopted the Second Circuit’s reasoning.⁸²

Brooker and the cases from other circuits adopting *Brooker*’s reasoning ushered in a fundamental change to compassionate release. Until the updated policy statement takes effect, district courts can determine, subject to appellate review,⁸³ the meaning of extraordinary and compelling reasons when considering defendant-initiated motions for compassionate release. No longer limited to the narrow categories included in the unamended compassionate release policy statement, individuals have raised myriad novel arguments to establish the existence of extraordinary and compelling circumstances. Many district court judges have embraced their newfound discretion and granted compassionate release motions they would previously have had to deny (or, more likely, would never have heard). Following *Brooker*, individuals

⁷⁸ 976 F.3d 228 (2d Cir. 2020).

⁷⁹ *Id.* at 230 (emphasis in original).

⁸⁰ *Id.* at 235.

⁸¹ *Id.* at 230.

⁸² See *supra* note 21. The Eleventh Circuit disagrees. See *United States v. Bryant*, 996 F.3d 1243, 1247 (11th Cir. 2021) (holding that the current policy statement applies to both BOP- and prisoner- initiated compassionate release motions given “[t]he Commission’s standards are still capable of being applied”).

⁸³ See, e.g., *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020) (“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.”).

have received compassionate release based on, among other reasons, the individual's relative youth at the time of conviction,⁸⁴ sentencing disparities between codefendants,⁸⁵ and sexual violence suffered while incarcerated.⁸⁶ Decisions such as these, and the discretion that allowed them, represent a necessary outpouring of compassion and give hope that the drought of compassion is ending.

However, judicial discretion has been a double-edged sword. While *Brooker* and the discretion it granted to district courts have increased the availability and use of compassionate release, that increase has not been uniform. Different judges have reached different conclusions as to whether similarly situated defendants meet the standard for compassionate release. In other words, unchecked judicial discretion has caused disparity in the review of compassionate release motions. These disparities are caused by both district courts and appellate courts exercising their newfound discretion.⁸⁷ Whether a defendant receives compassionate release is increasingly determined not by the circumstances articulated in their motion but by the judge (and binding precedent) that decides it. While this system is an improvement upon the pre-FSA system of compassionate release, it is not yet a just or defensible system. Under this system, geography rather than merit decides many cases. Regional droughts of compassion are better than a nationwide drought, but even a regional drought is unacceptable.

1. District court discretion.

Since the passage of the FSA, district courts have granted compassionate release motions at widely varying rates. A report released by the Commission in March 2022 noted that “[i]n the absence of an amended policy statement to provide guidance, there was considerable variability in the application of 18 U.S.C. § 3582(c)(1)(A) across the country.”⁸⁸ Specifically, it found that the likelihood that an individual's compassionate release motion

⁸⁴ See, e.g., *United States v. Maumau*, 993 F.3d 821, 837 (10th Cir. 2021).

⁸⁵ See, e.g., *United States v. Price*, 496 F. Supp. 3d 83, 90 (D.D.C. 2020).

⁸⁶ *United States v. Brice*, 2022 WL 17721031, at *3–4 (E.D. Pa. Dec. 15, 2022).

⁸⁷ U.S. SENT'G COMM'N, IMPACT OF FSA, *supra* note 71, at 4 (“In the absence of an amended policy statement to provide guidance, there was considerable variability in the application of 18 U.S.C. § 3582(c)(1)(A) across the country.”).

⁸⁸ *Id.*

would be approved “substantially varied by circuit.”⁸⁹ Across all courts, 25.7% of compassionate release motions were granted.⁹⁰ Yet many districts had a grant rate that substantially differed from the national average. For example, the District Court for the District of Columbia granted 29.5% of the compassionate release motions raised, and district courts within the Ninth Circuit granted 27.9%.⁹¹ On the other extreme, district courts within the Fifth Circuit granted only 9.8% of compassionate release motions, and the courts within the Eighth Circuit granted only 10.2%.⁹²

2. Appellate court discretion.

Appellate court discretion has also caused compassionate release disparities. In response to district courts’ newfound discretion to determine the meaning of extraordinary and compelling reasons, appellate courts have exercised their own discretion to police district courts’ determinations. When a district court is seen as stretching the meaning of extraordinary and compelling too far, appellate courts have stepped in and reversed the district court.⁹³ Doing so creates binding precedent stating certain circumstances cannot, as a matter of law, constitute extraordinary and compelling reasons within that circuit. Without guidance from the Commission, different appellate courts have reached opposite conclusions when deciding whether certain circumstances can ever constitute extraordinary and compelling reasons. These circuit splits over the meaning of extraordinary and compelling reasons are a major cause of the current compassionate release disparities.

For example, different courts have reached opposite answers when deciding whether nonretroactive changes to sentencing laws can constitute extraordinary and compelling reasons. This was the issue in Mr. Crandall’s and Mr. Ruvalcaba’s cases.⁹⁴ The FSA eliminated “18 U.S.C. § 942(c)’s stacked penalty provision (which required *consecutive* rather than concurrent sentences for

⁸⁹ *Id.*

⁹⁰ *Id.* at 16.

⁹¹ U.S. SENT’G COMM’N, COMPASSIONATE RELEASE DATA REPORT, *supra* note 70, at 7–9.

⁹² *Id.*

⁹³ *See Gunn*, 980 F.3d at 1181 (“District judges must operate under the statutory criteria—‘extraordinary and compelling reasons’—*subject to deferential appellate review.*” (emphasis added)).

⁹⁴ *See generally* Jaden Lessnick, Case Note, *Uncompassionate Incarceration: United States v. Thacker and Its Impact on Nonretroactivity-Based Compassionate Release*, U. CHI. L. REV. ONLINE (May 12, 2022), <https://perma.cc/L3PJ-R4GD>.

firearm possession and use) and reduc[ed] [] the attached mandatory minimum sentences.”⁹⁵ However, this change was only made prospectively; individuals sentenced under the pre-FSA sentencing regime did not benefit from the reform.⁹⁶ Because individuals sentenced before the FSA’s changes would be eligible for much lower sentences today, many sought compassionate release “on the basis of the FSA’s nonretroactive amendments,” contending “that their sentences are excessive and disparate relative to those sentenced after the FSA’s passage.”⁹⁷ Different district court judges decided the question differently: some held that these circumstances constitute extraordinary and compelling reasons and granted compassionate release, while others were unconvinced and denied the motions.⁹⁸ Upon appellate review, the disagreement continued. Of the circuit courts that have addressed the issue, four have decided that district courts can consider nonretroactive sentencing changes to be extraordinary and compelling reasons justifying compassionate release, though to varying degrees.⁹⁹ Five others have held the opposite and prohibit their district courts from considering nonretroactive sentencing changes an extraordinary and compelling reason.¹⁰⁰ The Fifth and Eleventh Circuits have not yet addressed the question, nor has the Second Circuit, though district courts in the Second Circuit have considered nonretroactive changes in the law when granting compassionate release.¹⁰¹ This is just one example of how conflicting circuit court decisions cause compassionate release disparities

⁹⁵ *Id.* (emphasis in original).

⁹⁶ First Step Act § 403(b), 132 Stat. at 5194.

⁹⁷ Lessnick, *supra* note 94.

⁹⁸ *Id. Compare* United States v. Johnson, 2022 WL 2866722, at *6 (D.D.C. July 1, 2022) (“[T]his Court concludes . . . that nonretroactive changes in law can form part of—and indeed a substantial part of—a finding that extraordinary and compelling reasons warrant reducing a defendant’s sentence.”), *with* United States v. Hicks, 2021 WL 1634692, at *8 (D.D.C. Apr. 27, 2021) (“To treat changes in the law and related mitigating factors as an extraordinary and compelling reason would effectively override these statutory limitations with a definitional sleight-of-hand. . . . The factors suggested by defendant therefore do not constitute an extraordinary and compelling reason for release.”).

⁹⁹ *See* United States v. McGee, 992 F.3d 1035, 1045–48 (10th Cir. 2021); United States v. McCoy, 981 F.3d 271, 285–87 (4th Cir. 2020); United States v. Ruvalcaba, 26 F.4th 14, 24–28 (1st Cir. 2022); United States v. Chen, 48 F.4th 1092 (9th Cir. 2022).

¹⁰⁰ *See* United States v. Crandall, 25 F.4th 585, 585–86 (8th Cir. 2022); United States v. Andrews, 12 F.4th 255, 261–62 (3d Cir. 2021); United States v. Thacker, 4 F.4th 569, 574 (7th Cir. 2021); United States v. Jenkins, 50 F.4th 1185 (D.C. Cir. 2022); *McCall*, 56 F.4th at 1053.

¹⁰¹ *See, e.g.,* United States v. Watts, 2023 WL 35029, at *9 (E.D.N.Y. Jan. 4, 2023):

by allowing some individuals to raise arguments in support of their motions that others cannot.

While the Supreme Court could address compassionate release disparities by resolving these circuit disputes, it has repeatedly declined to do so. Resolving circuit courts' disagreement as to the meaning of federal law—such as whether nonretroactive sentencing reforms can constitute extraordinary and compelling reasons—is the Supreme Court's bread and butter.¹⁰² However, the Court has repeatedly denied certiorari petitions asking it to resolve the question of nonretroactive sentencing reforms.¹⁰³ This is not a coincidence, but rather a pattern of the Court avoiding cases that present questions relating to the Commission's work; the Court has stated that “[i]t is the responsibility of the Sentencing Commission to address th[ese] division[s] to ensure fair and uniform application of the Guidelines.”¹⁰⁴

E. The Commission's Potentially Problematic Embrace of Judicial Discretion

In August 2022, the Senate confirmed President Joe Biden's nominees to the Commission and restored its quorum.¹⁰⁵ The newly reconstituted Commission soon after announced that promulgating an updated compassionate release policy statement was among its top priorities.¹⁰⁶ The Commission sought public comment on the proper role of judicial discretion in determining

This Court finds that Mr. Watt's original total sentence of ninety-two years and three months, including his mandatory eighty-five year stacked sentence for the five § 924(c) counts, to be served consecutively to his sentence of 87 months on the other counts of conviction, is among the extraordinary and compelling reasons justifying a reduction of his sentence.

¹⁰² See *Braxton v. United States*, 500 U.S. 344, 347 (1991) (“A principal purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law.”).

¹⁰³ See *Andrews v. United States*, 142 S. Ct. 1446 (2022) (mem.), *denying cert.* to 12 F.4th 255 (3d Cir. 2021); *Jarvis v. United States*, 142 S. Ct. 760 (2022) (mem.), *denying cert.* to 999 F.3d 442 (6th Cir. 2021); *Thacker v. United States*, 142 S. Ct. 1363 (2022) (mem.), *denying cert.* to 4 F.4th 569 (7th Cir. 2021).

¹⁰⁴ *Guerrant v. United States*, 142 S. Ct. 640, 640–41 (2022) (statement of Sotomayor, J., joined by Barrett, J., respecting the denial of certiorari).

¹⁰⁵ Nate Raymond, *Newly-Reconstituted U.S. Sentencing Panel Finalizes Reform Priorities*, REUTERS (Oct. 28, 2022), <https://perma.cc/W92R-7JAQ>.

¹⁰⁶ Carlton W. Reeves, *Federal Register Notice of Proposed 2022–2023 Priorities*, U.S. SENT'G COMM'N, <https://perma.cc/2SRJ-HPPA>.

the scope of extraordinary and compelling reasons and the authority of the Commission to oversee that discretion. The fundamental tension at hand is how to structure compassionate release such that the benefits of judicial discretion are enjoyed without allowing the disparities and inequities discretion introduces to endure.

A consensus among reform-minded commentators has emerged that the key to further progress in the compassionate release space is to protect and advance judicial discretion to decide the meaning of extraordinary and compelling reasons. Then-law student Michael Hamilton has argued that the “Commission should seek to emphasize that judicial discretion holds utmost importance in compassionate release decisions.”¹⁰⁷ He suggested the Commission promulgate a policy statement that includes a catchall provision “permit[ting] sentence reductions for any other extraordinary and compelling reasons as determined by the court.”¹⁰⁸ Others have taken this argument directly to the Commission.¹⁰⁹ For example, the Center for Justice and Human Dignity urged the Commission “to clarify that a court may grant compassionate release for reasons other than, or for reasons in combination with those described in [the policy statement].”¹¹⁰ Relatedly, the Federal Defenders Sentencing Guidelines Committee pushed the Commission to “recognize that courts are in the best position to consider” the meaning of extraordinary and compelling reasons.¹¹¹

The Commission followed these recommendations and, in April 2023, adopted amendments to the compassionate release policy statement giving courts some discretion to define extraordinary and compelling reasons.¹¹² The amendments propose three main reforms. First, they modestly expand the medical and familial circumstances capable of establishing extraordinary and compelling reasons.¹¹³ Second, they enumerated two new categories of extraordinary and compelling reasons: (1) “[t]he defendant, while

¹⁰⁷ Hamilton, *supra* note 19, at 1776.

¹⁰⁸ *Id.* (emphasis omitted).

¹⁰⁹ See generally *Public Comment on Proposed Priorities*, U.S. SENT’G COMM’N (Oct. 17, 2022), <https://perma.cc/7AET-DHKQ>.

¹¹⁰ HANNA LIEBMAN DERSHOWITZ, SHOLOM LIPSKAR & CTR. FOR JUST. AND HUM. DIGNITY, COMMENTS ON PROPOSED 2022–2023 PRIORITIES OF THE UNITED STATES SENTENCING COMMISSION 3–4 (2022).

¹¹¹ MICHAEL CARUSO, FED. PUB. DEFS., S.D. FLA., DEFENDER COMMENT OF THE COMMISSION’S PROPOSED POLICY PRIORITIES 3 (2022).

¹¹² U.S. SENT’G COMM’N, *supra* note 22, at 178–82.

¹¹³ *Id.* at 179–80.

in custody serving the term of imprisonment sought to be reduced, was a victim of sexual abuse . . . or physical abuse resulting in ‘serious bodily injury,’ . . . that was committed by, or at the direction of, a correctional officer,” and (2) when “a defendant received an unusually long sentence and has served at least 10 years of the term of imprisonment, a change in the law” that “produce[s] a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed,” the latter of which potentially resolves the dispute at issue in Mr. Crandall’s and Mr. Ruvalcaba’s cases.¹¹⁴ Finally, the amendments included a catchall provision that would give district courts significant latitude to grant compassionate release for “other reasons” that “are similar in gravity” to the enumerated circumstances.¹¹⁵

I aim to challenge this consensus and approach. The Commission should not promulgate a policy statement cementing broad judicial discretion—and its resulting disparities—and then consider its work complete. Doing so would fail to address the problems discussed above. Instead, by adopting a catchall provision cementing judicial discretion *and* then taking an active role in resolving the inevitable circuit splits over the scope of “extraordinary and compelling reasons” that such discretion will introduce, the Commission can end the existing regional droughts of compassion. In a perfect world, the Commission would consistently resolve these splits by adopting a broad interpretation of compassionate release. Admittedly, however, that perfect world is unlikely to be our own. Nevertheless, given the Commission’s embrace of compassionate release and several appellate courts’ hostility toward it, the Commission is more likely to reach a broad interpretation of compassionate release.¹¹⁶

The Commission seems intrigued by the more nuanced handling of judicial discretion that this Comment endorses. The Commission’s updated policy statement describes nonretroactive sentencing changes, under certain circumstances, as an extraordinary and compelling reason, potentially resolving the dispute at issue in Mr. Crandall’s and Mr. Ruvalcaba’s cases.¹¹⁷ However, before adopting this amendment, the Commission specifically requested further guidance on whether doing so “exceeds

¹¹⁴ *Id.* at 180–81.

¹¹⁵ *Id.* at 181; *see supra* text accompanying note 26.

¹¹⁶ *See infra* Part III.C for further discussion of how the Commission can attain uniformity by resolving regional droughts of compassion.

¹¹⁷ U.S. SENT’G COMM’N, *supra* note 22, at 178–82.

the Commission's authority" by directly disagreeing with some circuits' interpretation of § 3582(c)(1)(A).¹¹⁸ It appears the Commission is not yet convinced that it can or should resolve appellate courts' disputes. This Comment argues that it can and must. Without the Commission's continued and regular oversight of judicial discretion, the Commission's amendments to the compassionate release policy statement will fail to address the regional droughts of compassion the country currently faces, and instead likely exacerbate them.

II. THE COMMISSION'S AUTHORITY

This Part discusses how the Commission can use its statutory authority to oversee the judicial discretion its proposed catchall provision would grant courts, so that the benefits of that discretion can be enjoyed without allowing the disparities discretion inevitably introduces to endure.

The Commission's compassionate release authority is granted and guided by two statutes. First, the SRA instructs the Commission to respond to and eliminate unwarranted sentencing disparities.¹¹⁹ Congress has adopted a broad understanding of sentencing: of relevance is not just the sentence that a district court imposes, but rather the actual amount of time that an individual spends incarcerated. Sentencing disparities can, of course, occur when district courts impose unequal sentences for similarly situated individuals, but even sentences that begin as fair can become disparate if they are shortened in an inconsistent manner. That is what the post-*Brooker* compassionate release system allows. Just as Congress recognized that disparities in parole decisions under the pre-SRA indeterminate sentencing regime contributed to sentencing disparities, unchecked judicial discretion in compassionate release has created sentencing disparities. Admittedly, unwarranted sentencing disparities caused by compassionate release contribute to a relatively small subset of overall sentencing disparities, but they nevertheless exist. And, through the SRA, Congress instructed the Commission to address them.

¹¹⁸ *Id.* at 8.

¹¹⁹ *See* 28 U.S.C. § 991(b)(1)(B).

Second, through the FSA, Congress expressed its intent to increase the use and frequency of compassionate release.¹²⁰ An approach to eliminating compassionate release disparities that fails either statute's guidance should be abandoned.

This Part first discusses how the Commission could limit compassionate release disparities by eliminating discretion. However, it ultimately advocates against this approach, concluding the text of § 3582 forecloses this option and, even if not, eliminating discretion is undesirable. Instead, this Comment argues that the Commission can eliminate compassionate release disparities—without abandoning the benefits of judicial discretion—by overseeing circuit courts' discretion. By promulgating updated policy statements either expressly including or excluding the disputed circumstance in the policy statement's updated definition of extraordinary and compelling reasons, the Commission can resolve circuit splits and eliminate compassionate release disparities caused by circuit courts. Doing so would ensure that all individuals, regardless of the court that hears their motion, have an equal opportunity to receive compassion.

A. The Statutory Framework

As amended by the FSA, 18 U.S.C. § 3582(c) establishes the compassionate release framework. Any actions the Commission takes to reduce compassionate release disparities must be authorized by this statute. It states that

the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant . . . *may* reduce the term of imprisonment . . . after considering the factors set forth in section 3553(a) to the extent they are applicable, *if it finds that* extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.¹²¹

In other words, although clunky, the statute's text says a district court *may* grant compassionate release if (1) it finds extraordinary and compelling reasons warrant a sentence reduction,¹²²

¹²⁰ Yolanda Bustillo, Note, *Compassionate Release During Crises: Expanding Federal Court Powers*, 40 YALE L. & POL'Y REV. 223, 228, 235–36 (2021).

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

¹²² 18 U.S.C. § 3582(c)(1)(A)(i).

(2) granting compassionate release is consistent with the Sentencing Commission's applicable policy statements,¹²³ and (3) the sentencing factors in § 3553(a) support compassionate release.¹²⁴ These statutory requirements and limitations have important implications for how the Commission can and should structure judicial discretion to address compassionate release disparities.

Section 3582(c) mandates some judicial discretion. It says that a district court, under certain circumstances, *may* grant compassionate release.¹²⁵ The statute uses permissive language, suggesting a discretionary authority to grant compassionate release under these circumstances if the district court chooses to do so.¹²⁶ It does not use mandatory language such as “shall,” which would suggest district courts must grant compassionate release when certain circumstances exist.¹²⁷ In effect, while Congress granted the Commission broad powers relating to compassionate release, the Commission cannot mandate courts grant compassionate release. Section 3582(c) further entrenches judicial discretion by requiring courts to consult the § 3553(a) factors before granting compassionate release.¹²⁸ The Commission has no control over the § 3553(a) factors. Regardless of what the Commission says, by finding that the § 3553(a) factors do not support granting release, a defiant district court (subject to appellate review) always has authority to deny an individual's motion.

At the same time, § 3582(c) grants the Commission significant powers that it can use to address compassionate release disparities caused by judicial discretion. To grant an individual compassionate release, a court must find that “extraordinary and compelling reasons warrant such a reduction.”¹²⁹ As discussed below,¹³⁰ Congress delegated the task of “describ[ing]” extraordinary and compelling reasons to the Commission.¹³¹ The Commission can use its power to “describe what should be considered [an] extraordinary and compelling reason[]” to resolve disputes over

¹²³ 18 U.S.C. § 3582(c)(1)(A)(ii).

¹²⁴ 18 U.S.C. § 3582(c)(1)(A); *see supra* note 46.

¹²⁵ 18 U.S.C. § 3582(c)(1)(A).

¹²⁶ LARRY M. EIG, CONG. RSCH. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 10 (2014) (“Use of ‘shall’ and ‘may’ in statutes also mirrors common usage; ordinarily ‘shall’ is mandatory and ‘may’ is permissive.”).

¹²⁷ *Id.*

¹²⁸ For a reminder of what the § 3553(a) factors include, *see supra* note 46.

¹²⁹ 18 U.S.C. § 3582(c)(1)(A)(i).

¹³⁰ *See infra* Part II.C.1.

¹³¹ *See* 28 U.S.C. § 994(t).

what circumstances meet that admittedly opaque statutory standard.¹³² Further, § 3582(c) requires that any grant of compassionate release be “consistent with applicable policy statements issued by the Sentencing Commission.”¹³³ The Commission can use the “consistent with” provision to provide further limitations on when compassionate release can be granted.¹³⁴ In short, the text of § 3582(c) grants the Commission certain powers it can use to address compassionate release disparities, while taking some remedial strategies off the table.

The legislative and statutory histories of the FSA’s compassionate release reforms offer guidance on how the Commission should use its powers. Congress reformed compassionate release in the FSA in light of widespread dissatisfaction with how the BOP was exercising its gatekeeping authority.¹³⁵ Given the dearth of compassionate release motions filed by the BOP, Congress stripped it of its gatekeeping role and allowed individuals to directly petition courts for compassionate release. The FSA’s reforms indicate a congressional intention to increase the use of compassionate release. Indeed, the provision of the FSA reforming § 3582 was titled “Increasing the Use and Transparency of Compassionate Release.”¹³⁶ Speaking in support of the FSA, Representative Jerrold Nadler who at the time of the FSA’s passage served as the Ranking Member of the House Judiciary Committee, proudly noted that the FSA “include[s] a number of very positive changes, such as . . . improving application of compassionate release.”¹³⁷ Expressing similar sentiments, Senator Benjamin Cardin, a cosponsor of the FSA, celebrated the FSA for “expand[ing] compassionate release . . . and expedit[ing] compassionate release applications.”¹³⁸ Given the evil that Congress sought to correct and members’ statements in support of the FSA, it is clear that, through the FSA, Congress sought to expand the use of compassionate release. The Commission should honor

¹³² 28 U.S.C. § 994(t).

¹³³ 18 U.S.C. § 3582(c)(1)(A)(ii).

¹³⁴ The Commission has used the “consistent with” provision in the past to require individuals being granted compassionate release do not pose a danger to themselves or their community. U.S. SENT’G GUIDELINES MANUAL § 1B1.13 (U.S. SENT’G COMM’N 2001).

¹³⁵ See, e.g., EVALUATION & INSPECTIONS DIV., *supra* note 57; *United States v. Jones*, 980 F.3d 1098, 1100 (6th Cir. 2020).

¹³⁶ See First Step Act § 603(b), 132 Stat. at 5238.

¹³⁷ 164 CONG. REC. H10362 (daily ed. Dec. 20, 2018) (statement of Rep. Jerrold Nadler).

¹³⁸ 164 CONG. REC. S7753-01 (daily ed. Dec. 18, 2018) (statement of Sen. Benjamin Cardin).

Congress's intent as it structures judicial discretion and promulgates future compassionate release policy statements.

B. The Commission Cannot (and Should Not) Eliminate Judicial Discretion

The Commission could bring uniformity, and thus reduce disparity, by stripping district courts of their discretion to grant compassionate release under circumstances other than those enumerated in the Commission's policy statement. This approach would effectively entail abandoning the catchall provision. Doing so would undoubtedly reduce disparity because district courts could only grant compassionate release under the specific circumstances the Commission described. Presumably, granting compassionate release in any other circumstance would be inconsistent with an applicable policy statement and thus violate § 3582(c)'s "consistent with" provision. In effect, the Commission would achieve uniformity by equalizing down when compassionate release can be granted.

This Comment does not endorse this approach. Tying the hands of district courts in this way does violence to Congress's express aim to increase, not arbitrarily limit, the use of compassionate release.¹³⁹ This approach would prevent district court judges that are sympathetic to the FSA's policy aims from granting compassionate release in circumstances beyond those the Commission articulates. Reducing disparities is an important aim, but it would come at too high a price if it were achieved by limiting individual's ability to receive compassionate release. As a result, the Commission should adopt a catchall provision granting discretion to district courts beyond the circumstances enumerated in its policy statement.

Alternatively, the Commission could, in theory, try to reduce disparities caused by judicial discretion by compelling courts to grant compassionate release under certain circumstances. Setting a floor above which district courts must grant compassionate release would allow the Commission to create uniformity while simultaneously increasing the availability of compassionate release. However, as discussed above, this approach is foreclosed by § 3582. First, while the Commission undoubtedly has the author-

¹³⁹ See *infra* Part III.A; Bustillo, *supra* note 120, at 228.

ity to promulgate policy statements that district courts must follow when granting compassionate release,¹⁴⁰ and can describe extraordinary and compelling reasons, it lacks the power to compel district courts to grant compassionate release. So long as the compassionate release provision remains as written, the Commission cannot achieve the goals of the SRA *and* the FSA by eliminating judicial discretion.

C. The Commission Can (and Should) Oversee Judicial Discretion

While the Commission cannot (and should not) reduce compassionate release disparities by wholly eliminating judicial discretion, the Commission can achieve these dual aims by attacking the compassionate release disparities generated by circuit courts' discretion. Conflicting circuit court decisions interpreting the "extraordinary and compelling" standard contribute to the current disparities in compassionate release.¹⁴¹ As the experiences of Mr. Crandall and Mr. Ruvalcaba painfully make clear, different courts have reached opposing answers when deciding the same question.¹⁴² Crucially, if the Commission promulgates a policy statement cementing judicial discretion, future courts will inevitably disagree when deciding whether unenumerated circumstances can be considered an extraordinary and compelling reason under the catchall provision. Disagreement and circuit splits are a feature of judicial discretion. But these circuit splits do not have to endure; the Commission has the statutory authority to resolve them.¹⁴³ By regularly promulgating updated policy statements describing this standard, the Commission can resolve current and future circuit splits concerning the standard's meaning. By granting judicial discretion *and* then exercising its statutory authority to provide regular oversight of that discretion, the Commission can create a system of compassionate release that enjoys the benefits of judicial discretion without allowing the disparity discretion often causes to endure.

¹⁴⁰ 18 U.S.C. § 3582(c)(1)(A)(ii).

¹⁴¹ See U.S. SENT'G COMM'N, IMPACT OF FSA, *supra* note 71, at 9.

¹⁴² See *supra* Part I.D. See generally, Lessnick, *supra* note 94.

¹⁴³ See *supra* Part II.B.1; 28 U.S.C. § 994(t).

1. The Commission has the authority to define extraordinary and compelling reasons.

Section 3582(c) requires that a district court find “extraordinary and compelling reasons [that] warrant” a sentence reduction before granting compassionate release.¹⁴⁴ The phrase “[e]xtraordinary and compelling reasons” is not a blank slate from which courts can freely interpret. Instead, it is a term of art that Congress granted the Commission the authority to define.¹⁴⁵ Section 994(t) of title 28 states that “[t]he Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, 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.”¹⁴⁶ Both provisions were enacted as part of the SRA. In one stroke, Congress instructed the Commission to describe extraordinary and compelling reasons and required courts to find that extraordinary and compelling reasons exist before granting someone compassionate release. Reading the statute as a whole makes clear that Congress intended the Commission’s relevant policy statements to guide courts’ analyses. To suggest otherwise renders § 994(t) an interesting, but toothless, brainstorming exercise. Rather, Congress granted the Commission the authority to describe the meaning of extraordinary and compelling reasons and intended for the Commission’s description to be authoritative in courts’ analyses.

One could argue that reading § 994(t) as requiring courts to follow the Commission’s description of extraordinary and compelling reasons renders § 3582(c)(1)(A)(ii) “consistent with applicable policy statements” requirement surplusage. The Tenth Circuit has, incorrectly, adopted this position.¹⁴⁷ Because the Commission’s description of what should constitute extraordinary and compelling reasons is contained in a policy statement, the Tenth Circuit mistakenly reasoned that if courts are required to follow that description, § 3582(c)’s “consistent with” provision becomes surplusage given courts’ granting compassionate release would already have to be consistent with the Commission’s policy statement describing extraordinary and compelling reasons.¹⁴⁸

¹⁴⁴ 18 U.S.C. § 3582(c)(1)(i).

¹⁴⁵ See 28 U.S.C. § 994(t).

¹⁴⁶ *Id.*

¹⁴⁷ See *United States v. Maumau*, 993 F.3d 821, 831–34 (10th Cir. 2021).

¹⁴⁸ *Id.*

However, this argument misunderstands the scope of applicable policy statements. It assumes they do no more than define extraordinary and compelling reasons. In reality, the Commission can promulgate policy statements imposing additional requirements for compassionate release unrelated to the meaning of extraordinary and compelling reasons. If the Commission chooses to include such additional conditions, § 3582(c)(1)(A)(ii)'s "consistent with" provision ensures courts act in accordance with them. In fact, both the Commission's unamended and amended policy statement does just this. Section 1B1.13(2) of the Commission's amended compassionate release policy statement requires that "the defendant is not a danger to the safety of any other person or to the community."¹⁴⁹ Section 3582(c)(1)(A)(ii) is not surplusage; it requires courts act in accordance with this additional requirement.

The opposite surplusage argument also fails. This argument concludes incorrectly that interpreting § 3582(c)(1)(A)(i)'s extraordinary and compelling reasons provision as requiring courts to follow the Commission's description of extraordinary and compelling reasons renders that provision surplusage because § 3582(c)(1)(A)(ii)'s "consistent with" provision already requires courts to act in accordance with all applicable statements, including those defining extraordinary and compelling circumstances. As written, however, § 3582 requires a finding of extraordinary and compelling reasons before a district court can grant compassionate release even if there is no applicable policy statement. Whereas the "consistent with" requirement only applies when an applicable policy statement exists, the extraordinary and compelling circumstances provision ensures courts find extraordinary and compelling reasons before granting compassionate release even when no applicable policy statement exists. The current system of compassionate release is the best example for why § 3582(c)(1)(A)(i) is clearly not surplusage under this interpretation: even though most courts have found there to be no applicable policy statement, because of § 3582(c)(1)(A)(i), extraordinary and compelling reasons are still necessary for a grant of compassionate release.

This interpretation best aligns with Congress's broader intent in the SRA. The sponsors of the SRA were concerned with

¹⁴⁹ U.S. SENT'G GUIDELINES MANUAL § 1B1.13(2) (U.S. SENT'G COMM'N 2021).

sentencing disparities caused by unchecked discretion.¹⁵⁰ Compassionate release was created because the prior system of parole was plagued with indeterminacy caused by parole boards' broad discretion to decide when an individual's sentence should be shortened. Congress would not eliminate that system only to replace it with one in which individual judges enjoyed similarly unfettered discretion to determine when a sentence should be reduced. Congress was trying to bring determinacy and uniformity to sentencing. Replacing one system of unchecked discretion with another would not achieve that goal. Instead, Congress's aim of eliminating disparities is better served by the Commission frequently intervening to resolve the disputes inevitably introduced by the discretion granted to courts by Congress and the Commission's proposed catchall provision. Thus, unsurprisingly, Congress empowered the Commission to do just that: it instructed the Commission to describe extraordinary and compelling reasons and made the Commission's definition binding on courts.

3. The Commission can resolve appellate courts' disputes.

The dispute among circuits over whether nonretroactive sentencing changes can justify compassionate release illustrates how the Commission could reduce sentencing disparities by exercising its authority to describe extraordinary and compelling reasons. Given a lack of instruction from the Commission, circuit courts have decided the question on their own and, unsurprisingly, have reached different conclusions.¹⁵¹ A catchall provision permitting judicial discretion will lead to similar splits in the future. The Commission can resolve these future disputes by promulgating updated policy statements that explicitly answer disputed questions as they arise. For example, the Commission has expressly included, under certain circumstances, nonretroactive sentencing changes in its description of extraordinary and compelling reasons. Given that Congress granted the Commission the authority to describe extraordinary and compelling reasons, the Commission's determination would supersede any conflicting courts' interpretation.

¹⁵⁰ *Mistretta v. United States*, 488 U.S. 361, 366 (1989).

¹⁵¹ *See supra* notes 99–102 and accompanying text (discussing the different answers circuits have reached on the nonretroactive sentencing changes question).

The Supreme Court has previously held that the Commission, in certain limited contexts, has the authority to resolve circuit court disputes. In *Braxton v. United States*,¹⁵² the Supreme Court was asked to interpret a specific Guideline promulgated by the Commission. Thomas Braxton “was charged in a three-count indictment with (1) an attempt to kill a deputy United States marshal (§ 1114), (2) assault on a deputy marshal (§ 111), and (3) the use of a firearm during a crime of violence (§ 924(c)).”¹⁵³ During a plea hearing, Mr. Braxton “pleaded guilty to the assault and firearm counts.”¹⁵⁴ He pleaded not guilty to the attempt-to-kill count.¹⁵⁵ At sentencing, based on a provision in § 1B1.2(a) of the Commission’s 1990 Guidelines Manual, “the District Court in essence sentenced [Mr. Braxton] as though he had been convicted of attempted killing, the only charge to which Braxton had not confessed guilt.”¹⁵⁶ Circuit courts were split on whether § 1B1.2(a) authorized the district court to impose such a sentence.¹⁵⁷

The Supreme Court granted certiorari to resolve the split.¹⁵⁸ However, after certiorari was granted, the Commission began the process of updating the Guidelines, including § 1B1.2(a), with the explicit purpose of deciding the issue presented in Mr. Braxton’s case.¹⁵⁹ In an opinion written by Justice Antonin Scalia, the Court declined to decide the issue.¹⁶⁰ While reasserting the Court’s “principal purpose” is to resolve disputes among inferior courts, it acknowledged that in certain nonconstitutional law circumstances it is “not the sole body that could eliminate such conflicts.”¹⁶¹ Congress, of course, can resolve a dispute concerning one of its statutory provisions by passing a new law clarifying the prior statute and overruling conflicting court decisions. The Court similarly recognized that the Commission has the authority to resolve disputes relating to its Guidelines. Reasoning that because “[t]he Guidelines are of course implemented by the courts [] in charging the Commission periodically to review and revise the

¹⁵² 500 U.S. 344 (1991).

¹⁵³ *Id.* at 345.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 346.

¹⁵⁷ *Braxton*, 500 U.S. at 346.

¹⁵⁸ *Id.* at 347.

¹⁵⁹ *Id.* at 348; 56 Fed. Reg. 1891 (1991).

¹⁶⁰ Mr. Braxton’s certiorari petition was granted to resolve two questions presented. Though the Court declined to address the first question, it did resolve the second. See *Braxton*, 500 U.S. at 349–51.

¹⁶¹ *Id.* at 347.

Guidelines, 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.”¹⁶² In declining to decide the question presented to it, the Court noted, and tacitly endorsed, that “the Commission has already undertaken a proceeding that will eliminate circuit conflict over the meaning of” the Guideline at issue.¹⁶³ Eliminating a circuit conflict necessarily involves invalidating some circuit court decisions. The Supreme Court knew that, and it held that the Commission had the power to do so.

The Commission’s authority recognized by the Court in *Braxton* does not perfectly match the authority this Comment argues the Commission has to resolve circuit splits over the meaning of extraordinary and compelling reasons. However, none of the dissimilarities suggest *Braxton*’s reasoning should not apply in this instance. To start, *Braxton* considered the Guidelines whereas the Commission exercises its power over compassionate release through policy statements. While there are meaningful differences between Guidelines and policy statements, those distinctions are immaterial to this analysis, as discussed in Part II.C.4.

When the Court decided *Braxton* and acknowledged the Commission’s authority to resolve certain circuit splits, the Sentencing Guidelines were mandatory. Today they are merely advisory; however, this change does not impact the Commission’s ability to resolve circuit splits relating to compassionate release. In 2005, the Supreme Court decided *United States v. Booker*.¹⁶⁴ Freddie Booker was convicted of possession with the intent to distribute at least fifty grams of crack cocaine.¹⁶⁵ At sentencing, the court “concluded by a preponderance of the evidence that Mr. Booker had possessed an additional 566 grams of crack and that he was guilty of obstructing justice.”¹⁶⁶ Those postconviction judicial findings triggered an increased Guidelines range.¹⁶⁷ On appeal, Mr. Booker argued that increasing his sentence based on facts found by a judge—rather than a jury or stipulated in a plea agreement—

¹⁶² *Id.* at 348 (quotation marks omitted).

¹⁶³ *Id.* at 348–49.

¹⁶⁴ 543 U.S. 220 (2005).

¹⁶⁵ *Id.* at 227.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* Based on that increased guideline range, Booker was sentenced to thirty years of incarceration. *Id.*

violated the Sixth Amendment and was therefore unconstitutional.¹⁶⁸ The Supreme Court agreed.¹⁶⁹ To remedy this constitutional violation, the Court concluded that the statutory provision making the Guidelines mandatory “must be severed and excised. . . . So modified, the federal sentencing statute . . . makes the Guidelines effectively advisory. It requires the sentencing court to consider Guideline ranges . . . but it permits the court to tailor the sentence in light of other statutory concerns as well.”¹⁷⁰

The advisory nature of today’s Guidelines does not impact this analysis. Post-*Booker* commentators continue to suggest the Sentencing Commission retains the authority to resolve certain circuit conflicts as the Court recognized in *Braxton*. In 2017, well after *Booker*, then-law student Elliot Edwards noted that “[t]he Commission is in an unusually strong position to resolve such circuit conflicts. While the U.S. Supreme Court is traditionally responsible for resolving circuit splits over the meaning of a statute, it has recognized the Sentencing Commission’s unique authority and responsibility to ‘review and revise’ the Guidelines.”¹⁷¹ Citing *Braxton*, he wrote “the Court chose not to resolve a circuit conflict because Congress had entrusted the Commission with the duty to ‘make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest.’”¹⁷²

Most importantly, four current Supreme Court Justices have publicly suggested that, notwithstanding *Booker*, the Commission can resolve circuit disputes relating to its Guidelines. In a statement respecting the denial of certiorari in *Longoria v. United States*,¹⁷³ which asked the Court to resolve “an important and longstanding split among the Courts of Appeals over the proper interpretation” of a Sentencing Guideline,¹⁷⁴ Justice Sonia Sotomayor, joined by Justice Neil Gorsuch, wrote “separately to emphasize the need for clarification from the Commission.”¹⁷⁵ According to Justices Sotomayor and Gorsuch, it was the responsibility of the

¹⁶⁸ *Booker*, 543 U.S. at 227.

¹⁶⁹ *Id.* at 243–44.

¹⁷⁰ *Id.* at 245.

¹⁷¹ Elliot Edwards, Note, *Eliminating Circuit-Split Disparities in Federal Sentencing Under the Post-Booker Guidelines*, 72 IND. L.J. 817, 825 (2017).

¹⁷² *Id.* (quoting *Braxton*, 500 U.S. at 348); see also Heather Crabill, Comment, *Restraints of the Body or of the Mind: Conflicting Interpretations of the Physical Restraint Sentencing Enhancement*, 74 OKLA. L. REV. 795, 822 (2022) (discussing *Braxton*).

¹⁷³ 141 S. Ct. 978 (2021) (statement of Sotomayor, J., joined by Gorsuch, J., respecting the denial of certiorari).

¹⁷⁴ *Id.* at 979.

¹⁷⁵ *Id.*

Commission to address this issue.¹⁷⁶ Doing so presumes the Commission's ability to resolve the dispute and effectively overrule contrary circuit court decisions. Later, in *Guerrant v. United States*,¹⁷⁷ which "implicate[d] a split among the Courts of Appeals over the proper definition of a 'controlled substance offense,' and, accordingly, over which defendants qualify as career offenders," Justice Sotomayor, this time joined by Justice Amy Coney Barrett, again published a statement respecting the Court's denial of certiorari.¹⁷⁸ She wrote that "[i]t is the responsibility of the Sentencing Commission to address this division to ensure fair and uniform application of the Guidelines," citing *Braxton* for authority.¹⁷⁹ Most recently, in *McClinton v. United States*,¹⁸⁰ which sought review of a district court's use of acquitted conduct when determining an individual's sentence, Justice Brett Kavanaugh, joined by Justices Gorsuch and Barrett, released a statement respecting the denial of certiorari, in which he argued that because "[t]he Sentencing Commission is currently considering the issue[,] [i]t is appropriate for this Court to wait for the Sentencing Commission's determination before the Court decides whether to grant certiorari" to a petition raising the question.¹⁸¹ Four members of the Court, representing the full breadth of the Court's ideological spectrum, have recently acknowledged the Commission's enduring authority, indeed its "duty,"¹⁸² to resolve certain circuit court disputes.

4. The Commission can bind courts through its policy statements.

Whereas *Braxton* discussed a dispute over the Guidelines' proper interpretation, this Comment advocates for the Commission to resolve circuit disputes by promulgating a policy statement. There is no reason to think *Braxton's* reasoning applies with less force to a policy statement. In fact, if anything, *Braxton's* reasoning applies more forcefully today to policy statements than

¹⁷⁶ *Id.*

¹⁷⁷ 142 S. Ct. 640 (2022) (statement of Sotomayor, J., joined by Barrett, J., respecting the denial of certiorari).

¹⁷⁸ *Id.* at 640–41.

¹⁷⁹ *Id.*

¹⁸⁰ 600 U.S. at __ (2023) (mem.), *denying cert.* to 23 F.4th 732 (7th Cir. 2022).

¹⁸¹ *Id.* (statement of Kavanaugh, J., joined by Gorsuch J. and Barrett J., respecting the denial of certiorari).

¹⁸² *Braxton*, 500 U.S. at 348 ("The Commission took this action pursuant to its statutory duty 'periodically to review and revise' the Guidelines.").

Guidelines. Under 28 U.S.C. § 994(a)(1), the Commission is empowered to promulgate Guidelines which are to be used by courts in determining the proper sentence to impose upon an individual's conviction.¹⁸³ While, prior to *Booker*, the Guidelines were binding, today they are merely advisory.¹⁸⁴ Section 994(a)(2) authorizes the Commission to promulgate “general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further” the purposes of sentences.¹⁸⁵ While policy statements are normally advisory, as discussed below, in certain circumstances—including sentence modifications—they can be binding on courts.

In *Dillon v. United States*,¹⁸⁶ the Supreme Court discussed what impact, if any, its decision in *Booker* had on proceedings under 18 U.S.C. § 3582(c)(2). This provision provides the second means—besides compassionate release—through which district courts can review and reduce an individual's sentence.¹⁸⁷ It states that

in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.¹⁸⁸

In short, § 3582(c)(2) allows courts to reduce a sentence previously imposed if, after sentencing, the Commission lowers the relevant sentencing Guideline range. Thus, § 3582(c)(2) provides relief for changes in the Guidelines, which is similar to, but distinct from the dispute over nonretroactive changes in the law discussed in Mr. Crandall's and Mr. Ruvalcaba's cases.

In *Dillon*, the Court discussed how this provision interacts with the Commission's sentence modification policy statements.

¹⁸³ 28 U.S.C. § 994(a)(1).

¹⁸⁴ See *Booker*, 543 U.S. at 245.

¹⁸⁵ 28 U.S.C. § 994(a)(2).

¹⁸⁶ 560 U.S. 817 (2010).

¹⁸⁷ 18 U.S.C. § 3582(c)(2).

¹⁸⁸ 18 U.S.C. § 3582(c)(2).

In 1993, Percy Dillon was convicted of conspiracy to distribute and possession with the intent to distribute more than five hundred grams of powder cocaine and more than fifty grams of crack cocaine.¹⁸⁹ He was sentenced, based on the Sentencing Guideline's range, to 322 months of imprisonment.¹⁹⁰ After his sentencing, as part of the Commission's efforts to achieve sentencing parity for crack and powder cocaine convictions, the Commission lowered the Guideline range for his crack conviction.¹⁹¹ Based on this change, he filed a motion seeking a modification to his sentence under § 3582(c)(2).¹⁹² The district court agreed that his sentence should be reduced.¹⁹³

Based on § 3582(c)(2)'s text, sentence reductions must be "consistent with applicable policy statements issued by the Sentencing Commission,"¹⁹⁴ which, at the time, was § 1B1.10 of the U.S. Sentencing Guidelines.¹⁹⁵ Section 1B1.10(b)(2)(A) states that "the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection."¹⁹⁶ Thus, under the applicable policy statement, while § 3582(c)(2) allows for a sentence reduction in light of a change to the Sentencing Guidelines, that reduction cannot lower the ultimate sentence to a term below what would be authorized under the new Guidelines. This policy statement limited the reduction the district court could grant Mr. Dillon.¹⁹⁷ He appealed arguing that *Booker*, which rendered the Sentencing Guidelines advisory, also applied to any policy statement promulgated by the Commission.¹⁹⁸ In effect, he argued that the Commission's policy statements could not constrain district court judges.

In a 7–1 decision,¹⁹⁹ the Supreme Court disagreed with Mr. Dillon and held that *Booker* does not render policy statements guiding sentence modification decisions advisory because these

¹⁸⁹ *Dillon*, 560 U.S. at 822.

¹⁹⁰ *Id.* at 823.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ 18 U.S.C. § 3582(c)(2).

¹⁹⁵ U.S. SENT'G GUIDELINES MANUAL § 1B1.10 (U.S. SENT'G COMM'N 2007).

¹⁹⁶ *Id.*

¹⁹⁷ *Dillon*, 560 U.S. at 824–25.

¹⁹⁸ *Id.* at 825–26.

¹⁹⁹ Justice Samuel Alito did not take part in the decision.

proceedings do not present the Sixth Amendment issue that *Booker*'s remedial holding resolved.²⁰⁰ Because § 3582(c)(2) represents a sentence modification procedure separate from the constitutionally compelled components of a “criminal prosecution[],”²⁰¹ “proceedings under § 3582(c)(2) do not implicate the Sixth Amendment right to have essential facts found by a jury beyond a reasonable doubt.”²⁰² The Court reasoned that “after *Booker*, the Commission retains at least some authority to bind the courts.”²⁰³ The Court specifically pointed to 28 U.S.C. § 994(u), another provision of the SRA, which states that “[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.”²⁰⁴ Because the decisions made by the Commission under § 994(u) are binding, it “emphatically undermines the dissent’s insistence that the Guidelines after *Booker* are ‘completely advisory.’”²⁰⁵ Therefore, the Court held that § 3582(c)(2) “establishes a two-step inquiry.”²⁰⁶ First, a court must determine whether a reduction is authorized by the policy statement.²⁰⁷ Then, the court must consider whether the reduction is warranted based on the § 3553(a) factors.²⁰⁸

Given that the Court has held that policy statements guiding sentence modifications under § 3582(c)(2) are binding, the policy statements guiding sentence modifications under § 3582(c)(1)—including those describing what should be considered an extraordinary and compelling reason—must also be binding. One would be hard-pressed to explain a meaningful difference between the two provisions’ texts justifying differential treatment. The operative language in the two subsections is nearly identical.²⁰⁹ The Court in *Dillon* relied on the fact that § 994(u) authorizes the Sentencing Commission to make binding determinations relating to sentencing modifications. As this Comment has argued, § 994(t)

²⁰⁰ *Dillon*, 560 U.S. at 828.

²⁰¹ U.S. CONST. amend. VI.

²⁰² *Dillon*, 560 U.S. at 828.

²⁰³ *Id.* at 830.

²⁰⁴ 28 U.S.C. § 994(u).

²⁰⁵ *Dillon*, 560 U.S. at 830.

²⁰⁶ *Id.* at 826–27.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Compare* 18 U.S.C. § 3582(c)(1)(a), *with* 18 U.S.C. § 3582(c)(2).

similarly grants the Commission binding authority to describe extraordinary and compelling reasons. The two paths to sentence modification are too alike to argue seriously that the Commission's policy statements guiding them should be treated differently. Both have the power to bind courts. *Booker* does not change that.

Several circuit courts have endorsed such a view. The Sixth Circuit held that “[s]ection 3582(c)(1)’s and (c)(2)’s parallel language and structure compel us to conclude that compassionate release hearings are sentence-modification proceedings and that courts considering motions filed under § 3582(c)(1) must follow a *Dillon*-style test.”²¹⁰

Before the FSA, there was no question that the Commission's compassionate release policy statements were binding on courts. Only because the current policy is inapplicable do courts have the newfound authority to define extraordinary and compelling reasons. There is nothing in either the SRA or the FSA that grants district courts this power.

In holding that the current policy statement is inapplicable, most courts have acknowledged that once the Commission updates its policy statement defining extraordinary and compelling reasons, it will once again be binding on courts. The First Circuit, for example, advised that “‘applicable policy statements’ issued by the Sentencing Commission are binding on courts reviewing compassionate-release motions.”²¹¹ If that was not clear enough, the First Circuit continued:

Last but not least, we recognize that the situation is fluid. The Sentencing Commission's lack of a quorum has stymied the Commission from issuing policy statements. If and when the Sentencing Commission issues updated guidance applicable to prisoner-initiated motions for sentence reductions consistent with both section 3582(c)(1)(A) and the Sentencing Commission's statutory mandate under section 994(t), district courts addressing such motions not only will be bound by the statutory criteria but also will be required to ensure that their determinations of extraordinary and compelling reasons are consistent with that guidance.²¹²

²¹⁰ *Jones*, 980 F.3d at 1107.

²¹¹ *United States v. Ruvalcaba*, 26 F.4th 14, 19 (1st Cir. 2022) (quotation marks omitted).

²¹² *Id.* at 23–24 (citation omitted); see also *United States v. McCoy*, 981 F.3d 271, 284 (4th Cir. 2020).

That time has come: the Commission has regained its quorum and has updated the compassionate release policy statement. Once it takes effect on November 1, 2023, courts will be bound by it. If the Commission stipulates a specific circumstance can constitute an extraordinary and compelling reason but an appellate court has held the opposite, the Commission's determination will carry the day. This is true of disputes that exist today and of disputes that will arise in the future due to the discretion granted in the catchall provision.

5. The Commission's policy statement is due deference from courts.

Even if, contrary to what this Comment argues, the Commission lacks authority to independently erase contrary circuit case law, if appellate courts grant the Commission's amended policy statement deference, courts could abandon their prior contrary interpretations of § 3582(c)(1)(A) in favor of the amended policy statement's description of extraordinary and compelling reasons. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,²¹³ the Supreme Court resolved a situation like the one courts will face once the Commission's amended policy statement takes effect: an agency interpreted a statute contrary to a circuit court's prior interpretation. *Brand X* held that an agency's interpretation of an ambiguous statute should be given deference and therefore trumps a court's prior contrary interpretation of the same ambiguous statute.²¹⁴

Title II of the Communications Act of 1934,²¹⁵ as amended, "subjects all providers of 'telecommunications servic[e]' to mandatory common-carrier regulation."²¹⁶ The Federal Communications Commission (FCC), operating under its statutory authorization, interpreted "telecommunications service" to exclude "cable companies that sell broadband Internet service."²¹⁷ On appeal, the Ninth Circuit vacated the FCC's interpretation of the Act, reasoning that prior Ninth Circuit precedent interpreting "telecommunications services" to include cable modem services foreclosed the FCC's interpretation.²¹⁸

²¹³ 545 U.S. 967 (2005).

²¹⁴ *Id.* at 982–83.

²¹⁵ Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–163).

²¹⁶ *Brand X*, 545 U.S. at 973.

²¹⁷ *Id.* at 974.

²¹⁸ *Id.* at 979–80.

In an opinion written by Justice Clarence Thomas, the Supreme Court reversed the Ninth Circuit and held that “[a] court’s prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.”²¹⁹ The Court justified this rule as stemming from *Chevron, U.S.A. v. Natural Resources Defense Council*,²²⁰ which created a “presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than courts) to possess whatever degree of discretion the ambiguity allows.”²²¹ Because of this presumption, “[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”²²² In short, *Brand X* establishes that an intervening agency interpretation requires a court to “review[] the agency’s construction on a blank slate” and to grant the agency’s interpretation deference even if the court had previously interpreted the statute to the contrary, unless the statute’s text unambiguously forecloses the agency’s interpretation.²²³

The Commission’s amended policy statement is due *Brand X* deference. *Brand X* deference applies if three conditions are met. First, the agency must otherwise be entitled to deference.²²⁴ The Commission, like all administrative agencies, is entitled to deference when exercising its statutory authority to fill a statutory gap. Second, there must be a prior judicial interpretation of the disputed statute.²²⁵ As discussed above, in the absence of an applicable policy statement, courts have interpreted the meaning of extraordinary and compelling reasons on their own.²²⁶ Finally, the disputed statute must be ambiguous such that Congress created

²¹⁹ *Id.* at 982.

²²⁰ 467 U.S. 837 (1984).

²²¹ *Brand X*, 545 U.S. at 982 (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996)).

²²² *Id.* at 982–83.

²²³ *Id.* at 982.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *See supra* Part I.C.

a statutory gap that it intended to be filled by an agency's interpretation.²²⁷ Although some circuit courts have incorrectly suggested otherwise,²²⁸ § 3582(c)(1)(A) is ambiguous and created a statutory gap. Extraordinary and compelling is inherently ambiguous. If § 3582(c)(1)(A) was unambiguous, courts would not have reached fundamentally inconsistent interpretations of its meaning. Further, if its meaning was clear, there would be no need for the Commission to “describe what should be considered extraordinary and compelling reasons for sentence reduction.”²²⁹ Classifying § 3582(c)(1)(A) as unambiguous ignores Congress's express instruction that the Commission fill this statutory gap and renders § 994(t) superfluous. Even if the Commission's amended policy statement does not, on its own, erase contrary circuit case law, *Brand X* instructs courts to give deference to the amended policy statement by abandoning their prior interpretations of § 3582(c)(1)(A). Whether the Commission's amended policy statement overrides contrary case law on its own or due to *Brand X* deference, the practical outcome is the same: once the amended policy statement takes effect, contrary case law will be erased.

III. EXERCISING THIS AUTHORITY

Based on the text of the SRA, as modified by the FSA, the Commission has authority to resolve circuit splits over whether certain circumstances can establish extraordinary and compelling reasons by promulgating updated policy statements that expressly include (or exclude) disputed circumstances in the description of extraordinary and compelling reasons. However, the Commission's second concern—whether it should exercise this authority—remains. Why should the Commission, rather than another institution such as courts, decide what circumstances justify compassionate release?

This Part offers three answers. First, Congress expressly granted the Commission—rather than courts—the authority and duty to do so. Second, unique features of the Commission make it better suited to decide these questions compared to courts. Third,

²²⁷ *Brand X*, 545 U.S. at 982–83.

²²⁸ See, e.g., *United States v. McCall*, 56 F.4th 1048, 1064 (6th Cir. 2022) (“There is no such ambiguity here.”).

²²⁹ 28 U.S.C. § 994(t).

the Commission, having previously acted as a leader in progressive sentencing reform efforts, is more likely than courts to create a progressive and just system of compassionate release.

A. Congress Delegated This Task to the Commission

As discussed above, Congress expressly granted the Commission the authority to define extraordinary and compelling reasons.²³⁰ Relatedly, it explicitly instructed the Commission to respond affirmatively to unwarranted sentencing disparities.²³¹ If Congress wanted to retain authority and responsibility for itself, or grant them to another institution, such as courts, Congress could have done so. It did not. Respecting Congress's decision-making power requires accepting the Commission's authority and duty to resolve the problems identified with the current compassionate release system. For another branch of government to ignore the express will of Congress and claim this authority for itself would constitute a serious intrusion upon Congress's authority. Congress has made a choice and that choice must be respected.

B. The Commission Has Comparative Advantages

Congress's decision to grant the Commission, rather than courts, this authority settles the legal question, but, as a policy matter, one might debate the soundness of Congress's decision. This question—who should decide whether disputed circumstances constitute extraordinary and compelling reasons—requires considering “the comparative advantages” of circuit courts versus the Commission.²³² As one circuit judge has compellingly answered the question, “[t]he [Commission] is in the best position to set national sentencing policy—not just because the Commission can base its determinations on empirical data . . . but, more importantly, because it has democratic legitimacy.”²³³ In short, the Commission, rather than appellate courts, is better suited to make categorical determinations of whether certain circumstances constitute extraordinary and compelling reasons for three reasons: (1) the Commission has greater access to the knowledge

²³⁰ 28 U.S.C. § 994(t).

²³¹ See 28 U.S.C. § 991(b)(1)(B).

²³² *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring), *vacated on other grounds*, 552 U.S. 1306 (2008) .

²³³ *Id.*

needed to decide these questions, (2) the Commission can better bring about national uniformity, and (3) the Commission has more democratic legitimacy.

1. Knowledge.

The Commission was originally envisioned as an expert policymaking body.²³⁴ Its supporters expected the Commission to be able “to achieve rational federal sentencing policy by grounding its decisions in data and the expertise of its members.”²³⁵ By statute, the “purpose” of the Commission is to “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.”²³⁶ Although the Commission has not always achieved these purposes, it has better access, as compared to circuit courts, to the information necessary to doing so.

Whereas circuit courts are celebrated for their generalist judges, Commissioners and the Commission’s professional staff are selected because of their intimate knowledge with federal sentencing. “[T]he Commission fills an important institutional role” because “[i]t has the capacity courts lack to ‘base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.’”²³⁷ The Commission has a comparative advantage based on its internal expertise of sentencing and related empirical data.

However, no institution, including the Commission, is omniscient. Recognizing this, the Commission is structured such that its decision-making benefits from external knowledge. Whereas appellate judges rely predominantly on the parties’ briefs, limited amici briefs, and their own research to decide cases, the Commission is, by law, required to consider a much larger pool of knowledge. To promulgate an updated policy statement, the Commission must “consult” with the BOP, the Judicial Conference of the United States, the Department of Justice, and the Federal

²³⁴ Rachel E. Barkow, *The Evolving Role of the United States Sentencing Commission*, 33 FED. SENT’G REP. 1, 3 (2020).

²³⁵ *Id.*

²³⁶ 28 U.S.C. § 991(b)(1)(C).

²³⁷ *United States v. Kimbrough*, 552 US 85, 108–09 (2007) (quoting *Pruitt*, 502 F.3d at 1171 (McConnell, J., concurring)).

Public Defenders.²³⁸ Then, the Commission must follow the Administrative Procedures Act's²³⁹ notice-and-comment rulemaking procedures, publishing a proposed policy statement and allowing the public to share opinions on the proposal.²⁴⁰ During the notice-and-comment period for the Commission's proposed 2023 priorities, which included amendments to the compassionate release policy statement, the Commission "received more than 8,000 letters of public comment."²⁴¹ No circuit court, no matter how dedicated, could sift through this much information in a timely manner for a single case. Deciding tricky questions related to compassionate release requires extensive expertise and the ability to consider huge amounts of data; the Commission is better suited to provide that expertise than generalist circuit courts.

2. Uniformity.

If the five years since the FSA's passage have demonstrated anything, it is that circuit courts are unable to use their discretion in a way that establishes national uniformity. Yet the rule of law and Congress demand such uniformity, where practicable.²⁴² Because the Commission's policy statement binds courts nationwide, it, unlike circuit courts, can bring needed uniformity to compassionate release. Of course, the Supreme Court could also bring about this uniformity, but as discussed in Part I.C.2, the Court has shown no interest in doing so. Even if the Court is merely waiting for the Commission to provide guidance before it wades into the compassionate release question, it is unlikely the Court has room on its shrinking docket to respond to every circuit dispute that the catchall provision will introduce. Only the Commission, whose primary purpose is to confront sentencing disparities, is suited to engage in the whack-a-mole-type response that bringing uniformity in the shadow of judicial discretion will require.

²³⁸ 28 U.S.C. § 994(o).

²³⁹ Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

²⁴⁰ 28 U.S.C. § 994(x).

²⁴¹ *U.S. SENTENCING COMMISSION SEEKS COMMENT ON PROPOSED REVISIONS TO COMPASSIONATE RELEASE*, U.S. SENT'G COMM'N (Jan. 12, 2023) <https://perma.cc/X8ZT-DK89>.

²⁴² 28 U.S.C. § 991(b) ("The purposes of the United States Sentencing Commission are to . . . avoid[] unwarranted sentencing disparities.").

3. Democratic legitimacy.

The Commission can claim more democratic legitimacy in its decision-making than courts. Whereas judges, given their lifetime tenure, are, theoretically, free from democratic accountability, “[t]he Commission (for better or worse) is responsive to Congress in the way it performs these duties.”²⁴³ Like Article III judges, Commissioners are appointed by the President and must be approved by the Senate.²⁴⁴ By statute, the Commission must be bipartisan.²⁴⁵ Before the Commission can amend its Guidelines or policy statements, it must submit them to Congress, which can amend or reject them before they go into effect.²⁴⁶ Deciding under what circumstances someone can receive compassionate release should involve this input. At its core, compassionate release is about providing someone with compassion—with a second chance. Those questions should be decided by the entire polity. The Commission, rather than courts, is better suited to foster that discussion.

C. The Commission Has Comparative Disadvantages

As discussed above, the Commission has several institutional characteristics that justify Congress’s decision to task the Commission with describing the circumstances in which a sentence reduction is appropriate under § 3582(c)(1)(A). However, these same characteristics may at times frustrate the Commission’s ability to exercise its authority in the way this Comment proposes. While these concerns are legitimate, as discussed below they are likely overblown. Notwithstanding these concerns, the Commission is best suited to establish nationwide uniformity in compassionate release and is the body most likely to establish that uniformity in a way that expands access to compassionate release.

1. Future Commissioners may seek to unwind the current Commission’s work.

Ideally, the Commission would establish a uniform system of compassionate release by promulgating policy statements that

²⁴³ *Pruitt*, 502 F.3d at 1171 (McConnell, J., concurring).

²⁴⁴ 28 U.S.C. § 991(a).

²⁴⁵ 28 U.S.C. § 991(a) (requiring that no more than four Commissioners be of the same political party).

²⁴⁶ 28 U.S.C. § 994(p).

expand, rather than contract, individuals' ability to receive compassionate release. The Commission's amendments to the compassionate release policy statement, particularly its resolution of the question of nonretroactive changes in the law, suggest the current slate of Commissioners is committed to using its authority to improve compassionate release. However, there is no guarantee this will always be true. Unlike Article III judges, Commissioners do not have life tenure. Eventually they will be replaced, and if future Commissioners disagree with the policies adopted by previous Commissioners, these new Commissioners could change course. Similarly, while democratic input has, in recent memory, supported progressive criminal justice reforms, public opinion could, and may already, be shifting. Democratic accountability has, more often than not, increased the harshness of the federal sentencing regime.²⁴⁷ Congress has previously used its oversight of the Commission—a substantial source of the Commission's democratic legitimacy—to block some of the Commission's more progressive criminal justice reform efforts.

Given these concerns, one may think that it is better to leave compassionate release to judges who, presumably, are unaffected by political whims and personnel turnover. However, courts have not consistently enacted an expansive understanding of compassionate release. Many circuit courts have used their discretion to repeatedly limit the circumstances in which someone is eligible for compassionate release. It is not as if courts are creating a just system of compassionate release which would be stymied by introducing democratic legitimacy.

Further, institutional norms of the Commission and principles of administrative law would challenge any future Commission's attempts to unwind the current Commission's progress on compassionate release. The Commission's guiding principle is to provide "certainty and fairness" in federal sentencing.²⁴⁸ The Commission works slowly and tries to avoid abrupt pendulum swings in federal sentencing policy. Future Commissioners will likely feel institutional pressure to avoid summarily reversing the work of prior Commissions. Even if a future Commission did so,

²⁴⁷ See Peter K. Enns, *The Public's Increasing Punitiveness and Its Influence on Mass Incarceration in the United States*, 58 AM. J. POL. SCI. 857, 857 (2014) (arguing "for the importance of considering public opinion as a determinant of mass incarceration in the United States").

²⁴⁸ See 28 U.S.C. § 991(b)(1)(B).

there may be a claim that such a rescission was arbitrary and capricious.²⁴⁹ Given the current Commission has started down the path of using the authority described in this Comment to expand the circumstances under which extraordinary and compelling reasons justifying a sentence reduction under § 3582(c)(1)(A) exist, future Commissions will face institutional and legal pressure to not abandon this progress.

2. Structural limitations on the Commission's ability to resolve circuit splits.

Even if the Commission wants to resolve a circuit split by adopting a progressive understanding of compassionate release, it may be unable to do so if it again loses its quorum or if Congress blocks progressive amendments to the Commission's policy statement from taking effect. Similarly, the Commission simply may get overwhelmed by circuit splits such that it cannot act quickly enough to resolve all of them. The requirement of soliciting public comment on any proposed amendments to the policy statement necessarily slows down the Commission's response to novel circuit splits. The Commission is not perfectly suited to oversee the judicial discretion that Congress and the Commission have granted courts in deciding motions for compassionate release. However, even considering these institutional challenges, the Commission is better suited than any other institution.

D. The Commission Has Successfully Taken on This Role in the Past

The role this Comment proposes for the Commission—using its statutory authority to address unwarranted sentencing disparity by enacting progressive amendments to its Guidelines and policy statements—is not novel. The Commission's efforts to eliminate the racist sentencing disparity between crack and powder cocaine charges—one of the most infamous sentencing disparities in recent memory—is an example of how this Commission has taken on such a role in the past.²⁵⁰ The Commission, faithfully executing its statutory mandate to “avoid[] unwarranted sentencing disparities,” acted as a leader on efforts to eliminate this disparity.²⁵¹ Although the Commission did not succeed fully, it

²⁴⁹ See, e.g., *Motor Vehicles Mnfrs. Ass'n v. State Farm*, 463 U.S. 29, 42 (1983).

²⁵⁰ See MICHELLE ALEXANDER, *THE NEW JIM CROW* 140–44 (10th anniversary ed. 2020).

²⁵¹ 28 U.S.C. § 991(b)(1)(B).

“paved the way for future reforms lowering crack sentences and ultimately the lowering of all federal drug sentences.”²⁵² As it did in response to the crack–powder disparity, the Commission should use its statutory authority to lead efforts to address the compassionate release disparities that the catchall would otherwise allow.

The Commission began its efforts to end the crack–powder disparity under Judge Richard Conaboy’s term as chair of the Commission from 1994 through 1998.²⁵³ This period exemplifies the Commission’s role as a leader pushing for progressive sentencing reforms. Under his leadership, the Commission engaged in a systematic review of the federal cocaine sentencing policy, specifically the crack–powder sentencing disparity. After this review, “the Commission concluded that the disparity fails to meet the sentencing objective set forth by Congress.”²⁵⁴ The Commission unanimously recommended that Congress revisit the existing disparity.²⁵⁵

Unfortunately, politics were against Judge Conaboy and the Commission. During the peak of the war on drugs, Congress and President Bill Clinton’s administration had no interest in the Commission’s suggested reforms.²⁵⁶ Undeterred, the Commission continued to agitate for reform. In 1995, the Commission promulgated an amendment to the Sentencing Guidelines that “would have replaced the 100-to-1 ratio with a 1-to-1 ratio,” but Congress rejected the amendments.²⁵⁷ In 1997 and 2002, the Commission released reports urging Congress to reduce the disparity to at least one-to-five and one-to-twenty respectively.²⁵⁸ Again, Congress demurred.

In 2007, the Commission tried again. Realizing the political branches were unlikely to act, the Commission exercised its own authority and adopted an ameliorating change to the Guidelines.²⁵⁹ The Commission “reduce[d] the base offense level associated with each quantity of crack by two levels.”²⁶⁰ Unlike in 1995,

²⁵² Barkow, *supra* note 234, at 1.

²⁵³ *Id.* at 7.

²⁵⁴ *Kimbrough*, 552 U.S. at 97 (quotation marks omitted).

²⁵⁵ Barkow, *supra* note 234, at 7.

²⁵⁶ *Id.*

²⁵⁷ *Kimbrough*, 552 U.S. at 99.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 99–100.

²⁶⁰ *Id.* at 100.

Congress allowed the amendments to take effect.²⁶¹ This reform started to chip away at the sentencing disparity between crack and cocaine offenses.²⁶² Acknowledging its actions were “only . . . a partial remedy for the problems generated by the crack/powder disparity, the Commission noted that any comprehensive solution requires appropriate legislative action by Congress.”²⁶³

The Commission lobbied as hard as it could, and when its lobbying was ignored, it used its own powers to provide a partial remedy. This change in the Guidelines, which the Commission voted to apply retroactively, led to an average sentence reduction of over two years for people negatively impacted by the crack–powder disparity.²⁶⁴ Eventually, the Commission’s continued agitation paid off. In 2010, Congress passed the Fair Sentencing Act of 2010,²⁶⁵ which reduced the crack–powder disparity to eighteen-to-one.²⁶⁶ While an imperfect remedy, it was nonetheless an important step that would not have happened without the Commission’s agitation.²⁶⁷

As the Commission’s advocacy to eliminate the crack–powder sentencing disparity makes clear, the Commission is no stranger to lobbying for, and, when possible, itself implementing progressive sentencing reforms to eliminate disparities. The current system of compassionate release in which judges define the meaning of extraordinary and compelling reasons without the input or oversight of the Commission has created unwarranted and unacceptable sentencing disparities. The court that happens to hear an individual’s motion plays an outsized role in an individual’s likelihood of receiving compassion. But we need not be stuck with this system. The Commission can and should—as it has done in the past—exercise its statutory authority to create a system of compassionate release that enjoys the benefits of judicial discretion without shouldering its burdens.

The Commission is right to promulgate a policy statement that retains judicial discretion to determine the meaning of extraordinary and compelling reasons by including a catchall provision, but for judicial discretion to improve the compassionate

²⁶¹ *Id.*

²⁶² *Kimbrough*, 552 U.S. at 100.

²⁶³ *Id.* (quotation marks and citations omitted).

²⁶⁴ Barkow, *supra* note 234, at 10.

²⁶⁵ Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 U.S.C.).

²⁶⁶ Barkow, *supra* note 234, at 10.

²⁶⁷ *Id.*

release system, the Commission must also regularly promulgate updated policy statements that respond to, and resolve, circuit disputes introduced by this discretion. If the catchall provision takes effect, individuals will undoubtedly bring claims for compassionate release raising novel legal arguments. Many of these will likely be without merit, yet there will undoubtedly be some who articulate novel, meritorious circumstances that should justify a grant of compassionate release. Circuit courts will continue to disagree on which circumstances justify a sentence reduction. And when they do, the Commission should again step in and update its policy statement to resolve these new disputes. Rather than grant courts the authority to interpret freely the meaning of extraordinary and compelling reasons and then consider its work complete, the Commission must regularly respond to circuit court decisions and overrule those that unjustifiably limit compassionate release. The Commission's amendments to the compassionate release policy statement evince an inclination to take on this role. That inclination is correct.

CONCLUSION

After his successful appeal, Mr. Ruvalcaba reached a deal with the U.S. Attorney to allow his compassionate release motion to proceed unopposed.²⁶⁸ It was eventually granted and, in January 2023, he walked out of the Butner Federal Corrections Complex.²⁶⁹ At the time of this writing, Mr. Crandall remains incarcerated; no court has extended him compassion. If nothing changes, he will remain incarcerated until April 26, 2027.²⁷⁰ Judicial discretion is responsible for both outcomes. To be clear, this scenario is better than the one before the FSA, in which no court had discretion to grant either individual compassionate release. But a truly just system would grant both men compassionate release. The Commission can create such a system.

The Commission's April 2023 amendments to the compassionate release policy statement—specifically the catchall provision—will permit judicial discretion and, unless the Commission acts, the disparity that discretion invites. This Comment argued

²⁶⁸ See Unopposed Status Report, *United States v. Ruvalcaba*, 1:05-CR-10037-GAO, Dkt. No. 535, at *1 (D. Mass. Aug. 12, 2022).

²⁶⁹ See *Inmate Locator*, FED. BUREAU OF PRISONS, <https://perma.cc/A9ZU-KVKL> (Inmate No. 32884-112).

²⁷⁰ *United States v. Crandall*, 2020 WL 7080309, at *3 (N.D. Iowa Dec. 3, 2020).

that the Commission must strategically structure judicial discretion so that compassionate release enjoys discretion's benefits without allowing the disparities discretion creates to endure. The Commission has an underused tool capable of structuring judicial discretion in this way: Congress granted the Commission the authority to define the meaning of extraordinary and compelling reasons and made that definition binding on courts. By promulgating additional amendments to the policy statement that respond to and resolve future disputes as to the meaning of extraordinary and compelling reasons, the Commission can erase contrary appellate court holdings and bring uniformity to compassionate release. Doing so will end the regional droughts of compassion the current system allows.