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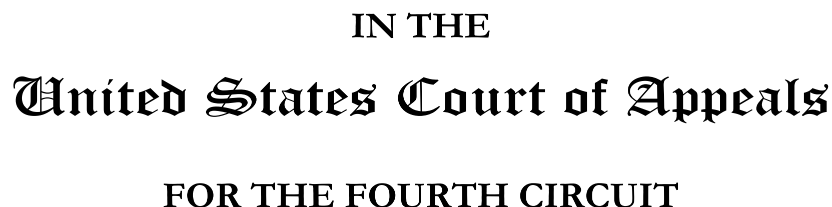

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

APPELLANT,

v.

KEITH E. BRYANT, et al.,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, NORTHERN DIVISION

THE HONORABLE CATHERINE C. BLAKE, DISTRICT JUDGE

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INTRODUCTION

The government asks this Court to return three men—each of whom has already been released after serving over 25 years in prison—to custody for an additional 20 years. That request is contrary to law and to the interests of justice, as the district court held in its opinions below. It is based on ten words in the commentary to a Sentencing Commission policy statement, language that directly conflicts with both the text of the statute (18 U.S.C. § 3582(c)(1)(A)(i)) and the text of the policy statement itself (U.S.S.G. § 1B1.13) that implements that statute. Indeed, the fact that the government has brought these appeals further demonstrates the need for precisely the judicial check on prosecutorial discretion at issue in this case, a check that Congress expressly created when implementing § 3582(c)(1)(A)(i). This Court should affirm the amended judgments of the district court and allow Keith Bryant, Craig Scott, and Kittrell Decator to continue their successful transitions back into their supportive communities.

STATEMENT OF THE CASE AND FACTS

I. Trial and Sentencing

Between September 1993 and June 1994, Keith Bryant (age 24), Craig Scott (age 23), and Kittrell Decator (age 22) participated in one attempted and two completed bank robberies—none of which resulted in any physical injuries. JA 94–

113.[1] Prior to their arrests, Scott and Decator had no criminal history, and Bryant had only a single prior conviction, for which he served no jail time. JA 286 (Decator), 371 (Bryant), 531 (Scott). Bryant, Scott, and Decator were charged with conspiracy and robbery offenses, as well as three counts each of using and carrying a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. § 924(c). JA 94–113. They proceeded to trial and were convicted of all counts. JA 57, 60.

At sentencing on February 23, 1996, the district court acknowledged that it had no discretion as to the sentences on the § 924(c) counts, and voiced its concern that the total sentence produced by these mandatory provisions were too severe. *See* JA 204 ("In my judgment, this is a very severe sentence. But I have no discretion . . . ."). But the judge's hands were tied, and even while acknowledging the redeeming qualities in each of the three young men,[2] it imposed prison terms of 637 months (53 years and 1 month) on Bryant, 627 months (52 years and 3 months) on Scott, and 633

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[1] In two of the three robberies, Scott was not present at the bank, but instead served as a lookout. JA 710–11. Bryant's role in the last of the three robberies was to "cleans[e] the [stolen] money of dye stain." JA 711.

[2] *See*, *e.g.*, JA 140 ("I, frankly, have been impressed by Mr. Bryant on his many appearances. . . . he's going to be years and years and years getting out and he's got so much to offer on the plus side."); JA 170 (Decator "isn't all bad by any means"); JA 238 ("I would hope that somebody some day, will think about whether or not [Scott] can't be paroled before these long years of this sentence[] roll by."); JA 239 ("[Scott is] the kind of person who can contribute an awful lot to society and to the lives of your family, friends. And I hope you get that chance.").

months (52 years and 9 months) on Decator. Of these sentences, fully 45 years were the result of the "stacked" § 924(c) counts.

II. The First Step Act

On December 21, 2018, the President signed the First Step Act into law. It contained two provisions relevant to Bryant's, Scott's and Decator's cases. Section 603(b) amended 18 U.S.C. § 3582(c)(1)(A), the so-called compassionate release statute. And Section 403 corrected a Supreme Court interpretation 18 U.S.C. § 924(c) that resulted in the imposition of enhanced § 924(c) sentences for "second or successive" § 924(c) convictions even when the defendant had no prior § 924(c) conviction—the highly-criticized "stacking" practice that resulted in the excessive sentences imposed on Bryant, Scott, and Decator.

A. Section 603(b) of the First Step Act

Section 603(b) of the First Step Act, titled "Increasing the Use and Transparency of Compassionate Release," amended 18 U.S.C. § 3582(c)(1)(A) to provide district courts with authority to reduce sentences in cases presenting extraordinary and compelling reasons whenever "the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons ["BOP"] to bring a motion on the defendant's behalf," or after "the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier[.]" First Step Act of 2018, § 603(b), Pub. L. 115-391, 132 Stat. 5194, 5239 (Dec. 21, 2018).

Previously, only the BOP could make such motions. With this amendment, Congress removed the BOP as the compassionate release gatekeeper because it too infrequently opened the gate. *See, e.g.*, Dep't of Justice, Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program*, at 11 (April 2013) ("The BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered.").[3] The title of Section 603(b) summed up its purpose: to expand the use and transparency of compassionate release. *See* 164 Cong. Rec. S7649 (daily ed. Dec. 18, 2018) (statement of Sen. Cardin) ("[T]his legislation includes several positive reforms from the House-passed FIRST STEP Act . . . . The bill expands compassionate release under the Second Chance Act and expedites compassionate release applications.").

B. Section 403 of the First Step Act

Section 403 of the First Step Act, titled a "Clarification of Section 924(c)," made clear that Congress always intended 18 U.S.C. § 924(c) to be a true recidivist statute. Congress re-wrote § 924(c) so that the enhanced mandatory minimum (20 years at the time of Bryant's, Scott's, and Decator's sentencing; 25 years today) is mandated only by a § 924(c) conviction that occurs after a prior such conviction has

[3] Available at https://oig.justice.gov/reports/2013/e1306.pdf.

become final. Accordingly, today, defendants like those involved in this appeal would receive 5-year terms on each § 924(c) count.

III. The Sentence Reductions

Following the enactment of the First Step Act, after serving approximately 25 years of their sentences, Bryant, Scott, and Decator moved for sentence reductions pursuant to § 3582(c)(1)(A)(i). JA 280–308, 357–496, 525–92. The district court granted the motions in separate opinions, reducing each of their sentences to time served. JA 623–653.

A. The Motions

Beginning in December 2019, Bryant, Scott, and Decator moved to reduce their sentences pursuant to § 3582(c)(1)(A)(i). JA 280–308, 357–496, 525–592. Their motions set forth extraordinary and compelling reasons to support that relief, including the draconian sentences imposed on them as a result of the interpretation of § 924(c) that the First Step Act corrected. JA 293–301 (Decator); JA 368–70 (Bryant); JA 537–39 (Scott). They also argued that their sentences did not reflect the offense conduct or their minimal (in Scott's and Decator's cases, non-existent) criminal records, and were wildly out of step with the sentences they would receive if prosecuted today. 293–301 (Decator); JA 368–70 (Bryant); JA 537–39 (Scott). Each defendant also pointed to his remarkable institutional record during nearly 25 years in custody, which provided "the most up-to-date picture" of his history and

characteristics and demonstrated that he would not pose a danger if released. *See Pepper v. United States*, 562 U.S. 476, 490–93 (2011); *see also* JA 296–301 (Decator); JA 371–78 (Bryant); 540–42 (Scott).

1. Bryant

Bryant, age 51, submitted extensive records showing that he had:

- completed thousands of hours of vocational, educational, and therapeutic programming, JA 393–457;
- served as a mental health companion, a position in which he worked with inmates "with significant [impairments in] mental health, cognitive and/or intellectual functioning" and for which he was commended by BOP staff as a "positive role model," JA 452;
- worked as a tutor in the Education Department, helping many fellow inmates earn their GEDs, JA 415; and
- maintained a perfect disciplinary record for the past 13 years, having incurred only three minor infractions in 2007, 2000, and 1998, JA 392.

His loved ones submitted ten letters on his behalf, describing the profound ways in which he had changed and grown since his sentencing in 1996 and affirming their readiness to help him transition home after his lengthy incarceration. JA 376–77. And, in a powerful testament to his leadership within the prison community, more

than a dozen of Bryant's fellow inmates wrote letters to the district court in support of his motion for a reduced sentence. JA 458–74.

2. Scott

Scott, age 50, devoted his time in custody to serving his fellow inmates by:

- teaching adult continuing education courses on such topics as French, political science, advanced political science, and acting, JA 556–58, 563, 573–75;
- facilitating a mentorship program called "Men 101," JA 576–78; and
- volunteering as a suicide watch companion, a position for which he was selected and trained by BOP staff, JA 583.

Scott also completed a wide array of educational courses, took multiple parenting classes, and devoted hundreds of hours to becoming computer literate. JA 558–562, 581–82. His disciplinary record was nearly unblemished, with only a single minor infraction in 1995. JA 551. His sisters, with whom he maintained a close relationship throughout his incarceration, urged the district court to reduce his sentence and endorsed his readiness to reenter the community. JA 590–91.

3. Decator

Decator, age 49, participated in extensive educational and rehabilitative programming, totaling more than 70 courses and 1,500 hours. JA 298. He maintained close relationships with family members and forged positive relationships

with community members, who expressed willingness to help him transition to life outside prison. JA 303–08. Attached to his motion were letters from:

- the owner of a local candle-making company, who offered to employ him upon his release, JA 304;
- the owner of a janitorial business, who also offered post-incarceration training and employment, JA 306; and
- the leader of a counseling group, who stated that he was prepared to accept Decator into a training program to become a recovery specialist, JA 308.

Decator's disciplinary record was minimal and non-violent, with all but one infraction occurring well over ten years ago. JA 336–37. The clergy of two different churches stood ready to welcome Decator into their congregations upon release, and Decator plans to take classes in Information Technology, given his keen interest in software engineering, network technology support, database information security, and web design. JA 301.

B. The Government's Responses

The government did not dispute that Bryant, Scott, and Decator were serving sentences 30 years longer than the ones they would receive if sentenced today, but nonetheless argued that the court lacked the authority to reduce their sentences. JA 316–30, 502–11, 600–09. According to the government, notwithstanding the passage of the First Step Act, only the BOP has the authority to determine whether grounds

other than health, age, and family circumstances warrant a sentence reduction. JA 316–30, 502–11, 600–09. Thus, the government argued, because the BOP does not consider an unusually long sentence a potentially extraordinary and compelling reason for relief, the district court had no authority to grant a sentence reduction on that basis. *See*, *e.g.*, JA 600–02.

In addition, focusing on the offense conduct a quarter-century ago to the exclusion of virtually every other factor,[4] the government, citing 18 U.S.C. § 3553(a), argued that the court should not reduce the sentences even if it had the authority to do so. JA 329–30, 518–20, 615–17.

C. The Replies

Bryant, Scott, and Decator filed replies confronting the government's contention that the BOP remains the gatekeeper for sentence reductions based on reasons other than health, age, and family circumstances. JA 338–55, 522–23, 620–21. They pointed out that the government's interpretation of the sentencing court's authority under § 3582(c)(1)(A)(i) is at odds with: (1) the plain language of that statute; (2) the expressed purpose of the First Step Act to increase the use of sentence reductions by removing the BOP from its gatekeeper role; and (3) the growing majority of district courts that have held that they have the authority, regardless of the

[4] The government hardly discussed Bryant's, Scott's, and Decator's transformation since their sentencing in 1996, except to call their "efforts at rehabilitation [] commendable." JA 330, 518, 616.

BOP's view, to determine whether extraordinary and compelling reasons other than health, age, and family circumstances warrant a sentence reduction. JA 338–55, 522–23, 620–21. They further argued that the government's § 3553(a) analysis seems trapped in a time capsule, ignoring their many post-offense accomplishments, which demonstrate that each defendant has grown up while incarcerated and is not the same man he was when committing these offenses in his mid-twenties. JA 338–55, 522–23, 620–21.

D. The District Court's Decisions

In opinions dated April 6, 2020, April 30, 2020, and May 13, 2020, the district court granted the defendants' motions. JA 623–32, 633–43, 644–53. It rejected the government's argument that it was constrained by the BOP's determination of what constitutes extraordinary and compelling reasons for compassionate release, holding that "the amended § 3582(c)(1)(A)(i) vests courts with independent discretion to determine whether there are 'extraordinary and compelling reasons' to reduce a sentence." JA 626, 636, 647. Exercising that authority, the court found that Bryant's, Scott's, and Decator's "continued incarceration under a sentencing scheme that has since been substantially amended," in combination with the other grounds presented, constituted an extraordinary and compelling reason warranting a sentence reduction. JA 628 (Decator), 638 (Bryant), 650 (Scott). The fact that the amendment to § 924(c) was not made retroactive by Congress, the court explained, did not prohibit the

consideration of that legislative change in deciding whether to reduce a sentence under § 3582(c)(1)(A). JA 628, 638, 649. Finding that Bryant, Scott, and Decator were much different men than they were 25 years ago, the court determined that a sentence reduction to time served would serve the goals of sentencing under § 3553(a). JA 628–31, 639–41, 650–52.

E. The Government's Motion to Stay

On May 13, 2020, more than a month after Decator was released from custody, nearly two weeks after Bryant was released, and hours after Scott was ordered released, the government moved the district court to stay its orders reducing the sentences to time served. Docket Entry, *United States v. Decator et al.*, CCB-95-0202 ("DE") 390. Bryant, Scott, and Decator responded to the government's motion on May 27, 2020. DE 393. While the motion was pending, the government filed notices of appeal between May 6, 2020, and June 10, 2020. JA 672–79.

On July 9, 2020, the district court denied the government's motion to stay. DE 414. In doing so, it reaffirmed its holding that "the compassionate release statute vest[s] courts with independent discretion to determine whether a proffered reason is 'extraordinary and compelling,'" and again found that Bryant's, Scott's, and Decator's "continued incarceration pursuant to 'stacked' § 924(c) convictions" is such a reason for compassionate release. DE 413 at 2. The court noted that it was "troubled by the government's extraordinary request to return these three men to federal custody" until

an appeal is decided. DE 413 at 5. It also stated that it was "disappointed that the government did not agree, at least as to these individuals, that the criminal justice reform implemented by the First Step Act presented an opportunity to correct an injustice." DE 413 at 5, n.5.

STANDARD OF REVIEW

This Court reviews *de novo* the legal question of whether the district court is constrained by the BOP's determination of what constitutes "other" extraordinary and compelling reasons for compassionate release. *See United States v. McDonald*, 61 F.3d 248, 254 (4th Cir. 1995).

SUMMARY OF THE ARGUMENT

The government raises three principal arguments in asking this Court to reverse the district court's grants of compassionate release and return Bryant, Scott, and Decator to prison for an additional 20 years. All three arguments fail.

First, it argues that the district court erred by wrongly concluding that § 3582(c)(1)(A)(i) permits a sentence reduction for extraordinary and compelling reasons other than age, health, and family circumstances upon request of a defendant, rather than the BOP. That position cannot be reconciled with the plain language of § 3582(c)(1)(A)(i) and U.S.S.G. § 1B1.13. It also directly conflicts with the purpose of the First Step Act, which was to remove the BOP from its role as gatekeeper of sentence reduction motions so courts could exercise this power more frequently. The

government's attempt to elevate ten vestigial words in the commentary above the statute and the policy statement itself, effectively eliminating one of the four grounds for a sentence reduction, is simply untenable, as the district court held. It also disregards the mountain of district court decisions that conclude judges are no longer bound by the BOP's determination of what constitutes extraordinary and compelling circumstances.

Second, the government argues that the district court retroactively applied Section 403 of the First Step Act. It did not. The district court's decision was based squarely on § 3582(c)(1)(A)(i), as amended by Section 603(b) of the First Step Act. Section 3582(c)(1)(A)(i) allows the court to reduce a sentence "in *any* case"—not any case "except those involving stacked sentences under § 924(c)"—presenting extraordinary and compelling reasons for a sentence reduction. Congress's decision not to make Section 403 retroactive does not mean it intended to bar courts from considering the impact of its amendment to § 924(c) in connection with a motion for relief under another statute, such as the motions in this case.

Third, the government argues that the district court's decisions amounted "in effect" to a form of judicial clemency. This is pure hyperbole. The exercise of statutory authority to reduce extraordinarily long sentences in cases that present extraordinary and compelling circumstances bears no resemblance to a clemency power. As the text and legislative history of § 3582(c)(1)(A)(i) make clear, the same

Congress that abolished parole intended the statute to operate as a "safety valve[] for modification of sentences," and specifically listed the length of a sentence as an example of a potential ground for a reduction under this provision. *See* S. Rep No. 98-225, at 55–56, 121 (1983). That is all the district court did here. And when the government exercises its discretion in ways that mandate excessive sentences, the availability of a judicial check on that authority, structured and circumscribed by statute and subject to appellate review, is entirely appropriate. This argument also does not engage with the fact that the power exercised by the district court in this case is precisely the same power it has always exercised under § 3582(c)(1)(A)(i): as the policy statement at § 1B1.13 makes clear, it has always been the role of the courts to review compassionate release motions and make a final determination about whether extraordinary and compelling reasons have been presented that warrant a sentence reduction. Now that the BOP motion requirement has been eliminated, federal judges may exercise that authority the way Congress intended from the outset.

In the same vein, the government's claim of "troubling" ramifications for the finality of sentences rings hollow. *See* Gov't Br. at 40. Sentences have precisely the degree of finality that Congress chooses to give them, and the correction of the excessive sentences at issue here falls comfortably within the authority conferred on judges by § 3582(c)(1)(A)(i).

ARGUMENT

I. The District Court Had the Authority to Reduce Bryant's, Scott's, and Decator's Sentences Based on "Extraordinary and Compelling Reasons."

The government is incorrect in contending that anything in the text of § 3582(c)(1)(A)(i), the relevant policy statement in the guidelines, or in the commentary to that policy statement prohibit the relief sought here. In fact, when read in conjunction with the changes to the compassionate release regime that were implemented by the First Step Act, the text of all three only reinforce the court's authority to exercise precisely the sentence-reduction power that is at the center of this appeal.

First, § 3582(c)(1)(A)(i) empowers a district court to reduce a sentence "in any case" where it finds that extraordinary and compelling reasons warrant a reduction. The legislative history of both the Comprehensive Crime Control Act of 1984 and the First Step Act confirms that § 3582(c)(1)(A)(i) means exactly what is says: courts have the authority to reduce sentences "in particularly compelling situations," *see* S. Rep No. 98-225, at 52, 56 (1983), including when they see the need to reduce "an unusually long sentence," *see* S. Rep No. 98-225, at 55–56, 121 (1983).

Second, there is nothing in the relevant policy statement issued by the Sentencing Commission that circumscribes that authority. To the contrary, once the procedural limitation of a BOP motion is read out of § 1B1.13, as it must be, it largely

mirrors the amended statutory text, adding only a requirement that the court ensure prior to ordering a sentence reduction that the defendant is not a danger.

Third, there is nothing in the commentary to § 1B1.13, when read consistent with the statute and the policy statement, in light of the First Step Act's amendments, that supports the limitation the government urges. Quite the opposite: the commentary expressly authorizes sentence reductions based on reasons "other than, or in combination with," the three grounds the government contends are the only available grounds for a reduction in this context. The government's argument that the BOP remains the "decider" for those seeking sentence reductions for "other" reasons thus asks this Court to: (1) elevate vestigial words in the commentary over the text of both § 3582(c)(1)(A)(i) and the policy statement in § 1B1.13 itself, (2) ignore the purpose of the First Step Act to remove the BOP from its role as gatekeeper for all sentence reductions under § 3582(c)(1)(A), (3) effectively eliminate one of the four grounds for sentence reductions identified by the Sentencing Commission, and (4) disregard the vast majority of district courts rejecting the government's argument. There is no basis for doing so, and so the district court decisions should be affirmed.

A. The District Court's Decisions Are Consistent with the Authority Granted to the Courts by the Text of 18 U.S.C. § 3582(c)(1)(A).

The district court's decisions were entirely consistent with the authority conferred on it by § 3582(c)(1)(A)(i). Section 3582(c)(1)(A)(i) has always made the

courts, not the BOP, the final arbiter of what is extraordinary and compelling, and that authority has never been limited to cases involving elderly or ill inmates, or those facing dire family circumstances. The government's argument that the BOP has sole discretion to determine when "other" extraordinary and compelling reasons warrant a sentence reduction has no support in either the text or the legislative history of § 3582(c)(1)(A).

1. The Text of § 3582(c)(1)(A).

First enacted as part of the Comprehensive Crime Control Act of 1984, § 3582(c)(1)(A) soon became known as the "compassionate release" statute. When Congress abolished federal parole in 1984, it enacted § 3582(c)(1)(A) to serve as a safety valve in cases where special circumstances warranted a sentence reduction, but for which parole review would no longer be available. Accordingly, the statute empowered district courts to modify a final term of imprisonment in four situations, one of which was the presence of "extraordinary and compelling reasons" warranting a reduction.

The text of the statute was—and still is—unambiguous. It does not limit a court's authority to specified sets of circumstances or circumscribe the extraordinary and compelling reasons upon which a court's decision can be based. Instead, it allows a court to exercise its discretion to reduce a sentence "in any case" where "extraordinary and compelling reasons warrant such a reduction." The only statutory

limitations are that rehabilitation, standing alone, is not sufficient, *see* 18 U.S.C. § 994(t), and that a reduction must be "consistent with the applicable policy statements issued by the [Sentencing] Commission," *see* 18 U.S.C. § 3582(c)(1)(A).

2. The Legislative History of § 3582(c)(1)(A).

The legislative history of § 3582(c)(1)(A) underscores its applicability to circumstances like the ones presented in Bryant's, Scott's, and Decator's cases. Congress did not cabin what can constitute an extraordinary and compelling reason, and the Senate Report states that the statute allows for "later review of sentences in particularly compelling situations." S. Rep No. 98-225, at 55–56, 121 (1983). In abolishing parole and creating a "completely restructured [G]uidelines sentencing system," *id.* at 52, 53 n.74, Congress recognized the need for judicial authority to reduce previously imposed sentences:

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, *cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence*, and some cases in which the sentencing guidelines for the offense of which the defendant was convicted have been later amended to provide a shorter term of imprisonment.

Id. at 55–56 (emphasis added). This authority empowered judges to reduce a term of imprisonment when justified by factors that previously could have been addressed through the (now abolished) parole system, while keeping "the sentencing power in the judiciary where it belongs." *Id.* at 121.

The government states that "the First Step Act changed the procedural mechanism by which compassionate release claims could be brought before the district court," but that "Congress left the substantive bases for relief unchanged." Gov't Br. at 22. We agree. The only change that the First Step Act made to the text of § 3582(c)(1)(A) was to remove the requirement of a BOP motion, and indeed to permit sentence reductions even if the BOP opposed them. The amendment did nothing to limit the district courts' authority to determine in a particular case whether extraordinary and compelling circumstances warrant a sentence reduction.

This Court's decision in *United States v. Goodwyn*, 596 F.3d 233 (4th Cir. 2010), does nothing to undermine this proposition. *See* Gov't Br. at 16. In *Goodwyn*, the Court explained that § 3582(c) listed the exceptions to the rule that the sentencing court cannot modify a final judgment. Consistent with the pre-First Step Act version of § 3582(c)(1)(A), the Court concluded that the sentencing court did not have the authority to modify the judgment because "the Director of the [BOP] did not move to reduce Goodwyn's sentence." *Goodwyn*, 596 F.3d at 235. The Court did not then—or ever—state that the BOP was the authority in determining the grounds for compassionate release.

In sum, both the text and purpose of § 3582(c)(1)(A) contradict the government's view that the BOP remains in charge of sentence reductions on grounds other than age, infirmity, or caregiver status. Sentencing courts have always

had the ultimate authority to decide whether a reduced sentence is warranted under § 3582(c)(1)(A), and that authority has never been restricted to those three discrete categories. *See, e.g.*, *United States v. Maumau*, No. 2:08-cr-00758-TC, 2020 WL 806121, at *4 n.5 (D. Utah Feb. 18, 2020) (finding that "district courts always had the discretion to determine what counts as compelling and extraordinary" and that the First Step Act's amendment "is not a new grant of discretion; it is merely an increased opportunity to exercise that discretion").

B. The Sentence Reductions in these Cases Were Consistent with the Policy Statement at U.S.S.G. § 1B1.13.

We agree that the sentence reductions granted here must be "consistent with the applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A). But the government skips over the Sentencing Commission's applicable policy statement, U.S.S.G. § 1B1.13, and goes straight to its commentary. By doing so, it ignores the plain text of § 1B1.13. *See Stinson v. United States*, 508 U.S. 36, 41 (1993) (distinguishing between policy statements and commentary). Section 1B1.13 confirms that a district court may grant a sentence reduction in any case where it determines that "extraordinary and compelling reasons warrant the reduction." There is no mention or suggestion in the policy statement itself that the *BOP's* determination of what constitutes extraordinary and compelling reasons warranting relief matters at all.

The text of § 1B1.13 largely parallels that of § 3582(c)(1)(A), stating, in relevant part:

> Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment . . . if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent that they are applicable, *the court determines that*—
>
> (1) (A) extraordinary and compelling reasons warrant the reduction;
>
> (2) the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and
>
> (3) the reduction is consistent with this policy statement.

U.S.S.G. § 1B1.13 (emphasis added).

Thus, the text of § 1B1.13 does not support the contention that BOP gets to determine the grounds for compassionate release. To the contrary, § 1B1.13 states that "the court determines" whether "extraordinary and compelling reasons warrant the reduction." The remainder of the policy statement adds one requirement: that the defendant is not a danger. It imposes no further constraints on the court's discretion to determine that extraordinary and compelling reasons warrant relief.

The only reference to the BOP in § 1B1.13 is to the pre-First Step Act condition precedent of a BOP motion—a requirement that directly conflicts with the First Step Act's amendments to § 3582(c)(1)(A). Accordingly, the phrase "upon motion of the director of the Bureau of Prisons" must be excised. *See Dorsey v. United States*, 567 U.S. 260, 266 (2012) ("The [statute] . . . interacts with the Guidelines in an

important way. Like other sentencing statutes, it trumps the Guidelines."); *see also* *United States v. Cantu-Rivera*, No. H-89-204, 2019 WL 2578272 at *2 n.1 (S.D. Tex. June 24, 2019) ("Because the current version of the Guideline policy statement conflicts with the First Step Act, the newly-enacted statutory provisions must be given effect.").

Section 1B1.13, like § 3582(c)(1)(A), therefore reinforces that the court has the ultimate authority to determine whether extraordinary and compelling reasons exist for compassionate release.

C. The District Court's Exercise of Its Authority Was Consistent with the Commentary Following U.S.S.G. § 1B1.13.

The commentary following § 1B1.13 is the focus of the government's brief. Specifically, the government argues that, because Application Note 1(D) of § 1B1.13 authorizes sentence reductions on grounds "other than" health, age, and family circumstances, "[a]s determined by the [BOP]," the district court lacked the authority to determine that such reasons warranted sentence reductions in these cases. Gov't Br. at 25–26; *see* U.S.S.G. § 1B1.13 n. 1(D).

This argument, however, violates the axiomatic rules of textual interpretation and the effect of statutes that are set out in cases like *Stinson* and *Dorsey*, namely that guidelines and their commentary must give way when they conflict with the text of a federal statute. *See Stinson*, 508 U.S. at 38, 45; *Dorsey*, 567 U.S. at 266. The

government does not argue those rules, instead attempting to avoid them by arguing that there is not a "conflict" and by straining to propose an amendment to the policy statement and the commentary that will leave the BOP in charge of just one ground for relief under the statute, a ground on which the BOP has literally *never* made a motion. This contorted reading of both the commentary and the case law is entirely unsupported by both the text and the purpose of the amendments to § 3582(c)(1)(A), as the majority of courts that have addressed this issue have acknowledged.

The government next attempts to argue that excising this conflicting language somehow violates 28 U.S.C. § 994(t) and is therefore improper regardless of a conflict. The government is correct that Congress, through 28 U.S.C. § 994(t), delegated to the Sentencing Commission the task of "describ[ing]" through the promulgation of a "policy statement[]" what constitutes "extraordinary and compelling reasons" for relief. But it is the government, not the defense, that asks this Court to violate § 994(t) by ignoring one of the Sentencing Commission's proffered bases for compassionate release: extraordinary and compelling reasons "other than, or in combination with," health, age, and family circumstances. U.S.S.G. § 1B1.13 n. 1(D). As mentioned, the BOP has never made a motion on such a basis, and, because its policy statement on the topic precludes it from doing so, it never will.[5] Thus, in the

[5] The program statement that governs the BOP's procedure for evaluating requests for a reduction in sentence pursuant to § 3582(c)(1)(A) limits the grounds to age,

face of a statutory amendment, the title of which made clear it was supposed to *increase* the use of compassionate release, accepting the government's contention would effectively *eliminate* one of four grounds for relief specified by the Sentencing Commission.

1. The Government's Interpretation of the Commentary Following U.S.S.G. § 1B1.13 Conflicts with the Text of § 3582(c)(1)(A) and § 1B1.13.

The commentary following § 1B1.13 sets out four grounds for finding that "extraordinary and compelling reasons exist": where the defendant has a qualifying medical condition, *see* U.S.S.G. § 1B1.13 n.1(A); where the defendant meets certain age-related criteria, *see id.* n.1(B); where the defendant has one of two enumerated "family circumstances," *see id.* n.1(C); or where, "[a]s determined by the [BOP], there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C)," *see id.* n.1(D). The fourth ground, commonly known as the "catch-all provision," authorizes sentence reductions for extraordinary and compelling reasons other than age, medical condition, or family circumstances. The government contends that because it

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medical condition and caregiver status. *See* BUREAU OF PRISONS, PROGRAM STATEMENT 5050.50, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582 AND 4205(G) (Jan. 17, 2019).

contains the language "as determined by the director of the Bureau of Prisons," only the BOP can make use of that ground.

That reading, however, places the commentary in direct conflicts with both the text of § 3582(c)(1)(A) and the text of the policy statement upon which the commentary elaborates. Neither § 3582(c)(1)(A) nor § 1B1.13 conditions a finding of extraordinary and compelling reasons on a determination by the BOP. In fact, both the statute and policy statement say exactly the opposite: that a sentence may be reduced if the *court* finds that extraordinary and compelling reasons so warrant. 18 U.S.C. § 3582(c)(1)(A) ("the court . . . may reduce the term of imprisonment . . . if it finds that extraordinary and compelling reasons warrant such a reduction"); U.S.S.G. § 1B1.13 ("the court may reduce a term of imprisonment . . . [where] the court determines that extraordinary and compelling reasons warrant the reduction"). Because it conflicts with § 3582(c)(1)(A) and § 1B1.13, the former commentary must give way. *See Stinson*, 508 U.S. at 43 ("If . . . commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline."); *United States v. Allen*, 909 F.3d 671, 674 (4th Cir. 2018). Specifically, the portion of Application Note 1(D) that says "[a]s determined by the [BOP]" must be excised. To hold otherwise in the face of a statute that was specifically amended to

authorize sentence reductions even when the BOP *opposes* such a motion would be perverse indeed.

Application Note 1(D)'s delegation of authority to the BOP to identify circumstances qualifying as extraordinary and compelling is a vestige of the pre-First Step Act regime, in which the statute and policy statement empowered only the BOP to move for compassionate release. It has no more place in the post-First Step Act world than the multiple other references in both the policy statement and the commentary to the BOP as gatekeeper, including the instruction that "[a] reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons." *See* U.S.S.G. § 1B1.13; *id.* n.1(D); *id.* n.4; *id.* n.5.

After the First Step Act, nothing in the commentary to § 1B1.13 precludes a court from determining that extraordinary and compelling reasons other than the specified categories of age, health, and family circumstances warrant a sentence reduction. Quite the opposite—the commentary makes clear that the Sentencing Commission intended that judges, not the BOP, would have the final say regarding what "other" reasons could warrant a sentence reduction. *See* U.S.S.G. n.4 (stating that "[t]he court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of reduction)" and "encourag[ing]" the filing of a motion for compassionate release where a defendant "meets any of the circumstances set forth in [the] Application Note").

The government attempts to avoid this conflict between the text of § 1B1.13 and the amended § 3582(c)(1)(A)—and, by extension, the conflict between the commentary and the policy statement—by arguing that § 1B1.13 still permits relief upon a BOP motion. Thus, the argument continues, the policy statement is not "inconsistent" with § 3582(c)(1)(A), but rather just "incomplete," and "any incompleteness in § 1B1.13's recitation of the *procedural* avenues for relief . . . does not grant district courts the license to legislate their own *substantive* bases for relief." Gov't Br. at 29.

Putting aside the question of why any court would strain in this way to reach a conclusion that is so obviously at odds with both the original purpose of the statute and the First Step Act's amendments to it, the stark fact is that *Congress*, not the district court, legislated the bases for sentence reductions, and they include the one at issue here. As discussed above, it unequivocally conferred that authority on *judges*, in a statute that makes no reference to the BOP. And though it also required any sentence reduction to be consistent with the Sentencing Commission's guidance, its policy statement also unambiguously confers the same authority on *judges*, again without any reference at all to the BOP. And when the BOP botched the job of gatekeeper for such motions, Congress removed it from that role for the explicit purpose of helping to reduce mass incarceration by *increasing the use* of sentence reductions. The government's convoluted argument would ignore that directive and inexplicably

excise all references to BOP from the policy statement and commentary save one, all in an effort to produce the exact opposite effect: eliminating *all* sentence reductions based on reasons other than the specified ones, because the BOP playbook refuses to permit it to ever endorse such a motion. This Court should reject that argument out of hand.

2. The Government's Interpretation of the Commentary Following U.S.S.G. § 1B1.13 Conflicts with the Purpose of the First Step Act.

The government's interpretation of Application Note 1(D) fails for the additional reason that it is contrary to the express purpose of the First Step Act. As discussed above, the First Step Act's amendments to § 3582(c)(1)(A) were enacted to expand the use of compassionate release because the BOP had utterly failed to exercise its authority. Between 1992 and 2012, the annual average number of prisoners who received compassionate release following a motion by the BOP was less than two dozen. *See, e.g.*, Human Rights Watch, *The Answer is No: Too Little Compassionate Release in US Federal Prisons*.[6] The First Step Act was Congress's response to the BOP's 36-year history of disuse and mismanagement of the compassionate release program. Again, against this backdrop, it would be odd in the extreme to read the requirement of BOP cooperation into the statute or the policy statement.

[6] Available at https://www.hrw.org/report/2012/11/30/answer-no/too-little-compassionate-release-us-federal-prisons.

The acceptance of the government's argument would create another anomaly: different standards for relief under the statute depending on the identity of the movant. It would narrow the grounds for relief available to a moving defendant even though, as mentioned, the expansion of such relief was the explicit goal of the First Step Act. *See United States v. Ebbers*, 432 F.Supp.3d 421, 427 (S.D.N.Y. 2020) (finding that there is "no indication in the text or the USSC's policy statements that the identity of the movant should affect the meaning of the phrase 'extraordinary and compelling reasons,'" and holding that U.S.S.G. § 1B1.13's "descriptions of 'extraordinary and compelling reasons' remain current, even if references to the identity of the moving party are not").

3. The Government's Interpretation of the Commentary Following U.S.S.G. § 1B1.13 Would Violate 28 U.S.C. § 994(t) by Eliminating One of the Four Grounds for Compassionate Release Enumerated by the Sentencing Commission.

The government's interpretation of Application 1(D) also fails because it does the very thing it accuses the defense of doing: violating 28 U.S.C. § 994(t), which states that the Sentencing Commission "shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." Contrary to the government's claim that the district court "improperly trod on the Sentencing Commission's unique domain" to determine the grounds for compassionate release, *see* Gov't Br. at 28, the district

court's decision was based squarely on the Sentencing Commission's guidance. The Sentencing Commission saw fit to include a "catch-all provision" that would allow the courts to grant compassionate release for reasons "other than" health, age, and family circumstances. U.S.S.G. § 1B1.13 n. 1(D).

The government's insistence that the BOP remains the ultimate authority on what constitutes extraordinary and compelling reasons under Application Note 1(D) would completely eliminate that provision. It would leave the BOP in charge of the one ground for compassionate release—extraordinary and compelling circumstances unrelated to age, infirmity, and caregiver status—that it has never found present in any case in the 36 years since the statute was enacted. That is not and cannot be the law.

The government cannot both contend that the Sentencing Commission has the authority to describe what should be considered extraordinary and compelling, and then effectively eliminate one of the four promulgated grounds for relief.

4. The Government's Interpretation of the Commentary Following U.S.S.G. § 1B1.13 Conflicts with the Rulings of the Vast Majority of District Courts Holding that They Are Not Limited to the Grounds for Relief Set Forth in Application Note 1(A)–(C).

Finally, in asking the Court to hold that only the BOP can determine whether extraordinary and compelling reasons for a sentence reduction are present in particular cases, the government conveniently omits that relatively few courts have

taken it up on this invitation. Indeed, every judge in the District of Maryland to have decided the issue has held that it is not limited to the criteria set forth in Application Note 1(A)–(C) in determining whether extraordinary and compelling reasons exist for compassionate release. *See, e.g.*, *United States v. Williams*, No. PWG-19-0134, 2020 WL 3073320, at *2-3 (D. Md. June 10, 2020); *United States v. Gardner*, No. JKB-09-0619, ECF No. 72 at 3 (D. Md. May 27, 2020); *United States v. Wise*, No. ELH-18-072, 2020 WL 2614816 (D. Md. May 22, 2020); *United States v. Barringer*, No. PJM-13-0129, ECF No. 91 at 6 (D. Md. May 20, 2020); *United States v. Gutman*, No. RDB-19-069, 2020 WL 2467435, at *2 (D. Md. May 13, 2020); *United States v. Mel*, No. TDC-18-0571, 2020 WL 2041674, at *3 (D. Md. Apr. 28, 2020); *see also United States v. Redd*, No. 1:97-cr-0006-AJT, 2020 WL 1248493, at *5 (E.D. Va. Mar. 16, 2020) (Trenga, J.)

Judges across the country have joined the judges in the District of Maryland in concluding that they are not constrained by the categories delineated in Application Note 1(A)–(C) in deciding whether extraordinary and compelling reasons warrant a sentence reduction and, indeed, have recognized that the views advocated by the government in this case comprise the "minority view." *See, e.g.*, *United States v. Rodriguez*, __ F. Supp. 3d __, 2020 WL 1627331, at *4–5 (E.D. Pa. Apr. 1, 2020); *see also United States v. Perez*, No. 88-10094-JTM, 2020 WL 1180719, at *2 (D. Kansas Mar. 11, 2020) (noting the government's agreement that the "majority of district courts" have concluded that they have "the authority to exercise the same discretion as the

BOP when weighing a request for compassionate relief").[7] Exercising their authority to grant compassionate release on reasons other than those contained in Application Note 1(A)–(C), a growing number of courts have based a finding of extraordinary and compelling reasons on the enormous disparity between the sentence the defendant received and the sentence he would have received for the same conduct today. A non-exhaustive list of cases includes:

- *United States v. Clausen*, No. 2:00-cr-00291-GJP, ECF No. 277 at 17 (E.D. Pa. July 24, 2020) (holding that the combination of the defendant's "off the charts" sentence and his "evident personal growth and rehabilitation" established extraordinary and compelling reasons warranting a sentence reduction);

[7] Minus an unpublished decision from the Tenth Circuit resolving a *pro se* appeal, none of the appellate courts has yet weighed in on the question of whether § 3582(c)(1)(A) permits a sentence reduction for extraordinary and compelling reasons other than age, health, and family circumstances upon request of a defendant rather than the BOP. *See United States v. Saldana*, 807 F. App'x 816, 817 (10th Cir. 2020). In *Saldana*, the court affirmed the district court's conclusion under § 3553(a) that a sentence reduction was not warranted. *Id.* at 820. Then, in a single paragraph, the court stated that the defendant, who moved for a reduction of his 106-month prison term based on a guidelines dispute, was not eligible for compassionate release because "neither the § 1B1.13 commentary nor BOP Program Statement 5050.50 identify post-sentencing developments in case law as an 'extraordinary and compelling reason' warranting a sentence reduction." *Id.* The decision, which is devoid of legal analysis, lacks any persuasive value and is at odds with the greater weight of authority holding that the court has the authority under § 3582(c)(1)(A) to determine other extraordinary and compelling reasons for compassionate release. Furthermore, even if a change in the advisory guideline range does not rise to the level of extraordinary and compelling, the overhaul of a mandatory sentencing regime, under which Bryant, Scott, and Decator were left serving sentences decades longer than Congress ever intended, certainly does.

- *United States v. Day*, No. 1:05-cr-460-AJT, ECF No. 257 at 23–24 (E.D. Va. July 22, 2020) (holding that the "gross disparity" between the sentence the defendant received and the sentence he would receive under the law today qualified as an extraordinary and compelling reason for compassionate release);

- *United States v. Quinn*, No. 91-CR-00608-DJJ-1(RS), 2020 WL 3275736, at *4 (N.D. Cal. June 17, 2020 (holding that "the enormous sentencing disparity created by subsequent changes to federal sentencing law" constitutes an extraordinary and compelling reason for compassionate release);

- *United States v. Lott*, No. 95CR72, 2020 WL 3058093, at *3 (S.D. Cal. June 8, 2020) (determining that the defendant's 240-month on his second § 924(c) count, which today would be "limited to 60 months" presents an extraordinary compelling reason for a sentence reduction);

- *United States v. Littrell*, __ F. Supp. 3d __, 2020 WL 4188008, at *1 (E.D. Mo. May 19, 2020) ("The unwarranted sentencing disparity of [the defendant's] 40 year sentence compared to the 20 year sentence he would have received today, together with his good conduct while incarcerated, his lack of any serious criminal history, and his recent diagnosis of Covid 19 all justify this reduction in sentence and his release.");

- *United States v. Brown*, No. 4:05-cr-00227-1, 2020 WL 2091802, at *7 (S.D. Iowa Apr. 29, 2020) ("More and more courts have found that exceptional rehabilitation; large sentencing disparities; and COVID-19's unprecedented dangers all constitute extraordinary and compelling reasons to grant compassionate release."), *appealed by the gov't*;

- *United States v. McCoy*, No. 2:03-cr-197, 2020 WL 2738225, at *6 (E.D. Va. May 26, 2020) (citing the disparity between the defendant's sentence and what those sentenced for similar crimes after the First Step Act receive today in granting compassionate release), *appealed by the gov't*;

- *United States v. Arey*, No. 5:05-CR-00029, 2020 WL 2464796, at *5 (W.D. Va. May 13, 2020) ("The dramatic change to § 924(c) sentences constitutes an extraordinary and compelling reason.");

- *United States v. Haynes*, __ F. Supp. 3d __, 2020 WL 1941478, at *15 (E.D.N.Y. Apr. 22, 2020) (granting compassionate release based on the enormous disparity between the sentence the defendant received and the one he would receive today due to the First Step Act's changes to § 924(c));

- *United States v. Marks*, __ F. Supp. 3d __, 2020 WL 1908911, at *16 (W.D.N.Y. Apr. 20, 2020) (holding that extraordinary and compelling reasons for relief existed because "the mandatory 'stacking' of § 924(c) counts . . . drastically increased Marks's sentence above what it would otherwise have been"), *appealed by the gov't*;

- *United States v. McPherson*, __ F. Supp. 3d __, 2020 WL 1862596, at *5 (W.D. Wash. Apr. 14, 2020) (granting compassionate release for McPherson who was "sentenced to over 32 years in prison for what is now probably a 17-year crime");

- *United States v. Defendant(s)*, No. 2:99-cr-00257-CAS-3, 2020 WL 1864906, at *6 (C.D. Cal. Apr. 13, 2020) (granting compassionate release based on the defendant's "exceptional personal growth, and the injustice of facing a term of incarceration several decades longer than Congress now deems warranted" (internal quotation marks omitted));

- *United States v. Hope*, No. 90-cr-06108-KMW-2, 2020 WL 2477523, at *4 (S.D. Fla. Apr. 10, 2020) ("Mr. Hope's original, mandatory life sentence represents the type of sentencing disparity that the First Step Act was enacted to redress—as demonstrated by the fact that if sentenced today his *maximum* statutory sentence would be 35 years, his *maximum* guidelines sentence would be 32 years, and he has already served nearly 30 years in prison." (footnote omitted)), *appealed by the gov't*;

- *United States v. Millan*, No. 91-CR-685 (LAP), 2020 WL 1674058, at *15 (S.D.N.Y. Apr. 6, 2020) (granting compassionate release for a defendant who received a mandatory life sentence under pre-*Booker* law);

- *United States v. Owens*, No. 97-CR-2546-CAB, ECF No. 93 at 5 (S.D. Cal. Mar. 20, 2020) (finding that "extraordinary and compelling reasons exist for a reduction in Owen's sentence based on the changes in how § 924(c) sentences are calculated as a result of the First Step Act");

- *United States v. Redd*, 2020 WL 1248493, at *5 (finding "extraordinary and compelling reasons" based on "the sentence [the defendant] received relative to the sentence he would now receive for the same offense" after Section 403 of the First Step Act eliminated enhanced penalties for defendants convicted for the first time of multiple § 924(c) charges in the same indictment);

- *United States v. Perez*, 2020 WL 1180719, at *1 (finding "extraordinary and compelling" reasons for relief "particularly considering the fact that under today's non-mandatory sentencing guidelines the court would have had more discretion to consider a variance from the advisory guideline range[,]" as compared to the defendant's mandatory career offender sentence);

- *United States v. Young*, No. 2:00-cr-0002-1, 2020 WL 1047815, at *7 (M.D. Tenn. Mar. 4, 2020) (finding "extraordinary and compelling reasons" based in part on the fact that "Congress has expressly renounced the interpretation of § 924(c) that resulted in [the defendant's] lengthy sentence");

- *United States v. O'Bryan*, No. 96-10076-03-JTM, 2020 WL 869475, at *1-2 (D. Kansas Feb. 21, 2020) (determining "extraordinary and compelling reasons" existed "in light of the [First Step Act's] modification of sentencing for offenses under § 924(c)");

- *Maumau*, 2020 WL 806121, at *7 (concluding that "the changes in how § 924(c) sentences are calculated is a compelling and extraordinary reason to provide relief on the facts present here"), *appealed by the gov't*;

- *United States v. Urkevich*, No. 8:03CR37, 2019 WL 6037391, at *4 (D. Neb. Nov. 14, 2019) ("A reduction in his sentence is warranted by extraordinary and compelling reasons, specifically the injustice of facing a term of incarceration forty years longer than Congress now deems warranted for the crimes committed [due to the changes to § 924(c) penalties]."));

- *Cantu-Rivera*, 2019 WL 2578272, at *2 (determining one of the factors constituting extraordinary and compelling reasons in the case was "the fundamental change to sentencing policy carried out in the First Step Act's

elimination of life imprisonment as a mandatory sentence solely by reason of a defendant's prior convictions").

These decisions reflect, as they must, the right side of the law, but they also are on "the right side of history." *Haynes*, 2020 WL 1941478, at *15. This Court should not disregard the growing number of district courts holding that they may base a finding of extraordinary and compelling reasons on reasons other than health, age, and family circumstances, just as the district court concluded here. *Cf. Elliott v. Am. States Ins. Co.*, 883 F.3d 384, 392 (4th Cir. 2018) (citing the "overwhelming majority of district courts" as agreeing with the court's approach (quotation omitted)); *Abbot by Abbot v. Am. Cyanamid Co.*, 844 F.2d 1108, 1112 & n.1 (4th Cir. 1988) (same). Considering the plain language of § 3582(c)(1)(A) and § 1B1.13, the First Step Act's objective to increase the use of compassionate release, and the means taken to do so by weakening the BOP's authority, this Court should affirm the district court's holding that it was not constrained by the BOP's determination of what constitutes other extraordinary and compelling reasons meriting release.

II. The District Court Did Not Retroactively Apply Section 403 of the First Step Act

The government claims that the district court gave "retroactive application to the First Step Act's changes to § 924(c) sentences," *see* Gov't Br. at 30, but the court did no such thing. Bryant, Scott, and Decator each asked the district court to consider his motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A).

JA 285 (Decator's Motion to Reduce Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i)); 357 (Bryant's Motion to Reduce Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i)); 525 (Scott's Supplemental Motion to Reduce Sentence Pursuant to 18 U.S.C. § 3582(c)(1)(A)(i)). The district court did so, and its orders granting relief relied exclusively on its authority under § 3582(c)(1)(A). It did not purport to give retroactive effect to the changes to § 924(c); indeed, it acknowledged "the fact [Bryant's, Scott's, and] Decator's sentence[s] will not be reduced pursuant to a retroactive application of the amended § 924(c)." JA 628. Rather, the court concluded that Bryant's, Scott's, and Decator's "continued incarceration under a sentencing scheme that has since been substantially amended is a permissible 'extraordinary and compelling' reason to consider [them] for compassionate release." JA 628, 650.

The government's assertion that the district court made an "end-run[] around the clear dictates of the First Step Act," *see* Gov't Br. at 34, is untenable. Congress's decision not to give retroactive effect to the First Step Act's amendments to § 924(c) did not foreclose relief under generally-available provisions like § 3582 to defendants with stacked § 924(c) convictions. Section 3582 was enacted to create a safety valve, and was employed in precisely that manner to provide much-deserved relief for Bryant, Scott, and Decator. The government cites nothing in the text of the First Step Act or § 3582 or the legislative history of either statute suggesting that Congress

intended to foreclose the courts from granting compassionate release on the basis of the amended § 924(c).[8]

The government instead clings to *United States v. Jordan*, 952 F.3d 160 (4th Cir. 2020), but that decision is inapposite. *See* Gov't Br. at 33–34. In *Jordan*, this Court confirmed what the First Step Act's text makes clear: the First Step Act's changes to § 924(c) do not apply retroactively and, therefore, cannot benefit a defendant whose case was on appeal when the First Step Act was passed. Because the district court's decision does not give retroactive effect to the § 924(c) amendments, *Jordan* has no bearing on this case.

The government argues that "the non-retroactivity of the § 924(c) changes must be seen as an express legislative choice," *see* Gov't Br. at 31, but even taking that as true, the district court's orders respected that choice. Had Congress provided retroactive effect to the amendment to § 924(c), every defendant subjected to the "stacking" of such counts in his first § 924(c) case would be presumptively eligible for relief. Because Congress declined to do so, relief is available only to a limited subset of defendants, only those whose cases present "extraordinary and compelling

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[8] The government claims to be asking this Court to respect "Congress's policy choices," a particularly feeble claim against the backdrop of roundly ignoring Congress's choice to remove the BOP as an obstacle to compassionate release. *See* Gov't Br. at 34. We ask the Court to follow the text of the relevant statute and policy statement, which both accord precisely with Congress' actual "policy choices."

reasons." *See Maumau*, 2020 WL 806121, at *7 ("The United States objects to this conclusion because, it notes, Congress could have made its changes to § 924(c) retroactive but it chose not to do so. While this is a relevant consideration, it ultimately has little bearing on the court's conclusion. It is not unreasonable for Congress to conclude that not all defendants convicted under § 924(c) should receive new sentences, even while expanding the power of the courts to relieve some defendants of those sentences on a case-by-case basis.") (citation omitted). The district court applied precisely this test in determining that Bryant, Scott, and Decator demonstrated extraordinary and compelling reasons for relief.

Bryant, Scott, and Decator did not seek, and the court did not grant, a retroactive application of Section 403 of the First Step Act.

III. The District Court's Decisions Were Entirely Consistent with Separation of Powers Principles

Finally, the government argues that the district court's decision operates "in effect, like a grant of clemency, and thereby end-runs powers generally reserved to the executive branch." *See* Gov't Br. at 35. This is not only incorrect, but fails to grasp that a judicial check on prosecutorial power—essential in this case to "correct an injustice"—is in total harmony with our system of checks and balances. DE 413. The authority granted by § 3582(c)(1)(A) is not new, boundless, or troubling, as the government claims.

A. The District Court's Authority Is Not New

The authority upon which the district court relied in granting the defendants' motions in this case is, in fact, long-standing. Even before the First Step Act, § 3582(c)(1)(A) stated that the court may reduce a sentence "if *it [the court]* finds" extraordinary and compelling reasons exist for the reduction. The amended version of the statute reinforces this authority by allowing a court to exercise its discretion to reduce a sentence "in any case" where "extraordinary and compelling reasons warrant such a reduction." It was always the intent of Congress that § 3582(c)(1)(A) operate as a "safety valve[] for modification of sentences" allowing for "later review of sentences in particularly compelling situations," such as the reduction "of an unusually long sentence." *See* S. Rep No. 98-225, at 55–56, 121 (1983). In particular, it was Congress's intent that this authority be exercised in a manner that keeps "the sentencing power *in the judiciary where it belongs*." *Id.* at 121 (emphasis added).

For this reason, the government's claim that the district court usurped the role of the executive branch in finding extraordinary and compelling reasons existed for compassionate release is without support. In trying to liken the court's grant of compassionate release to executive clemency, the government complains that the court can exercise its power to grant compassionate release "on an ad hoc basis," citing the court's comment that the existence of extraordinary and compelling reasons does not alone dictate sentencing relief. *See* Gov't Br. at 37; *see also* JA 638 ("It is not

unreasonable for Congress to conclude that not all defendants convicted under § 924(c) should receive new sentences, even while expanding the power of the courts to relieve some defendants of those sentences on a case-by-case basis."). But that is exactly what § 3582(c)(1)(A) and § 1B1.13 demand.[9] In addition to finding that extraordinary and compelling reasons exist for compassionate release, the court must determine that the release of the defendant would not pose a danger to the community and that relief is warranted under § 3553(a). Under this highly fact-specific scheme, some defendants who satisfy the extraordinary and compelling reasons standard will nevertheless be ineligible for sentencing relief.

The government contends that this scheme "would allow for disparities in sentencing, with some stacked § 924(c) defendants gaining immediate release while others do not." Gov't Br. at 37. There is no question that over time there have been a great many imprudent uses of § 924(c) "stacking," which, combined with the racially disparate use of the practice, is why the Sentencing Commission and the Judicial Conference of the United States called upon Congress to put an end to it. And since

[9] And, indeed, it is consistent with what courts do day in and day out in imposing sentences. It is axiomatic that not every defendant convicted of the same crime receives the same sentence. The court must engage in a careful balancing of the § 3553(a) factors and determine the sentence that is sufficient but not greater than necessary for the particular defendant that stands before it. *United States v. Brown,* 2020 WL 2091802 at *7 (The sentencing court's role in "releasing defendants from incarceration is a delicate business—but not any more so than incarcerating them initially.").

there is no such thing as too much justice, there are others inmates just like Bryant, Scott, and Decator whose sentences will likely require reductions. Indeed, that no doubt accounts for the avalanche of cases described above. Only one thing is for sure: the government's apparent proposal "to solve that problem by 'leveling down'—that is, by withholding the opportunity from everyone alike," *United States v. Johnson*, 961 F.3d 181, 191 (2d Cir. 2020), is not a position befitting the Department of Justice.

The district court did precisely what § 3582(c)(1)(A) has always allowed: it concluded that extraordinary compelling reasons existed for compassionate release; it found that the release of Bryant, Scott, and Decator would not pose a danger; and it determined that a time-served sentence was warranted under § 3553(a).[10]

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[10] Notably, the government does not argue that the district court abused its discretion in determining a reduction was warranted under § 3553(a) or that the release of Bryant, Scott, and Decator would not pose a danger to the community. Nor could it. The court considered and rejected every argument the government raised below and, contrary to the government's one-sentence complaint, gave ample time for the victims to be heard. *See* Gov't Br. at 38–39. To the extent the government contends that Bryant, Scott, and Decator were released before "the government even had a chance to reach out to the victims," that is on the government. *See* Gov't Br. at 38–39. Prior to granting release in each of the three cases, the court contacted the parties to request that the defendants' reentry plans be submitted to the U.S. Probation Office for approval, leaving little doubt as to the court's intention to grant the motions and leaving ample time for the government to contact the victims. JA 356. Indeed, between when the first defendant submitted his motion and when the court issued its first ruling in Decator's case, *four months* passed. More than three weeks passed before the court issued its second ruling in Bryant's case. And another

B. The District Court's Authority Is Not Boundless

Far from "boundless," *see* Gov't Br. at 37, the authority granted by § 3582(c)(1)(A) is also narrowly cabined by the statute and the Sentencing Commission's policy statement. A district court may reduce a sentence only when it determines that "extraordinary and compelling reasons" warrant such relief. The authority to do justice in such circumstances threatens no harm to the federal sentencing regime or our system of checks and balances. There is nothing earth-shattering, and certainly nothing unconstitutional, about a judicial check on an exercise of prosecutorial discretion. That is particularly so in the instant cases, where the government forced life imprisonment on three individuals who committed crimes as young men and who have, 25 years later, done everything in their power to make amends for their actions. Limited as it is to cases presenting only extraordinary and compelling reasons, § 3582(c)(1)(A) is arguably an insufficient check, but in any event it certainly does not stand "in tension with separation of powers principles." *See* Gov't Br. at 36.[11]

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two weeks passed before it issued the third ruling in Scott's case. The government cannot seriously claim that it did not have sufficient time to contact the victims.

[11] Section 3582(c)(1)(A)'s limitation of compassionate release to those presenting extraordinary and compelling reasons also undermines the government's claim that district courts' ability to "draw the lines on their own under § 3582(c)(1)(A)" would render other portions of that statute "superfluous." Gov't Br. at 39–40. Congress's decision to delineate two other grounds for sentence reductions, in § 3582(c)(2) and

C. The District Court's Authority Is Not Troubling

Finally, as for the government's argument about the "troubling ramifications" of this case, the only thing "troubling" is the government's determination to elevate ten outdated words in Application Note 1(D) above the clear text and purpose of § 3582(c)(1)(A) and § 1B1.13 in an effort to return three extraordinary men to prison for two more decades. Gov't Br. at 40. The government insinuates that Bryant, Scott, and Decator bided their time until their original sentencing judge had retired in the hope that they could "find a sympathetic ear to their entreaties." Gov't Br. at 39. But that is of course not what happened. As an initial matter, contrary to the government's assertion that "the original sentencing judge [] felt strongly that the lengthy sentences were justified in this case," *see* Gov't Br. at 39, the judge repeated over and over again that, if he was "writing on a clean slate," he would be inclined to agree with the defendants that the § 924(c) counts only required five-year terms. JA 199, 202, 209, 223. But in a pre-First Step Act, pre-*Booker* world, the court simply did not have that authority. Nor could the court consider a sentence reduction pursuant to § 3582(c)(1)(A) because that required the BOP to file a motion and, as discussed above, it hardly ever did.

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§ 3582(c)(1)(A)(ii), suggests that the circumstances covered by those provisions do not rise to the level of "extraordinary and compelling" and, thus, form separate grounds for relief.

It was not until the First Step Act, when Congress enabled inmates to proceed to court when the BOP failed to make a motion or even expressly denied an application for one, that the court could even consider a motion for compassionate release. Bryant, Scott, and Decator filed their motions in the wake of that change. There was no "judge-shopping." *See* Gov't Br. at 39. There were no "serial filings." *See* Gov't Br. at 39. No "Pandora's box" was opened. Instead, three deserving men got to return home to their families after 25 years apart from them. Far from "frustrating the purposes of the [Sentencing Reform Act]," the court honored congressional intent by using the authority bestowed on it by § 3582(c)(1)(A) to correct an injustice. *See* Gov't Br. at 39.

CONCLUSION

For the foregoing reasons, this Court should affirm the amended judgments of the district court.

Respectfully submitted this 29th day of July, 2020.

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Appellate Rule 34(a), Bryant, Scott, and Decator respectfully request oral argument in this case. The matters presented in this appeal are matters of first impression and likely to recur, and the district courts need guidance.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND LENGTH LIMITATIONS

1. This brief has been prepared using fourteen point, proportionally spaced, serif typeface (Garamond) using Microsoft Word.

2. EXCLUSIVE of the corporate disclosure statement; table of contents; table of citations; statement with respect to oral argument; any addendum containing statutes, rules, or regulations, and the certificate of service, this brief contains no more than 12,000 words.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief and/or a copy of the work or line print-out.

/s/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of July, 2020, I electronically filed the foregoing Brief of Appellees with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF user: Mr. Jason Daniel Medinger, Assistant United States Attorney; Aidan Taft Grano, Assistant United States Attorney; Joseph Attias, Assistant United States Attorney; Daniel Taylor Young, Assistant United States Attorney; Richard Daniel Cooke, Assistant United States Attorney, Office of the United States Attorney, 4th Floor, 36 South Charles Street, Baltimore, MD 21201.

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