Nos. 20-6869(L), 20-6875, 20-6877

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

KEITH E. BRYANT, et al.,

Appellees.

Appeal from the United States District Court for the
District of Maryland, Northern Division
The Honorable Catherine C. Blake, District Judge

OPENING BRIEF OF APPELLANT UNITED STATES OF AMERICA

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INTRODUCTION

Federal law provides that the United States Sentencing Commission shall determine what constitutes the kind of "extraordinary and compelling" circumstances that warrant compassionate release of an inmate under 18 U.S.C. § 3582(c)(1)(A)(i). 28 U.S.C. §§ 994(a)(2)(C), 994(t). Further, any grant of compassionate release must be "consistent with" the Commission's regulatory pronouncements. 18 U.S.C. § 3582(c)(1)(A).

Here, however, the district court held that it could independently promulgate its own criteria for granting release under § 3582(c)(1)(A)(i), and determined that the recent changes to sentences for convictions under 18 U.S.C. § 924(c) were sufficiently extraordinary and compelling to grant relief. JA 626, 636, 647. In the process, the district court violated the dictates of § 3582(c)(1)(A), usurped the Sentencing Commission's authority, contravened this Court's precedent (*United States v. Jordan*), and exercised an ad hoc clemency power reserved to the executive branch. JA 628, 638, 649. As such, the government has filed this appeal seeking reversal.

STATEMENT OF JURISDICTION

The defendants in this appeal were convicted and sentenced for a series of violent, armed bank robberies that they perpetrated in 1993 and 1994. JA 242-79.

They later sought release under 18 U.S.C. § 3582(c)(1)(A)(i). JA 281-622. The district court had jurisdiction over this criminal case pursuant to 18 U.S.C. § 3231. The district court granted the defendants' motions and reduced their sentences to time-served. JA 623-53. The government timely filed notices of appeal. JA 672-79. This Court has jurisdiction over this consolidated appeal pursuant to 18 U.S.C. § 3731 and 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court erred in determining that the First Step Act's amendments to 18 U.S.C. § 924(c), coupled with the defendants' efforts at rehabilitation, constituted an "extraordinary and compelling reason[]" for a sentence reduction under the compassionate release statute, 18 U.S.C. § 3582(c)(1)(A)(i).

STATEMENT OF THE CASE

The defendants in this case, Kittrell Decator, Keith Bryant, and Craig Scott, were charged in connection with a series of violent, armed bank robberies occurring in 1993 and 1994. JA 94-113. During these robberies, which they planned and rehearsed in detail, they donned ski masks and hoods, shoved shotguns within inches of the heads of several bank tellers, and made off with approximately $407,000 in total. JA 710-12. During trial, they tried to intimidate and harass a government eyewitness, JA 119-20, 713, two (Bryant and Decator) were disruptive and abusive

toward the district judge, JA 149, 163, 178, and one (Decator) verbally assaulted the jurors after the verdict was returned, JA 172. They were convicted on all counts and sentenced. JA 242-79. They later sought release under 18 U.S.C. § 3582(c)(1)(A)(i), which the district court granted. JA 623-53. The government here briefly describes the robberies, followed by the post-conviction proceedings which give rise to the instant appeal.

A. The Defendants Commit Multiple Armed Robberies

The charges in this case stemmed from two completed bank robberies and one attempted bank robbery, occurring on September 21, 1993, June 6, 1994, and June 8, 1994. JA 94-112.

On September 21, 1993, at approximately 11:00 a.m., Decator, Bryant, Scott, and one other codefendant (Jonathan Jones) entered the Maryland National Bank at 6700 York Road, Baltimore, Maryland. JA 710. Scott and Jones were armed with shotguns and took command of the lobby by pointing their guns at innocent victims. JA 710. Bryant was armed with a Glock semi-automatic pistol and proceeded to the teller area where, at gunpoint, he forced the tellers to empty their cash drawers. JA 710. Decator took the manager and head teller to the vault where, armed with a .22 caliber revolver, he forced them to empty the contents of the vault. JA 710. The four robbers escaped in Decator's pickup truck with almost $290,000. JA 710;

see also United States v. Scott, 1999 WL 1134547 at *1 (4th Cir. Dec. 13, 1999); *United States v. Decator*, 1997 WL 225988 at *1 (4th Cir. May 6, 1997).

After dissipating the funds from the first robbery, the defendants then planned a second robbery, this one targeting the First National Bank, located at 1514 Woodlawn Avenue, Baltimore, Maryland. JA 710. On June 6, 1994, at approximately 12:30 p.m., Decator and Bryant entered the bank armed with 9 mm semi-automatic pistols. JA 710. Scott was positioned as a lookout outside the bank. JA 710. After entering the bank, Decator forced the manager to the vault area while Bryant maintained control of the lobby by pointing his gun at the innocent victims. JA 710. The bank manager was unable to open the vault quickly enough and both Decator and Bryant fled upon being alerted by Scott via radio that their time in the bank had expired. JA 710. No bank proceeds were taken in this attempted heist. JA 710.

Because the First National robbery was unsuccessful, the defendants planned a third robbery, this time targeting the same Maryland National Bank they had robbed in September. On June 8, 1994, at approximately 10:00 a.m., Jones and Decator entered the Maryland National Bank once again. JA 711. Each was armed with the same semiautomatic pistols that Decator and Bryant had utilized on June 6th. JA 711. Scott remained outside as a lookout with the getaway vehicle.

JA 711. During the robbery, Decator forcibly disarmed the bank security guard and took his .357 caliber revolver. JA 711. The proceeds of this robbery totaled $117,000. JA 711.

As Decator, Jones, and Scott were fleeing and entering Decator's truck, a bystander named Dr. Steven Kopits noticed the commotion, followed the defendants, and wrote down the license plate number. JA 711. Based on this lead, later that afternoon, Decator and Jones were arrested at Decator's residence. JA 711. The bank security guard's .357 caliber revolver, the ski masks and sweatshirts they had worn during the robberies, and the two 9 mm semiautomatic pistols they had used to intimidate their victims during the robberies were recovered from Decator's truck. JA 711. Scott was arrested later that day in a hotel trying to remove dye stains from the robbery proceeds. JA 711.

B. The Defendants Are Charged, Convicted, And Sentenced

On July 12, 1994, defendants Decator and Scott were indicted in Case No. 94-281 for: (1) conspiracy to commit bank robbery, in violation of 18 U.S.C. § 371 (Count 1); (2) three counts of armed bank robbery and attempt, in violation of 18 U.S.C. § 2113(a), (f) (Counts 2, 4, and 6); and (3) three counts of using or carrying a firearm during the commission of a crime of violence, in violation of 18 U.S.C. § 924(c) (Counts 3, 5, and 7). JA 94-101.

The district court subsequently ordered severance of the counts and the defendants. JA 14. Also, Jones began cooperating with the government and identified Bryant as a co-conspirator. *Decator*, 1997 WL 225988 at *4. The government therefore dismissed some charges against Decator and Scott in order to re-charge the case with Bryant now as a codefendant. *Id.* The net result was that these defendants received four separate jury trials, and were convicted on all charges at each one. Specifically, on November 15, 1994, the jury returned guilty verdicts as to Decator and Scott as to Counts 6 and 7 in Case No. 94-281, which related to the June 8th robbery. JA 17. On November 22, 1994, Jones was found guilty on Counts 4, 5, 6, and 7 in Case No. 94-281, which related to the June 6th attempted robbery and June 8th robbery. JA 19. On October 23, 1995, Bryant and Scott were found guilty on all counts in Case No. 95-202. JA 57. Finally, on December 6, 1995, Decator was found guilty on all counts in Case No. 95-202. JA 60.

The matter proceeded to sentencing. The district court had before it the statements of the victims of these crimes, who described the searing impact on them of having masked men point shotguns at their heads at close range. JA 712 ("I do not feel safe . . . . I'm afraid. . . . I want these guys put away forever."); JA 713 ("When they came screaming into the bank with guns drawn I began to pray that this would not be the day I died. Until you have experienced this feeling you have no

idea how terrifying it is.").

The district court began the sentencing by finding that the defendants had tried to obstruct justice by intimidating Dr. Kopits, the government witness who identified the robbers after the June 8th heist. Specifically, Decator and Scott contacted Bryant, who was not in custody at the time, to get him to intimidate Kopits into not testifying. JA 713. Additionally, strange visitors went to Kopits's office, which he interpreted as a threat. JA 713. Also, a call was made to the home of an associate of Kopits probing about who was going to testify at the Jones trial. JA 713. Finally, individuals secreting themselves in a car near Kopits's house appeared to be conducting surveillance on Kopits. JA 713. This necessitated the government to place a security detail on Kopits in advance of trial. JA 713. The district court found beyond a reasonable doubt that the defendants willfully engaged in these attempts at witness intimidation. JA 119-20; JA 192 (district court finding that Scott "went out in front . . . with regard to the attempt to put pressure on Dr. Copitz [sic] and/or his family"); JA 163 (district court stating that "Decator wanted contact made with Dr. Copitz [sic] to try to scare him"); JA 165 (district court stating that "Decator took part in this and took part up to his neck, period, exclamation

point.").[1]

The district court next addressed Decator and held him in contempt for verbally assaulting the jury after the verdict was announced in Case No. 95-202. JA 172. Specifically, after the verdict was read, Decator launched into a verbal tirade about how the trial was unfair, the witnesses were liars, and the government was trying to crucify him. *See Decator*, 1997 WL 225988 at *6 (describing how Decator was "verbally assaulting the jurors"). The court also noted Decator was disruptive throughout the trial. JA 163. The court held that Decator's conduct towards the jury and the court was simply "unconscionable" and fully warranted a contempt finding. JA 172.

The district court applied the low end of the sentencing guidelines range on the substantive bank robbery and conspiracy counts of conviction, and ran all of those sentences concurrent to each other; the court also imposed the mandatory consecutive sentences for the 924(c) counts related to the September 21st, June 6th, and June 8th instances where the defendant aimed shotguns and pistols at the heads

[1] The government also had evidence that the defendants tried to bribe another witness (Reginald Barnette) for favorable testimony, but the district court ultimately declined to address that matter because the record had not been developed and the obstruction enhancement was already shown through the intimidation of Kopits. JA 131-32.

of their victims during the robberies; and finally the court gave Decator a six-month consecutive sentence for contempt related to his verbal assault on the jury. JA 184-85, 258 (Decator); JA 143, 251 (Bryant); JA 237, 264 (Scott).[2]

In imposing these sentences, the district court appreciated that these were lengthy sentences; however, the district court found that the Sentencing Commission recognized the impact of its sentencing structure and came to the reasoned conclusion that "severity was needed [in this kind of case] because of the combined conduct" of multiple armed robberies that placed numerous victims in harm's way. JA 123. The court later returned to this issue of the mandatory minimums associated with the 924(c) sentences. Recognizing the brazenness, the sophistication, and the serial, violent nature of these robberies, the court remarked that, "thoughtful and careful people have established those minimums and if there is a justification . . . for the severity it exists in this case." JA 205.

C. The Defendants Seek Release Under 18 U.S.C. § 3582(c)(1)(A)(i)

Starting in December 2019, the defendants moved for release under § 3582(c)(1)(A)(i), claiming that "extraordinary and compelling reasons" supported

[2] Amended judgments were later issued for Decator and Scott to account for minor discrepancies between the oral pronouncement of sentence and the written judgments. JA 269-79; *see also Decator*, 1997 WL 225988 at *6.

their release. JA 281-621. The defendants took advantage of a provision in the recently-enacted First Step Act that changed the procedural mechanism by which inmates could seek release under § 3582(c)(1)(A). JA 288. Specifically, while federal law previously permitted a court to reduce a defendant's term of imprisonment under § 3582(c)(1)(A) only if the Bureau of Prisons (BOP) filed a motion on the defendant's behalf, the First Step Act amended § 3582(c) to allow inmates themselves to file motions seeking such relief after fully exhausting administrative remedies with the BOP. JA 288. Importantly, however, the First Step Act did not amend the substantive bases for such relief, which still had to be promulgated by the Sentencing Commission. *See* 18 U.S.C. § 3582(c)(1)(A) (requiring that any relief granted be "consistent with applicable policy statements issued by the Sentencing Commission"); *see also* 28 U.S.C. §§ 994(a), (t) (Congress delegating regulatory power to the Sentencing Commission to determine what is "extraordinary and compelling"). Notwithstanding these clear statutory commands that the Sentencing Commission was vested with the authority to determine the substantive bases for relief, the defendants argued that the district court could exercise independent authority to determine for itself what constitutes "extraordinary and compelling reasons" for release. JA 292, 364, 533. The defendants then argued that, because the First Step Act had reduced the mandatory

minimum sentences that would be imposed had the defendants been convicted today under 18 U.S.C. § 924(c), these changes constituted "extraordinary and compelling reasons" to award relief here, JA 293-94, 368, 538, even though Congress expressly declined to make the changes to § 924(c) retroactive. The defendants further argued that, assuming the court could invent its own criteria outside of the Sentencing Commission's regulations and applied the § 924(c) changes retroactively, the relevant factors under 18 U.S.C. § 3553(a) militated in favor of relief. JA 294, 370, 540.

The government opposed, pointing out that: (1) federal law vested the Sentencing Commission (not the district courts) with the authority to determine what constitutes an "extraordinary and compelling" reason for relief under § 3582(c)(1)(A)(i); (2) it would be particularly improper to cite the First Step Act's changes to § 924(c) sentences to grant relief here when Congress expressly declined to make those § 924(c) changes retroactive; (3) the defense was essentially attempting to give the district courts a kind of clemency power reserved to the executive branch; and (4) under the relevant § 3553(a) factors, relief was not warranted given the particularly violent, serial nature of these crimes and the

devastating impact they had on the victims. JA 309-337; JA 497-521; JA 593-619.[3]

Without conducting a hearing, the district court granted the motions and ordered the defendants' immediate release. JA 623-53. The district court began by acknowledging that "[u]nder 28 U.S.C. § 994(t), the United States Sentencing Commission is responsible for defining 'what should be considered extraordinary and compelling reasons for sentence reduction' under § 3582(c)(1)(A)." JA 635. The court then recognized that the Sentencing Commission exercised that authority by enacting a policy statement, U.S.S.G. §1B1.13 cmt. n.1(A)-(D), specifying certain age- and illness-related grounds for granting a sentence reduction under § 3582(c)(1)(A)—none of which applied in this case. *See* JA 636. However, the court determined that U.S.S.G. §1B1.13 was outdated and inconsistent with the First Step Act because, in its view, U.S.S.G. §1B1.13 had not been updated to reflect the procedural change that defendants could petition the district court directly for relief without a motion by the BOP. JA 636. Based on this perceived inconsistency on

[3] With regard to the § 3553(a) factors, the government also recognized the laudable post-conviction programming completed by the defendants, but also noted the infractions the defendants had sustained during their time in custody. JA 336 (BOP disciplinary report for Decator showing seven sustained violations, most recently in 2018 for possession of a contraband cellphone); JA 392 (BOP disciplinary report for Bryant showing three sustained violations, including a 2007 charge for fighting); *but see* JA 551 (BOP disciplinary report for Scott showing only a single violation from 1995).

the procedural mechanics to apply for relief, the district court held that it was empowered to determine for itself whether the defendants had demonstrated sufficiently extraordinary and compelling circumstances to warrant a sentence reduction. JA 636. Specifically, the court held that "[w]hile Sentencing Commission and BOP criteria remain helpful guidance, 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 636. The court then considered the changes to § 924(c) sentences wrought by the First Step Act, found that the defendants would have received shorter sentences had they been sentenced today, and considered this difference to be sufficient to award relief under § 3582(c)(1)(A)(i). JA 638. Finally, the court considered the relevant § 3553(a) factors and ultimately reduced the defendants' sentences to time-served. JA 630, 639, 650.

The government filed this appeal in light of the district court's error. As detailed below, this Court should reverse.

SUMMARY OF ARGUMENT

The district court erred in multiple ways here.

First, the district court's decision violates § 3582(c)(1)(A). Federal law requires that any grant of compassionate release must be "consistent with applicable

policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A). The district court's orders here are clearly not "consistent" with any regulatory promulgation by the Commission. Nowhere in U.S.S.G. §1B1.13 is there any mention of "stacked" § 924(c) sentences being sufficient for compassionate release. Because the district court's decision contravenes § 3582(c)(1)(A), reversal is required.

Second, the district court's decision violates 28 U.S.C. §§ 994(a), (t). These code sections provide that the Sentencing Commission "shall describe what should be considered extraordinary and compelling reasons for sentence reduction" under § 3582(c). Disregarding this congressional command, the district court determined it could make up its own criteria, and thereby arrogated to itself a power that was directly and exclusively vested with the Commission. As such, reversal is required.

Third, the district court's decision violates the First Step Act and end-runs this Court's precedents. As this Court has recognized, in adopting the First Step Act, Congress declined to make retroactive the changes to § 924(c) sentences. *United States v. Jordan*, 952 F.3d 160, 173-74 (4th Cir. 2020). And yet, the district court did just that here by calibrating the defendants' sentences to what they would have received had they been sentenced today, thereby giving retroactive application to the First Step Act provisions that Congress expressly made prospective only. In doing

so, the district court created a loophole by which district courts can ignore this Court's precedents under the guise of awarding relief under § 3582(c)(1)(A)(i). Because the First Step Act may not be contravened and appellate precedents must be respected, reversal is required.

Fourth, the district court's decision violates separation of powers principles. The district court granted itself plenary powers to determine, on a case-by-case basis, what is sufficiently extraordinary and compelling to warrant the immediate release of an inmate. Using this power, the court effectively commuted the defendants' sentences and ordered immediate release. This constitutes a judicial clemency power. However, our Constitution vests the executive branch with that power. Moreover, Congress expressly forbade courts from revisiting criminal judgments, declaring that they must be "final" for all purposes, except where modification is specifically authorized. 18 U.S.C. § 3582(b). In this way, the district court carved out for itself an executive branch function and exercised it in a manner forbidden by the legislative branch. This is inconsistent with separation of powers principles.

In sum, the district court here contravened numerous statutory and regulatory provisions, countermanded this Court's precedent, and granted itself a level of discretion over sentence reductions that Congress neither envisioned nor authorized. For these reasons, this Court should reverse the district court's decisions.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING RELIEF UNDER 18 U.S.C. § 3582(c)(1)(A)(i)

A. Standard of Review

This Court reviews *de novo* issues of statutory interpretation, including the district court's legal authority to grant relief under § 3582(c). *United States v. Wirsing*, 943 F.3d 175, 182 (4th Cir. 2019); *United States v. Mann*, 709 F.3d 301, 304 (4th Cir. 2013).

B. The District Court's Decision Violates 18 U.S.C. § 3582(c)(1)

The default rule is that federal sentences are "final" for all purposes once they are imposed. 18 U.S.C. § 3582(b). A district court therefore generally "may not modify a term of imprisonment once it has been imposed . . . ." 18 U.S.C. § 3582(c). Congress imposed these strictures because of the numerous salutary goals advanced by finality—consistency in judgments, effective deterrence, closure for victims, and conservation of judicial resources—but also to guard against "judicial changes of heart." *See United States v. Goodwyn*, 596 F.3d 233, 235 (4th Cir. 2010).

Section 3582(c)(1) allows a narrow exception to the general rule of finality, but only in a very limited circumstance. Specifically, Congress provided that a district court:

> may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—
>
> (i) extraordinary and compelling reasons warrant such a reduction; or
>
> (ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);
>
> **and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission . . . .**

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

Pursuant to its statutory mandate, the Sentencing Commission has promulgated four circumstances that constitute extraordinary and compelling reasons: "(A) Medical Condition of the Defendant," "(B) Age of the Defendant," "(C) Family Circumstances," or "(D) Other Reasons . . .[a]s determined by the Director of the Bureau of Prisons."[4] U.S.S.G. § 1B1.13, cmt. n.1. The Commission

[4] The BOP exercised its rulemaking authority in this area by enacting Program Statement 5050.50, available at https://www.bop.gov/policy/progstat/5050_050_EN.pdf. None of the provisions

then explicated the precise contours of these categories, limiting relief to when, *inter alia*, the defendant is suffering from a terminal illness such as cancer, the defendant is over 65 years old and has served a significant portion of the sentence, or the primary caretaker of the defendant's minor child has died. *Id.*

In this way, in order to have the legal authority to modify a sentence under § 3582(c)(1)(A)(i), the district court must: (1) find as a factual matter that the defendant has demonstrated one of "extraordinary and compelling reasons" listed in U.S.S.G. § 1B1.13; (2) weigh the relevant § 3553(a) factors; and (3) ensure that any reduction is strictly in compliance with the applicable policy statement issued by the Sentencing Commission. 18 U.S.C. § 3582(c)(1)(A)(i); *United States v. Saldana*, 807 F. App'x 816, 819 (10th Cir. 2020).

Pursuant to a straightforward application of these provisions to this case, it is clear the district court erred. None of the factors set forth in § 1B1.13 or Program Statement 5050.50 applied here. In fact, the defendants never even tried to claim as much. Rather, the sole ground cited by the defendants for relief was the fact that they were subjected to stacked § 924(c) sentences under then-existing law when they were originally sentenced, and the law had now changed. Problematically for the

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of this Program Statement is at issue in this case.

defendants, nowhere in § 1B1.13 has the Sentencing Commission made any allowance for stacked § 924(c) sentences to serve as a basis for relief. This should have ended the matter. But, it did not.

Rather, the district court held it could exercise "independent discretion" to make up its own criteria for compassionate release wholly separate and apart from the Sentencing Commission. JA 626, 636, and 647 (finding that the defendants' stacked § 924(c) sentences warranted relief because they would not have received the same sentences had they been sentenced today).

In this way, the district court's decisions here were not "consistent" with Sentencing Commission policy. To the contrary, they were unabashedly and admittedly *in*consistent. The district court recognized that the Commission enacted in U.S.S.G. § 1B1.13 the applicable policy statement governing this area, but felt at liberty to ignore this provision and go its own way. Congress did not permit district courts such license. Section 3582(c)(1)(A) clearly tethers the district court's authority to the "applicable policy statements issued by the Sentencing Commission." The district court's decisions thus violate the clear language of § 3582(c)(1)(A) because they are inconsistent with § 1B1.13. This Court must therefore reverse.

Indeed, numerous courts confronting this very issue have rejected the

invitation to violate § 3582(c)(1)(A) and create their own bases for compassionate release:

- *Saldana*, 807 F. App'x at 820 (rejecting compassionate release claim based on post-sentencing rehabilitation 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");

- *United States v. Plowright*, 2020 WL 3316989, at *2 (S.D. Ga. June 18, 2020) (rejecting claim that stacked § 924(c) sentences could warrant compassionate release because "§ 3582 (c)(1)(A) as amended by the FSA still requires courts to abide by policy statements issued by the Sentencing Commission. . . . . Accordingly, this Court will not consider circumstances outside of the specific examples of extraordinary and compelling reasons to afford relief");

- *United States v. Rollins*, 2020 WL 3077593, at *2 (N.D. Ill. June 10, 2020) (rejecting claim that stacked § 924(c) sentences resulting in 106-year sentence and the FSA's changes to the law could warrant compassionate release because "§ 3582(c)(1)(A)(i) does not grant the court the authority to reduce Rollins's sentence on this ground");

- *United States v. Strain*, 2020 WL 1977114, at *4 (D. Alaska Apr. 24, 2020) ("The Director of the BOP has not issued any policy or finding that sentences that

resulted from now-impermissible 'stacking' of § 924(c) offenses qualify as an 'extraordinary and compelling reason.' Accordingly, this reason cannot serve a basis for granting Strain's Motion even in light of her substantial and commendable efforts toward rehabilitation.");

- *United States v. Goldberg*, 2020 WL 1853298, at *4 (D.D.C. Apr. 13, 2020) (rejecting argument that a defendant's need to care for his elderly parents was sufficient for release because "[a] sentence reduction on this basis would [] not be 'consistent with applicable policy statements issued by the Sentencing Commission,' as required by § 3582(c)(1)(A).");

- *United States v. Childs*, 2019 WL 6771781, at *2 (D. Kan. Dec. 12, 2019) (rejecting compassionate release claim based on "the recent passage of the First Step Act combined with the stacking of his firearm offenses and the new Guideline calculations" because the extraordinary and compelling reasons listed in § 1B1.13 "do not include changes to the statutory minimums or the Guidelines").[5]

The government respectfully submits this Court should follow these

[5] The government acknowledges that other courts have disagreed with these findings and reached results similar to the ones at issue here. *See, e.g.*, *McCoy v. United States*, 2020 WL 2738225 (E.D. Va. May 26, 2020); *United States v. Marks*, 2020 WL 1908911 (W.D.N.Y. Apr. 20, 2020); *United States v. Maumau*, 2020 WL 806121 (D. Utah Feb. 18, 2020). It should be noted that the government is pursuing appeals in *McCoy*, *Marks*, and *Maumau*.

persuasive authorities and reverse the district court's contrary holding because it is inconsistent with § 3582(c)(1)(A).

And the defendants were wrong below to contend that the recent changes to § 3582 by the First Step Act allow a different result. To be sure, the First Step Act changed the procedural mechanism by which compassionate release claims could be brought before the district court. Specifically, it allowed inmates to file motions for release under § 3582(c)(1)(A) after full exhaustion, whereas before, such motions could only be filed by the BOP. *See* First Step Act of 2018, § 603, Pub. L. No. 115-391, 132 Stat. 5194, 5239. However, while amending the procedural avenues for relief, Congress left the substantive bases for relief unchanged. Specifically, Congress left intact the requirement that any grant of relief had to be "consistent" with Sentencing Commission policy set forth in 18 U.S.C. § 3582(c)(1)(A). Congress also left intact 28 U.S.C. § 994(t), discussed further below, which vests the Sentencing Commission with the power to determine what constitutes "extraordinary and compelling reasons." Because the defendants' interpretation of the First Step Act would require this Court to ignore the substantive pieces of § 3582(c)(1)(A) that were unaffected by the First Step Act, their argument must be rejected. *See United States v. Ebbers*, 432 F. Supp. 3d 421, 427 (S.D.N.Y. Jan. 8, 2020) ("The First Step Act did not revise the substantive criteria for compassionate

release . . . . Congress [in the FSA] in fact only expanded access to the courts; it did not change the standard."); *United States v. Zullo*, 2019 WL 7562406, at *3 (D. Vt. Sept. 23, 2019) ("The court rejects Zullo's argument that the amendment of 18 U.S.C. § 3852(c)(1)(A) removing the requirement of a BOP motion also removed the substantive effect of U.S.S.G. § 1B1.13."); *United States v. Willis*, 382 F. Supp. 3d 1185, 1187 (D.N.M. 2019) ("Aside from allowing prisoners to bring a motion directly, the First Step Act did not change the standards for compassionate release.").

The plain text of the statute must control. Here, federal law provides squarely that any grant of compassionate release must be "consistent" with § 1B1.13. Because these grants are not, reversal is required.

C. The District Court's Decision Violates 28 U.S.C. §§ 994(a), (t)

In addition to violating § 3582(c)(1)(A), the district court's decision also runs afoul of 28 U.S.C. § 994 and the express delegation of policy-making authority to the Sentencing Commission.

Federal law provides that the Sentencing Commission "shall promulgate and distribute to all courts of the United States . . . 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 set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate

use of— . . . the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18 . . . ." 28 U.S.C. § 994(a)(2)(C). The Commission was thus given plenary power to "promulgate" and "distribute" to the courts the manner and circumstances under which relief could be granted under § 3582(c). Congress thus vested the Commission, not district courts, with the authority to make substantive determinations for when compassionate release can be granted.

But there is more. Congress went on to provide specifically that: "**The 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." 28 U.S.C. § 994(t) (emphasis added). The only limitation placed on this plenary grant of power was that rehabilitation alone could not be considered an extraordinary and compelling reason. *Id.*

In this way, Congress could not have been clearer: it vested the Commission wholly and exclusively with the power to determine what constitutes extraordinary and compelling circumstances. No mention was made of district courts being able to exercise this power. Congress delegated this power to the Commission alone.

And lest there be any doubt about this, the Supreme Court has clarified that

the Commission's policy statements are binding on lower courts when they are considering granting relief under § 3582(c). *Dillon v. United States*, 560 U.S. 817, 827 (2010) (interpreting § 3582(c)(2) as "requir[ing] the court to follow the Commission's instructions in § 1B1.10" which was binding under 28 U.S.C. § 994(u)); *see also Stinson v. United States*, 508 U.S. 36, 45-47 (1993) (holding that the Sentencing Commission's commentary is "binding" on federal courts). In other words, district courts may not simply go their own way; they are bound to faithfully apply the Sentencing Commission's policy judgments.

Here, the district court acted in contravention of §§ 994(a), (t). While Congress directly and exclusively delegated to the Sentencing Commission the power to determine what is extraordinary and compelling, the district court arrogated to itself "independent discretion" to exercise that same power. JA 647. This was clearly not permitted by 28 U.S.C. § 994(t). Rather than accepting the binding nature of the Commission's rulemaking as required under *Dillon*, the district court instead hijacked the Commission's role and legislated its own policy preferences to award relief here. Federal law simply does not permit this. *Rollins*, 2020 WL 3077593, at *2 ("allowing the court to supplant the Director's exclusive role in determining what, as a matter of substance, qualifies as an extraordinary and compelling reason under Note 1(D) would be inconsistent with 28 U.S.C. § 994(t)").

Reversal is therefore required.

Indeed, to affirm the district court, this Court would have to assume that through the First Step Act's expansion of a procedural threshold, Congress repealed, *sub silentio*, the entire substantive edifice of decision-making authority upon which sentence reduction motions rest: § 994(t)'s delegation of authority to the Sentencing Commission; § 994(a)(2)(C)'s delegation to the Commission of the role of arbiter regarding the "appropriate use" of § 3582(c); and § 3582(c)(1)(A)'s requirement that any sentence modification be "consistent with applicable policy statements issued by the Sentencing Commission."

But of course, this did not occur. Congress is aware of its own laws and would not codify such a drastic change into law without saying so. *See Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001) ("We must assume that, when Congress amended § 2680(h) in 1974, it was aware of § 2680(a) and its contours.") (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979)). The Supreme Court has made clear that "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Hui v. Castaneda*, 559 U.S. 799, 810 (2010) (internal quotation marks omitted). And yet, a *sub silentio* repeal by implication is precisely what the district court did here by casting aside 28 U.S.C. §§ 994(a), (t).

And aside from the facial impropriety of effectively repealing by implication § 994(t), the rationale given by the district court for its actions does not withstand scrutiny. Here, the district court felt empowered to act because it claimed that, following the First Step Act's procedural changes in how compassionate release could be sought, § 1B1.13 was outdated because it had not been updated to reflect that defendants themselves could file motions for relief following full exhaustion. JA 647 (holding that § 1B1.13 "is at least partially inconsistent with the First Step Act" because it "indicates that § 3582(c)(1)(A)(i) review is available only upon motion of the BOP, which is no longer correct"). The district court then threw the baby out with the bath water and held that this discrepancy gave it plenary power to re-imagine the substantive bases for § 3582(c)(1)(A)(i) relief in ways not permitted under § 1B1.13.

This was wrong on many levels.

As an initial matter, § 1B1.13 is not inconsistent with current law. It provides that § 3582(c)(1)(A) relief can be granted "[u]pon motion of the Director of the Bureau of Prisons." That was true before the First Step Act, and it is still true today. The BOP can still move for compassionate release. There is thus no facial inconsistency there. In this way, the district court's addition of the word "only" to § 1B1.13 is simply wrong on the plain text of the statute and an improper attempt to

read inconsistency into the commentary where none exists. *See United States v. Muldrow*, 844 F.3d 434, 441 (4th Cir. 2016) (rejecting request for § 3582(c)(2) relief that depended on ignoring the Commission's commentary because "we see no inconsistency between the Guidelines and the commentary as revised by Amendment 759" and "[w]e decline to strain the text to create one.").

As one court recently put it, "'there is no comparable inherent incompatibility between a statute allowing defendants to move for compassionate release and a policy statement allowing BOP a role in determining whether compassionate release is warranted, and thus no basis for deeming the policy statement overridden.'" *United States v. Garcia*, — F. Supp. 3d —, 2020 WL 2039227, at *4 (C.D. Ill. Apr. 28, 2020) (citation omitted). The district court here was too quick to find conflict where there was none, and in so doing improperly trod on the Sentencing Commission's unique domain and Congress's authority to create that role for the Commission. *See Muldrow*, 844 F.3d at 439 ("Cognizant of our role vis-à-vis the Commission, this court rarely invalidates part of the commentary as inconsistent with the Guidelines text.") (citing *United States v. Shell*, 789 F.3d 335, 357 (4th Cir. 2015) (Wilkinson, J., dissenting)). Here, the Commission's policy statement does not state that relief can "only" be achieved through a BOP motion and hence there is no fatal inconsistency.

To be sure, it does omit mention of a defendant being allowed to bring a motion himself. But, that omission does not make the policy statement inconsistent, only perhaps incomplete. *See Rollins*, 2020 WL 3077593, at *2 ("Contrary to Rollins's submission, U.S.S.G. § 1B1.13 is not inconsistent with § 3582(c)(1)(A)(i) . . . .").

But even if there is any incompleteness in § 1B1.13's recitation of the *procedural* avenues for relief, that still does not grant district courts the license to legislate their own *substantive* bases for relief. Congress delegated to the Sentencing Commission the task of determining what is extraordinary and compelling. Nowhere in § 994(t) or § 3582(c)(1)(A) does it provide that courts can usurp the Commission's role if a court believes the Commission has not acted promptly enough to update its regulations. And even then, an omission in the procedural avenues for relief surely does not entitle district courts the sweeping powers to engage in substantive rulemaking. In sum, even if § 1B1.13 leaves some ambiguity in the process by which relief can be obtained, lower courts cannot fill that vacuum with their own substantive policy preferences; that is the job of the Sentencing Commission. *United States v. Lynn*, 2019 WL 3805349, at *4 (S.D. Ala. Aug. 12, 2019) ("If the policy statement needs tweaking in light of Section 603(b) [of the First Step Act], that tweaking must be accomplished by the

[Sentencing] Commission, not by the courts."); *accord United States v. Shields*, 2019 WL 2359231 (N.D. Cal. June 4, 2019).

D. The District Court's Decision Violates The First Step Act And End-Runs This Court's Precedent

Aside from violating federal law, the district court's decision also violates the First Step Act and this Court's precedents by giving retroactive application to the First Step Act's changes to § 924(c) sentences.

Prior to the First Step Act, when a defendant was charged with multiple offenses under 18 U.S.C. § 924(c) for using a firearm during a crime of violence, the defendant faced increasing terms of imprisonment that were required to be imposed consecutively for each § 924(c) conviction. The defendant received a five-year mandatory minimum sentence for a first conviction, and a 20-year consecutive mandatory minimum for a second, and another 20-year consecutive mandatory minimum for a third, even when all three convictions arose from a single prosecution. *See Deal v. United States*, 508 U.S. 129, 134-37 (1993).

The First Step Act amended § 924(c) to avoid this "stacking" of consecutive, mandatory sentences for each successive § 924(c) conviction within the same prosecution. Rather, Congress provided that the mandatory minimum for a second or subsequent offense applies only when a prior conviction under § 924(c) already

"has become final." Pub. L. No. 115-391, § 403(a), 132 Stat. 5194, 5222.

Importantly, however, Congress declined to make these changes retroactive. Rather, the First Step Act provides that § 403(a)'s amendments to § 924(c) "shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." § 403(b), 132 Stat. at 5222. This non-retroactively was notable because in the same statute Congress made the Fair Sentencing Act provisions retroactive. *Id.* § 404(b), 132 Stat. at 5222. In this way, the non-retroactivity of the § 924(c) changes must be seen as an express legislative choice. *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.") (citation omitted). Indeed, this Court recognized as much in *United States v. Jordan*, 952 F.3d 160, 173-74 (4th Cir. 2020), where this Court held that these changes to § 924(c) sentences did not apply retroactively.

Moreover, it must be borne in mind that affixing penalties for crimes is principally the function of the legislative branch, not the courts. *See Mistretta v. United States*, 488 U.S. 361, 363 (1989) (citing *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 94 (1820) (identifying "the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the

legislature, not the Court, which is to define a crime, and ordain its punishment.")). "'[W]hatever views may be entertained regarding severity of punishment . . . [t]hese are peculiarly questions of legislative policy.'" *Dorszynski v. United States*, 418 U.S. 424, 442 (1974) (ellipsis in original) (quoting *Gore v. United States*, 357 U.S. 386, 393 (1958)).

Furthermore, federal law makes clear that Congress exercises exclusive control over retroactivity determinations of federal laws; district courts are not empowered to provide retroactive effect where not legislatively provided. Specifically, the federal savings statute, 1 U.S.C. § 109, provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." Thus, if instead of modifying the statutory penalties attendant to § 924(c), the First Step Act had simply abolished § 924(c) altogether, § 109 makes clear that pre-existing § 924(c) sentences would remain valid. *See United States v. Ward*, 770 F.3d 1090, 1095 (4th Cir. 2014) ("Under the Savings Statute, absent a clear indication from Congress of retroactive application, a defendant is not entitled to 'application of ameliorative criminal sentencing laws

repealing harsher ones in force at the time of the commission of an offense.'") (quoting *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 661 (1974)).

Here, notwithstanding the clear non-retroactivity of § 403 of the First Step Act, this Court's decision in *Jordan*, and the general proposition that the legislature is in charge of setting penalties for crimes and determining retroactivity, the district court nonetheless gave retroactive application to the § 924(c) changes to the defendants in this case and legislated its own penalty system for serial § 924(c) sentences that were issued before the recent First Step Act amendments. Specifically, the court noted the changes wrought by the First Step Act and concluded that "[t]he fact that Decator, if sentenced today for the same conduct, would likely receive a dramatically lower sentence than the one he is currently serving, constitutes an 'extraordinary and compelling' reason justifying potential sentence reduction under § 3582(c)(1)(A)(i)." JA 627. In this way, the district court end-run both Congress and this Court by usurping the Sentencing Commission's power and then using it to grant relief in a manner directly opposed to congressional will. This requires reversal.

Moreover, the district court's holding falls apart for an additional reason. The district court claimed that "granting compassionate release on the basis of the amended § 924(c) is not obviously contrary to congressional intent" because § 403

was entitled a "clarification" to § 924(c), which the court explained meant that "Congress never intended the statute to result in a 'stacked' sentence like Decator's." JA 628. This was error, and again in contravention of this Court's precedent. This Court expressly rejected that argument in *Jordan*. This Court held that "Section 403(a) does not 'clarify' something that once was ambiguous; it changes § 924(c)." *Jordan*, 952 F.3d at 173.

District courts apply the law as written by the legislature, and must follow this Court's precedents. Lower courts cannot carve out for themselves free-range equitable powers that can be used on an ad hoc, case-by-case to evade congressional instruction or this Court's decisions. And yet, that is what is happening here. The grants of relief to these defendants constitute end-runs around the clear dictates of the First Step Act and this Court's binding precedent. This cannot be countenanced because it would render Congress's policy choices "meaningless." *See United States v. Cisneros*, 2020 WL 3065103, at *3 (D. Haw. June 9, 2020) ("[T]his court hesitates to conclude that it should reduce Cisneros's sentence solely on the ground that the change in the law constitutes an extraordinary and compelling circumstance. Otherwise, every inmate who might receive a reduced sentence today would be eligible for compassionate release, and Congress's decision not to make the First Step Act retroactive would be meaningless."). This Court should therefore reverse.

E. The District Court's Decision In Effect Operates As A Form Of Judicial Clemency

Finally, the district court's decision is problematic because it operates, in effect, like a grant of clemency, and thereby end-runs powers generally reserved to the executive branch.

It is well-settled that "[o]nly the President has the power to grant clemency for offenses under federal law." *Harbison v. Bell*, 556 U.S. 180, 187 (2009); U.S. CONST., Art. II, § 2, cl. 1. *See also Schick v. Reed*, 419 U.S. 256, 267 (1974) (the power to commute sentences "is an enumerated power of the Constitution and […] its limitations, if any, must be found in the Constitution itself"). "[P]ardon and commutation decisions have not traditionally been the business of courts[…]." *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998). Pursuant to this grant of authority, the executive branch has in place detailed, routinized, and formal procedures for considering clemency requests. 28 C.F.R. § 1.1 *et seq*.

The district court's decision provides an end-run around that formal process. The district court took it upon itself to regard the defendants' sentences as unjust. JA 630. The district court did this even though the original sentencing judge considered the lengthy sentences to be completely appropriate given the conduct. JA 205 ("if there is a justification . . . for the severity it exists in this case"). In this

way, the district court's action here was precisely the kind of "judicial change of heart" that this Court warned against in *Goodwyn*. 596 F.3d at 235. Then, expressing disagreement with her predecessor, the district court here effectively commuted the defendants' sentences to time-served and ordered immediate release. In this way, the district court allowed the defendants to circumvent the executive branch's clemency process to receive, in effect, the same relief they would receive if they were granted a presidential commutation. This stands in tension with separation of powers principles because commutation powers are reserved to the executive branch. See *Loving v. United States*, 517 U.S. 748, 757 (1996) ("[I]t remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another.").[6]

Moreover, the district court's construction acts in a manner similar to executive branch clemency in another respect. Specifically, the district court

[6] Indeed, underscoring that the district court here was granting the defendants relief in a manner they could have received through the executive branch's commutation process, it should be noted that Bryant twice applied for clemency and was rejected, with the most recent denial coming on May 11, 2016. *See* https://www.justice.gov/pardon/search-clemency-case-status-since-1989?first_name=keith&last_name=bryant. Scott was also denied clemency on September 30, 2016. *See* https://www.justice.gov/pardon/search-clemency-case-status-since-1989?first_name=craig&last_name=scott. In this way, the district court, exercising an executive branch function, granted defendants Bryant and Scott the very kind of relief that the executive branch did not feel was warranted.

endorsed the view that lower courts would be empowered to consider some stacked § 924(c) sentences to warrant relief and not others. *See* JA 628 (quoting *Maumau*). The problem with this approach is that it is precisely the kind of ad hoc balancing that the executive branch performs in considering clemency. This approach also runs afoul of 18 U.S.C. § 3553(a)(6) because it would allow for disparities in sentencing, with some stacked § 924(c) defendants gaining immediate release while others do not.

At bottom, by divorcing itself from the constraints imposed by Congress and the Sentencing Commission, the district court has carved out for itself a clemency power that it can exercise on an ad hoc basis. This would allow courts to exercise the kind of commutation power that is traditionally relegated under the Constitution to the executive branch.

* * *

Faithful application of the plain text of 18 U.S.C. § 3582(c)(1)(A), 28 U.S.C. § 994(t), and U.S.S.G. § 1B1.13 should be sufficient to resolve this appeal. It is worth emphasizing, however, the fundamental changes that would be wrought in sentencing if this case were not reversed. If § 3582(c)(1)(A)(i) permits courts to reduce sentences for whatever reasons they see fit, it would severely undermine the federal sentencing scheme, affording district courts a new boundless clemency

power inconsistent with the Sentencing Reform Act (SRA) of 1984.

The compassionate release statute is part of the SRA's intricate sentencing scheme, and allowing courts the power exercised by the district court here would frustrate the very purposes for which the SRA was enacted. The SRA was the result of Congress's determination that federal sentencing was rife with unwarranted disparity and uncertainty. *See* S. Rep. 98-225, at 49. Congress created the Sentencing Commission to "provide certainty and fairness," "avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct," and maintain "sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices[.]" 28 U.S.C. § 991(b)(1)(B). *See also Peugh v. United States*, 569 U.S. 530, 535 (2013).

Problematically, however, if district courts are allowed free-wheeling modification power under the compassionate release provisions, the very kind of disparity and uncertainty the SRA was trying to avoid will be re-introduced. Indeed, here, the district court suggested that it could reduce some defendants' stacked § 924(c) sentences, but not others. JA 647.

Likewise, although the victims who were terrorized by the defendants in this case thought the district court had imposed a certain sentence, the district court has

shattered that certainty and peace of mind and granted immediate release before the government even had a chance to reach out to the victims.

Finally, the current construct only encourages judge-shopping and thereby further reduces certainty. Specifically, the original sentencing judge here felt strongly that the lengthy sentences were justified in this case. JA 205. That judge retired. The defendants then filed these motions which were referred to a different judge, who granted the relief. That kind of disparate result only encourages serial filings under § 3582(c)(1)(A) until the defendants can find a sympathetic ear to their entreaties. If such a Pandora's box is opened, no sentence will ever be final; they will always be subject to revisitation to see if a judge in her "independent discretion" deems the defendant's case extraordinary and compelling. The very purposes for which the SRA was enacted demand that we reject that approach.

Moreover, aside from frustrating the purposes of the SRA, the district court's approach here would render broad swaths of the statute simply superfluous. For example, § 3582(c)(2) permits a reduction where a defendant has been sentenced to a term of imprisonment based on a sentencing range that was subsequently lowered by the Commission and certain other requirements are met. If district courts are allowed plenary powers to resentence under § 3582(c)(1)(A), the reduction provisions of § 3582(c)(2) would be rendered meaningless. Similarly, §

3582(c)(1)(A)(ii) allows a court to reduce sentences where the defendant is over 70 years old and has served at least 30 years of a sentence. But, under the district court's current construct, what is to prevent a district court from simply using § 3582(c)(1)(A)(i) to find extraordinary circumstances where the defendant is 65 years old and has served 20 years of a sentence? Section 3582(c)(1)(A)(ii) would be rendered nugatory if district courts can draw the lines on their own under § 3582(c)(1)(A)(i).

In sum, the district court's decision has several troubling ramifications. Federal statutes can be ignored or rendered superfluous, the Sentencing Commission can be relegated to insignificance, and this Court's precedents can be evaded. This Court can avert these problems by reversing the district court.

CONCLUSION

Based on the foregoing, the government respectfully requests that this Court reverse the district court's orders granting relief under 18 U.S.C. § 3582(c)(1)(A)(i) and remand with instructions that the defendants' motions must be denied under controlling law.

Respectfully submitted,

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STATEMENT WITH RESPECT TO ORAL ARGUMENT

The United States respectfully requests oral argument in this case given the legal issues presented by this appeal.

CERTIFICATE OF COMPLIANCE

1. This brief has been prepared using:

   Microsoft Word, Times New Roman, 14 Point

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, the brief contains 8,588 words.

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___/s/_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 8, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF user:

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