No. 20-1732

In the Supreme Court of the United States

THOMAS BRYANT, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE AMERICAN CONSERVATIVE UNION FOUNDATION NOLAN CENTER FOR JUSTICE AND THE CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The American Conservative Union Foundation Nolan Center for Justice is a nonprofit organization dedicated to improving the criminal-justice system in ways that improve public safety, increase government accountability, and protect human dignity. The Center raises public awareness of proposed criminal-justice reforms through opinion pieces, media interviews, briefing papers, the testimony of expert witnesses at government hearings, and the judicial process. On occasion, it works with policymakers to advance conservative solutions to address matters of societal concern. The First Step Act was one such occasion, where the Nolan Center worked closely with the White House and conservatives in Congress to craft and enact meaningful federal criminal justice reform legislation.

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 that is dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice, founded in 1999, focuses on the scope of criminal liability, the proper role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal-justice system, and accountability of law

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel, any party, or any other person or entity—other than *amici curiae*, their members, and their counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

enforcement. Cato published articles endorsing the First Step Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

The First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018), is "the most significant criminal justice reform bill in a generation." 164 Cong. Rec. S7649 (daily ed. Dec. 17, 2018) (statement of Sen. Grassley). The legislation addressed recognized inequities that plagued the criminal justice system and sapped it of public legitimacy. Among other things, it transformed the process for reducing the sentences of some prisoners by amending 18 U.S.C. § 3582(c), known as the compassionate-release provision. Under that provision, a district court can reduce a defendant's sentence if it determines that "extraordinary and compelling reasons warrant such a reduction," 18 U.S.C. § 3582(c)(1)(A)(i), provided the reduction is "consistent" with any "applicable policy statements" promulgated by the Sentencing Commission, *id.* § 3582(c)(1)(A).

Compassionate release is not a new concept. Before the passage of the First Step Act, a federal court could reduce a sentence under Section 3582(c) if the Director of the Bureau of Prisons (BOP) filed an initial motion seeking a reduction. But BOP was notoriously reluctant to support pleas for early release, no matter how warranted. As a result, defendants who did not belong in prison languished there and added needless costs to BOP and the taxpayers. To address this problem, the First Step Act amended Section 3582(c) to strip BOP of its gatekeeping role. Defendants now can file their own compassionate release motions, and courts now are authorized to consider for themselves whether sentence reductions are warranted, regardless of

BOP's position (or lack of any position) on whether compassionate release is appropriate in the circumstances. The Congress that enacted the First Step Act on an overwhelming bipartisan basis emphasized that the Act would confer substantially greater discretion on judges to determine case-by-case whether circumstances warrant compassionate release for any given defendant.

The Eleventh Circuit, however, adopted an atextual interpretation of the Act that strips district courts of that discretion and puts BOP back in charge. In conflict with every other court of appeals to address the issue, the Eleventh Circuit has concluded that a preexisting Sentencing Commission policy statement that explicitly applied only to "motion[s] by the Director of the [BOP]," U.S.S.G. § 1B1.13, and in that context permitted compassionate release *both* in a narrow set of enumerated circumstances *and* in other circumstances BOP deemed appropriate, is "applicable" to defendant-filed motions as well. As a result, it held that in the context of defendant-filed motions, district courts are barred from considering any grounds other than the narrow set of specifically enumerated circumstances—effectively reinstalling BOP as the gatekeeper for most requests for compassionate release and stripping district courts of the broad discretion Congress meant to confer. If not corrected, this decision will frustrate Congress's effort to mitigate an overly restrictive approach taken by BOP to compassionate release.

Certiorari should be granted.

ARGUMENT

I. CONGRESS DELIBERATELY EMPOWERED SENTENCING JUDGES TO MITIGATE CRIMINAL JUSTICE INEQUITIES

Leading up to the passage of the First Step Act, there was broad bipartisan agreement that serious inequities plagued the criminal justice system. Draconian mandatory minimums were keeping non-violent offenders in prison long past any reasonable point, the costs of incarceration were skyrocketing, and the penalty imposed on defendants for forcing the government to meet its burden at trial rather than taking a plea was generating indefensible sentencing disparities. Congress originally enacted the compassionate release "safety valve" to allow BOP to mitigate these problems on a case-by-case basis where "extraordinary and compelling reasons" warranted. *See* S. Rep. No. 98-225, at 121 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3304. But BOP notoriously failed to exercise that authority.

Congress designed the First Step Act to remedy precisely these problems. And a large part of the solution was providing sentencing judges independent discretion to fix sentencing inequities case-by-case when they arise, and thereby fill the role that BOP had effectively abandoned.

A. Recognized Inequities Plague The Criminal Justice System

1. A bipartisan consensus has emerged that significant problems and inequities plague the criminal justice system. First and foremost, the prison population has skyrocketed. The federal inmate population was only 56,821 in 1990. *See*

James Stephan, Bureau of Justice Statistics, *Census of State and Federal Correctional Facilities, 1990*, at 3 (May 1992), https://bjs.ojp.gov/redirect-legacy/content/pub/pdf/csfcf90.pdf. But by 2017—the year before the First Step Act was enacted—it had ballooned to 183,058. *See* Jennifer Bronson & E. Ann Carson, Bureau of Justice Statistics, *Prisoners in 2017*, at 3 (Apr. 2019), https://bjs.ojp.gov/redirect-legacy/content/pub/pdf/p17.pdf.

Mandatory minimums fueled this incarceration explosion, and they were also widely regarded as unjust in their own right. They were part of a decades-old response to the nation's drug epidemic that had achieved "just the opposite of what [Congress was then] trying to achieve." 164 Cong. Rec. S7644 (daily ed. Dec. 17, 2018) (statement of Sen. Durbin). Instead of winning the drug war, "[t]he availability of heroin, cocaine, and methamphetamine increased," and the prison system was flooded with drug offenders serving lengthy mandatory minimum sentences for "*nonviolent*" crimes. *Id.* (emphasis added); Bronson & Carson, *supra*, at 1 ("Nearly half of federal prisoners were serving a sentence for a drug-trafficking offense at fiscal year-end 2017."). Mandatory minimums were also viewed as pernicious because they prevented sentencing judges from exercising discretion to distinguish between those defendants who truly deserved enhanced punishment and those who did not. 164 Cong. Rec. at S7644 (statement of Sen. Durbin) (noting the unjust reality that mandatory minimums "don't allow judges to distinguish between drug kingpins . . . and lower level offenders"); *see also* Megan Keller, *Mike Lee: Mandatory sentencing forces you to ask "does this punishment fit the crime?*", The Hill (Nov. 27,

2018), https://thehill.com/homenews/senate/418413-mike-lee-mandatory-sentencing-forces-you-to-ask-does-this-punishment-fit-the (Senator Mike Lee stating: "when we get into a situation where we're routinely imposing[] 15, 20, 25, sometimes 55-year mandatory minimum sentences, you have to ask yourself the question, does the punishment fit the crime?").

Meanwhile, mandatory minimums and the elimination of parole exacerbated the "trial penalty," which undermines the integrity of the criminal justice system itself. This Court has repeatedly recognized that the right to trial by jury is fundamental to the legitimacy of the criminal justice system. *See Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (recognizing that "unanimous suffrage of twelve of [defendant's] equals and neighbours" guards against "oppression and tyranny" (citations omitted)); *United States v. Booker*, 543 U.S. 220, 238-39 (2005) ("The Framers of the Constitution understood the threat of 'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases."). Yet the coercive pressure of longer sentences often compels defendants to forgo that right, *sometimes even by pleading to a crime they did not commit*. *See, e.g.*, Innocence Project, DNA Exonerations in the United States, https://innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited July 13, 2021) (identifying that DNA evidence has exonerated 44 persons who pled guilty to crimes they did not commit). "The decision to go to trial is a gamble: the payoff can be acquittal and complete freedom, but often the more likely outcome is conviction and a longer sentence" than if the defendant had pled. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L.

Rev. 2463, 2507 (2004). The growing gulf in sentencing between those who exercised their right to trial by jury and those who forfeited that right for leniency has had a toxic effect on the perceived fairness of the entire criminal justice system. *See, e.g.*, Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. of Books (Nov. 20, 2014); *see also* Nat'l Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf.

And all of this has occurred against a backdrop of rapidly escalating incarceration costs. In 1990, the yearly cost to house a federal inmate was $14,456. *See* Stephan, *supra*, at 2. But by 2017, it was $36,299.25. Annual Determination of Average Cost of Incarceration, 83 Fed. Reg. 18,863, 18,863 (Apr. 30, 2018). At the time of the First Step Act, these costs were approaching a tipping point: As the House Report put it, the "stark" choice emerging was to either "control federal prison spending or see significant reductions in the resources available for all non-prison criminal justice areas." H.R. Rep. No. 115-699, at 23 (2018), 2018 WL 2348593. If Congress could not get prison costs under control, the budgeting consequences would mean "fewer prosecutors to bring charges, fewer agents to investigate federal crimes, less support to state and local criminal justice partners, less support to treatment, prevention and intervention programs, and cuts along a range of other criminal justice priorities." *Id.* at 23-24.

2. BOP has long had the power to mitigate these inequities on a case-by-case basis. The original version of the compassionate release provision at issue here authorized district courts to reduce a sentence upon a motion by BOP when "extraordinary and compelling reasons warrant[ed] such a reduction." 18 U.S.C. § 3582(c)(1)(A)(i) (Supp. II vol. 2 1984). Congress described the provision as providing a "safety valve[]"where the circumstances no longer warranted imprisonment. *See* S. Rep. No. 98-225, at 55-56, 121, *as reprinted in* 1984 U.S.C.C.A.N. at 3238-39, 3304.

BOP, however, notoriously shirked its gatekeeper role. An Inspector General (IG) report in 2013 found that an average of only 24 inmates were released per year through BOP's administration of the compassionate release program. *See* Office of the Inspector General, Dep't of Justice, *The Federal Bureau of Prisons' Compassionate Release Program*, at 1 (Apr. 2013), https://oig.justice.gov/press/2013/2013_05_01.pdf (OIG Report). BOP's compassionate release program was so dysfunctional that it even denied compassionate release for an inmate who suffered a stroke and was in a vegetative condition. *Id.* at 24. "For years, the [BOP] approved only prisoners who were near death or completely debilitated. While nonmedical releases were permitted, an inspector general report found in 2013, not a single one was approved over a six-year period." Christie Thompson, *Old, Sick and Dying in Shackles*, Marshall Project (Mar. 7, 2018), https://www.themarshallproject.org/2018/03/07/old-sick-and-dying-in-shackles. This was particularly galling because, as the IG recognized, "an effectively managed compassionate release program would

result in cost savings for the BOP," OIG Report at i, and very few prisoners awarded compassionate release recidivate, *id.* at 49-50 (recidivism rate of 3.5% under compassionate release, versus 41% general rate for federal offenders). Ultimately, the IG concluded that BOP had "not properly manage[d] the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered." *Id.* at 11.

Congress took notice. A few years after the IG's report, a bipartisan group of senators wrote DOJ to express "deep[] concern that BOP is not fulfilling its role in the compassionate release process." Letter from 12 U.S. Senators to J. Rod Rosenstein, Deputy Attorney General, & Dr. Thomas R. Kane, Acting Bureau of Prisons Director, at 3 (Aug. 3, 2017), https://famm.org/wp-content/uploads/2017.08.03-Letter-to-BOP-and-DAG-re.-Compassionate-Release.pdf (Senators Letter). The senators explained that BOP's task of filing motions was merely "administrative," and that it was the "appropriate purview of the sentencing court to [then] determine if a defendant's circumstances warrant a sentence reduction under compassionate release." *Id.* at 2-3. And they expressed frustration that BOP was rarely exercising this authority, even as prison costs were increasing.

B. Congress Enacted The First Step Act To Address These Problems

The First Step Act resulted from a strong bipartisan determination to remedy recognized inequities in our federal criminal justice system. *See* 164 Cong. Rec. S7645 (daily ed. Dec. 17, 2018) (statement of Sen. Durbin) (noting "extraordinary

political coalition" for criminal justice reform); 164 Cong. Rec. S7749 (daily ed. Dec. 18, 2018) (statement of Sen. Leahy) (stating support for First Step Act was "not just bipartisan; it [was] nearly nonpartisan"); 164 Cong. Rec. S7778 (daily ed. Dec. 18, 2018) (statement of Sen. Grassley) (observing that he did not know "whether we have had legislation like this before . . . whereby we have put together such diverse groups of people and organizations that support the bill").

Certain aspects of the Act addressed the problems outlined above directly. For example, the Act reduced mandatory minimums for certain non-violent offenses. Pub. L. No. 115-391, § 401, 132 Stat. at 5220-21. Other parts of the Act addressed these problems indirectly. For example, sentencing judges were given greater discretion to sentence low-level, nonviolent drug offenders to terms below the applicable mandatory minimum, and authority to retroactively apply the Fair Sentencing Act of 2010, which had itself reduced the application of certain mandatory minimums. *Id.* §§ 402, 404, 132 Stat. at 5221-22. Congress expected these and other provisions to bear cost-saving fruit: "[I]mproving the effectiveness and efficiency of the federal prison system" was core to its entire design. H.R. Rep. No. 115-699, at 22.

The First Step Act also fundamentally altered the process for seeking and granting compassionate release, by empowering judges on a case-by-case basis to mitigate inequities Congress had not addressed systemically. Whereas, previously, only BOP could move for a sentence reduction, the First Step Act permits prisoners to move for their own compassionate release, and allows courts to resolve for themselves whether "extraordinary and

compelling reasons" justify that relief, unfettered by BOP inertia. *See* Pub. L. No. 115-391, § 603(b), 132 Stat. at 5238. With the BOP bottleneck cleared, Congress expected sentencing judges to exercise substantial new discretion. *See* 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Cardin) (the First Step Act "expands compassionate release"); *see generally* 164 Cong. Rec. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Booker) (the First Step Act "includes critical sentencing reforms that will . . . give judges discretion back—not legislators but judges who sit and see the totality of the facts"); 164 Cong. Rec. S7748 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar) ("By giving . . . judges this discretion, we will give them the tools to better see that justice is done."); 164 Cong. Rec. S7649 (daily ed. Dec. 17, 2018) (statement of Sen. Grassley) ("[T]he bill provides for more judicial discretion . . . "); 164 Cong. Rec. S7739 (daily ed. Dec. 18, 2018) (statement of Sen. Schumer) ("T]he legislation will give judges more discretion . . . "); *see also* Senators Letter at 2 ("[T]he sentencing court, rather than the BOP, is best suited to decide if the prisoner deserves compassionate release.").

II. CERTIORARI IS NECESSARY TO PREVENT THE SUBSTANTIAL FRUSTRATION OF CONGRESS'S PURPOSE

The Eleventh Circuit's decision departs egregiously from the text and purpose of the First Step Act, as well as from the unanimous consensus of every other circuit that has addressed the same issue. If not reversed, this decision will have enormous ramifications for many among the tens of thousands of federal prisoners from states in the

Eleventh Circuit. *See* Prison Policy Initiative, *Correctional Control 2018: Incarceration and supervision by state*, https://www.prisonpolicy.org/reports/correctionalcontrol2018_data_appendix.html (last visited July 13, 2021).

A. The Eleventh Circuit's Decision Subverts The Text And Purpose Of The First Step Act By Reinserting BOP As A Gatekeeper On Requests For Compassionate Release

Courts must interpret statutes according to the ordinary meaning of the text at the time of enactment. *See, e.g.*, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019). The Eleventh Circuit professed fidelity to that foundational rule, but it adopted a reading that is directly contrary to the text's ordinary meaning. And its decision, if allowed to stand, will frustrate the accomplishment of Congress's undisputed purpose.

1. The crux of the Eleventh Circuit's textual analysis was that compassionate release decisions must apply the Sentencing Commission's pre-First Step Act policy statement at U.S.S.G. § 1B1.13 because "the commonsense reading of 'applicable policy statements'" (in 18 U.S.C. § 3582(c)(1)(A)) "includes U.S.S.G. § 1B1.13, no matter who files the motion." Pet. App. 13a. But deeming U.S.S.G. § 1B1.13 an "applicable policy statement" turns that language on its head. As every other circuit has recognized, U.S.S.G. § 1B1.13 is "facially inapplicable" to motions filed by a defendant because it "state[s] in plain and clear terms when [it] applies: 'Upon motion of the Director of the Bureau of Prisons[.]'" *See United States v. Long*, 997 F.3d 342, 357, 358 (D.C. Cir. 2021) (alteration in original).

2. Besides being profoundly atextual, the Eleventh Circuit's interpretation will frustrate rather than advance the purpose Congress meant to achieve. That too was error because courts must favor the "textually permissible interpretation that furthers rather than obstructs" a statute's purpose. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, at 63 (2012); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7 (2011) ("[C]onsidering the provision in conjunction with the purpose and context leads us to conclude that only one interpretation is permissible.").

The Commentary Notes to Section 1B1.13 enumerate three narrow "extraordinary and compelling circumstances,"[2] but commit the articulation of others to BOP's sole discretion. U.S. Sent'g Guidelines Manual § 1B1.13 cmt. n.1(D) (2018). That made good sense at the time the statement was adopted, when motions for compassionate release could be filed only by BOP. But by authorizing defendants to file their own motions, Congress intended to remove BOP from that gatekeeping role and vest in district courts the independent authority to consider all possible grounds for release. Recognizing that BOP had fallen down on the job of properly administering the program, *see* Senators Letter at 3, Congress "deliberately broadened [the] availability" of compassionate release. *Long*, 997 F.3d at 359; *see also* 164 Cong. Rec. at S7774 (statement of Sen.

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[2] Those circumstances are narrowly circumscribed and cover the "Medical condition of the Defendant," "Age of the Defendant," and "Family Circumstances." *See infra* at 17.

Cardin) (same), by conferring broad discretion on sentencing judges that would be unfettered by BOP.

By denying district courts the authority to consider the full spectrum of grounds for compassionate release absent a BOP motion, the Eleventh Circuit's decision turns back the clock and nullifies a key goal of the First Step Act. Instead of honoring Congress's intent in the Act, the Eleventh Circuit's decision elevates the purpose of the *Sentencing Reform Act of 1984,* which had the *opposite* goal of "*limit[ing]* discretion" in the courts. Pet. App. 21a (emphasis added).

Indeed, the Eleventh Circuit's decision will frustrate the Sentencing Commission's intentions as well. Even before the First Step Act, the Sentencing Commission, recognizing district courts are "in a unique position to assess whether [extraordinary and compelling] circumstances exist, and whether a reduction is warranted," sought to grant courts as much discretion as was statutorily possible. *See* Sentencing Guidelines for United States Courts, 81 Fed. Reg. 27,262, 27,264 (May 5, 2016). The catch-all provision in its policy statement applied only to additional grounds advanced by *BOP* not to limit courts' discretion, but in recognition of the fact that, at the time, "only the [BOP] ha[d] the statutory authority to file a motion for compassionate release." *Id.* It would have been an empty gesture to provide a catch-all for *court* discretion because, if BOP did not believe particular circumstances were "extraordinary and compelling," those circumstances would never be presented to the court in the first instance. It is, however, completely anachronistic to apply that limitation, which was explicitly tied to motions filed by BOP, to motions filed today by defendants under

the First Step Act. By eliminating BOP's gatekeeper role, the First Step Act was intended to expand district courts' discretion to provide compassionate release regardless of BOP's intransigence.

B. If Not Reversed, The Decision Below Will Exacerbate Sentencing Inequities In The Eleventh Circuit And Needlessly Inflate Taxpayer Costs

As noted, in enacting the First Step Act, Congress meant to address BOP's record of intransigence and the waste of incarcerating prisoners long past the realization of any reasonable rehabilitative, retributional, or preventative goals. Compassionate release plays an important part in this, as DOJ's Inspector General recognized. The annual cost of incarcerating a single federal prisoner is now above $37,000. *See* Annual Determination of Average Cost of Incarceration Fee (COIF), 84 Fed. Reg. 63,891, 63,891-92 (Nov. 19, 2019). And the cost of keeping a federal prisoner in a BOP medical center is approximately *double* the general incarceration cost. *See* OIG Report at 45. In 2020, the district courts granted 2,587 motions for compassionate release—resulting in well over $100 million in savings to BOP. *See* U.S. Sentencing Commission, Compassionate Release Data Report: Calendar Year 2020, at Table 3 (June 2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210609-Compassionate-Release.pdf (Compassionate Release Data Report). Under the decision below, however, district court power to grant compassionate release will be sharply circumscribed, and these savings will be limited significantly going forward.

The facts of petitioner's case provide a conspicuous example of how extraordinarily limited compassionate release will be in the Eleventh Circuit under the decision below. The current commentary notes to Section 1B1.13 provide that, absent a motion by BOP, "extraordinary and compelling reasons exist" under only three circumstances. U.S. Sentencing Guidelines Manual § 1B1.13 cmt. n.1. A medical condition can suffice, but only if it is "terminal" or if it is near-terminal, permanent, and "substantially diminishes" the prisoner's ability to provide self-care. *Id.* cmt. n.1(A). Age can also suffice, but only if the prisoner is over 65, is "experiencing a serious deterioration" in health because of age, *and* has served 10 years or 75% of the prison term. *Id.* cmt. n.1(B). And "[f]amily [c]ircumstances" can also suffice, but only if the caregiver of the prisoner's children has died or become incapacitated, or where the prisoner is the "only available caregiver" for a spouse/partner that has become incapacitated. *Id.* cmt. n.1(C). Treating Section 1B1.13 as controlling even for defendant-filed motions will limit district courts to considering only those circumstances. Here, this means deeming it *irrelevant* that petitioner (1) would have been eligible for a much lower sentence if he were sentenced today under the First Step Act; (2) was penalized for exercising his constitutional right to a jury trial (his co-defendants, who pled, were all released *over a decade ago*); and (3) has been a model prisoner. Pet. 8-9. Under a proper understanding of the First Step Act, a district court could at least *consider* those factors, *see* Senators Letter at 2 ("[T]he sentencing court, rather than the BOP, is best suited to decide if the prisoner deserves compassionate

release."), but the upshot of the Eleventh Circuit's decision is that they are now forbidden to do so.

This change will erode systemic improvements that have already been realized. Before this decision, prisoners in the Eleventh Circuit were released after filing motions under the First Step Act for similarly compelling reasons not enumerated in Section 1B1.13. Such defendant-filed motions have had outsized importance during the COVID-19 pandemic. *See, e.g.*, *United States v. Russell*, No. 3:05-CR-00257, 2021 WL 1597927, at *6-7 (N.D. Ala. Apr. 23, 2021) (granting compassionate release to prisoner with type-2 diabetes, obesity, and hypertension who also would have "face[d] a much lighter sentence if he were sentenced today"); *United States v. Hewlett*, No. 5:93-CR-00137, 2020 WL 7343951, at *5-6 (N.D. Ala. Dec. 14, 2020) (similar for asthmatic prisoner). Indeed, sometimes DOJ does not even oppose compassionate release. *See United States v. Poulnott*, No. 1:89-cr-00001, 2020 WL 7974295 (N.D. Ga. Dec. 30, 2020) (government did not oppose release where 58-year-old prisoner had served 32 years of lengthy mandatory minimums, had serious health issues, and had worked his way up to and held the highest attainable position at prison work facility over a period of decades). Yet under the Eleventh Circuit's ruling, *none of these prisoners* would have been eligible for release.

The Eleventh Circuit's decision also perversely reinstates as a gatekeeper a BOP that has even *less* incentive to perform that role than it did before the First Step Act. Previously, when the only avenue for compassionate release was a motion by BOP, the agency was repeatedly taken to task for its failure to devote resources to that responsibility. *See, e.g.*, OIG

Report; Senators Letter. But now that the First Step Act permits defendants to file their own motions, and BOP has even less incentive to perform that role, it is even less likely to file motions on defendants' behalf. And experience shows that motions by BOP are now exceedingly rare. In 2020, for example, BOP-filed motions were responsible for only *0.7%* of compassionate releases, including just two in the Eleventh Circuit. *See* Compassionate Release Data Report, at Table 3. Unless this Court grants certiorari, the Eleventh Circuit's decision will for practical purposes end any consideration of compassionate release for prisoners in the circuit beyond the very narrow circumstances enumerated in U.S.S.G. § 1B1.13, which were never meant to be exclusive. That is the opposite of what Congress intended.

CONCLUSION

The petition for certiorari should be granted.

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