No. 20-1732

IN THE

Supreme Court of the United States

THOMAS BRYANT, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR RACHEL E. BARKOW AND BRENT E. NEWTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici Rachel E. Barkow and Brent E. Newton have extensive familiarity with the United States Sentencing Commission (the Sentencing Commission, or the Commission), and with the Commission's process for amending the federal sentencing guidelines and associated policy statements.

Rachel E. Barkow is the Vice Dean, Charles Seligson Professor of Law, and Faculty Director of the Center on the Administration of Criminal Law at New York University School of Law. Professor Barkow served as a Member of the Sentencing Commission from 2013 to 2019.

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Both Professors Barkow and Newton have also taught courses on criminal law and policy and have written on the topic of sentencing. Through their professional experience and scholarship, amici can attest

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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. No party, counsel for a party, or any other person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

to the important role the Sentencing Commission plays in the administration of criminal justice. Amici know first-hand how the Commission addresses important matters relating to the substance and evolution of the federal sentencing guidelines and policy statements. In particular, they understand that the Commission considers proposed changes to its guidelines and policy statements by way of extensive deliberation and data-driven analysis. In the context of this case, amici have an interest in ensuring that this Court appreciates the extensive and time-consuming process that the Commission undertakes before making any such changes.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. Congress created the United States Sentencing Commission to promulgate and update guidelines and policy statements to foster transparency, uniformity, and proportionality in federal criminal sentencing. Importantly, Congress made sure that methodical analysis, public comment, and careful deliberation would drive the Commission's work.

A. In the Sentencing Reform Act of 1984, Congress created the Sentencing Commission and articulated considerations for the Commission to take into account in drafting its initial set of sentencing guidelines and policy statements, which are compiled in the Commission's *Guidelines Manual*. The Commission carefully studied past sentencing practices and available data to arrive at the first *Guidelines Manual*, published in 1987. Since then, on an annual basis, the Commission has collected and analyzed data from

tens of thousands of criminal sentences to determine when and how to revise the *Guidelines Manual*.

B. When amending the sentencing guidelines and accompanying policy statements, the Commission follows a process known as the amendment cycle. That cycle, which takes place every year, begins with a preliminary list of policy priorities and concludes with the Commission's vote on whether to amend the *Guidelines Manual*. The Commission's work depends throughout on the research and analysis of its interdisciplinary policy teams and input from key stakeholder groups and the public. Congress has an opportunity to review any promulgated amendments and has 180 days to pass legislation rejecting a revision of the *Guidelines Manual* before it becomes effective. The amendment cycle underscores that the Commission's process for considering revisions of the sentencing guidelines and associated policy statements is deliberative and time-consuming.

II. The Commission consists of seven voting members and requires at least four voting members to be in place in order to have a quorum to promulgate and amend sentencing guidelines or policy statements. Since January 2019, the Commission has not had a quorum. The Commission at present is therefore powerless to clarify or amend the policy statement that is at issue in this case. The Commission adopted the pertinent policy statement, contained in section 1B1.13 of the *Guidelines Manual,* in 2007, long before Congress enacted the First Step Act of 2018, which now permits defendants to file motions for compassionate release and no longer requires that such motions be filed by the Director of the Bureau of Prisons. To date,

the Commission has had no occasion to consider the question of what standards might be applicable in the context of defendant-filed compassionate release motions.

A. The Sentencing Commission at present does not have a quorum for promulgating and amending sentencing guidelines or policy statements. Currently, there is only one voting member serving on the Commission. The President has not nominated anyone to fill any of the six vacant seats, nor has he indicated he will do so anytime soon. Past Administrations have not consistently placed a high priority on filling Sentencing Commission vacancies.

B. Even if sufficient Commissioners were eventually nominated and confirmed to achieve a quorum, the Sentencing Commission would be unlikely to act quickly on the compassionate release question that is at issue here. Typically, in light of its deliberative and multi-step processes, it takes many months or even years for the Commission to address and vote on major changes to the sentencing guidelines and its policy statements.

C. Congress first authorized compassionate release when it abolished federal parole in 1984. Since then, Congress has made several changes to sentencing law, including the First Step Act of 2018. Applying this new law and considering whether amendment of its policy statements may be warranted can reasonably be expected to be a major undertaking for the Commission. Accordingly, even if the Commission were to gain a quorum, the Commission is unlikely to address the issue of defendant-filed compassionate

release requests anytime soon. Against this backdrop, this Court should therefore not wait for the Commission to act before resolving the question presented.

ARGUMENT

I. The Sentencing Commission Carefully Updates Its Guidelines And Policy Statements Through Public Comment, Methodical Analysis, And Extensive Deliberation.

A. Congress authorized the Commission to develop sentencing guidelines and policy statements to foster coherence in federal sentencing.

1. Congress created the U.S. Sentencing Commission and provided for the development of federal sentencing guidelines because of a lack of "honesty," "uniformity," and "proportionality" in criminal sentencing. *Barber v. Thomas*, 560 U.S. 474, 482 (2010) (citing USSG § 1A3, p. s., at 1.2). The lack of "honesty in sentencing" was the product of individuals being released early on parole and not serving their specified prison sentences in full. *See id.*; *see also* S. Rep. No. 98-225, at 56 (1983). The lack of "uniformity" and "proportionality" reflected the nearly unfettered discretion of sentencing courts under then-existing sentencing statutes. *See Barber*, 560 U.S. at 482; *see also Peugh v. United States*, 569 U.S. 530, 535 (2013). Constrained only by broad statutorily prescribed sentencing ranges, district judges applied their "own notions of the purposes of sentencing." S. Rep. No. 98-225, at 38. The outcome

was "all but guaranteed": an inequitable and indeterminate sentencing system where "similarly situated offenders" often "receive[d] different sentences." H.R. Rep. No. 98-1017, at 34 (1984).

Against this backdrop, Congress enacted the Sentencing Reform Act of 1984 "to increase transparency, uniformity, and proportionality in sentencing." *Dorsey v. United States*, 567 U.S. 260, 265 (2012); *see* Pub. L. No. 98-473, 98 Stat. 1837 (1984). In the Sentencing Reform Act, Congress abolished the traditional parole system by generally prohibiting courts from "modify[ing] a term of imprisonment once it ha[d] been imposed," 18 U.S.C. § 3582(c), and providing for a system of supervised release upon the completion of a defendant's term of incarceration, *Johnson v. United States*, 529 U.S. 694, 696-97 (2000). Congress also provided for the development of new "proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders." *Mistretta v. United States*, 488 U.S. 361, 379 (1989).

Congress delegated to a new expert body—the Sentencing Commission—the task of "establish[ing] [new] sentencing policies and practices for the Federal criminal justice system" and "measuring" their efficacy. 28 U.S.C. § 991(b)(1)-(2). Congress placed the Commission in the judicial branch in recognition of the fact that sentencing is largely a judicial function. *See id.* §§ 991(a), 994, 995(a)(1); *see also* S. Rep. No. 98-225, at 159.

Congress expected the Commission to strike a balance between different interests. On the one hand,

the Commission was to avoid and reduce sentencing disparities among similarly situated defendants. 28 U.S.C. § 991(b)(1)(B). On the other hand, the Commission's "sentencing policies and practices" were to retain "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). To that end, Congress prescribed seven statutory factors relevant to the Commission's formulation of offense categories, 28 U.S.C. § 994(c)(1)-(7), and eleven factors relevant to the formulation of categories of defendants, *id.* § 994(d)(1)-(11). Congress granted the Commission discretion to promulgate sentencing guideline provisions and policy statements in accordance with those considerations.

In the aftermath of the Sentencing Reform Act, in determining the appropriate sentence lengths to be included in new guideline ranges, the Commission looked to "typical past [sentencing] practice," as "determined by an analysis of 10,000 actual cases." Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, Hofstra L. Rev. 1, 7 (1988). From past cases, the Commission was able to identify critical data, such as "the offense, the defendant's background and criminal record, the method of disposition of the case, and the sentence imposed," as well as the "actual amount of time served (or to be served) by the defendant." *Id.* at 7-8 n.50. The Commission's data-driven analysis concluded in 1987 with the publication of the first *Guidelines Manual*, a document that compiles the sentencing guidelines and the Commission's policy

statements and official commentary. The new guidelines and policy statements significantly narrowed the broad statutory sentencing ranges that had resulted in the indeterminate sentencing system that Congress sought to replace.

While the guidelines and policy statements are now advisory in light of this Court's decision in *United States v. Booker*, 543 U.S. 220, 245-46 (2005), there is no question that they have become an integral part of the modern federal sentencing system. The guidelines (and the Commission's policy statements) are "the starting point and the initial benchmark" for sentencing, *Gall v. United States*, 552 U.S. 38, 49 (2007), and the "lodestone of sentencing," *Peugh*, 569 U.S. at 544. They represent "the Federal Government's authoritative view of the appropriate sentences for specific crimes," *id.* at 545, which district judges consider when fashioning the appropriate punishment in a particular case, *see* 18 U.S.C. § 3553(a)(4)-(5). Roughly three-quarters of federal criminal defendants are sentenced within the guidelines—either within the applicable guideline range (as is the case in most instances), or outside the range where there is a departure that the *Guidelines Manual* recognizes and provides for (such as substantial assistance to the prosecution).[2]

2. Congress did not intend the Commission's development of sentencing guidelines and policy statements to be a static exercise. "The [sentencing] statutes and the Guidelines themselves foresee

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[2] U.S. Sent'g Comm'n, *2020 Annual Report* 7 (*2020 Annual Report*), < https://tinyurl.com/y2yb7bze>.

continuous evolution helped by the sentencing courts and courts of appeals in that process." *Rita v. United States*, 551 U.S. 338, 350 (2007). Congress thus directed that the Commission's policies and practices should "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(C); *see also* § 994(o), (p) & (x).

Data and experience drive the Commission's revisions to the guidelines and policy statements. Every year, the Commission collects and reviews data on all sentenced felony and Class A misdemeanor defendants. *See 2020 Annual Report* at 6-7; *see also* 28 U.S.C. § 994(w)(1). In Fiscal Year 2020, for example, the Commission received approximately 300,000 charging and sentencing documents regarding 64,565 individuals. *2020 Annual Report* at 7.

Congress contemplated that the Commission would periodically review the *Guidelines Manual* to make appropriate revisions in response to court decisions, congressional directives, and the Commission's own reports. The Commission has done that repeatedly, promulgating 813 amendments since 1987. *See* U.S. Sent'g Comm'n, *Guidelines Manual*, App. C.

B. The detailed amendment process that Congress prescribed underscores the Commission's deliberative nature.

The Commission follows a meticulous process every time it amends the *Guidelines Manual*. That

process, known as the "amendment cycle," takes place every year. U.S. Sent'g Comm'n, *Federal Sentencing: The Basics* 34-36 (Sept. 2020); *see* 28 U.S.C. § 994(o)-(p).

The cycle generally begins in June when the Commission publishes a list of proposed policy priorities in the *Federal Register*, which it also makes available on the Commission's website. *Federal Sentencing: The Basics* at 34-35. In that notice, the Commission requests written comment from key stakeholders (such as the Criminal Law Committee of the Judicial Conference, federal public defenders, the Department of Justice, and the Commission's advisory groups), and from the public. *Id.* at 34; *see also* 28 U.S.C. § 994(o). The stated priorities include areas where amendments might be appropriate. U.S. Sent'g Comm'n, *Rules of Practice and Procedure*, Rule 5.2(a) (2016). After closely reviewing the comments on the proposed priorities, the Commission finalizes the list and "publish[es it] in the *Federal Register*, and make[s] available to the public for inspection, a notice of priorities for Commission inquiry and possible action." *Id.*

Throughout, the Commission's interdisciplinary policy teams carefully research and analyze the specified policy priorities. *Federal Sentencing: The Basics* at 35. At the end of that process, the Commission, as it deems appropriate, formulates any "proposed amendments" to a guideline, policy statement, or official commentary in the *Guidelines Manual*. *Id.* The Commission provides notice of these "proposed amendments"—again, by publishing them in the *Federal Register* and posting them on its website—and invites comment. *See* Prac. & Proc. R. 4.4. When

practicable, the minimum period of public comment must be at least 60 calendar days. *Id.* During that period, the Commission ordinarily receives written testimony and holds public hearings where it hears from interested witnesses. *See* Prac. & Proc. R. 4.4 & 4.5.

Once the comment period concludes, typically around April, the Commission votes on whether to adopt any of the proposed amendments. *See Federal Sentencing: The Basics* at 35. The Commission has until May 1 to submit to Congress any amendments to the *Guidelines Manual* that it has voted to promulgate, along with "an explanation or statement of reasons for the amendments." Prac. & Proc. R. 4.1; *see* 28 U.S.C. § 994(p). Congress then has 180 days, if it wishes, to enact legislation either modifying or disapproving the amendment. *See* 28 U.S.C. § 994(p). If it does not act by November 1, the proposed amendment becomes effective on that date. *See id*; *see also* Prac. & Proc. R. 4.1. In the ordinary course, it thus takes at least a year and a half for a provision of the *Guidelines Manual* to be amended.

In theory, unlike guideline amendments, "[a]mendments to policy statements and commentary may be promulgated and put into effect at any time." Prac. & Proc. R. 4.1. But in practice the Commission treats guidelines and policy statements the same for amendment purposes, following the above process in either case. *See* Prac. & Proc. R. 2.2, 4.1, 4.3-4.5, 5.2; *see generally* U.S. Sent'g Comm'n, *Guidelines Manual*, App. C.

For instance, the same voting rules apply to all amendments to the *Guidelines Manual*, including

policy statements. *See* Prac. & Proc. R. 2.2(b). And the Commission is expected to "include amendments to policy statements and commentary in any submission of guideline amendments to Congress and put them into effect on the same November 1 date as any guideline amendments issued in the same year." Prac. & Proc. R. 4.1. The Commission likewise provides "comparable opportunities for public input on proposed policy statements and commentary considered in conjunction with guideline amendments." Prac. & Proc. R. 4.3.

The Commission's policy statements are an integral piece of the overall sentencing system. District judges must consider them along with the sentencing guidelines themselves when fashioning a defendant's criminal sentence. *See* 18 U.S.C. § 3553(a)(4)-(5). Accordingly, the Commission typically undertakes its deliberative and time-consuming amendment cycle when revising its policy statements, just as it does with respect to changes in the guidelines themselves.[3]

[3] Congress may on occasion authorize the Commission to promulgate "emergency amendments" to the guidelines on an expedited basis. *Federal Sentencing: The Basics* at 36. In such instance, the Commission need not conduct a public hearing on the proposed amendment. Prac. & Proc. R. 4.5; *see, e.g.*, Amendment 748, App. C, vol. III, at 381 ("implement[ing] the emergency directive in section 8 of the Fair Sentencing Act of 2010"); Amendment 651, App. C, vol. II, at 352 ("implement[ing] the directive in section 401(m) of the 'Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003'"); Amendment 541, App. C, vol. I, at 492 ("implement[ing] section 302 of the Comprehensive Methamphetamine Control Act of 1996").

II. The Commission's Lack Of A Quorum And Its Exhaustive Amendment Process Militate In Favor Of This Court's Intervention To Resolve The Question Presented.

A. The Commission is authorized to have seven voting members, but currently six of those seven positions are vacant.

Whether § 1B1.13 of the U.S. Sentencing Guidelines is an "applicable" policy statement binding district courts in considering defendant-filed motions for compassionate release under 18 U.S.C. 3582(c)(1)(A) is an important statutory interpretation question that the courts of appeals have been grappling with for the past several years. All but the Eleventh Circuit have determined § 1B1.13 does not apply in such circumstances, but that court's contrary interpretation in this case has injected uncertainty into the question of the statute's proper interpretation. To the extent the Commission could address the issue by promulgating a revised policy statement, that is unlikely to happen quickly.

The Commission is authorized to have seven voting members, and it must have at least four of them in place to have a quorum, which is the minimum number of members required to promulgate or amend sentencing guidelines and policy statements. *See* 28 U.S.C. §§ 991(a), 994, 995(d). The Commission has been at least two members short of a quorum since January 2019.[4] Without a quorum, the Commission

[4] U.S. Sent'g Comm'n, *2019 Annual Report* 3 (*2019 Annual Report*), <https://tinyurl.com/39wte4ux>.

has been unable to vote on any amendments to the *Guidelines Manual*, including after the passage of the First Step Act in late 2018. *See* 28 U.S.C. § 995(d).

Currently, Senior Judge Charles R. Breyer (N.D. Cal.) serves as the Commission's Acting Chair, but the other six voting member positions are vacant with no nominations pending to fill them.[5] Patricia K. Cushwa (of the U.S. Parole Commission) and Jonathan J. Wroblewski (of the U.S. Department of Justice) serve as non-voting Commissioners, and thus do not count towards the Commission's quorum.[6]

Despite six vacant seats up for nomination, selecting Commissioners has not been a priority.[7] Indeed, Commissioner vacancies have been a persistent problem. Open Commissioner slots were left unfilled in the final years of President Obama's tenure, and nominees advanced by the Trump Administration received no hearing.[8] President Trump nominated five

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[5] U.S. Sent'g Comm'n, *About the Commissioners*, <https://tinyurl.com/2scwer44>.

[6] *Id.*

[7] President Biden has so far prioritized filling judicial vacancies, as well as vacancies for U.S. Attorneys and U.S. Marshals. *See, e.g.*, White House, President Biden Announces Third Slate of Judicial Nominees (May 12, 2021), < http://tinyurl.com/thirdslate>; Letter from Dana Remus, White House Counsel-Designate, to Senators, U.S. Congress (Dec. 22, 2020), <http://tinyurl.com/6vjafxph>.

[8] Madison Alder, *Near-Vacant Sentencing Panel Gives Biden Chance for Fresh Start* (June 28, 2021), <https://tinyurl.com/nfvse55a>.

individuals for Commissioner spots in 2020, but the Senate did not take up the nominations.[9]

Even if the President were to make nominations to the Commission in the near future, it might take many months or more for the Senate to ultimately confirm a nominee. For example, President Obama first nominated Judge Danny C. Reeves (E.D. Ky.) to the Commission on March 15, 2016.[10] His nomination expired on January 3, 2017, but President Obama renominated him two weeks later.[11] President Trump withdrew that nomination on February 28, 2017, but then renominated Judge Reeves on March 1, 2017.[12] More than a year after his initial nomination, on March 21, 2017, the Senate finally confirmed Judge Reeves as a Member of the Commission.[13] To take another example, it took nearly a year for the Senate to confirm Chief Judge Patti Saris (D. Mass.) as a Member of the Commission: President Obama nominated

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[9] *See id.*; *see also* White House, Nominations & Appointments, President Donald J. Trump Announces Intent to Nominate and Appoint Individuals to Key Administration Posts (Aug. 12, 2020), <https://tinyurl.com/5atbk6y4>.

[10] White House, President Obama Nominates Judge Danny C. Reeves to Serve on the United States Sentencing Commission (Mar. 15, 2016), <https://tinyurl.com/kxh2snss>.

[11] *See* White House, Presidential Nominations Sent to the Senate (Jan. 17, 2017), <https://tinyurl.com/sbr4srep>.

[12] *See* PN85, 115th Cong. (2017), <https://tinyurl.com/4r28j2my>.

[13] *See id.*

her on April 28, 2010, and the Senate confirmed her on December 22, 2010.[14]

Ultimately, even if the President were to nominate individuals to fill vacant Commission seats, the confirmation process would likely take time with no guarantee of success. And without a quorum, the Commission will remain unable to consider making policy changes that might address the question presented.

B. Even if a quorum were attained, the Commission is unlikely to act quickly regarding the compassionate release question at issue in this case.

Even assuming the President were to nominate, and the Senate were to confirm, sufficient members to the Commission to reach a quorum, the Commission is not likely to address and resolve the question presented in this case anytime soon. The Commission acts deliberately when it considers whether to modify an important policy statement. The amendment cycle described above illustrates the systematic, multi-step process that the Commission generally undertakes when it pursues a possible revision of its guidelines and policy statements.

The stages of the amendment process begin only after the Commission has decided to consider an issue as one of its potential policy priorities. The Commission, even assuming it is operating at full capacity,

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[14] PN1714, 111th Cong. (2010), <https://tinyurl.com/44ktk8wk>.

may decide at any particular juncture not to pursue amendment of the policy statement relevant to the statutory interpretation conflict presented in this case. Notably, the Commission took 22 years to issue its first policy statement identifying the extraordinary and compelling reasons that could justify reducing an individual's sentence on grounds of compassionate release. *See United States v. Jones*, 980 F.3d 1098, 1104 (6th Cir. 2020).

Even assuming the Commission were to achieve a quorum and were to consider amending the pertinent policy statement, as noted above, that process is time-consuming. For example, although the Commission first considered whether to reduce guideline levels across drug-type offenses in 2010, it did not propose changes until the 2013-14 amendment cycle.[15] After publishing a preliminary list of policy priorities, the Commission formally announced in August 2013 that federal drug sentences would be a policy priority for the then-ongoing amendment cycle.[16] The Commission held six public meetings and hearings over the course of 11 months and received more than 60,000 letters from interested persons during the public

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[15] Chief Judge Patti B. Saris, Remarks for Public Meeting, U.S. Sent'g Comm'n 1 (Apr. 10, 2014), <https://tinyurl.com/2fjhxnxc>.

[16] News Release, U.S. Sent'g Comm'n, U.S. Sentencing Commission Selects Policy Priorities for 2013-2014 Guidelines Amendment Cycle (Aug. 15, 2013), <https://tinyurl.com/2yc3ufs7>.

comment period.[17] The Commission voted to approve those changes on April 30, 2014, and on July 18, 2014, it voted to apply those changes retroactively.[18] Pursuant to statute, 28 U.S.C. § 994(p), those amendments did not become effective until November 1, 2014.

There is no guarantee that the Commission, even if it attained a quorum, would opt to amend its policy statement, or that it would do so in a way that would resolve the conflict here. But even if the Commission were to decide to do so, the agency's amendment process is lengthy, and there is no reason to believe that any Commission action relevant to the question presented would take place anytime soon.

C. The compassionate release issue is especially important and consequential.

The compassionate release provision in the Sentencing Reform Act authorizes district courts to reduce a sentence when warranted for "extraordinary and compelling reasons." 18 U.S.C. § 3582(c)(1)(A)(i). That provision, as enacted in 1984, authorized the Director of the Bureau of Prisons (BOP) to file motions for compassionate release in particular cases. *Id.* § 3582(c)(1)(A). But the Director rarely exercised that

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[17] *See* U.S. Sent'g Comm'n, *Materials on 2014 Drug Guidelines Amendment*, <https://tinyurl.com/fz559urc>; Chief Judge Patti B. Saris, Remarks for Public Meeting (July 18, 2014), <https://tinyurl.com/4rp6cebb>.

[18] *See* News Release, U.S. Sent'g Comm'n, U.S. Sentencing Commission Unanimously Votes to Allow Delayed Retroactive Reduction in Drug Trafficking Sentences 1 (July 18, 2014), <https://tinyurl.com/48625993>.

authority.[19] From 2013 to 2017, for example, BOP filed on the order of 300 motions for compassionate release out of 5,400 prisoner requests to file such motions on their behalf.[20] *See also Jones*, 980 F.3d at 1104 (citing article reporting on BOP data). During that period, "266 persons died in custody waiting for the Director to review their applications." *Id.*

Congress then enacted the First Step Act of 2018, which, among other things, modified the compassionate release provision. Defendants are now permitted to file compassionate release motions under 18 U.S.C. § 3582(c)(1)(A) directly on their own behalf. District courts may reduce a sentence "upon motion of the defendant" where it finds "extraordinary and compelling reasons" so long as the reduction is "consistent with applicable policy statements issued by the Sentencing Commission." *Id.* § 3582(c)(1)(A)(i)-(ii).

This statutory change has dramatically increased the number of compassionate release motions filed and granted. The latest data indicate, for example, that a total of 12,138 motions for compassionate release were decided between 1989 and 2020, 6,229 of which were filed in the last four-year period alone. U.S. Sent'g Comm'n, *Compassionate Release Data Report*, Calendar Year 2020, Table 1 (June 2021) ("*2020*

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[19] *See* Christie Thompson, *Old, Sick and Dying in Shackles*, The Marshall Project (Mar. 7, 2018), <https://tinyurl.com/t6czcrsc> (compiling BOP data indicating that, from 2013 to 2017, only six percent of applications were approved).

[20] *Id.*

Compassionate Release Data Report"). Of those total motions filed, 21% (or 2,549) have been granted. *Id.*

Many more petitions for compassionate release are pending, brought on in large part due to the global COVID-19 pandemic, in combination with the enactment of the First Step Act of 2018. Between March and May 2020, "10,940 federal prisoners applied for compassionate release." *Jones*, 980 F.3d at 1105. And since the beginning of the pandemic in March 2020, nearly 31,000 prisoners have sought such relief.[21]

Federal courts have recognized the importance of compassionate release and how recent legislative changes have affected defendants. The Second Circuit, for example, recently noted that, prior to the First Step Act's enactment, "on average, only 24 incarcerated people per year were released on BOP motion." *United States v. Brooker*, 976 F.3d 228, 231 (2d Cir. 2020). Moreover, mismanagement plagued the program, as BOP's "'implementation of the program ... [was] inconsistent and result[ed] in ad hoc decision making,'" and the BOP "'ha[d] no timeliness standards for reviewing...requests.'" *Id.* at 231-32 (quoting Dep't of Just. Off. of the Inspector Gen., *The Federal Bureau of Prisons' Compassionate Release Program* 11 (2013)). But as the Sixth Circuit observed, Congress recognized this problem and sought to expand compassionate release. *Jones*, 980 F.3d at 1104-05. The "key step Congress took was removing the BOP

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[21] Keri Blakinger & Joseph Neff, *31,000 Prisoners Sought Compassionate Release During COVID-19. The Bureau of Prisons Approved 36*, The Marshall Project (June 11, 2021), <https://tinyurl.com/hwf548ce>.

from its preclusive gatekeeper position by permitting inmates to file compassionate-release motions on their own behalf." *United States v. Elias*, 984 F.3d 516, 519 (6th Cir. 2021) (internal quotation marks omitted); *see also United States v. McCoy*, 981 F.3d 271, 276 (4th Cir. 2020) (explaining that the First Step Act "remove[d] the Bureau of Prisons from its former role as a gatekeeper over compassionate-release petitions").

The First Step Act's enactment, "though seemingly only procedural in its modification of the decisionmaker[,]" thus "quickly resulted in significant substantive consequences." *Brooker*, 976 F.3d at 233. The Commission reported that in the first year following passage of the First Step Act, "145 offenders were granted compassionate release under 18 U.S.C. § 3582(c)(1)(A), a five-fold increase from fiscal year 2018, during which 24 compassionate release motions were granted." U.S. Sent'g Comm'n, *The First Step Act of 2018: One Year of Implementation* (2020). Thus, "[w]hat Congress seems to have wanted, in fact occurred." *Brooker*, 976 F.3d at 233; *see also Jones*, 980 F.3d at 1105 ("Data indicate that the First Step Act's tearing down the BOP's levee between imprisoned persons and the federal courts is already achieving Congress's desired effect.").

Notwithstanding these important legislative changes, the question presented here "'raise[s] a difficult legal question'" that has "divided" the lower courts. *Elias*, 984 F.3d at 519. Among the circuits, "there has emerged a newfound consensus…that § 1B1.13 is not an applicable policy statement for compassionate-release motions brought directly by

inmates, and so district courts need not consider it when ruling on those motions." *Id.*; *accord United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020); *McCoy*, 981 F.3d at 281-82.

The Eleventh Circuit's contrary ruling in this case makes this issue especially important to defendants within that circuit. Because the Eleventh Circuit's rule constrains a district court's discretion when considering a defendant's compassionate release motion, the result is that different standards apply to defendant-filed motions in that circuit than to the defendant-filed motions in the remaining circuits that have addressed the question.

This issue is a pressing one that has the potential to affect thousands of individuals. Approximately 13% (or 1,600) of all decided compassionate release motions originated from the Eleventh Circuit, of which the district courts granted 15% (or 242). *2020 Compassionate Release Data Report*, Table 1. And defendants filed 98.3% (or 238) of the granted motions. *Id.*, Table 3.

The Commission has not previously had occasion to consider what standards should apply when BOP no longer occupies its former gatekeeping role for compassionate release motions. Section 1B1.13, as currently framed and adopted in 2007, refers only to compassionate release motions filed by the BOP Director. The Commission has not considered the question of defendant-filed motions, which now constitute the vast majority of motions for compassionate release. As such, to the extent a reconstituted Commission were to consider amending its policy statement

to address the passage of the First Step Act of 2018 and its authorization of defendant-filed motions, any such consideration would likely entail an especially careful and deliberative process.

The Commission could act in myriad ways to address the question presented by Congress' enactment of the First Step Act of 2018. Or it could choose to not act at all at any particular point in time. But even assuming the Commission were to achieve a quorum and were to consider amending the policy statement at issue, the process would almost certainly be lengthy. For all of these reasons, this Court should not wait for the Sentencing Commission to act before resolving the question presented.

CONCLUSION

For the above reasons, *amici curiae* urge the Court to grant the certiorari petition to resolve an important issue that the U.S. Sentencing Commission is unlikely to address anytime soon.

Respectfully submitted,

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Date: July 15, 2021