No. _____

In the Supreme Court of the United States

ERIC ANDREWS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a district court may consider the 2018 amendment to the sentences mandated by 18 U.S.C. § 924(c) in determining whether a defendant has shown "extraordinary and compelling reasons" warranting a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i).

Whether a district court may consider the length of a defendant's sentence in determining whether a defendant has shown "extraordinary and compelling reasons" warranting a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i).

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

United States v. Andrews, No. 20-2768 (3d Cir.) (opinion denying motion for rehearing issued December 2, 2021).

United States v. Andrews, No. 20-2943 (7th Cir.) (opinion affirming the judgment below and denying motion for sentence reduction issued August 30, 2021).

United States v. Andrews, No. 2:05-cr-00280-ER (E.D. Pa.) (order denying motion for compassionate release issued November 2, 2020).

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JURISDICTION

The decision of the court of appeals was entered on August 30, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 403 of the First Step Act, titled "Clarification of Section 924(c) of Title 18, United States Code," states:

> (a) In General.—Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final".
>
> (b) Applicability to Pending Cases.—This section, and the amendments made by this section, 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.

Section 603 of the First Step Act states, in relevant part:

> (b) Increasing The Use And Transparency Of Compassionate Release.—Section 3582 of title 18, United States Code, is amended—
>
> > (1) in subsection (c)(1)(A), in the matter preceding clause (i), by inserting after "Bureau of Prisons," the following: "or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier[.]"

18 U.S.C. § 3582 states, in relevant part:

> (c) Modification of an Imposed Term of Imprisonment.—The court may not modify a term of imprisonment once it has been imposed except that—
>
> > (1) in any case—
> >
> > > (A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of

> such a request by the warden of the defendant's facility, whichever is earlier, 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; . . .
> >
> > > and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]

18 U.S.C. § 3553(a) states, in relevant part:

> (a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> > (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> >
> > (2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

> (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; . . .
>
> (5) any pertinent policy statement—
>
> (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
>
> (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

INTRODUCTION

This case squarely presents two important issues of statutory interpretation. The first issue has deeply divided the federal courts of appeals: whether a district court may consider the First Step Act's

amendment to 18 U.S.C. § 924(c), which dramatically reduced the mandatory consecutive sentences for "second or successive convictions" under that law in virtually all cases, in determining whether a sentence should be reduced under 18 U.S.C. § 3582(c)(1)(A)(i). The second issue is similarly important: whether a district court can consider the length of a defendant's sentence when considering whether "extraordinary and compelling" reasons exist for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i).

Four courts of appeals, including the Third Circuit, have answered the first question in the negative. These courts have held that because the amendment to Section 924(c) was not made categorically retroactive, it cannot be considered, either standing alone or in combination with other factors, in determining whether "extraordinary and compelling reasons" warrant a sentence reduction under Section 3582(c)(1)(A)(i). Three courts of appeals have reached the opposite conclusion, correctly holding that the plain language of Section 3582(c)(1)(A)(i) permits district courts to consider the First Step Act's seismic changes to Section 924(c) when determining whether such reasons are present.

This first question presented concerns two important provisions of the First Step Act. The first is Section 403, which effectively reversed this Court's 1993 interpretation of 18 U.S.C. § 924(c) that led to the imposition of draconian, enhanced mandatory sentences (like the one in this case) for "second or subsequent" Section 924(c) convictions when the defendant had no prior conviction under that provision. The amendment put an end to the absurdly long sentences resulting from a prosecutorial practice known

as "§ 924(c) stacking," which, according to three Sentencing Commission reports over a span of fourteen years, had been invoked by prosecutors for decades in a manner that discriminated against Black men. The 2018 amendment, titled a "Clarification of Section 924(c)," made clear that the law's dramatically enhanced mandatory and consecutive sentences (in Petitioner's case, a minimum of 25 years for his second Section 924(c) conviction) would henceforth be *recidivism-based* enhancements, mandated only when Section 924(c) convictions are obtained after a prior conviction under that statute has become final. Finally, the amendment was made retroactive, but only partially so: Congress directed that it be applicable to crimes committed before the First Step Act was enacted, but only if those defendants had not yet been sentenced.

The second is Section 603(b), which amended 18 U.S.C. § 3582(c)(1)(A), the sentence-reduction law that has become known as the compassionate release statute. The amendment removed the Bureau of Prisons (the "BOP") as the gatekeeper for such motions, and empowered defendants to make them directly, because the BOP had too infrequently opened the gate, improperly curtailing the sentence reduction authority that Congress gave district courts. *See, e.g.*, U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., *The Federal Bureau of Prisons' Compassionate Release Program* 11 (2013) ("The BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible

candidates for release not being considered.").[1] The title of Section 603(b) explained its purpose: it was aimed at "Increasing the Use and Transparency of Compassionate Release." *See* 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Cardin) ("[T]his legislation includes several positive reforms from the House-passed FIRST STEP Act. . . . The bill expands compassionate release under the Second Chance Act and expedites compassionate release applications.").

As relevant here, Section 3582(c)(1)(A)(i) authorizes a sentence reduction when a district court, after considering the factors set forth in 18 U.S.C. § 3553(a), finds that "extraordinary and compelling reasons warrant such" relief and that "a reduction is consistent with applicable policy statements issued by the Sentencing Commission[.]" This latter requirement has its roots in the Sentencing Reform Act of 1984, which directed the Sentencing Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction[.]" 28 U.S.C. § 994(t). Critically, in that same statute, Congress demonstrated its ability to place particular factors out of bounds. Specifically, it noted that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." *Id.* Nothing in Section 3582 itself, the First Step Act, or any other statute otherwise limits the factors a district court may consider in determining whether extraordinary and compelling reasons warrant a sentence reduction.

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[1] U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., *The Federal Bureau of Prisons' Compassionate Release Program* (2013), https://oig.justice.gov/reports/2013/e1306.pdf.

In recent months, however, the Third, Sixth, Seventh and Eighth Circuits have grafted onto Section 3582(c)(1)(A)(i) just such a limitation; they have held that district courts are prohibited from considering the 2018 amendment to Section 924(c) in deciding whether to reduce the draconian sentences produced by stacking. Their rationale: because Congress chose not to make the amendment to Section 924(c) categorically retroactive for *all* of the more than 2,500 inmates serving stacked Section 924(c) sentences, its dramatic revision to that sentencing regime cannot be considered in *any* such case, even on a compassionate release motion. Pet. App. 12a–13a; *see also United States v. Crandall*, -- F.4th --, 2022 WL 385920, at *3 (8th Cir. Feb. 9, 2022).

Not only does this aggressive, judicially created amendment to Section 3582(c)(1)(A)(i) find no support in the text of any relevant statute, but also it goes far beyond Section 994(t)'s limitation on considering rehabilitation *alone*. These four courts of appeals have not merely held that the amended Section 924(c) sentencing regime cannot, standing alone, warrant a reduction (as is the case for rehabilitation), they have directed that it cannot be considered *at all*, even in combination with other relevant factors on a case-by-case basis. Pet. App. 12a–13a; *see also Crandall*, 2022 WL 385920, at *3. The result is perverse. In considering whether to reduce sentences that often equate to life without parole, district judges in those circuits must ignore the fact that both Congress and President Trump deemed stacked Section 924(c) sentences so obviously excessive that they acted to make sure no one in the same circumstances would ever again be subjected to them. It is

difficult to conjure a factor more relevant to determining whether an indefensible mandatory sentence should be reduced than the fact that it is decades (sometimes centuries) longer than the mandatory sentence that would be applicable today, especially when the harshness of that repudiated regime was visited upon defendants in a racially discriminatory fashion. That is precisely the absurdity that the First, Fourth, and Tenth Circuits have pointed out in correctly holding that, when deciding whether extraordinary and compelling reasons warrant a sentence reduction, a district court may consider the amendment to Section 924(c). *United States v. McCoy*, 981 F.3d 271, 285 (4th Cir. 2020); *United States v. Maumau*, 993 F.3d 821, 837 (10th Cir. 2021); *United States v. Ruvalcaba*, -- F.4th --, 2022 WL 468925, at *9 (1st Cir. Feb. 15, 2022).

The Third Circuit compounded its error and created a second limitation that further eviscerates the compassionate release statute. The panel held that the length of a sentence itself cannot be considered in an analysis of whether extraordinary and compelling reasons warranting the reduction of that sentence are present. The Third Circuit reached this conclusion despite Congress's explicit statement that the compassionate release statute was created to reduce the lengths of "unusually long sentences." *See* S. Rep. No. 225, 98th Cong., 1st Sess. 55–56 (1983). The Seventh Circuit has agreed with the Third Circuit's flawed reasoning, while the Second and Fourth Circuits have correctly opined that the length of a sentence could be considered. Pet. App. 11a–12a; *see also United States v. Brooker*, 976 F.3d 228, 238 (2d Cir. 2020); *United States v. Thacker*, 4 F.4th 569, 574 (7th Cir. 2021).

This case offers an ideal vehicle to resolve these questions. Both the district court and the Third Circuit considered and addressed both issues, and they are cleanly presented here. There are no threshold issues that would preclude this Court from reaching the questions presented. Indeed, the Third Circuit expressly held that, as a matter of law, neither Section 403 of the First Step Act nor the length of a sentence could ever be considered in deciding whether extraordinary and compelling reasons warrant a reduction. *See* Pet. App. 11a–14a. Finally, timely resolution of the conflict is particularly important because similar sentence reduction motions are currently being filed in substantial numbers around the country. This Court should grant certiorari and reverse the decision below.

STATEMENT

1. In 1984, Congress amended 18 U.S.C. § 924(c) as part of the Comprehensive Crime Control Act. In relevant part, it revised Section 924(c) such that "[i]n the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for ten years." Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005(a), 98 Stat. 2138-2139. In 1988, Congress amended Section 924(c) yet again by replacing the 10-year sentence for a "second or subsequent conviction" with a 20-year sentence. Pub. L. No. 100-690, § 6460, 102 Stat. 4373 (1988).

In 1993, this Court considered whether a defendant's second through sixth convictions under Section 924(c), all obtained in the same proceeding as his first, constituted "second or subsequent convic-

tion[s]" within the meaning of that provision. *Deal v. United States*, 508 U.S. 129 (1993). This Court answered the question in the affirmative. Five years later, Congress increased the mandatory minimum penalty for second or subsequent convictions under Section 924(c) from 20 to 25 years. Pub. L. No. 105-386, 112 Stat. 3469 (1998).

In the years that followed *Deal*, the practice of § 924(c) stacking attracted significant criticism. The Judicial Conference of the United States urged Congress on multiple occasions to amend the draconian penalties it produced.[2] On one such occasion, the Chair of the Criminal Law Committee described Section 924(c) as one of the "most egregious mandatory minimum provisions that produce the unfairest, harshest, and most irrational results in the cases sentenced under their provisions."[3]

The Sentencing Commission also has repeatedly reported that the enhanced sentences for "second or successive" convictions under Section 924(c) were disproportionately invoked by prosecutors against Black defendants, and went so far on one of those occasions as to call upon Congress to "eliminate the

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[2] U.S. SENT'G COMM'N, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System ("Mandatory Minimum Report")* 360–61, n.904 (2011), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_12.pdf.

[3] *Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834, and H.R. 1466 Before the Subcomm. on Crime, Terrorism and Homeland Security of H. Comm. on the Judiciary*, 111th Cong. 60–61 (2009) (statement of Chief Judge Julie E. Carnes on behalf of the Judicial Conference of the United States).

'stacking' requirement and amend 18 U.S.C. § 924(c) to give the sentencing court discretion to impose sentences for multiple violations of section 924(c) concurrently with each other." *See* MANDATORY MINIMUM REPORT at 368; *see also* U.S. SENT'G COMM'N., *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 90, 113 (2004) ("If a sentencing rule has a disproportionate impact on a particular demographic group, however unintentional, it raises special concerns about whether the rule is a necessary and effective means to achieve the purposes of sentencing."); U.S. SENT'G COMM'N, *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System* 6 (2018) ("Black offenders were convicted of a firearms offense carrying a mandatory minimum more often than any other racial group. . . . The impact on Black offenders was even more pronounced for offenders convicted either of multiple counts under section 924(c) or offenses carrying a mandatory minimum penalty under the Armed Career Criminal Act.").

Finally, in 2018, the First Step Act put an end to *Deal*'s interpretation of the law. Section 403, titled "Clarification of Section 924(c)," re-wrote that provision so that the enhanced mandatory sentences are mandated only by a Section 924(c) conviction that occurs after a prior such conviction has become final. The amendment was made retroactive, but only partially so: Congress directed that the new regime was applicable to convictions under Section 924(c) based on conduct committed before the date of enactment,

but only if the sentence on such a conviction had not yet been imposed.

2. In the Comprehensive Crime Control Act of 1984, Congress abolished federal parole and created a "completely restructured guidelines sentencing system." S. Rep. No. 225, 98th Cong., 1st Sess. 52, 53 n.196 (1983). Having eliminated parole as a "second look" at lengthy sentences, Congress recognized the need for an alternative:

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

Id. at 55–56 (emphasis added). Put differently, the statute replaced the Parole Commission's opaque review of every federal sentence with a much narrower judicial review of cases presenting "extraordinary and compelling reasons" for relief from unusually long prison terms. By lodging that authority in federal district courts, this change kept "the sentencing power in the judiciary[,] where it belongs." *Id.* at 52, 53 n.196, 121.

But the law also established a gatekeeper—the authority could be exercised only upon a motion by the Director of the BOP. Unsurprisingly, the BOP

too rarely exercised this power, leaving the sentence reduction authority vested by Congress in judges dramatically underutilized.[4] In response, Congress amended Section 3582(c)(1)(A) in Section 603 of the First Step Act. Under the amended statute, defendants are permitted to present sentence reduction motions to the sentencing court on their own if the BOP declines to make a motion on their behalf within 30 days of being asked to do so. 18 U.S.C. § 3582(c)(1)(A).

3. During a one-month period in 2005, when Petitioner was nineteen-years old, he committed a string of robberies with a small group. Pet. App. 2a, 18a. No guns were discharged and there were no lasting physical injuries from the robberies. Petitioner, who had no criminal history prior to these robberies, was eventually indicted on 27 charges, including one conspiracy charge, thirteen substantive Hobbs Act Robbery counts and thirteen Section 924(c) counts.

At trial, Petitioner was convicted of all counts. Pet. App. 3a. The district court sentenced Petitioner to more than 311 years imprisonment, around 307 years (3,684 months) of which were mandatory consecutive sentences for Petitioner's thirteen Section 924(c) counts. Pet. App. 18a–19a. On the conspiracy count and the thirteen substantive robbery counts, the district court imposed concurrent terms of imprisonment of fifty-seven months. On the first Sec-

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[4] *See, e.g.*, U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., *The Federal Bureau of Prisons' Compassionate Release Program* 11 (2013) ("The BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered."), https://oig.justice.gov/reports/2013/e1306.pdf.

tion 924(c) count, the court imposed a mandatory, consecutive term of eighty-four months. On the other twelve Section 924(c) counts (the stacked Section 924(c) counts), the court imposed mandatory, consecutive terms of 300 months each. *Id*. at 19a.

On August 12, 2019, Petitioner requested that Warden E. Bradley of FCI Canaan move for a sentence reduction on his behalf. Petitioner based his request on multiple extraordinary and compelling circumstances, including: (1) his young age at the time of his offenses; (2) the shocking length of his sentence; (3) the change in the mandatory sentencing regime as a result of the First Step Act; and (4) his impressive rehabilitation during his many years of incarceration. On August 28, 2019, Warden Bradley denied Petitioner's request.

On November 21, 2019, Petitioner filed a motion for a sentence reduction in the district court. After briefing, the district court denied Petitioner's motion, finding that the reasons put forth in support of the motion—including the amendment to the sentences mandated by 18 U.S.C. § 924(c)—were not "extraordinary and compelling." *See* Pet. App. 52a. In particular, the district court held that the dramatic change in the sentencing regime, ushered in by the First Step Act, cannot constitute "extraordinary and compelling" reasons because doing so "would intrude on Congress's authority to determine the temporal scope of its statutes" since Congress determined "the amendment should not be applied retroactively." Pet. App. 33a–34a. The district court also held that the length of Petitioner's sentence could not be considered an extraordinary and compelling reason because doing so would "infringe on the legislature's province to fix penalties," particularly when manda-

tory minimums are involved, and would "offend[] the rule of finality." Pet. App. 31a–32a.

The Third Circuit affirmed, holding that there is "nothing 'extraordinary' about leaving untouched the exact penalties that Congress prescribed and that a district court imposed for particular violations of a statute" and that considering sentence length would "infringe on Congress's authority to set penalties." Pet. App. 11a–12a (citation omitted). The Third Circuit also held that the "nonretroactive" changes to Section 924(c) "cannot be a basis for compassionate release" because doing so would "sow conflict within the statute" given the changes do "not apply to people who had already been sentenced." Pet. App. 12a–13a.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve the circuit split concerning whether a district court may consider the First Step Act's amendment to Section 924(c) in determining whether a defendant sentenced under the pre-amendment regime has shown "extraordinary and compelling reasons" warranting a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)(i). At the same time, this Court should also clarify whether the length of a sentence can be considered in an analysis of "extraordinary and compelling reasons" under the same statute.

This case meets all of the Court's criteria for granting certiorari. First, the first question presented concerns an intractable, acknowledged circuit split on a recurring question of statutory interpretation that only this Court can resolve, and the second question has created a similarly important split.

Second, the Third Circuit's conclusion that a district court is prohibited from considering both that a defendant is serving a sentence decades (or, as in this case, centuries) longer than the one Congress currently believes is appropriate and the length of that sentence itself, is incorrect. The holdings of the Third, Sixth, Seventh, and Eighth Circuits on the first question, and the Third Circuit on the second question, cannot be reconciled with the plain text of Section 3582(c)(1)(A)(i), and the limitation those holdings engraft onto the law also undermines a clear purpose of that provision. Third, the questions presented are important and will profoundly affect a large number of defendants who are serving indefensible sentences that current law would not permit. Fourth, this case is an ideal vehicle.

A. The Decision Below Created An Intractable, Acknowledged Circuit Split.

Seven courts of appeals have considered whether the 2018 amendment to Section 924(c) can be considered in determining whether extraordinary and compelling reasons warrant a reduction in sentence pursuant to Section 3582(c)(1)(A)(i) where the defendant was sentenced under the pre-amendment regime. Those decisions have produced an active 4-3 circuit split. In addition, the Third Circuit's decision below on the second question splits from opinions expressed by the Second, Fourth, Seventh, and Tenth Circuits. This Court should grant review to resolve both conflicts.

1. Four Courts of Appeals Have Held District Courts Cannot Consider the First Step Act's Changes to Section 924(c).

Four courts of appeals have held that a district court is prohibited from considering the First Step Act's amendment to Section 924(c) in determining whether "extraordinary and compelling reasons" warrant a sentence reduction on a defendant-filed compassionate release motion.

In *United States v. Jarvis*, a divided panel of the Sixth Circuit affirmed the district court's conclusion that a defendant's stacked, mandatory Section 924(c) sentences that could not be imposed today cannot be considered as grounds for a sentence reduction, even in combination with other bases for relief. 999 F.3d 442, 442 (6th Cir. 2021). The court reasoned that a contrary conclusion would render "useless" Congress's decision that the amendment would not apply to cases in which sentence had already been imposed at the time of enactment. *Id.* at 443. The Sixth Circuit acknowledged a split with the Fourth and Tenth Circuits, *id.* at 444 ("We appreciate that the Fourth Circuit disagrees with us, and that the Tenth Circuit disagrees in part with us."), but concluded that the applicable law "does not permit us to treat the First Step Act's non-retroactive amendments, whether by themselves or together with other factors, as 'extraordinary and compelling' explanations for a sentencing reduction," *id.* at 445.[5]

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[5] Multiple panels of the Sixth Circuit have continued to reach opposite conclusions on this question. *United States v. Owens*, 996 F.3d 755, 760 (6th Cir. 2021), was the first case to reach this question in the context of Section 924(c) stacking, holding that the changes implemented by the First Step Act, even if not

Similarly, the Seventh Circuit held that "the discretionary authority conferred by § 3582(c)(1)(A) . . . cannot be used to effect a sentencing reduction at odds with Congress's express determination embodied in § 403(b) of the First Step Act that the amendment to § 924(c)'s sentencing structure apply only prospectively." *Thacker*, 4 F.4th 569, 574. The court

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fully retroactive, could be considered in determining whether extraordinary and compelling reasons exist that warrant a sentence reduction under Section 3582(c)(1)(A)(i). Following that decision, the majority in *Jarvis* concluded that *Owens* conflicted with an earlier-decided case which noted that a different non-retroactive First Step Act amendment could not alone justify a sentence reduction in that context. *Jarvis*, 999 F.3d at 445–46 (citing *United States v. Tomes*, 990 F.3d 500 (6th Cir. 2021)). As the *Jarvis* dissent correctly observed, however, "nothing in *Tomes* precludes a district court from considering a sentencing disparity due to a statutory amendment along with other grounds for release." *Id*. at 450 (Clay, J., dissenting). After *Jarvis*, a different panel in the Sixth Circuit held, in *United States v. Hunter*, 12 F.4th 555, 564 n.4 (6th Cir. 2021), that "a non-retroactive First Step Act amendment fails to amount to an 'extraordinary and compelling' explanation for a sentencing reduction," reinforcing the court's decision in *Jarvis*. A few months later, the Sixth Circuit again reversed course in *United States v. McCall*, 20 F.4th 1108 (6th Cir. 2021), which clarified that *Owens* was the "first in-circuit case" to address the issue of whether "a court may consider a nonretroactive change in the law as one of several factors forming extraordinary and compelling circumstances qualifying for sentence reduction under 18 U.S.C. § 3582(c)(1)(A)," and its holding, that such reasons can be considered, "'remains controlling authority' that binds future panels." *McCall*, 20 F.4th at 1114, 1116. *McCall* therefore expressly rejected *Hunter*'s deviation from *Owens*. *But see United States v. McKinnie*, 24 F.4th 583, 589–90 (6th Cir. 2022) (finding, in a case concerning judicial, as opposed to statutory, sentencing changes, that *Hunter* and *Tomes* remain the controlling authorities in denying that a "non-retroactive judicial decision" can constitute an extraordinary and compelling reason).

also expressed "broader concerns with allowing § 3582(c)(1)(A) to serve as the authority for relief from mandatory minimum sentences" based on "principles of separation of powers." *Id.* The court acknowledged the circuit split on this question, observing that "courts have come to principled and sometimes different conclusions as to whether the change to § 924(c) can constitute an extraordinary and compelling reason for compassionate release." *Id.* at 575. ("The Fourth Circuit, on the one hand, takes the view that the sentencing disparity resulting from the anti-stacking amendment to § 924(c) may constitute an extraordinary and compelling reason for release.").

The Third Circuit, in its decision below, adopted the same rule, concluding that "[t]he nonretroactive changes to the § 924(c) mandatory minimums . . . cannot be a basis for compassionate release." Pet. App. 12a. The Third Circuit reasoned that "Congress specifically decided that the changes to the § 924(c) mandatory minimums would not apply to people who had already been sentenced," declining to "construe Congress's nonretroactivety directive as simultaneously creating an extraordinary and compelling reason for . . . release." *Id.* at 13a. The Third Circuit "join[ed] the Sixth and Seventh Circuits," and acknowledged a split with the Tenth and Fourth Circuits. *Id.* The Third Circuit recently denied a petition for rehearing *en banc*. Pet. App. 53a–54a.

Finally, the Eighth Circuit has recently adopted the same interpretation. *Crandall*, 2022 WL 385920, at *3. In *Crandall*, that court held that the First Step Act "is comparable to the decision of a sentencing judge in 2018 to impose a lesser sentence than a predecessor imposed in 1990 for the same offense.

Neither circumstance is a sufficient ground to support a reduction of the previously imposed sentence under § 3582(c)(1)(A)." *Id.* Consequently, in the Eighth Circuit, the First Step Act's amendment to Section 924(c) may never constitute an "extraordinary and compelling reason" to reduce a sentence. *Id.*

2. Three Courts of Appeals Have Held District Courts May Consider the First Step Act's Changes to Section 924(c).

Three courts of appeals have held, in clear conflict with the Third, Sixth, Seventh, and Eighth Circuits, that district courts may consider the disparity between the mandatory sentences imposed and the mandatory sentences applicable under current law in deciding whether extraordinary and compelling reasons warrant a reduction.

The Fourth Circuit was the first to establish this rule in *United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020). The defendants in that case had been charged with multiple Section 924(c) counts and sentenced to between 35 and 53 years of imprisonment, largely due to stacking. *Id.* at 274. Each defendant's motion for a sentence reduction relied heavily on the severity of the sentences then mandated by Section 924(c) and the First Step Act's fundamental changes to those sentences, as well as his exemplary conduct while incarcerated. *Id.* The district courts granted each defendant a sentence reduction, and the Fourth Circuit affirmed. *Id.* at 288. In so doing, the panel held that district courts may treat "as 'extraordinary and compelling reasons' for compassionate release the severity of the defendants' § 924(c)

sentences and the extent of the disparity between the defendants' sentences and those provided for under the First Step Act." *Id.* at 286. It further explained that Congress's decision "not to make § 403 of the First Step Act categorically retroactive does not mean that courts may not consider that legislative change in conducting their individualized reviews of motions for compassionate release." *Id.* The court found "nothing inconsistent about Congress's paired First Step Act judgments: that 'not *all* defendants convicted under § 924(c) should receive new sentences,' but that the courts should be empowered to 'relieve *some* defendants of those sentences on a case-by-case basis.'" *Id.* at 287 (citation omitted).

In similar circumstances, and based on the same reasoning, the Tenth Circuit affirmed a sentence reduction in *United States v. Maumau*, 993 F.3d 821 (10th Cir. 2021). The court explained that district courts "have the authority to determine for themselves what constitutes 'extraordinary and compelling reasons,'" including "the 'incredible' length of [ ] stacked mandatory sentences under § 924(c); the First Step Act's elimination of sentence-stacking under § 924(c); and the fact that [the defendant], if sentenced today, . . . would not be subject to such a long term of imprisonment." *Id.* at 834, 837 (citation omitted).

The First Circuit recently adopted the same rule. *Ruvalcaba*, 2022 WL 468925, at *9. It concluded that there is no "textual basis in the [First Step Act] for a categorical prohibition anent non-retroactive changes in sentencing law." *Id.* "[G]iven the language that Congress deliberately chose to employ," the First Circuit saw "no textual support for concluding that such changes in the law may never consti-

tute part of a basis for an extraordinary and compelling reason" and declined to "infer that Congress intended such a categorical and unwritten exclusion[.]" *Id*. The First Circuit held that the arguments advanced by the Third, Sixth, Seventh, and Eighth Circuits "cannot support a categorical rule that nonretroactive changes in sentencing law, even when considered on an individualized basis, may never support a reason for a sentence reduction." *Id*. at *10.

3. The Circuit Conflict On the First Question Will Not Resolve Without a Decision From This Court.

This split among more than half the circuits is entrenched and unlikely to resolve without action from this Court. The Third, Sixth, Seventh, and Eighth Circuits have all explicitly recognized the circuit split. *See* Pet. App. 13a ("We join the Sixth and Seventh Circuits in reaching this conclusion."); *Jarvis*, 999 F.3d at 444 ("We appreciate that the Fourth Circuit disagrees with us, and that the Tenth Circuit disagrees in part with us."); *Thacker*, 4 F.4th at 575 ("[W]e are not the only court to deal with this issue. In fact, it has come up across the country, and courts have come to principled and sometimes different conclusions as to whether the change to § 924(c) can constitute an extraordinary and compelling reason for compassionate release."); *Crandall*, 2022 WL 385920, at *3 ("We find ourselves in agreement with" the Third, Sixth, and Seventh Circuits). The Third Circuit and the Sixth Circuit both recently denied rehearing *en banc*, *see* Pet. App. 53a–54a; Order, *United States v. Jarvis*, No. 20-3912 (6th Cir. Sept. 8,

2021), ECF No. 41, before the Sixth Circuit then ordered petitioner to file a response to the government's petition for rehearing in *McCall*, *see* Order, *McCall*, No. 21-3400 (6th Cir. Feb. 10, 2022), ECF No. 24. The Seventh Circuit expressly stated that "[n]o judge in active service requested to hear [the] case *en banc*," *Thacker*, 4 F.4th at 576. There is no realistic prospect that the circuit conflict will resolve without the Court's intervention, and thus the issue need not percolate further. Seven courts of appeals have already addressed the question presented, and the arguments on both sides have been fully aired.

Finally, this Court's review is especially necessary because the holdings of the Third, Sixth, Seventh, and Eighth Circuits undermine the explicit goal of Section 603 of the First Step Act to increase the use of compassionate release. Leaving this split unresolved will exacerbate one of the very problems the First Step Act was designed to correct, and will cause defendants within the Third, Sixth, Seventh, and Eighth Circuits to be unable to obtain sentence reductions that similarly situated defendants in the First, Fourth, and Tenth Circuits can receive.

4. Four Circuits Have Disagreed on the Second Question Presented.

Four courts of appeals have disagreed on the second question presented.

The Third Circuit below held that "[t]he duration of a lawfully imposed sentence" cannot create extraordinary and compelling circumstances for a sentence reduction. Pet. App. 11a. Joining the Third Circuit, the Seventh Circuit wrote that there "is nothing 'extraordinary' about leaving untouched the

exact penalties that Congress prescribed and that a district court imposed for particular violations of a statute." *Thacker*, 4 F.4th at 574.

On the other side, the Fourth Circuit, while holding that changes to Section 924(c) could be considered an extraordinary and compelling reason, wrote that they saw "no error in [the district court's] reliance on the length of a defendants' sentence" as part of their compassionate release analysis. *McCoy*, 981 F.3d at 288. The Second Circuit, in an opinion holding the Sentencing Commission's policy statement was not applicable to defendant-filed compassionate release motions, found that the consideration of the length of a defendant's sentence in an analysis of whether extraordinary and compelling reasons exists was likely intended by Congress. *Brooker*, 976 F.3d at 238 (citing legislative text from original passage of the compassionate release statute, which noted "that reduction may be appropriate when 'other extraordinary and compelling circumstances justify a reduction of an *unusually long* sentence'"). Specifically, the Second Circuit noted that a district court's belief of the "injustice of [the defendant's] lengthy sentence" could weigh in favor of a sentence reduction. *Id*.

B. The Decision Below is Incorrect.

The Third Circuit's decision in this case fundamentally misunderstands the nature and purpose of Section 3582(c)(1)(A) and the scope of the authority Congress granted to district courts under that statute. This misunderstanding led to it incorrectly rule on both questions presented.

1. The Third Circuit Was Incorrect in Holding Congress's Changes to Section 924(c) Sentencing Cannot Be Considered as a Basis for Sentence Reduction.

The Third Circuit below affirmed the district court's denial of Petitioner's sentence reduction motion and reiterated that Congress's clarification of the penalty scheme in Section 924(c) cannot be considered, either alone or in conjunction with other reasons, as the basis for such a reduction. Pet. App. 12a. That holding is plainly incorrect.

First, it places out of bounds one of the most "extraordinary and compelling reasons" one could imagine when it comes to deciding whether circumstances "justify a reduction of an unusually long sentence." S. Rep. No. 225, 98th Cong., 1st Sess. 55–56, 121 (1983). As the Fourth Circuit correctly pointed out in *McCoy*, the First Step Act's amendment to Section 924(c) is "not just any sentencing change, but an exceptionally dramatic one" because it eliminated a misuse of Section 924(c)'s recidivist enhancements that for decades produced unusually cruel sentences that were decades longer "than what Congress has now deemed an adequate punishment for comparable . . . conduct." 981 F.3d at 285 (quoting *United States v. Redd,* 444 F. Supp. 3d 717, 723 (E.D. Va. 2020)). In other words, it is precisely the type of change in the law that should weigh heavily in a judicial "second look" under Section 3582(c)(1)(A).

Second, the Third Circuit's holding—that "[t]he nonretroactive changes to the § 924(c) mandatory minimums . . . cannot be a basis for compassionate release," Pet. App. 12a.—arrogated to the court a

power only Congress possesses. The text of the relevant statutes provides no support for the decision to place this particular factor out of bounds. The error is placed in even sharper relief by the fact that the legislative framework shows that Congress knows well how to do exactly that; 28 U.S.C. § 994(t) specifically provides that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." The Third Circuit not only erred by adding another factor to the out-of-bounds list, but also exacerbated that error by taking it one step further. Rather than merely holding that the amendment to Section 924(c) cannot, standing alone, be the basis of a sentence reduction (like rehabilitation), the court held that a district court cannot consider *at all* the fact that Congress deemed the sentences previously mandated by that provision to be so obviously excessive they will never again be imposed. *See, e.g.*, Pet. App. 12a.

Third, the ruling below precludes consideration of a number of related bases for sentence reductions that are "extraordinary and compelling." For example, it ignores the grossly disproportionate nature of the sentences that the old Section 924(c) regime mandated as compared to the average sentences imposed for crimes like murder.[6] It also ignores the racially disparate deployment of these draconian provisions by prosecutors for decades, a problem

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[6] From 2015 to 2020, the average federal sentence for murder was 264 months. *See* U.S. SENT'G COMM'N, *Interactive Data Analyzer*, https://ida.ussc.gov/analytics/saw.dll?Dashboard; *see also, e.g.*, *United States v. Decator*, 452 F. Supp. 3d 320, 326 (D. Md. 2020) (granting release and noting that defendant's 633-month sentence is "roughly twice as long as federal sentences imposed today for murder").

highlighted by the Sentencing Commission repeatedly until Section 924(c) was amended in 2018.[7] Under the Third Circuit's rationale, entirely valid bases like this for a sentence reduction are similarly off limits. Only Congress has the authority to do that.

The lower court's judicial amendment to Section 3582(c)(1)(A)(i) was impermissible, and that is enough to require reversal. In addition, its rationale was wrong. The Third Circuit's decision was based on its view that allowing district judges to consider a dramatic legislative change no one could truly ignore would "would sow conflict within the statute." Pet. App. 13a. But there is no sense in which allowing courts to consider the prospective outlawing of onerous mandatory sentences is at odds with a decision not to make the change categorically retroactive to every prior case. The same Congress that elected against full retroactivity used the same statute to open a different (if narrower) window for potential relief by amending Section 3582(c)(1)(A) to afford defendants direct access to courts to seek sentence reductions based on extraordinary and compelling reasons like this change. There is "nothing inconsistent about Congress's paired First Step Act judg-

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[7] *See* U.S. SENT'G COMM'N, *Fifteen Years of Guidelines Sentencing* 90, 131 (2004), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf; *Mandatory Minimum Report* at ch. 9, https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system; *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System* 24–25 (2018), https://www.ussc.gov/ sites/default/files/pdf/research-and-publications/research-publications/2018/20180315_Firearms-Mand-Min.pdf.

ments: that 'not *all* defendants convicted under § 924(c) should receive new sentences,' but that the courts should be empowered to 'relieve *some* defendants of those sentences on a case-by-case basis.'" *McCoy*, 981 F.3d at 287 (citation omitted); *see also Maumau*, 993 F.3d at 837 (affirming compassionate release based on district court's "individualized review of all the circumstances," including "'the First Step Act's elimination of sentence-stacking under § 924(c)'") (citation omitted).

For the foregoing reasons, the approach adopted by the First, Fourth, and Tenth Circuits is the only one consistent with the text and purpose of Section 3582(c)(1)(A). As those courts have described, there is nothing in the statutory text that supports the crabbed view of the breadth of a district court's discretion adopted by the Third, Sixth, Seventh, and Eighth Circuits, especially in the context of a statutory scheme that was created precisely to allow judges to take a second look at unusually long sentences after some time had passed. Just as nothing in the statute *compels* a sentence reduction in every case involving § 924(c) stacking under the old regime, there is no textual basis for *precluding* a reduction based, at least in part, on those seismic, and long overdue, changes to the law.

2. The Third Circuit Was Incorrect in Holding the Length of a Defendant's Sentence Cannot Be Considered as a Basis for Sentence Reduction.

The Third Circuit was incorrect in concluding that sentence length cannot be considered in a compassionate release motion for many of the same rea-

sons that it and other circuits are wrong in concluding that changes to Section 924(c) cannot be considered.

As discussed above, district courts cannot place restrictions on what can be considered in an analysis of extraordinary and compelling reasons beyond those Congress sets itself. The only such reason Congress has limited district courts from considering is rehabilitation, and even that restriction is constrained to cases where rehabilitation is the *only* reason put forth. 28 U.S.C. § 994(t).

Additionally, as the Second Circuit pointed out in *Brooker*, providing relief for "unusually long sentences" is one of the explicitly-stated reasons Congress enacted the compassionate release statute. S. Rep. No. 225, 98th Cong., 1st Sess. 55–56 (1983). Thus, it would be odd indeed if Congress placed the length of a defendant's sentence off limits for district courts to consider when deciding motions under that very same compassionate release mechanism. In placing sentence length off limits by judicial fiat, the Third Circuit gutted a core purpose of Congress when it passed Section 3582(c)(1)(A) decades ago.

C. The Issues Are Important and Recurring.

The questions of whether a district court may consider the 2018 amendment to Section 924(c) in determining whether "extraordinary and compelling reasons" warrant the reduction of an unusually long sentence based on the pre-amendment regime or whether it can consider the length of the sentence itself are important and recurring questions of federal law. District courts across the country have granted a large number of sentence reductions based

in part on both the unfairness of lengthy sentences that would be substantially shorter today and the excessive length of the sentences themselves, and new motions are being filed every day.

Among the harms caused by the holdings below, and similar ones in the Sixth, Seventh, and Eighth Circuits, is that the outcome of motions based on virtually indistinguishable grounds, stemming from essentially identical conduct, now often depends entirely on the circuit in which a defendant was convicted. In the First, Fourth, and Tenth Circuits, district courts are reducing these indefensible sentences by decades or centuries, and defendants are being released from prison. In the Third, Sixth, Seventh, and Eighth Circuits, defendants like Petitioner will die in prison instead, or be released at extremely advanced ages. The second issue raised by this petition compounds this concern, as it applies not only to inmates serving sentences under draconian statutes that were later amended, like Section 924(c), but also a large number of federal inmates serving unnecessarily long sentences based on other sentencing provisions.

These unwarranted disparities in outcomes across circuits warrants review of both issues presented to this Court.

D. This Case Presents an Ideal Vehicle.

This case squarely and cleanly presents issues that have divided the circuit courts. It is therefore an ideal vehicle for resolving both questions presented.

Petitioner raised both questions throughout the proceedings below. *See* Pet. App. 5a, 27a–28a. He argued in the district court that a sentence reduction

was appropriate due to the severity of his Section 924(c) sentences themselves and the disparity between the mandatory sentence imposed and one he would face today, and the district court squarely decided the issue in the government's favor. *See* Pet. App. 33a, 39a, 52a. Petitioner raised both issues again in the Third Circuit, which also squarely decided it in the government's favor and affirmed the district court's judgment solely on this basis. Pet. App. 11a–12a (holding "nonretroactive changes to the § 924(c) mandatory minimums . . . cannot be a basis for compassionate release" and that considering sentence length would "infringe on Congress's authority to set penalties").

There are also no threshold issues that would limit this Court's review. The issues were clearly presented and preserved below, and the Third Circuit based its decision solely on the questions presented, without reference to any other bases for relief raised by Petitioner in his initial motion.

Timely resolution of the issues is important. Sentence reduction motions are being filed and decided on a seemingly daily basis in the district courts. There is no reason for this Court to delay—and every reason for it to move swiftly—to resolve this circuit split. The longer this Court waits, the more judicial resources will be wasted if the Court rejects the Third Circuit's position. And defendants like Petitioner, whose motions for a sentence reduction have been denied pursuant to the flawed rubric established by the court below and in three other circuits, will continue to serve excessively long prison terms.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 2022

APPENDIX

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2768

UNITED STATES OF AMERICA

v.

ERIC ANDREWS,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Action No. 2-05-cr-00280-002)
District Judge: Honorable Eduardo C. Robreno

Argued: March 16, 2021

Before: SHWARTZ, PORTER, and MATEY,
Circuit Judges.

(Filed: August 30, 2021)

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OPINION OF THE COURT

PORTER, *Circuit Judge*.

Eric Andrews is serving a 312-year sentence for committing a series of armed robberies when he was nineteen. After Congress enacted the First Step Act, Andrews filed a compassionate-release motion and argued that his case presented "extraordinary

and compelling reasons" warranting a reduced sentence under 18 U.S.C. § 3582(c)(1)(A)(i). We will affirm the District Court's denial of Andrews's motion.

I

During a one-month period in 2005, Eric Andrews and a group of his confederates robbed thirteen North Philadelphia businesses at gunpoint. Andrews was charged with the thirteen robberies, conspiring to commit the robberies, and brandishing a firearm during the completed crimes. After trial, a jury found Andrews guilty on all counts and he was sentenced to 312 years' imprisonment: 57 months for his role in the robberies and conspiracy under 18 U.S.C. § 1951, and 3,684 months for brandishing a firearm during a crime of violence under 18 U.S.C. § 924(c). Andrews received such an elevated sentence in large part because, at the time, each additional § 924(c) count carried a 25-year mandatory minimum. See 18 U.S.C. § 924(c)(1)(C)(i) (2006) (amended by First Step Act of 2018, Pub. L. No. 115-391, § 403(a), 132 Stat. 5194, 5221–22).[1]

In 2018, Congress changed that by passing the First Step Act. The Act revised § 924(c) so that the 25-year mandatory minimum for subsequent offenses would not apply unless the defendant already had a final conviction for a § 924(c) charge at the time of

[1] At the time Andrews was sentenced, 18 U.S.C. § 924(c) provided that "[i]n the case of a second or subsequent conviction under this subsection, the person shall . . . be sentenced to a term of not less than 25 years." 18 U.S.C. § 924(c)(1)(C)(i) (2006) (amended by First Step Act § 403(a)).

the offense. See First Step Act § 403(a); *United States v. Davis*, 139 S. Ct. 2319, 2324 n.1 (2019) ("[O]nly a second § 924(c) violation committed 'after a prior [§ 924(c)] conviction . . . has become final' will trigger the 25-year minimum."). Had Andrews been sentenced today, his consecutive convictions for brandishing a firearm would each generate a statutory minimum of 7 years, resulting in a 91-year sentence. But Congress specifically chose not to apply the statutory change to people who had already been sentenced under the old version: "This section, and the amendments made by this section, 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." *Id*. § 403(b). Because Andrews was sentenced in 2006, he could not receive a reduced sentence under the new sentencing scheme. See *United States v. Hodge,* 948 F.3d 160, 162 (3d Cir. 2020) ("[T]he new § 924(c) mandatory minimum does not apply to defendants initially sentenced before the First Step Act's enactment.").

However, Andrews was still able to move for a modified sentence under 18 U.S.C. § 3582(c)(1)(A). He was able to do so because of another innovation of the First Step Act—prisoner-initiated motions for compassionate release. *See* First Step Act § 603(b). Previously, all motions for compassionate release had to be made by the Director of the Bureau of Prisons. But the First Step Act created an avenue for prisoners to file their own motions in federal court. *Id*.

The First Step Act added the procedure for prisoner-initiated motions while leaving the rest of the compassionate-release framework unchanged. So just like Bureau-initiated motions, a prisoner's motion may be granted if the court finds that the sentence reduction is (1) warranted by "extraordinary and compelling reasons"; (2) "consistent with applicable policy statements issued by the Sentencing Commission"; and (3) supported by the traditional sentencing factors under 18 U.S.C. § 3553(a), to the extent they are applicable. 18 U.S.C. § 3582(c)(1)(A).

In support of his motion, Andrews pointed to the recent changes to the § 924(c) mandatory minimums and the duration of his sentence. He also noted his rehabilitation in prison, his relatively young age at the time of his offense, the government's decision to charge him with thirteen § 924(c) counts,[2] and his alleged susceptibility to COVID-19. Andrews claimed that, together, those six reasons were extraordinary and compelling under the compassionate-release statute.

Before the District Court could consider whether the proposed reasons collectively satisfied the extraordinary-and-compelling requirement it

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[2] Andrews claims that the government's decision to charge him with thirteen § 924(c) counts was an abuse of prosecutorial discretion in two ways: (1) consecutive § 924(c) counts were disproportionally used against black men like Andrews; and (2) he was sentenced much more severely than his co¬defendants who cooperated and pleaded guilty, effectively making his 312-year sentence a punishment for exercising his right to go to trial.

first had to determine what "extraordinary and compelling" meant under § 3582(c)(1)(A)(i). The government claimed that the court was bound by a Commission policy statement describing "extraordinary and compelling reasons" as: (1) medical conditions, (2) complications in old age, (3) family circumstances, and (4) "other reasons" as determined by the Director of the Bureau of Prisons. *See* U.S. Sent'g Guidelines Manual § 1B1.13 cmt. n.1 (U.S. Sent'g Comm'n 2018). The court disagreed, concluding that, by its terms, the policy statement applied only to Bureau-initiated motions. *United States v. Andrews*, 480 F. Supp. 3d 669, 676 (E.D. Pa. 2020). Indeed, the policy statement begins with the words "[u]pon motion of the Director of the Bureau of Prisons," U.S.S.G. § 1B1.13, and its commentary specifically states that a "reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons," *id.* § 1B1.13 cmt. n.4 (emphasis added). The court thus concluded that the policy statement was "inapplicable" to prisoner-initiated motions. *Andrews*, 480 F. Supp. 3d at 677. As a result, the court concluded that it was free to interpret "extraordinary and compelling" for itself and consider reasons beyond the four categories listed in the policy statement. *Id.*

Even so, the District Court noted that its inquiry was not boundless. The inapplicability of the policy statement did not mean, for example, that all of Andrews's proposed reasons fell within the statutory meaning of "extraordinary and compelling." The court concluded that two of the proposed reasons—the duration of Andrews's

sentence and the nonretroactive changes to mandatory minimums—could not be extraordinary and compelling as a matter of law. *Id*. at 678–80. The court also concluded that, although it was not bound by the policy statement, the policy statement could still provide helpful guidance in determining what constitutes extraordinary and compelling reasons. *Id*. at 683–84. So, utilizing the text, dictionary definitions, the policy statement, [3] and existing precedent, the court determined that Andrews's four remaining reasons collectively fell short of being extraordinary and compelling under the statute. *Id*. at 682–88. Andrews timely appealed.

II

The District Court had subject-matter jurisdiction under 18 U.S.C. § 3231, and we have jurisdiction under 28 U.S.C. § 1291. We exercise de novo review over the District Court's interpretation of statutes and policy statements. *See Gibbs v. Cross*, 160 F.3d 962, 964 (3d Cir. 1998). But a grant of compassionate release is a purely discretionary decision. *United States v. Pawlowski*, 967 F.3d 327, 330 (3d Cir. 2020). We therefore review a district court's decision to deny a compassionate-release motion for abuse of discretion. *Id*. Under the abuse-of-discretion standard, we will not disturb the court's determination unless we are left with "a definite and firm conviction that [it] committed a clear error of

[3] In interpreting the policy statement, the court also considered a program statement promulgated by the Bureau of Prisons. *Andrews*, 480 F. Supp. 3d at 685–86.

judgment in the conclusion it reached." *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Oddi v. Ford Motor C*o., 234 F.3d 136, 146 (3d Cir. 2000)).

III

A

The first issue is whether the District Court was bound by the Commission's policy statement. We conclude that it was not.

As the District Court noted, the text of the policy statement explicitly limits its application to Bureau-initiated motions. Thus, according to its plain language, the existing policy statement[4] is not applicable—and not binding—for courts considering prisoner-initiated motions. In reaching this conclusion, we align with nearly every circuit court

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[4] Under the compassionate-release statute, all sentence reductions must be "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A). More specifically, Congress has directed the Sentencing Commission to issue general policy statements "describ[ing] 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). But the Commission has not yet promulgated a post–First Step Act policy statement describing what should be extraordinary and compelling in the context of prisoner-initiated motions. Though vexing, that temporary anomaly does not authorize this Court to effectively update the Commission's extant policy statement by ignoring the pre-First Step Act language relating to Bureau-initiated motions. *See United States v. Long*, 997 F.3d 342, 358 (D.C. Cir. 2021).

to consider the issue. *See United States v. Brooker*, 976 F.3d 228, 235 (2d Cir. 2020); *United States v. McCoy*, 981 F.3d 271, 282 (4th Cir. 2020); *United States v. Shkambi*, 993 F.3d 388, 393 (5th Cir. 2021); *United States v. Elias*, 984 F.3d 516, 519–20 (6th Cir. 2021); *United States v. Gunn*, 980 F.3d 1178, 1180–81 (7th Cir. 2020); *United States v. Aruda*, 993 F.3d 797, 802 (9th Cir. 2021); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021); *United States v. Long*, 997 F.3d 342, 355 (D.C. Cir. 2021). *But see United States v. Bryant*, 996 F.3d 1243, 1247–48 (11th Cir. 2021).

B

That leads us to the second issue: whether, in interpreting and applying the phrase "extraordinary and compelling reasons," the District Court erred. We conclude that it did not.

1

To start, the District Court did not err when it consulted the text, dictionary definitions, and the policy statement to form a working definition of "extraordinary and compelling reasons." Given that the compassionate-release statute does not define "extraordinary and compelling reasons," the court looked to those resources to give shape to the otherwise amorphous phrase. That was not error. "We look to dictionary definitions to determine the ordinary meaning of a word . . . with reference to its statutory text." *Bonkowski v. Oberg Indus., Inc.*, 787

F.3d 190, 200 (3d Cir. 2015). And courts may consider an extrinsic source like the policy statement if, like here, it "shed[s] a reliable light on the enacting Legislature's understanding of [an] otherwise ambiguous term[]." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

But Andrews claims that, because the policy statement is not binding on prisoner-initiated motions, the court had no business looking to it for guidance on the meaning of "extraordinary and compelling reasons." We disagree. The court correctly recognized that although the policy statement is no longer binding, it still sheds light on the meaning of extraordinary and compelling reasons. "It is a commonplace of statutory interpretation that 'Congress legislates against the backdrop of existing law.'" *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) (quoting *McQuiggin v. Perkins*, 569 U.S. 383, 398 n.3 (2013)). Because Congress reenacted the compassionate-release statute without any alterations to the phrase "extraordinary and compelling reasons," it was reasonable for the court to conclude that the phrase largely retained the meaning it had under the previous version of the statute. *See United States v. Johnson*, 948 F.3d 612, 619 (3d Cir. 2020); *see also* Antonin Scalia & Brian A. Garner, *Reading Law*: *The Interpretation of Legal Texts* 322 (2012) ("The clearest application of the prior-construction canon occurs with reenactments: If a word or phrase . . . has been given a uniform interpretation by inferior courts or the responsible agency, a later version of

that act perpetuating the wording is presumed to carry forward that interpretation.").

Moreover, the District Court looked to the policy statement's descriptions of extraordinary and compelling circumstances as a guide, not as an ultimate binding authority. *See Andrews*, 480 F. Supp. 3d at 682–84. That is not error. The policy statement's descriptions of extraordinary and compelling circumstances can "guide discretion without being conclusive." *Gunn*, 980 F.3d at 1180. In arriving at that conclusion, we again align with the reasoning of the majority of our sister circuits that have considered the issue. *See McCoy*, 981 F.3d at 282 n.7; *United States v. Tomes*, 990 F.3d 500, 503 n.1 (6th Cir. 2021); *Gunn*, 980 F.3d at 1180; Aruda, 993 F.3d at 802. *But see Shkambi*, 993 F.3d at 392.

2

The District Court also did not err when it concluded that the duration of Andrews's sentence and the nonretroactive changes to mandatory minimums could not be extraordinary and compelling reasons warranting sentence reduction.

We begin with the length of Andrews's sentence. The duration of a lawfully imposed sentence does not create an extraordinary or compelling circumstance. "[T]here is nothing 'extraordinary' about leaving untouched the exact penalties that Congress prescribed and that a district court imposed for particular violations of a statute." *United States v. Thacker*, 4 F.4th 569, 574 (7th Cir. 2021). "Indeed, the imposition of a sentence

that was not only permissible but statutorily required at the time is neither an extraordinary nor a compelling reason to now reduce that same sentence." *United States v. Maumau*, 993 F.3d 821, 838 (10th Cir. 2021) (Tymkovich, C.J., concurring). Moreover, considering the length of a statutorily mandated sentence as a reason for modifying a sentence would infringe on Congress's authority to set penalties. *See Gore v. United States*, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, these are peculiarly questions of legislative policy." (citation omitted)).

The nonretroactive changes to the § 924(c) mandatory minimums also cannot be a basis for compassionate release. In passing the First Step Act, Congress specifically decided that the changes to the § 924(c) mandatory minimums would not apply to people who had already been sentenced. *See* First Step Act § 403(b). That is conventional: "[I]n federal sentencing the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced." *Dorsey v. United States*, 567 U.S. 260, 280 (2012). "What the Supreme Court views as the 'ordinary practice' cannot also be an 'extraordinary and compelling reason' to deviate from that practice." *United States v. Wills*, 997 F.3d 685, 688 (6th Cir. 2021). Interpreting the First Step Act, we must "bear[] in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the

overall statutory scheme." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 320 (2014) (internal quotation marks omitted) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). And when interpreting statutes, we work to "fit, if possible, all parts" into a "harmonious whole." *Brown & Williamson*, 529 U.S. at 133 (internal quotation marks omitted) (quoting *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959)). Thus, we will not construe Congress's nonretroactivity directive as simultaneously creating an extraordinary and compelling reason for early release. Such an interpretation would sow conflict within the statute. *See United States v. Jarvis*, 999 F.3d 442, 444 (6th Cir. 2021) ("Why would the same Congress that specifically decided to make these sentencing reductions non-retroactive in 2018 somehow mean to use a general sentencing statute from 1984 to unscramble that approach?").

We join the Sixth and Seventh Circuits in reaching this conclusion. *See* Jarvis, 999 F.3d at 444–46; *Thacker*, 4 F.4th at 576; *see also United States v. Loggins*, 966 F.3d 891, 892–93 (8th Cir. 2020) (district court did not misstate the law in finding "that a non-retroactive change in law did not support a finding of extraordinary or compelling reasons for release"). *But see McGee*, 992 F.3d at 1048 (a nonretroactive change to mandatory minimums cannot, by itself, create extraordinary and compelling circumstances; but nonretroactive changes may be paired with other unique circumstances to create extraordinary and compelling reasons warranting a sentence

reduction); *McCoy*, 981 F.3d at 286 (nonretroactive changes to mandatory minimums may create extraordinary and compelling circumstances). But in holding that the statutorily required sentence or Congress's nonretroactive sentencing reductions are not extraordinary and compelling reasons for purposes of § 3582(c)(1)(A), we are not saying that they are always irrelevant to the sentence-reduction inquiry. If a prisoner successfully shows extraordinary and compelling circumstances, the current sentencing landscape may be a legitimate consideration for courts at the next step of the analysis when they weigh the § 3553(a) factors. *See Jarvis*, 999 F.3d at 445; *Thacker*, 4 F.4th at 575–76.

C

Finally, we consider whether the District Court abused its discretion in determining that Andrews's four remaining reasons fell short of the extraordinary-and-compelling requirement. Because the court carefully considered the remaining reasons and arrived at a reasoned result, we conclude that the court operated well within its discretion.

The court recognized that Andrews was arrested at a relatively young age and that, since that time, he has taken great strides in his rehabilitation—he regularly attends church, he's had a clean disciplinary record in prison since 2013, and

he helped develop a charitable program to benefit the Salvation Army. *Andrews*, 480 F. Supp. 3d at 687. But the court ruled that Andrews's other two proposed reasons—the government's decision to charge him with thirteen firearm counts and his susceptibility to COVID-19—weighed against him because he presented no facts showing that prosecutors abused their discretion and he provided insufficient details about his susceptibility to COVID-19. *Id*. at 686. The court then explained that, although Andrews's age and rehabilitation could both be viewed as extraordinary, those reasons by themselves were insufficiently compelling to warrant a reduced sentence. *Id*. at 687–88. Thus, the court denied Andrews's motion for compassionate release. *Id*. at 688.

Courts wield considerable discretion in compassionate-release cases, and we will not disturb a court's determination unless we are left with a "definite and firm conviction that [it] committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Pawlowski*, 967 F.3d at 330 (alteration in original) (internal quotation marks omitted) (quoting *Oddi*, 234 F.3d at 146). We discern no clear error of judgment here.

* * *

For the reasons stated, we will affirm the District Court's order denying Andrews's motion for compassionate release.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

United States of America,	:	CRIMINAL ACTION
	:	NO. 05-280-02
v.	:	
	:	
Eric Andrews.	:	

MEMORANDUM

EDUARDO C. ROBRENO, J. August 19, 2020

In 2018, Congress enacted the First Step Act ("FSA"). The FSA provided for, among other things, the reduction of federal sentences, if the federal prisoner could demonstrate extraordinary and compelling reasons warranting such relief. Circa March 2020, the United States (as well as most of the world) recognized the presence of a novel coronavirus, which could endanger the lives of millions of people. Particularly at risk, because of the inherent conditions of incarceration, were persons kept in custodial environments.

The confluence of these twin events, the passage of the FSA and the appearance of the coronavirus, created a perfect storm, generating countless petitions for compassionate release giving birth to district court decisions in the hundreds, granting and denying relief.

Without guidance from Congress and the Sentencing Commission (which lacks a quorum to

act) concerning the meaning of the terms extraordinary and compelling, and in the fog of war created by incomplete and at times conflicting health information, courts have struggled to find their way to a principled disposition of compassionate release petitions.

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With this experience in mind, the Court will proceed to consider the instant motion for compassionate release by first defining the scope of its own authority to reduce a lawfully imposed sentence and, upon locating such authority, determining whether the facts and circumstances alleged here rise to the level of extraordinary and compelling.

I. INTRODUCTION

Eric Andrews is serving a 312-year sentence for thirteen armed robberies he committed when he was nineteen years old. The FSA amended the compassionate release provision in the United States Code to allow defendants to move the Court for a reduction of a sentence for extraordinary and compelling reasons. Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239 (codified at 18 U.S.C. § 3582(c)(1)(A)). Under this authority, Andrews moves the Court for a reduction of his sentence.

II. BACKGROUND

In 2005, Andrews, at nineteen years of age, was charged with committing thirteen robberies, conspiring to commit robberies, and brandishing a firearm during the completed crimes. Andrews was indicted along with three others, and of the three, two pleaded guilty, and one, along with Andrews, proceeded to trial, where the two were found guilty.

Andrews was sentenced to 312 years' imprisonment: the conspiracy and substantive

robbery counts account for fifty-seven months of his sentence, while the other 3,684 months of his sentence were imposed on account of thirteen counts of brandishing a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c). These firearm counts each carry a mandatory minimum sentence of seven years. But at the time Andrews was sentenced, successive § 924(c) counts in the first prosecution each carried a mandatory minimum of twenty-five years. Thus, with twelve § 924(c) counts carrying mandatory twenty-five-year sentences, which must run consecutively, this disproportionate sentence was mandated.

The FSA amended § 924(c) to provide that the twenty-five-year mandatory minimum only applies to a "violation of this subsection that occurs after a prior conviction under this subsection has become final." § 403(a), 132 Stat. 5194, 5221–22 (codified at 18 U.S.C. § 924(c)(1)(C)). While the amendment was titled a "clarification," the provision was explicitly not retroactive, unlike other portions of the FSA. § 403(b), 132 Stat. 5194, 5222. Even if the amendment applied retroactively or Andrews were sentenced today under the amended provision, he would be sentenced to a mandatory minimum of ninety-one years for the thirteen § 924(c) counts.

Andrews argues that he does not seek retroactive application of the § 924(c) amendment, but that he instead moves the Court for compassionate release under 18 U.S.C. § 3582(c)(1). He asks for a reduction of his sentence to time served, after having served fourteen years. In arguing that extraordinary and compelling reasons

exist, Andrews's motion focused on the length of the sentence and the FSA's reduction of § 924(c) successive mandatory minimums on a first conviction. And while not expressly arguing that they are extraordinary and compelling reasons, it also pointed to his rehabilitation in prison and his young age at the time of the offenses as factors under § 3553(a). In his reply to the government's response, he more directly argued that all four of these reasons are extraordinary and compelling when considered together, as part of a holistic review, and he added that the decision to charge thirteen § 924(c) counts as a trial penalty is also an extraordinary and compelling reason. In the briefing—both by Andrews and by the government—the question of whether there are extraordinary and compelling circumstances here was largely eclipsed by the issue of the Court's power to grant compassionate release.

At the oral argument—where the Court pressed the parties about whether there are extraordinary and compelling reasons here—Andrews again asserted the holistic approach. While pointing to all five reasons listed above, Andrews especially focused on the length of the sentence and the government's decision to charge thirteen consecutive § 924(c) counts. He argued, "if this [United States Attorney's] Office used the prosecutorial judgment it used back then against a 19-year-old and made him eat 13 consecutive mandatory seven-year sentences, this Court would have the authority [to grant compassionate release one day after the sentence was imposed]." Oral Arg. Tr. 45:2–45:5, ECF No. 245.

By way of a letter, after the briefing and argument, Andrews also raised his susceptibility to the COVID-19 pandemic, due to hypertension requiring medication, as an additional extraordinary and compelling reason for granting his motion.

III. LEGAL STANDARD

In interpreting a statute, the Court begins "with the statutory text," and "[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." BP Am. Prod. Co. v. Burton, 549 U.S. 84, 91 (2006) (citations omitted). The Court considers "the specific context in which that language is used, and the broader context of the statute as a whole," assumes "that every word in a statute has meaning," and avoids "interpreting one part of a statute in a manner that renders another part superfluous." Disabled in Action of Pennsylvania v. Se. Pennsylvania Transp. Auth., 539 F.3d 199, 210 (3d Cir. 2008) (internal quotations and citations omitted). The Court "also consider[s] the overall object and policy of the statute, and avoid[s] constructions that produce odd or absurd results or that are inconsistent with common sense." *Id*. (internal quotations and quotation marks omitted).

IV. DISCUSSION

To decide Andrews's compassionate release motion, the Court must first determine its authority to reduce a lawfully imposed sentence and, once it locates the scope of the authority, it must evaluate

whether Andrews's case presents extraordinary and compelling reasons for granting the motion.

A. The Court's Authority to Reduce a Sentence

The concept of compassionate release is not a novel one. It was created with the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, § 3582(c)(1)(A), 98 Stat. 1837, 1998–99, which also abolished parole and created the current determinate sentencing regime. Under the compassionate release provision as originally written in 1984, a motion for compassionate release could only be brought by the Bureau of Prisons ("BOP"). § 3582(c)(1)(A), 98 Stat. 1837, 1998–99. In December of 2018 Congress enacted the FSA. And the FSA—for the purpose of increasing the use and transparency of compassionate release, as the relevant section is titled—amended the compassionate release provision to allow a motion brought directly by the defendant. § 603(b), 132 Stat. 5194, 5239 (codified at 18 U.S.C. § 3582(c)(1)(A)). Thus, while the BOP was the gatekeeper to compassionate release under the Comprehensive Crime Control Act of 1984, the FSA divested the BOP of this sole gatekeeper role.

Under the compassionate release provision, as amended, the Court may, on the defendant's motion, "reduce the term of imprisonment" of the defendant "after considering the factors set forth in section 3553(a)" if (1) the administrative exhaustion requirement is met, (2) "extraordinary and compelling reasons warrant such a reduction," and (3) "such a reduction is consistent with applicable

policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1). Because there is no dispute that the exhaustion requirement is met here, the Court first turns to what the Court may properly consider as extraordinary and compelling reasons.

1. Extraordinary and Compelling Reasons

Congress did not define extraordinary and compelling reasons, except by providing that rehabilitation alone is not enough. 28 U.S.C. § 994(t). Instead, Congress directed the Sentencing Commission ("Commission") to "describe what should be considered extraordinary and compelling reasons for sentence reduction" under compassionate release. *Id*.

Following Congress's direction, the Commission described extraordinary and compelling reasons, in a policy statement, as (1) illness, (2) old age, (3) family circumstances, and (4) other reasons determined by the BOP. U.S. Sentencing Guidelines Manual § 1B1.13 cmt. n.1 (U.S. Sentencing Comm'n 2018).[1] It is undisputed that there is no illness, old age, or family circumstance that provides the basis for granting compassionate release here. The only question, at the outset, is whether the Court, in considering a defendant's motion for compassionate release, may only consider these reasons and other

[1] In turn, the BOP does not define "other" reasons, but provides that compassionate release can be granted based on illness, old age, or family circumstances. Federal Bureau of Prisons, Program Statement 5050.50 (Jan. 17, 2019).

reasons determined by the BOP, or whether it may go beyond those reasons.

Many district courts have now weighed in on this question, and they overwhelmingly conclude that a court can make an independent determination of what constitutes extraordinary and compelling reasons. Although a minority of district courts have held that reasons other than illness, old age, and family circumstances are limited to those determined by the BOP,[2] "a majority of district courts have concluded that the 'old policy statement provides helpful guidance, [but] . . . does not constrain [a court's] independent assessment of whether "extraordinary and compelling reasons" warrant a sentence reduction under § 3852(c)(1)(A).'" United States v. Rodriguez, --- F. Supp. 3d ----, No. 03-cr-00271, 2020 WL 1627331, at *4 (E.D. Pa. Apr. 1, 2020) (alterations in original) (quoting United States v. Beck, 425 F. Supp. 3d 573, 582 (M.D.N.C. 2019)).

The majority of courts reason that because the Commission's policy statement is by its own terms limited to compassionate release motions brought by

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[2] See United States v. Lynn, No. 89-cr-0072, 2019 WL 3805349, at *4 (S.D. Ala. Aug. 13, 2019) ("The Commission may well decide that, since BOP is no longer the gatekeeper regarding the filing of motions for compassionate release, neither should it be the gatekeeper regarding the residual category of extraordinary and compelling reasons for compassionate release. Should the Commission so amend its policy statement, the courts will of course be bound by Section 3582(c)(1)(A) to follow the amended version. Until that day, however, the Court must follow the policy statement as it stands."), appeal dismissed, No. 19-13239-F, 2019 WL 6273393 (11th Cir. Oct. 8, 2019).

the BOP, the policy statement is inapplicable to motions brought directly by defendants. *Id*. Therefore, given that the policy statement is applicable only to motions brought by the BOP and not those brought by defendants, the Court can make its own independent determination as to extraordinary and compelling reasons when the defendant moves for compassionate release. *Id*.[3] This is the more persuasive line of cases.

The minority's position is not persuasive because it would put motions brought directly by the defendant at a disadvantage to those brought by the BOP. In other words, under the minority view, when the BOP brings the motion, compassionate release may be granted based on reasons other than illness, old age, and family circumstances, but when the defendant brings the motion, compassionate release may not be granted based on such "other" reasons. And, as one court put it, it would be an odd result if the defendant could only bring the motion "by accepting a pared-down standard of review that omitted the flexible ["other" reasons] catchall standard." *Id*. *5.[4]

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[3] See also United States v. Brown, 411 F. Supp. 3d 446, 449–50 (S.D. Iowa 2019) ("In the absence of an applicable policy statement . . . the district court can consider anything—or at least anything the BOP could have considered—when assessing a defendant's motion."), order amended on reconsideration, --- F. Supp. 3d ----, No. 05-cr-00227-1, 2020 WL 2091802 (S.D. Iowa Apr. 29, 2020)).

[4] The position taken by a minority of courts is also inconsistent with case law that provides that courts give no deference to administrative agencies in this situation. See Rodriguez, --- F. Supp. 3d at ----, 2020 WL 1627331, at *6 n.12

The government's argument that the policy statement is binding misses the mark because the policy statement does not apply to motions by defendants. The government argues that most courts have ruled incorrectly because the Commission's policy statement is binding, citing Dillon v. United States, 560 U.S. 817, 819 (2010). But this argument is unavailing because, even if binding when the BOP brings the motion, the policy statement is inapplicable to situations where the defendant, not the BOP, brings the motion for compassionate release.[5]

("[C]ourts 'do not generally accord deference to one agency's interpretation of a regulation issued and administered by another agency.'" (quoting Chao v. Community Tr. Co., 474 F.3d 75, 85 (3d Cir. 2007)).

[5] See Rodriguez, --- F. Supp. 3d at ----, 2020 WL 1627331, at *4 ("Accordingly, by its own terms, the scope of the old policy statement is clearly outdated and, at the very least, does not apply to the entire field of post-First Step Act motions. In other words, for prisoner-filed motions, there is a gap left open that no 'applicable' policy statement has addressed."); United States v. Beck, 425 F. Supp. 3d 573, 579 (M.D.N.C. 2019) ("By its terms, the old policy statement applies to motions for compassionate release filed by the BoP Director and makes no mention of motions filed by defendants."). Further, the policy statement cannot be binding to the extent it contradicts the FSA because guidelines can only be binding if they do not contradict statutes. See United States v. Adeyemi, No. 06-cr-124, 2020 WL 3642478, at *14 (E.D. Pa. July 6, 2020) (holding that the policy statement is not binding because "[t]he plain language of section 3582(c)(1)(A)(i), not just Congress's intent to improve and increase compassionate release, contradicts the introductory phrase of Note 1(D) to the Commission's policy statement" (citing United States v. LaBonte, 520 U.S. 751 (1997) & Stinson v. United States, 508 U.S. 36 (1993))).

That said, if the sentencing commission updates the policy statement to make it applicable to motions by defendants, the Court must ensure that the sentence reduction upon a defendant's motion is consistent with that policy statement.[6] In the meantime,[7] the Commission's policy statement, while inapplicable to motions by defendants, nonetheless provides helpful guidance to the Court in determining what constitutes extraordinary and compelling reasons.[8] United States v. Ebbers, 432 F. Supp. 3d 421, 427 (S.D.N.Y. 2020).

2. Reasons Other Than Illness, Old Age, and Family Circumstances

The Court will consider Andrews's suggested reasons for finding that extraordinary and compelling reasons are present, except when the proposed reasons violate the doctrine of separation of powers. Andrews presents the following as extraordinary and compelling reasons: (1) young age at the time of the offense, (2) rehabilitation in prison,

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[6] See United States v. Lynn, No. 89-cr-0072, 2019 WL 3805349, at *4 (S.D. Ala. Aug. 13, 2019) ("Should the Commission so amend its policy statement, the courts will of course be bound by Section 3582(c)(1)(A) to follow the amended version."), appeal dismissed, No. 19-13239-F, 2019 WL 6273393 (11th Cir. Oct. 8, 2019).

[7] See Rodriguez, --- F. Supp. 3d. at ----, 2020 WL 1627331, at *6 ("Nothing in § 3852(c)(1)(A)(i) requires courts to sit on their hands in situations like these. Rather, the statute's text directly instructs courts to 'find that' extraordinary circumstances exist.").

[8] See infra Section IV.B.

(3) susceptibility to COVID-19, (4) the prosecutorial charging decision, (5) the length of the sentence, and (6) the amendment to § 924(c).

Not all of Andrews's suggested reasons are appropriate to consider. The offender's young age and rehabilitation may be extraordinary reasons in that they may be "[b]eyond what is usual, customary, regular, or common." Extraordinary, Black's Law Dictionary (10th ed. 2014). Similarly, young age and rehabilitation may be compelling in that they may demonstrate "[a] need so great that irreparable harm or injustice would result if it is not met." Compelling Need, Black's Law Dictionary (10th ed. 2014). And the government does not dispute that susceptibility to COVID-19, under certain circumstances, can be an extraordinary and compelling reason. But the other three reasons—the prosecutor's charging decision, the length of the sentence, and the amendment to § 924(c)—implicate separation of powers concerns.

A sentence is the result of decisions by all three branches of the government. The legislature defines the crime and establishes the penalty. The executive determines whether to prosecute the crime. And the judiciary imposes a specific sentence following a conviction, but within the scope of the penalty established by the legislature. Thus, a motion for compassionate release calls into question the judgments of all three branches. The Supreme Court has recognized that sentencing "has never been thought of as the exclusive constitutional province of any one Branch." Mistretta v. United States, 488 U.S. 361, 390 (1989). So, determining the power of the Court to reduce a sentence implicates

separation of powers jurisprudence, which is animated by a concern about "the encroachment or aggrandizement of one branch at the expense of the other." *Id*. at 382 (quoting Buckley v. Valeo, 424 U.S. 1, 122 (1976)).

The separation of powers doctrine requires "that the Judicial Branch neither be assigned nor allowed 'tasks that are more properly accomplished by [other] branches.'" *Id*. at 383 (alteration in original) (quoting Morrison v. Olson, 487 U.S. 654, 680–81 (1988)). Thus, any consideration of extraordinary and compelling reasons must respect Congress's "exclusive power to define offenses and to establish penalties" and recognize that "the decision whether or not to prosecute and what charges to file generally rests within the prosecutor's broad discretion." United States v. MacEwan, 445 F.3d 237, 251 (3d Cir. 2006) (internal quotations and quotation marks omitted).

As to the three reasons that raise separation of powers concerns here—i.e., the prosecutor's charging decision, the length of the sentence, and the amendment to § 924(c)—the Court will assume, without deciding, that prosecutorial decisions may appropriately be considered as extraordinary and compelling reasons, despite the serious separation of powers concerns.[9] But the other two suggested

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[9] In our criminal justice system, "[w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." United States v. Batchelder, 442 U.S. 114, 124 (1979). And judicial authority to review prosecutorial decisions remains a "limited authority to affect prosecutorial actions when those actions are taken in

reasons—the length of the sentence and the amendment to § 924(c)—implicate separation of powers concerns that cannot be avoided and to which the Court now turns.

a. Length of the Sentence

The length of the sentence cannot be an extraordinary and compelling reason to grant compassionate release because this would infringe on the legislature's province to fix penalties. This is especially true when mandatory minimums are involved. In essence, Andrews asks the Court to reevaluate his sentence and fashion its own brand of

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violation of the Constitution." United States v. Santtini, 963 F.2d 585, 596 (3d Cir. 1992). That said, Congress may place some "statutory [] limits enforceable through judicial review" on "the exercise of prosecutorial discretion." Nader v. Saxbe, 497 F.2d 676, 679 n.19 (D.C. Cir. 1974); see also The Confiscation Cases, 74 U.S. 454, 457 (1868). But courts "may not lightly impute to Congress an intent to remove prosecutorial discretion from the Executive and place it in courts and private parties." Nathan v. Smith, 737 F.2d 1069, 1079 (D.C. Cir. 1984) (Bork, J., concurring); see also United States v. HSBC Bank USA, N.A., 863 F.3d 125, 138 (2d Cir. 2017); United States v. Fokker Servs. B.V., 818 F.3d 733, 742 (D.C. Cir. 2016). In this case, the Court need not determine whether the FSA authorizes judicial review of charging decisions because, as discussed further below, Andrews does not even begin to come close to a showing of prosecutorial misconduct or abuse of discretion. See infra Section IV.B. Therefore, the Court will assume without deciding that the FSA authorizes a consideration of prosecutorial decisions as extraordinary and compelling reasons.

justice. But to do so in this manner would intrude on legislative prerogatives.

In our criminal justice system, "the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts.'" Harmelin v. Michigan, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring) (quoting Rummel v. Estelle, 445 U.S. 263, 275–76 (1980)). It is well settled that "the scope of judicial discretion with respect to a sentence is subject to congressional control." Mistretta, 488 U.S. at 364 (citing Ex parte United States, 242 U.S. 27 (1916)). "Congress has the power to define criminal punishments without giving the courts any sentencing discretion." Chapman v. United States, 500 U.S. 453, 467 (1991) (citation omitted). Ultimately, in legislating mandatory sentences for certain crimes, Congress divested the courts of all sentencing discretion below those mandatory minimums. MacEwan, 445 F.3d at 251.

Reducing a sentence based on the length of the sentence would be a usurpation of Congress's power to set criminal penalties. Compassionate release does not give federal courts free rein to reassess lawfully imposed sentences; it "is not an opportunity to second guess or to reconsider whether the original sentence was just." United States v. Ebbers, 432 F. Supp. 3d 421, 429 (S.D.N.Y. 2020). Compassionate release is not a form of judicial (as opposed to executive) clemency.

And especially where the length of the sentence was determined by the imposition of a

mandatory minimum, the encroachment into the legislature's province is exacerbated. Reducing a mandatory minimum sentence based on its length is a bold assertion of full discretion—constrained only by the Court's own assessment of whether the length is extraordinary and compelling—where Congress expressly divested the courts of all such discretion.[10]

Further, to consider the length of the sentence as an extraordinary and compelling reason for reducing a sentence also offends the rule of finality enacted by Congress. 18 U.S.C. § 3582(b). It is true that compassionate release provides "an 'exception to the general rule of finality' over sentencing judgments." United States v. Rodriguez, 855 F.3d 526, 529 (3d Cir. 2017) (quoting Dillon v. United States, 560 U.S. 817, 824 (2010)). But this limited power does not license courts to revisit all sentences. In other words, if the Court were permitted under the guise of compassionate release to reduce a sentence based on the Court's idiosyncratic belief

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[10] The Court only holds that the length of a sentence, including a sentence imposed pursuant to a mandatory minimum, cannot itself be an extraordinary and compelling reason for granting compassionate release. The reduction of a sentence below the mandatory minimum is a separate and distinct issue. Whether a sentence that was imposed pursuant to a mandatory minimum may be reduced where there are valid extraordinary and compelling reasons, e.g., illness, remains an open question. See United States v. Varnado, No. 14-cr-283, 2020 WL 2512204, at *1 n.1. (S.D. Cal. May 15, 2020) ("Whether district courts have authority to grant a reduction in sentence under § 3582(c)(1)(A) where the defendant's original sentence was based on a mandatory minimum is an open question."), appeal docketed, No. 20-50160 (9th Cir. June 10, 2020).

that the previously imposed sentence is too long, compassionate release would be the exception that swallows the general rule of finality. Under this view, a federal court could resentence a defendant immediately after the defendant has been sentenced. And a court could reduce a duly imposed sentence to time served immediately after the sentence is pronounced. Under these circumstances, the federal judiciary would return to the much-criticized indeterminate sentencing regime, and a duly imposed, legal sentence would be simply aspirational, without the requisite finality.

Therefore, the Court cannot consider the length of a lawfully imposed sentence, even if it is a disproportionate sentence, as an extraordinary and compelling reason warranting compassionate release.

b. Amendment to § 924(c)

The FSA's amendment to § 924(c) cannot be an extraordinary and compelling reason because this would intrude on Congress's authority to determine the temporal scope of its statutes. The amendment is expressly not retroactive, and the retroactivity of a statute is determined by Congress and not by a court, unless Congress has not expressly determined its retroactivity. Granting a motion for compassionate release on the basis of the amendment to § 924(c) would supplant the retroactivity determination of courts—that the amendment should be applied retroactively on a case-by-case basis—for the retroactivity

determination of Congress—that the amendment should not be applied retroactively. When Congress speaks on the retroactivity of the statute, its judgment is final.

Retroactivity doctrine "allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes." Landgraf v. USI Film Prod., 511 U.S. 244, 273 (1994). And a court only determines the retroactivity of a statute when "the statute contains no [] express command" regarding retroactivity. *Id*. at 280. This is because "the legislative power is the power to make law, and Congress can make laws that apply retroactively." Patchak v. Zinke, 138 S. Ct. 897, 905 (2018). The constitutional restrictions on Congress's authority to decide the retroactivity of statutes are limited to the Ex Post Facto Clause, the Contracts Clause, the Takings Clause, the Bills of Attainder Clause, and the Due Process Clause. Bank Markazi v. Peterson, 136 S. Ct. 1310, 1325 (2016) (citing Landgraf 511 U.S. at 266–67). But "[a]bsent a violation of one of those specific provisions," the Court must give a statute "its intended [temporal] scope." *Id*. (quoting Landgraf, 511 U.S. at 267–68).

A number of courts that have considered whether the amendment to § 924(c) can be an extraordinary and compelling reason have held that it can.[11] These courts reason that "a legislative

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[11] See United States v. Quinn, --- F. Supp. 3d ----, No. 91-cr-00608, 2020 WL 3275736, at *4 (N.D. Cal. June 17, 2020) ("Consistent with numerous other courts to have confronted similar situations since the FSA, this decision turns on the enormous sentencing disparity created by subsequent changes

rejection of the need to impose sentences under § 924(c), as originally enacted, as well as a legislative declaration of what level of punishment is adequate" is an extraordinary and compelling reason. United States v. Redd, --F. Supp. 3d ----, No. 97-cr-00006, 2020 WL 1248493, at *6 (E.D. Va. Mar. 16, 2020) (footnote omitted). Some of these courts hold that the amendment may only be a basis for granting compassionate release "in combination with other circumstances." United States v. Defendant(s), No. 99-cr-00257, 2020 WL 1864906, at *6 (C.D. Cal. Apr. 13, 2020) (quoting United States v. O'Bryan, No. 96-cr-10076-03, 2020 WL 869475, at *2 (D. Kan. Feb. 21, 2020)). They reason that the amendment's express non-retroactivity forecloses granting a motion for compassionate release when the amendment is the only reason for doing so but does not prevent a court from granting compassionate release based on the amendment together with another reason. United States v. Brown, --- F. Supp. 3d ----, No. 05-cr-00227-1, 2020 WL 2091802, at *9 (S.D. Iowa Apr. 29, 2020).[12]

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to federal sentencing law which constitutes an 'extraordinary and compelling reason' for Quinn's compassionate release."); United States v. Brown, --- F. Supp. 3d ----, No. 05-cr-00227-1, 2020 WL 2091802, at *8 (S.D. Iowa Apr. 29, 2020) (collecting cases).

[12] See also United States v. Pitts, No. 94-cr-70068-2, 2020 WL 1676365, at *7 (W.D. Va. Apr. 6, 2020) ("To be clear, the limitation of § 403(b) does not necessarily preclude the court from reducing Pitts' drug sentences. But § 403(b) indicates that Congress did not intend the sentencing disparity between defendants sentenced before and after the § 924(c) amendment to constitute a sufficient basis on its own to grant the reduction

This reasoning is not persuasive. This interpretation "effectively [provides the statute] retroactive effect on a case-by-case basis." United States v. Jackson, No. 08-cr-20150-02, 2020 WL 2812764, at *5 (D. Kan. May 29, 2020), reconsidered on other grounds, No. 08-cr-20150-02, 2020 WL 4284312, at *1 (D. Kan. July 27, 2020). The amendment provides as follows: "This section, and the amendments made by this section, 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. 5194, 5222. The text of the amendment plainly states that individuals will receive the benefit of the amendment if they have not been sentenced. Considering the amendment as an extraordinary and compelling reason is giving the benefit of the amendment to individuals who were already sentenced, thus turning the amendment on its head. If Congress wanted the amendment to be retroactive on a case-by-case basis, it would have said so in the text of the statute.

The legislative history of the FSA informs that the amendment was the product of a legislative

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Pitts seeks."), appeal docketed, No. 20-6551 (4th Cir. Apr. 22, 2020); United States v. Chan, No. 96-cr-00094-13, 2020 WL 1527895, at *6 (N.D. Cal. Mar. 31, 2020) ("It is not unreasonable for Congress to conclude that not all defendants convicted under § 924(c) should receive new sentences, even while expanding the power of the courts to relieve some defendants of those sentences on a case-by-case basis." (quoting United States v. Maumau, No. 08-cr-00758-11, 2020 WL 806121 (Feb. 18, 2020))).

compromise,[13] which the Court must respect. In other words, the Court must "giv[e] full effect to all of Congress' statutory objectives, as well as the specific balance struck among them." Lewis v. Alexander, 685 F.3d 325, 343 (3d Cir. 2012) (citing Rodriguez v. United States, 480 U.S. 522, 525–26 (1987)). To contradict the plain text of the statute based on the title of the amendment[14] or the greater purpose of

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[13] See 164 Cong. Rec. S7,749 (daily ed. Dec. 18, 2018) (statement of Sen. Leahy) ("I would like to see a broader judicial safety valve and additional retroactive activity. . . . But this is the nature of compromise. You don't get everything you want. And when I look at the scope of reforms before us today—including a modest expansion of the safety valve, retroactive application of the Fair Sentencing Act, a reduction to some of the most indefensible mandatory minimums on the books, as well as reforms to add evidence-based practices to our prison system and reentry efforts—I believe this is a historic achievement."); 164 Cong. Rec. S7,649–50 (daily ed. Dec. 17, 2018) (statement of Sen. Grassley) ("Some have called for eliminating mandatory minimums or cutting them back severely. I happen to be a supporter of mandatory minimum sentences because it helps law enforcement take down criminal enterprises, but at the same time, I recognize there is some unfairness in how these mandatory minimum sentences are sometimes applied. . . . The President deserves credit for brokering a deal that improves fairness and supports law enforcement. A tremendous amount of credit is also due to my colleagues in the Senate who helped to forge a bipartisan compromise on complex issues.").

[14] See United States v. Quinn, --- F. Supp. 3d ----, No. 91-cr-00608, 2020 WL 3275736, at *4 (N.D. Cal. June 17, 2020) ("'The portion of the First Step Act amending § 924(c) is titled "Clarification of Section 924(c), ... suggesting that Congress never intended the statute to result in a "stacked" sentence' like Quinn's." (alteration in original) (quoting United States v.

the FSA "frustrates rather than effectuates legislative intent." Rodriguez, 480 U.S. at 526. Invocations of lofty ideals of criminal justice reform enshrined throughout the FSA do not override the plain text of the amendment.

Moreover, the argument that compassionate release can be used as a vehicle to provide case-by-case retroactivity without running afoul of the retroactivity provision ignores principles of statutory construction. The Court looks to "the canon generalia specialibus non derogant, that the specific governs the general in interpreting a statutory scheme." Cazun v. Attorney Gen. United States, 856 F.3d 249, 256 (3d Cir. 2017). Before applying this canon, it must be determined that the two provisions at issue "both address the same subject matter" and "cannot be reconciled." Creque v. Luis, 803 F.2d 92, 94–95 (3d Cir. 1986).

The generalia canon forecloses the use of the compassionate release provision to circumvent the retroactivity provision. The two provisions address the same subject matter in that, when compassionate release takes the amendment into account, they both address whether sentenced defendants will get the benefit of the amendment. And holding that the provisions are reconciled by not giving the benefit of the amendment to all sentenced defendants but only to some sentenced defendants on a case-by-case basis is a rewriting of the amendment, not a reconciliation at all. To be retroactive is to "extend[] in scope or

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Decator, --- F. Supp. 3d ----, No. 95-cr-0202, 2020 WL 1676219, at *4 (D. Md. Apr. 6, 2020))).

effect to matters that have occurred in the past." Retroactive, Black's Law Dictionary (10th ed. 2014). The retroactivity provision provides specifically that the amendment will extend to matters where the defendant has not been sentenced. To construe the amendment to apply to matters where the defendant has already been sentenced makes the general provision trump the specific provision.

Therefore, the Court cannot consider the amendment to § 924(c) as an extraordinary and compelling reason for granting compassionate release.

B. Extraordinary and Compelling Reasons in This Case

Having determined the authority and circumstances under which a sentence may be reduced, the Court now turns to whether Andrews presents reasons warranting compassionate release.

Neither Congress nor the Commission have elaborated on the meaning of extraordinary and compelling reasons other than old age, health, and family circumstances. In the absence of guidance, the Court gives these terms their ordinary meanings. See United States v. Castano-Vasquez, 266 F.3d 228, 233 (3d Cir. 2001) (citing Chapman v. United States, 500 U.S. 453, 461–62 (1991)).

The ordinary meaning of extraordinary is "[b]eyond what is usual, customary, regular, or common." Extraordinary, Black's Law Dictionary

(10th ed. 2014).[15] And the ordinary meaning of compelling need is "[a] need so great that irreparable harm or injustice would result if it is not met." Compelling Need, Black's Law Dictionary (10th ed. 2014).

In enacting the FSA, Congress chose the terms to be expressed in the conjunctive. See Reese Bros. v. United States, 447 F.3d 229, 235 (3d Cir. 2006) ("The usual meaning of the word 'and,' however, is conjunctive."). Each of the terms, "extraordinary" and "compelling," has a distinct meaning. When Congress chooses to speak in the conjunctive, it intends that each element of the conjunction be satisfied separately and individually. See id. at 235–37. In other words, for compassionate release to be available, in the first instance, the Court must find that there are sufficient grounds that the circumstances identified by the defendant are both extraordinary and compelling.

Most commonly, though, Courts conflate the two terms, applying a sort of "totality of the circumstances" or seat-of-the-pants "I know it when I see it" approach.[16] This manner of exercising the

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[15] Accord United States v. Castano-Vasquez, 266 F.3d 228, 233 (3d Cir. 2001) ("The ordinary meaning of 'extraordinary' is 'more than ordinary . . . going beyond what is usual, regular, common, or customary . . . exceptional to a very marked extent.'" (alterations in original) (citing Webster's New Int'l Dictionary 807 (3d ed. 1993))).

[16] See, e.g., United States v. Clausen, No. 00-cr-291-2, 2020 WL 4260795, at *7 (E.D. Pa. July 24, 2020) ("Clausen's circumstances—particularly the combination of his excessive sentence and his demonstrated rehabilitation—present extraordinary and compelling reasons that justify a sentence

"broad discretion of the district court risks introducing significant disparities in sentences under the rubric of compassionate release," depending upon the prism through which individual courts view the case. United States v. Ebbers, 432 F. Supp. 3d 421, 430 (S.D.N.Y. 2020).

In the presence of this vague standard, the Court's judgment can be informed by the Commission's policy statement, the BOP's program statement, and the case law interpreting them. Of course, neither the Commission's policy statement, the BOP's program statement, nor, in the absence of Supreme Court or Third Circuit guidance, the case law interpreting them is binding on the Court.[17] Nor

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reduction."); United States v. Adeyemi, No. 06-cr-124, 2020 WL 3642478, at *28 (E.D. Pa. July 6, 2020) ("We ultimately conclude Mr. Adeyemi has shown extraordinary and compelling reasons—not due to Mr. Adeyemi's health conditions alone, nor due to a change in sentencing law, but under the combination of the factors approved and applied by the Bureau of Prisons."); McCoy v. United States, No. 03-cr-197, 2020 WL 2738225, at *6 (E.D. Va. May 26, 2020) ("While none of the foregoing factors can independently support a sentence reduction, in combination, Petitioner has established extraordinary and compelling reasons for a sentence reduction in the aggregate. Specifically, Petitioner's relative youth at the time of the sentence, the overall length of the sentence, the disparity between his sentence and those sentenced for similar crimes after the FIRST STEP Act, and his rehabilitative efforts form an extraordinary and compelling basis for relief."), appeal docketed, (4th Cir. June 5, 2020).

[17] As discussed above, the Commission's policy statement and the BOP's program statement are not applicable to compassionate release motions brought by defendants, and thus they are not binding on the Court here. See supra

is their application mandatory. However, they are helpful in that they represent the sort of experience and collective wisdom to guide us in this uncharted area.

The Commission's policy statement provides that extraordinary and compelling reasons exist when the defendant is suffering from an irremediable medical condition, has reached an old age after serving a substantial portion of a sentence and is deteriorating in health, or becomes the only available caregiver for a minor or spouse.[18] The

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Section IV.A.1. And the only court of appeals to consider the question of other extraordinary and compelling reasons so far is the Tenth Circuit, in a nonprecedential opinion. See United States v. Saldana, 807 F. App'x 816, 819 (10th Cir. 2020) (nonprecedential) ("BOP Program Statement 5050.50 identifies several nonexclusive factors to determine whether 'other' extraordinary and compelling reasons exist: the defendant's criminal and personal history, nature of his offense, disciplinary infractions, length of sentence and amount of time served, current age and age at the time of offense and sentencing, release plans, and '[w]hether release would minimize the severity of the offense.'" (quoting Federal Bureau of Prisons, Program Statement 5050.50 at 12 (Jan. 17, 2019))).

[18] U.S. Sentencing Guidelines Manual § 1B1.13 cmt. n.1(A)–(C) (U.S. Sentencing Comm'n 2018) (providing that extraordinary and compelling circumstances exist when (1) "defendant is suffering from a terminal illness" or from a condition "that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover;" (2) "defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less;" or (3) there is a "death or incapacitation of the caregiver of the defendant's

policy statement also provides that "other" reasons may be extraordinary and compelling, without further defining these "other" reasons. U.S. Sentencing Guidelines Manual § 1B1.13 cmt. n.1(D) (U.S. Sentencing Comm'n 2018). While the enumerated reasons (i.e. illness, old age, and family circumstances) look to circumstances at the time the motion is made, the policy statement provides that "the fact that an extraordinary and compelling reason reasonably could have been known or anticipated by the sentencing court does not preclude consideration for a reduction under this policy statement." *Id*. at § 1B1.13 cmt. n.2.

Reviewed in toto, the common theme throughout the policy statement is that there are extraordinary and compelling reasons in situations where there are uncommon circumstances and continued imprisonment would result in a significant collateral or secondary harm to the defendant. This understanding is consistent with the ordinary meaning of the words "extraordinary" and "compelling." And a number of courts have found extraordinary and compelling reasons in situations consistent with this understanding. One such situation is where there is an uncommon illness or medical complication (extraordinary) and continued imprisonment increases the likelihood of an untimely death or a serious injury (compelling).[19] Another

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minor child or minor children" or "incapacitation of defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner").

[19] See United States v. Rodriguez, --- F. Supp.3d ----, No. 03-cr-00271-1, 2020 WL 1627331, at *7 (E.D. Pa. Apr. 1, 2020)

situation is where the defendants or their dependents are unusually vulnerable (extraordinary) and continued imprisonment inflicts harm on certain ailing defendants or on defendants' closely-related dependents with no other caregiver (compelling).[20] Thus, "other" situations warranting a finding of extraordinary and compelling reasons may also be found when there are unusual conditions (extraordinary) and continued imprisonment results in a significant collateral or secondary harm to the defendant (compelling).

The Commission's policy statement further informs the Court by reference to the BOP, which provides a list of factors to guide the Court's judgment. The BOP's program statement provides that, in determining whether to grant compassionate

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(finding that it is extraordinary and compelling that the defendant "suffers from underlying health conditions that render him especially vulnerable to COVID-19," that "prison is a particularly dangerous place for [the defendant] at this moment," and that "he has served almost all of his sentence and has shown commendable rehabilitation while in prison"); United States v. Beck, 425 F. Supp. 3d 573, 581 (M.D.N.C. 2019) (finding that it is extraordinary and compelling that "[a]s long as [the defendant] stays in BoP custody, she faces a substantial likelihood of substandard medical care for her life-threatening disease").

[20] See Ebbers, 432 F. Supp. 3d at 432 (finding that it is extraordinary and compelling that the defendant is over 65 years old, has served more than ten years, and "is sick, weak, disoriented, and bedridden"); United States v. Bucci, 409 F. Supp. 3d 1, 2 (D. Mass. 2019) (finding that it is extraordinary and compelling that "[the defendant] is the only available caregiver for an ailing, close member of his family: his mother" (internal quotation and quotation marks omitted)).

release, the following should be considered: (1) the nature of the offense; (2) the inmate's criminal history, personal history, current age, age at the time of the offense, discipline in prison, adjustment to prison, and release plans; (3) any detainers that have not been resolved; (4) the amount of the sentence served; (5) any victim's comments; and (6) "[w]hether release would minimize the severity of the offense." Federal Bureau of Prisons, Program Statement 5050.50 at 12 (Jan. 17, 2019). In many ways, these considerations overlap with the § 3553(a) factors, which a court must ultimately consider before granting compassionate release. See United States v. Beck, 425 F. Supp. 3d 573, 580 (M.D.N.C. 2019).

In attempting to divine the meaning of "other" reasons (not enumerated in the policy statement), some courts have interpreted the BOP's program statement, providing this list of factors, as an additional basis, or additional bases, for finding extraordinary and compelling reasons. See United States v. Adeyemi, No. 06-cr-124, 2020 WL 3642478, at *25 (E.D. Pa. July 6, 2020). But the BOP's program statement factors are not necessarily "other" extraordinary and compelling reasons. While the factors may be helpful in informing the judgment of the Court, the presence of one or more of these factors is not sufficient in and of itself to justify the granting of compassionate release.

In fact, the BOP's program statement presents the factors as aids to the exercise of discretion, not as independent reasons for granting compassionate release. The very language of the program statement directs that these factors should be considered "[f]or

all [compassionate release] requests," including under illness, old age, and family circumstances (the enumerated reasons), not just for "other" extraordinary and compelling reasons. Federal Bureau of Prisons, Program Statement 5050.50 at 12 (Jan. 17, 2019).

Moreover, these factors are "considered to assess whether the [compassionate release] request presents particularly extraordinary and compelling circumstances," not whether the compassionate release request presents "other" extraordinary and compelling reasons. *Id*. (emphasis added). So, for example, there may be extraordinary and compelling reasons for reducing the sentence of a defendant who is exposed to an increased risk of serious illness by susceptibility to COVID-19, but only if he has completed a large portion of his sentence and not if he has completed a small portion of his sentence.

Distilling the teachings from both the Commission's policy statement and the BOP's program statement, the Court concludes that there are extraordinary reasons where there are uncommon or unusual circumstances, and there are compelling reasons where continued imprisonment would result in a significant secondary or collateral harm to the defendant. Accordingly, the Court will apply this standard to the remaining reasons proposed by Andrews: (1) the government's charging decision, (2) Andrews's susceptibility to COVID-19, (3) his age, and (4) his rehabilitation. The Court will consider each reason advanced by Andrews in turn.

First, Andrews points to the prosecutor's decision to charge thirteen stacking § 924(c) counts.

There is no evidence that Andrews was singled out or treated differently from the other three defendants in this case or other similarly situated defendants. Instead, the facts are that the prosecutors followed applicable prosecutorial policies. At the time that Andrews was prosecuted, in 2005, the exercise of prosecutorial discretion by line prosecutors at the United States Attorney's Office for the Eastern District of Pennsylvania was controlled by Department of Justice policy. The relevant charging policy at the time was detailed in a memorandum from Attorney General John Ashcroft.

Memorandum from John Ashcroft, Att'y Gen., Dep't of Justice, to U.S. Attorneys Regarding Policy on Charging of Criminal Defendants (Sept. 22, 2003) ("Ashcroft Memo"), https://www.justice.gov/archive/opa/pr/2003 /September/03_ ag_516. htm (last visited Aug. 18, 2020).

The prosecutors in this case acted in accordance with the Department of Justice charging policies, such that there was no abuse of prosecutorial discretion. The policy provided that "in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case." *Id*. It further provided that "[t]he use of statutory enhancements is strongly encouraged, and federal prosecutors must therefore take affirmative steps to ensure that the increased penalties resulting from specific statutory enhancements, such as the filing of an information pursuant to 21 U.S.C. § 851 or the filing of a charge under 18 U.S.C. § 924(c), are

sought in all appropriate cases." *Id*. Indeed, pursuant to the policy "[a] prosecutor may forego or dismiss a charge of a violation of 18 U.S.C. § 924(c) only with the written or otherwise documented approval of an Assistant Attorney General [or another supervisor]." *Id*. Thus, Andrews points to no facts showing that prosecutors abused their discretion. And, accordingly, the prosecutor's charging decision does not favor finding extraordinary and compelling reasons for granting compassionate release.

Second, Andrews points to his susceptibility to COVID-19. At the outset, "the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release." United States v. Raia, 954 F.3d 594, 597 (3d Cir. 2020). A risk factor is required, and when a defendant's "hypertension was described as 'mild' and he was prescribed two medications for the condition," that "defendant has not established that his high blood pressure and related medical conditions constitute a serious medical condition" to find extraordinary and compelling reasons. United States v. Nesbitt, No. 09-cr-181, 2020 WL 3412577, at *2–3 (E.D. Pa. June 22, 2020). Andrews does not describe his hypertension beyond saying that it requires medication, and thus the Court finds that it is not a serious enough condition to favor finding extraordinary and compelling reasons.[21]

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[21] Additionally, the risk to Andrews at USP Canaan, the facility where he is housed, is at this point little more than speculative. See United States v. Buckman, No. 14-cr-540-01,

Third, Andrews points to his young age at the time he committed the offenses. He was nineteen years old at the time he committed the offenses. Only three percent of all federal offenders were less than twenty-one years old in 2019. U.S. Sentencing Comm'n, Sourcebook of Federal Sentencing Statistics Table 7 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/Table07.pdf (last visited Aug. 18, 2020). So, his age at the time of the offenses is beyond what is common, i.e., extraordinary. And this young age indicates less culpability and enhances the possibility of rehabilitation.[22] So, his age at the time

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2020 WL 4201509, at *4 (E.D. Pa. July 22, 2020) ("When prisons can keep the number of positive COVID-19 cases low or even at zero, which is the case at Alderson FPC, the risk of exposure is too speculative to render the circumstances extraordinary and compelling." (citation omitted)). There are zero positive test of 230 that have been conducted at the institution. Federal Bureau of Prisons, COVID-19: Coronavirus, https://www.bop.gov/coronavirus/ (last visited Aug. 18, 2020). And the BOP has implemented protocols to curb the spread of the novel coronavirus in the future and to ensure the safety of all inmates, including the quarantining of inmates who are susceptible to the virus due to preexisting health conditions. Federal Bureau of Prisons, BOP Implementing Modified Operations, https://www.bop.gov/coronavirus/covid19_status.jsp (last visited Aug. 18, 2020).

[22] See Miller v. Alabama, 567 U.S. 460, 472 (2012) ("We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" (quoting Graham v. Florida, 560

of the offenses favors granting compassionate release.

Fourth, Andrews points to his rehabilitation in prison. He has an unblemished disciplinary record since 2013 and regularly attends church. He has also taken classes that have prepared him for employment in carpentry, plumbing, and personal fitness. And he assisted in the development of a crochet program, under which he volunteers time to knitting items to donate to the Salvation Army. Thus, Andrews's rehabilitation can also be viewed as extraordinary, and it favors granting the motion.

And yet, Andrews's young age and rehabilitation are not compelling reasons by themselves to warrant the Court's exercise of its discretion to reduce his sentence.[23] The Court is not aware of any cases where young age at the time of the offense and rehabilitation were found to be both

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U.S. 48, 68 (2010))); James C. Howell et al., Bulletin 5: Young Offenders and an Effective Response in the Juvenile and Adult Justice Systems: What Happens, What Should Happen, and What We Need to Know 18 (2013), https://www.ncjrs.gov/pdffiles1/nij/grants/242935.pdf ("Hence adolescents and young adults simply do not have the physiological capacity of adults over age 25 to exercise judgment or control impulses.") (last visited Aug. 18, 2020).

[23] Whether to grant an authorized sentence reduction is ordinarily committed to the discretion of the district court. See United States v. Mateo, 560 F.3d 152, 154 (3d Cir. 2009) ("We review a court's ultimate decision whether to grant or deny a defendant's motion to reduce sentence under § 3582(c)(2) for abuse of discretion."); United States v. Castano-Vasquez, 266 F.3d 228, 233 (3d Cir. 2001) ("We leave the determination of whether a defendant presents an extraordinary case to the sound discretion of the sentencing court.").

extraordinary and compelling to warrant granting compassionate release without other reasons to support it.[24] Although Andrews's age at the time of the offense and his rehabilitation are uncommon, and thus extraordinary, these reasons are not compelling to warrant a sentence reduction in that there is no significant collateral or secondary harm to Andrews by his continued imprisonment.

Ultimately, the only harm Andrews articulates, based on young age and rehabilitation, is the harm of continued imprisonment. The BOP's program statement recognizes age at the time of the offense as a factor to consider. And it arguably recognizes rehabilitation in that it lists personal history, discipline in prison, adjustment to prison, and release plans as factors to consider. But as discussed above, the BOP's program statement factors are not necessarily extraordinary and

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[24] Cf. McCoy v. United States, No. 03-cr-197, 2020 WL 2738225, at *6 (E.D. Va. May 26, 2020) ("Specifically, Petitioner's relative youth at the time of the sentence, the overall length of the sentence, the disparity between his sentence and those sentenced for similar crimes after the FIRST STEP Act, and his rehabilitative efforts form an extraordinary and compelling basis for relief."), appeal docketed, (4th Cir. June 5, 2020); United States v. Maumau, No. 08-cr-00758-11, 2020 WL 806121, at *7 (D. Utah Feb. 18, 2020) ("Based on the above, the court concludes that a combination of factors—Mr. Maumau's young age at the time of the sentence, the incredible length of the mandatory sentence imposed, and the fact that, if sentenced today, he would not be subject to such a long term of imprisonment—establish an extraordinary and compelling reason to reduce Mr. Maumau's sentence.").

compelling reasons in and of themselves. This case illustrates why this is so.

The circumstances of Andrews's imprisonment suggest that a number of the BOP's program statement factors could support a finding of extraordinary reasons. And yet there is insufficient support for a finding of compelling reasons here. It is true that there may be a harm in the continued imprisonment of a person who is considered rehabilitated and less culpable because of his age at the time of the offense. But, unlike the risk of contracting a serious illness or the risk of harm to a vulnerable dependent, this type of harm is not collateral or secondary to imprisonment. The harm here is that Andrews will continue to be imprisoned pursuant to a lawfully imposed sentence. This is not the harm that compassionate release was intended to remedy.

Therefore, the Court will exercise its discretion to find that Andrews does not present extraordinary and compelling reasons for granting compassionate release.[25]

V. CONCLUSION

For the reasons stated above, the motion for compassionate release will be denied. An appropriate Order follows.

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[25] While compassionate release is not warranted under the FSA, the facts of this case compel the exercise of the executive power to grant clemency and order the reduction of this sentence. The sentencing Judge would support such an effort.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2768

UNITED STATES OF AMERICA

v.

ERIC ANDREWS,
Appellant

(E.D. Pa. No. 2-05-cr-00280-002)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, and PHIPPS, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT

s/ David Porter
Circuit Judge

Dated: December 2, 2021
JK/cc: All Counsel of Record