Nos. 24-820, 24-860

In the Supreme Court of the United States

DANIEL RUTHERFORD, PETITIONER

v.

UNITED STATES, RESPONDENT

JOHNNIE MARKEL CARTER, PETITIONER

v.

UNITED STATES, RESPONDENT

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF SENATORS CORY BOOKER AND DICK DURBIN AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE[*]

Amicus curiae Senator Cory Booker has represented the State of New Jersey in the United States Senate since 2013. Senator Booker is a member of the Senate Judiciary Committee and its Subcommittee on Crime and Counterterrorism, which oversees the United States Sentencing Commission. Amicus curiae Senator Dick Durbin has represented the State of Illinois in the United States Senate since 1997. Senator Durbin is the ranking member of the Senate Judiciary Committee and its Subcommittee on Crime and Counterterrorism.

Both Senators Booker and Durbin were lead sponsors of the First Step Act of 2018, a landmark, bipartisan criminal justice reform bill that "break[s] from the decades of failed policies that led to mass incarceration." Press Release, Booker Statement on Senate Passage of Landmark Criminal Justice Reform Bill (Dec. 18, 2018).[1] Since the passage of the First Step Act, Senators Booker and Durbin have advocated for the Sentencing Commission to implement the Act through updated guidelines and policy statements, including with respect to courts' authority to reduce sentences. *See* Press Release, Durbin Meets with U.S. Sentencing Commission on Implementing Provisions

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[*] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

[1] https://www.booker.senate.gov/news/press/booker-statement-on-senate-passage-of-landmark-criminal-justice-reform-bill.

in First Step Act into Sentencing Guidelines (Dec. 7, 2022).[2]

Senators Booker and Durbin have a strong interest in the sound interpretation of the federal sentencing laws, including in particular the First Step Act. The Senators also have a strong interest in preserving the Sentencing Commission's expressly delegated authority to issue policy statements describing "extraordinary and compelling reasons" that may justify compassionate release. The Senators submit this brief to explain that the decision below misinterprets the First Step Act and usurps Congress' authority to expressly delegate authority to the Commission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Third Circuit's repudiation of the Commission's policy statement at U.S.S.G. § 1B1.13(b)(6) is wrong as a matter of statutory interpretation and offends separation-of-powers principles.

The decision below fails to grapple with Congress' express delegation of authority to the Commission over four decades ago in the Sentencing Reform Act to describe "extraordinary and compelling reasons" for compassionate release. The phrase "extraordinary and compelling" is capacious and elastic by design, and Congress made the Commission responsible for describing such circumstances over time to reflect "advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(C). Separation-of-powers principles dictate that courts must respect the Commission's exercise of that authority. Courts may police only

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[2] https://www.durbin.senate.gov/newsroom/press-releases/durbin-meets-with-us-sentencing-commission-on-implementing-provisions-in-first-step-act-into-sentencing-guidelines.

the outer bounds of the "extraordinary and compelling" standard. The Commission's policy statement fits comfortably within those bounds. Nothing about the plain meaning of "extraordinary and compelling" precludes the Commission from describing a narrow set of circumstances where changes in law, among other factors, are potentially "extraordinary and compelling." That is what the Commission did in section 1B1.13(b)(6).

The decision below erroneously reads into the First Step Act an implied congressional "will" to restrict the authority that Congress granted to the Commission in the Sentencing Reform Act. Had Congress wanted to restrict the Commission's authority, it certainly knew how. It has expressly done so before. But the First Step Act contains no such restriction. By reading the First Step Act implicitly to limit the Commission's authority, the decision below ignored this Court's admonition against finding implicit repeals absent irreconcilable conflict. No conflict exists here: Congress' decision not to make the First Step Act's changes to section 924(c) categorically retroactive is completely compatible with its separate, longstanding directive that the Commission describe "extraordinary and compelling reasons" that courts evaluate in individual cases to determine compassionate release eligibility.

The decision below thus misinterprets the Sentencing Reform Act and the First Step Act and contravenes separation-of-powers principles that require courts to regard both statutes as fully effective, rather than picking and choosing between them.

ARGUMENT

I. The Sentencing Reform Act Permits the Sentencing Commission To Identify Changes in Law as One Factor Relevant to the Individualized Assessment of "Extraordinary and Compelling Reasons" for Sentence Reduction

A. The Sentencing Reform Act Confers Broad Authority on the Commission To Describe "Extraordinary and Compelling Reasons"

1. Federal courts' authority to reduce an imprisonment term if "extraordinary and compelling reasons warrant such a reduction" originated in the Sentencing Reform Act of 1984, a landmark reform bill that caused a sea change in the federal sentencing system. Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1987, 1998-99 (codified as amended at 18 U.S.C. § 3582(c)(1)(A)); *see Pepper v. United States*, 562 U.S. 476, 488-89 (2011).

Before 1984, authority to set and alter the length of federal sentences rested with three actors outside of Congress: the Parole Commission, the Bureau of Prisons (BOP), and courts. The Parole Commission had discretion to grant or deny parole after a prisoner served a minimum amount of his sentence. *See Tapia v. United States*, 564 U.S. 319, 323-25 (2011); Parole Commission and Reorganization Act, Pub. L. No. 94-233, § 2, 90 Stat. 219, 220, 222 (1976) (codified at 18 U.S.C. §§ 4203(b)(1), 4205(b)). On BOP's motion, a court could hasten a prisoner's eligibility for parole by reducing the minimum required term. 90 Stat. at 223 (codified at 18 U.S.C. § 4205(g)). Sentencing judges, knowing that the Parole Commission might release defendants early, would sometimes adjust prison terms accordingly, which produced "an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, [and] committed under similar circumstances." *Koon v. United*

States, 518 U.S. 81, 92 (1996) (quoting S. Rep. No. 98-225, at 38 (1983)); *see Mistretta v. United States*, 488 U.S. 361, 365-66 (1989); Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985-1987*, 45 Hofstra L. Rev. 1167, 1173-74 (2017).

In the Sentencing Reform Act, Congress sought to address these problems and otherwise "increase transparency, uniformity, and proportionality in sentencing" by introducing a new actor, the Sentencing Commission. *Dorsey v. United States*, 567 U.S. 260, 265 (2012); *Peugh v. United States*, 569 U.S. 530, 535 (2013). Congress created the Commission as an "expert body" that would help to replace the disjointed outcomes of the old sentencing system with uniformity and fairness in the new one. *See Mistretta*, 488 U.S. at 412. The Commission's "basic objectives," set out by Congress, *Rita v. United States*, 551 U.S. 338, 348 (2007), include "provid[ing] certainty and fairness" in meeting the goals of sentencing, by "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences," as well as "reflect[ing], to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process," 28 U.S.C. § 991(b)(1)(B)-(C).

Congress vested the Commission with broad powers to set federal sentencing policies and practices nationwide, along with the information-gathering tools needed to perform its functions. With an "affirmative vote of at least four members," the Commission "promulgate[s] and distribute[s] to all courts of the United States" guidelines and policy statements regarding sentencing. 28 U.S.C. § 994(a)(1)-(2). To better fulfill its duties, the Commission can request information from any other federal agency or

judicial officer; hold hearings and call witnesses; and collect data from public and private agencies. *Id.* § 995(a)(8), (13), (21). By statute, the Commission's proposed guidelines are subject to the notice-and-comment requirements of the Administrative Procedure Act, and by practice, the Commission also opens its proposed policy statements to comment. 28 U.S.C. § 994(x); *see* U.S. Sent'g Comm'n, *Rules of Practice and Procedure* 4.3 (2016); *infra* pp. 20-21, 26.

In the exercise of its substantial authority, the Commission remains "fully accountable" to Congress. *Mistretta*, 488 U.S. at 393. The Commission must report to Congress at least annually, and its proposed amendments are subject to Congress' disapproval and modification. 28 U.S.C. §§ 994(p), 997; *see* U.S. Sent'g Comm'n, *Rules of Practice and Procedure* 4.1. And, of course, the Commission must exercise its authority subject to the strictures of federal statutes. *United States v. LaBonte*, 520 U.S. 751, 757 (1997); *accord* 28 U.S.C. § 994(a).

2. When Congress created the Sentencing Commission, it simultaneously abolished the parole system. *Peugh*, 569 U.S. at 535. The Sentencing Reform Act generally prevents courts from modifying sentences, with some exceptions. *Dillon v. United States*, 560 U.S. 817, 824 (2010) (citing 18 U.S.C. § 3582(b)). One such exception is what has come to be known as the compassionate-release provision, which permits courts, in their discretion, to "reduce the term of imprisonment" if "extraordinary and compelling reasons warrant such a reduction." 18 U.S.C. § 3582(c)(1)(A). Courts may reduce a sentence only "after considering the factors" in 18 U.S.C. § 3553(a), and only if the reduction "is consistent with applicable policy statements issued by the Sentencing Commission," *id.* § 3582(c)(1)(A).

Having employed the terms "extraordinary and compelling," which were capacious and elastic by design, Congress simultaneously and expressly delegated the Commission broad authority to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples." 28 U.S.C. § 994(t). Congress imposed one—and only one—limitation on the Commission's authority: "Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." *Id.*

Congress' express delegation of this authority to the Commission reflects Congress' judgment that the Commission is best positioned to identify the "extraordinary and compelling reasons" that may warrant a sentence reduction. Unlike any other actor in our federal system, the Commission combines judicial experience, sentencing expertise, and national data-gathering tools—all while remaining accountable to Congress. The Sentencing Reform Act "placed the Commission in the Judicial Branch precisely because of the Judiciary's special knowledge and expertise" in sentencing. *Mistretta*, 488 U.S. at 396. At the same time, the Commission "has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise." *Kimbrough v. United States*, 552 U.S. 85, 109 (2007) (quotation omitted).

The Commission's compassionate-release policies—like all its policies—are subject to congressional control. Congress can direct the Commission to "revoke or amend any or all of the Guidelines . . . at any time." *Mistretta*, 488 U.S. at 393-94. And although the Commission's proposed policy statements need not undergo the mandatory congressional review period that applies to guidelines amendments, the Commission's practice is to "include

amendments to policy statements and commentary in any submission of guideline amendments to Congress." U.S. Sent'g Comm'n, *Rules of Practice and Procedure* 4.1 (2016); *e.g.*, Sentencing Guidelines for United States Courts, 88 Fed. Reg. 28,254, 28,255 (May 3, 2023).

By authorizing the Commission to issue "policy statements" (plural) on compassionate release, 28 U.S.C. § 994(t), Congress contemplated that the Commission would issue new policy statements over time as it gained additional awareness of the circumstances that warrant sentence reductions. Indeed, the Sentencing Reform Act encouraged such changes, tasking the Commission with "reflect[ing] . . . advancement in knowledge of human behavior." *Id.* § 991(b)(1)(C). Congress "fore[saw] continuous evolution" in the Commission's work. *Rita*, 551 U.S. at 350.

The Commission has done exactly that, substantially revising its description of "extraordinary and compelling reasons" three times. *See* U.S.S.G. Supp. App. C, Amends. 698, 799, 814 (effective 2007, 2016, and 2023). The Commission's power encompasses both setting and refining over time federal sentencing policy on compassionate release, allowing it to guide courts as it advances the purposes of sentencing, however incrementally. 28 U.S.C. § 991(b)(1).

B. The Commission Has Authority To Identify Changes in Law as One Factor Relevant to the Individualized Assessment of "Extraordinary and Compelling Reasons"

Under the Sentencing Reform Act, the Commission may guide courts to consider certain changes in law in determining whether a defendant presents an extraordinary and compelling reason for a sentence reduction under appropriate circumstances. Nothing about the plain

meaning of the terms "extraordinary" and "compelling" excludes changes in law.[3] *See Rutherford* Petitioner Br. 15-16 (providing dictionary definitions); *Carter* Petitioner Br. 41 (same). The Sentencing Reform Act therefore does not prohibit the Commission from recognizing changes in law as one factor in the extraordinary-and-compelling analysis.

Not every change in law may be extraordinary and compelling, but some can be when viewed in the context of an individual case. Changes to criminal penalties are themselves rare, and they may produce a disparity so extreme or unjust as to create an extraordinary and compelling reason in an individual case, when considered in light of the defendant's personal circumstances. For example, where a defendant was sentenced under an inordinately harsh statutory penalty, Congress' later decision to mitigate that severity might be an extraordinary and compelling reason to grant a sentence reduction in the defendant's case. Section 3582(c)(1)(A) "provides a mechanism for relief" when post-sentencing developments "produce[] unfairness to the defendant." *Setser v. United States*, 566 U.S. 231, 243 (2012). Just like with aging or health-related challenges a defendant may face, the extraordinary-and-compelling analysis focuses not on whether the condition is itself rare, but on whether, when weighed among other considerations, it produces an exceptional reason to reconsider that defendant's sentence.

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[3] When it enacted the Sentencing Reform Act, Congress recognized that "an eventual reduction in the length of a term of imprisonment is justified by changed circumstances," including for example, "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." S. Rep. No. 98-225, at 55-56.

Identifying the circumstances in which a change in law can, together with other individualized considerations, produce an extraordinary and compelling reason for a sentence reduction is well within the authority and expertise of the Commission. The Commission routinely studies sentencing outcomes nationwide, with an eye toward diagnosing unwarranted disparities and detecting other shortcomings in the sentencing system's fulfillment of its purposes. *See* 28 U.S.C. § 991(b)(2) (describing the Commission's purpose of "develop[ing] means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing"). For instance, the Commission has periodically assessed the circumstances under which mandatory minimum penalties have produced unjust outcomes. *See, e.g.*, U.S. Sent'g Comm'n, *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 359 (Oct. 2011)[4] ("The 'stacking' of mandatory minimum penalties for multiple violations of [title 18] section 924(c) results in excessively severe and unjust sentences in some cases.").

Applying its expertise and aided by public input and the adjudicatory experience of courts nationwide, the Commission can study the circumstances in which a change in law may constitute an extraordinary and compelling reason for a sentence reduction in individual cases and issue a policy statement reflecting its conclusions. *See Rita*, 551 U.S. at 350. When it does so, courts may then utilize their "access to, and greater familiarity with, the

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[4] https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system.

individual case and the individual defendant" to determine whether a change in law is extraordinary and compelling in a given case. *See id.* at 357.

II. The First Step Act Does Not Curtail the Commission's Expressly Delegated Authority To Describe "Extraordinary and Compelling Reasons"

In concluding that the Commission lacks the authority to identify certain statutory changes in sentencing law as extraordinary and compelling reasons for sentence reduction, the Third Circuit leaned heavily on Congress' decision not to make the First Step Act's reforms categorically retroactive. *Rutherford* Pet. App. 30a n.22, 32a ("When it comes to the modification of § 924(c), Congress has already taken retroactivity off the table, so we cannot rightly consider it."). According to the Third Circuit, that decision precludes the Commission from describing these changes as potentially "extraordinary and compelling reasons"—even when combined with other factors.[5]

The decision below did not adequately grapple with the Sentencing Reform Act's express delegation of authority to the Commission or the plain meaning of "extraordinary and compelling." Instead, the Third Circuit purported to find in the First Step Act a "will of Congress" to restrict authority that Congress had expressly delegated to the Commission decades earlier. *Rutherford* Pet. App. 29a. In reaching that conclusion, the Third Circuit failed to apply the stringent standard for finding an implicit repeal and stretched Congress' targeted retroactivity choice into a sweeping principle. In

[5] The Third Circuit did not pass on whether other, nonstatutory changes in law might constitute extraordinary and compelling reasons rendering a defendant eligible for compassionate release. *Rutherford* Pet. App. 31a n.23. That question is not presented in these cases.

short, the Third Circuit violated a cardinal rule of statutory interpretation by "displac[ing] ordinary statutory terms with judicial 'speculation as to Congress's intent.'" *Pulsifer v. United States*, 601 U.S. 124, 179 (2024) (Gorsuch, J., dissenting) (quoting *Magwood v. Patterson*, 561 U.S. 320, 334 (2010)) (cleaned up).

The First Step Act did not (expressly or impliedly) diminish Congress' express delegation of authority, three decades earlier, to the Commission to describe and refine through policy statements "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).

A. The First Step Act Does Not Explicitly Restrict the Commission's Authority

In 2018, with broad bipartisan support, including from Senators Booker and Durbin as two of the Act's sponsors, "a supermajority of Congress enacted the First Step Act, a landmark piece of legislation that changed the federal criminal-sentencing system in numerous respects." *Hewitt v. United States*, 145 S. Ct. 2165, 2169 (2025); *see* First Step Act, Pub. L. No. 115-391, 132 Stat. 5194 (2018).

One key aim of the First Step Act was alleviating "the much-maligned 'stacking' sentencing regime" under 18 U.S.C. § 924(c). *Hewitt*, 145 S. Ct. at 2176; First Step Act § 403. "An 'extraordinary political coalition' formed, as members of Congress worked together to develop 'a bipartisan sentencing and prison reform bill' to address § 924(c) stacking." *Hewitt*, 145 S. Ct. at 2176 (quoting 164 Cong. Rec. S7645 (Dec. 17, 2018) (statement of Sen. Durbin)). "The First Step Act was the much-anticipated, much-heralded fruit of their labor—and one that many in Congress hoped would yield immediate benefits." *Id.*

In a separate title of the Act, Congress made a single change to the compassionate release provision. It created a new procedural pathway for compassionate release by permitting prisoners themselves to move for a sentence reduction. First Step Act § 603(b)(1). Before the First Step Act, only BOP could move for compassionate release. 18 U.S.C. § 3582(c)(1)(A) (2017). BOP seldom used this power. In a 2013 report, DOJ's Inspector General admonished BOP for its poor and inconsistent management of the compassionate-release program, with an average annual release of just twenty-four individuals. *See* U.S. Dep't of Just., *The Federal Bureau of Prisons' Compassionate Release Program* 1 (Apr. 2013).[6] Responding to this report and public criticism, the Commission issued a policy statement in 2016 that broadened its description of "extraordinary and compelling reasons" and encouraged BOP to move for compassionate release whenever "extraordinary and compelling reasons" exist. U.S.S.G. Supp. App. C, Amend. 799. Still, BOP persisted in its low grant rates, approving just 6 percent of compassionate release applications from 2013 to 2017. *See* Christie Thompson, *Frail, Old and Dying, but Their Only Way Out of Prison Is a Coffin*, N.Y. Times (Mar. 7, 2018).[7]

Congress intervened in the First Step Act and eliminated the bottleneck caused by BOP's gatekeeping role. In making this change, Congress sought to "increas[e] the use and transparency of compassionate release." First Step Act § 603(b) (capitalization omitted). The new procedural mechanism worked as intended. Between October 2019 and September 2024 (a period that included the COVID-19 pandemic), approximately 33,000 motions for compassionate release were filed and approximately

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[6] https://oig.justice.gov/reports/2013/e1306.pdf.

[7] https://www.nytimes.com/2018/03/07/us/prisons-compassionate-release-.html.

5,000 were granted. U.S. Sent'g Comm'n, *Compassionate Release Data Report: Fiscal Year 2023*, at tbl.1 (Mar. 2024);[8] U.S. Sent'g Comm'n, *Compassionate Release Data Report: Fiscal Year 2024*, at tbl.1 (Mar. 2025).[9]

But this new procedural pathway was just that—procedural. It did not alter the "extraordinary and compelling reasons" standard that governs compassionate release. It did not change the requirement that any sentencing "reduction [be] consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A). Nor did it touch the Commission's authority to issue policy statements regarding "the sentence modification provisions set forth in . . . [section] 3582(c)," 28 U.S.C. § 994(a)(2)(C), or to "describe what should be considered extraordinary and compelling reasons" for purposes of compassionate release, *id.* § 994(t). Following the First Step Act, the statutory bar on "[r]ehabilitation of the defendant alone" remains the sole express limitation on the Commission's latitude to describe "extraordinary and compelling reasons for sentence reduction." 28 U.S.C. § 994(t).

B. The First Step Act Does Not Impliedly Rescind the Commission's Authority

The decision below hinges on the Third Circuit's assumption that Congress' decision not to make the First Step Act's changes to section 924(c) categorically retroactive implicitly forbade the Commission from describing those changes in law as relevant to the "extraordinary and

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[8] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/FY23-Compassionate-Release.pdf.

[9] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/FY24-Compassionate-Release.pdf.

compelling" analysis. *Rutherford* Pet. App. 29a. That conclusion is wrong.

Repeals by implication are disfavored. *Morton v. Mancari*, 417 U.S. 535, 549 (1974). Bedrock principles of separation of powers dictate a "strong presumption" that "Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510 (2018) (cleaned up). Courts will find an implied repeal only if "provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality op.) (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936)). Unsurprisingly, this "stringent standard" is rarely met. *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 142 (2001) (citation omitted). That is particularly true in the sentencing context, *see Rodriguez v. United States*, 480 U.S. 522, 524 (1987), "for Congress has shown that it knows how to direct sentencing practices in express terms." *Concepcion v. United States*, 597 U.S. 481, 497 (2022) (quotes omitted).

The Third Circuit did not apply this "stringent" standard. Instead, it simply concluded that it would be "inconsistent" with the First Step Act for sentencing courts to consider the reforms to section 924(c) as part of the "extraordinary and compelling" analysis because "Congress specifically decided that the changes to the § 924(c) mandatory minimums would not apply to people who had already been sentenced." *Rutherford* Pet. App. 29a (citation omitted). According to the Third Circuit, reading "Congress's nonretroactivity directive as simultaneously creating an extraordinary and compelling reason for early release . . . would sow conflict within the statute." *Id.* (citation omitted).

That reasoning misunderstands the nonretroactivity decision that Congress made in the First Step Act. The First Step Act does not mention the "extraordinary and compelling" standard of section 3582(c)(1)(A). Nor does it hint at a wish to displace the Commission's authority under section 994(t)—let alone do so "clear[ly] and manifest[ly]," as the repeal-by-implication standard requires. *Me. Cmty. Health Options v. United States*, 590 U.S. 296, 315 (2020) (quotes omitted). Far from creating an "irreconcilable conflict," Congress' decision not to make its changes to section 924(c) categorically retroactive is entirely compatible with Congress' separate, longstanding directive that an expert deliberative body describe the "extraordinary and compelling reasons" that courts assess on an individualized basis to determine eligibility for sentence reduction.

Congress is "not shy about placing . . . limits" on courts' discretion in sentence-modification proceedings "where it deems them appropriate." *Concepcion*, 597 U.S. at 494.[10] Congress "knows how to direct sentencing practices in express terms." *Kimbrough*, 552 U.S. at 103. In the same provision delegating to the Commission the authority to describe "extraordinary and compelling reasons," Congress dictated that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason." 28 U.S.C. § 994(t). Congress could have said the same about its amendment to section

[10] To the extent the Third Circuit assumed that the First Step Act cabined courts' sentencing discretion, this Court rejected that argument in *Concepcion*, 597 U.S. 481. "Nothing in the text and structure of the First Step Act expressly, or even implicitly, overcomes the established tradition of district courts' sentencing discretion." *Id.* at 495; *see also United States v. Davis*, 99 F.4th 647, 657-58 (4th Cir. 2024) ("*Concepcion*'s broad reasoning permits federal judges to think expansively about what constitute 'extraordinary and compelling reasons' for release, absent specific congressional limitations.").

924(c) or nonretroactive sentencing reforms generally. *See Polselli v. IRS*, 598 U.S. 432, 439 (2023) ("Had Congress wanted to include" other restrictions, "it certainly knew how to do so."). But it did not create such a bar. *See United States v. Ruvalcaba*, 26 F.4th 14, 26 (1st Cir. 2022) (declining to "infer that Congress intended such a categorical and unwritten exclusion in light of its specific statutory exclusion regarding rehabilitation"); *United States v. Chen*, 48 F.4th 1092, 1098 (9th Cir. 2022) ("To hold that district courts cannot consider non-retroactive changes in sentencing law would be to create a categorical bar against a particular factor, which Congress itself has not done.").

Considerations of fairness and finality, among other factors, affect Congress' decision whether to make penalty changes retroactive. Weighing those factors, Congress may choose from a range of retroactivity options, from automatic vacatur of sentences to across-the-board eligibility for case-by-case resentencing, or anything in between. *See, e.g.*, First Step Act § 404(b) (categorical eligibility for resentencing for qualified defendants). Or Congress may decide against blanket retroactivity or blanket eligibility for retroactivity. *See, e.g.*, *id.* § 403(b).

That legislative choice does not bear on the Commission's authority to describe "extraordinary and compelling reasons" for compassionate release in particular cases. The Commission's expressly delegated authority to describe "extraordinary and compelling reasons" for compassionate release stands separate and apart from Congress' retroactivity decisions. The Commission's decision to describe changes in law in limited circumstances, and within courts' larger discretionary analysis, as potentially presenting a reason for compassionate release does not tread on Congress' legislative

role any more than considering a defendant's old age, declining health, or other personal circumstances, even though that the defendant was sentenced under a statute that lacked special solicitude for those circumstances. Congress can both decide against categorical retroactivity and empower the Commission to decide whether changes in law can create extraordinary and compelling reasons for compassionate release on an individualized basis.

III. The Commission's Policy Statement Is an Appropriately Limited and Valid Exercise of the Commission's Expressly Delegated Authority To Describe "Extraordinary and Compelling Reasons"

The Commission's policy statement, implemented in relevant part at section 1B1.13(b)(6), appropriately identifies a narrow set of cases involving unusually long sentences that may warrant compassionate release. The policy statement is perfectly consistent with governing law and well within the Commission's authority. The circuits that have reached the opposite conclusion misread the statutory text and fail to respect Congress' express delegation of authority.

A. The Policy Statement Is Appropriately Limited

After thorough consideration, the Commission issued a conservative policy statement that applies in a limited set of cases.

1. Congress expressly directed the Commission to describe via policy statements "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). Congress expected that, after it enacted the First Step Act, the Commission would update its policy statement to guide

courts' discretion in deciding defendant-filed compassionate-release motions. But two weeks after the First Step Act became law, the Commission lost its quorum of voting members and was incapacitated for several years. U.S. Sent'g Comm'n, *2022 Annual Report* 2;[11] U.S. Sent'g Comm'n, *2018 Annual Report* 2.[12]

During that multi-year period without a quorum, most courts of appeals held that the Commission's then-existing policy statement was inapplicable to defendant-filed motions. *See United States v. Andrews*, 12 F.4th 255, 259 (3rd Cir. 2021) (collecting cases). This left most district courts without an applicable policy statement to direct their review of defendant-filed compassionate-release motions. In this void, thousands of compassionate-release motions filed during the COVID-19 pandemic exposed significant geographic disparities in grant rates: 9.6 percent granted in the Fifth and Eighth Circuits versus 28.8 percent in the First and D.C. Circuits. U.S. Sent'g Comm'n, *Compassionate Release Data Report: Fiscal Years 2020 to 2022*, at tbl.3 (Dec. 2022).[13]

Members of the Senate Judiciary Committee across the political spectrum recognized the importance of "restor[ing] the Commission's quorum and enabl[ing] the Commission to resume its important work," including "the critical task of implementing the First Step Act" and, chiefly, "changes to compassionate release." *Hearing on Nominations Before the Sen. Judiciary Comm.*, 117th Cong. (2022) (statements of Chair Durbin and Ranking

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[11] https://www.ussc.gov/about/annual-report-2022.

[12] https://www.ussc.gov/about/annual-report/archive/annual-report-2018.

[13] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20221219-Compassionate-Release.pdf.

Member Grassley).[14] The commissioners were therefore "nominated and confirmed in an overwhelmingly bipartisan spirit." U.S. Sent'g Comm'n, Pub. Meeting, Tr. 6 (Feb. 23, 2023) [hereinafter Pub. Meeting] (statement of Hon. Carlton W. Reeves).[15]

2. With its quorum restored, the Commission's key priority was updating its policy statement at section 1B1.13 to "implement the First Step Act" and "further describe what should be considered extraordinary and compelling reasons." Proposed Priorities for Amendment Cycle, 87 Fed. Reg. 60,438, 60,439 (Oct. 5, 2022). The Commission received over 8,000 public comments—"by far the most" ever received—on its proposed priorities. U.S. Sent'g Comm'n, *2022 Annual Report*, *supra* p. 19. After reviewing the public comments, updating section 1B1.13 remained the Commission's top priority for the amendment cycle. Final Priorities for Amendment Cycle, 87 Fed. Reg. 67,756, 67,756 (Nov. 9, 2022). The Commission then published a notice and request for public comment and hearing on its proposed amendments. Sentencing Guidelines for United States Courts, 88 Fed. Reg. 7180 (Feb. 2, 2023). One proposal was to add to the description of "extraordinary and compelling reasons": "*Changes in Law*.—The defendant is serving a sentence that is inequitable in light of changes in the law." *Id.* at 7184. The Commission indicated a "heightened interest" in suggestions regarding this proposal, stressing its openness to public comment. *Id.* at 7180.

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[14] https://www.judiciary.senate.gov/committee-activity/hearings/06/08/2022/nominations.

[15] https://www.ussc.gov/policymaking/meetings-hearings/public-hearing-february-23-24-2023.

Again, the Commission received and considered substantial comments—some supporting, some opposing, and some suggesting a more tailored approach to adding changes in law to the Commission's description of "extraordinary and compelling reasons."[16] In strong support of the changes-in-law proposal, for example, Senators Booker and Durbin, along with Senator Hirono, submitted commentary observing that "[t]he statutory language of § 3582(c)(1)(A) is certainly broad enough to encompass legal changes which have occurred since the defendant's original sentencing." Letter from Senators Cory A. Booker, Richard J. Durbin, and Mazie K. Hirono to Hon. Reeves 2 (Mar. 14, 2023).[17] They noted, however, that a change in law "alone would not entitle [a defendant] to relief," as courts would still have to consider the remainder of section 1B1.13 and the section 3553(a) factors. *Id.* Many current and former federal judges supported the Commission's recognition that post-sentencing changes in law may, in appropriate cases, qualify as "extraordinary and compelling reasons" for sentence reduction.[18]

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[16] *See* U.S. Sent'g Comm'n, *Sample of Public Comment Received on Proposed Amendments: 88 FR 7180* (Mar. 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202303/88FR7180_public-comment.pdf. The Commission also held public hearings on its proposed amendments. *See* Sentencing Guidelines for United States Courts, 88 Fed. Reg. 28,254, 28,254 (May 3, 2023). Chair Carlton Reeves said to the public on the first day of hearings: "The Commission's policies need to reflect not just our perspectives, but your research, your data, your experiences." Pub. Meeting, *supra* p. 20.

[17] https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230719/FPD.pdf.

[18] *See*, *e.g.*, Joint Letter from Wayne Andersen, Former U.S. District Judge, et al., to U.S. Sent'g Comm'n 1-2 (Mar. 14, 2023), Letter from Hon. Lynn Adelman to U.S. Sent'g Comm'n, Letter from Hon. Martha Vázquez to U.S. Sent'g Comm'n (Mar. 7, 2023),

On the other hand, while the Department of Justice "encourage[d] the Commission to clearly articulate . . . the circumstances where compassionate release is appropriate," and voiced its shared concern "about equity in the criminal justice system, including as it pertains to unusually long sentences," it opposed the changes-in-law proposal as written. Letter from Jonathan J. Wroblewski to Hon. Reeves 2, 6 (Feb. 15, 2023).[19]

3. The Commission responded by meaningfully narrowing its policy statement. The revised policy statement, which the Commission submitted to Congress, and which became effective, contains no less than five guardrails. *See* Sentencing Guidelines for United States Courts, 88 Fed. Reg. 28,254, 28,255 (May 3, 2023). A change in law "*may be considered* in determining whether the defendant presents an extraordinary and compelling reason," but "*only* where": (1) the sentence is "unusually long"; (2) the defendant has served at least 10 years in prison; (3) the change in law is not a nonretroactive amendment to the Guidelines Manual; (4) the change in law produces a "gross disparity" between the existing sentence and the likely contemporaneous sentence; and (5) there is "full consideration of the defendant's individualized circumstances." U.S.S.G. § 1B1.13(b)(6) (emphases added). The Commission also added a "Limitation on Changes in Law" provision prohibiting consideration of changes in law in the extraordinary-and-compelling analysis outside of these bounds. *Id.* § 1B1.13(c).

The final policy statement specifies that courts are *permitted* to find an extraordinary and compelling reason

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https://www.ussc.gov/policymaking/public-comment/public-comment-march-14-2023.

[19] https://www.justice.gov/criminal/media/1369086/dl?inline.

based on changes in law if these conditions are satisfied. Such a finding is not mandatory. And only if a court decides, in its discretion, that an extraordinary and compelling reason exists in an individual case does it proceed to analyze the section 3553(a) factors to decide whether to reduce the sentence. The policy statement does not make any defendant automatically eligible for a sentence reduction. *Cf. Chen*, 48 F.4th at 1100. "To obtain a sentence reduction based in part on . . . non-retroactive changes, each defendant will have to overcome many more obstacles than a defendant who is automatically eligible for a resentencing due to a truly retroactive change in the law." *Id.* For example, the defendant still must demonstrate that the changes in law "rise to the level of 'extraordinary and compelling' in his individualized circumstances," and the district court must consider administrative exhaustion and the section 3553(a) factors. *Id.* (citing 18 U.S.C. § 3582(c)(1)). Additionally, the court must find that "[t]he defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g)." U.S.S.G. § 1B1.13(a)(2).

B. The Policy Statement Is Valid

As discussed, the Third Circuit reasoned that the policy statement is invalid because it "conflicts with the will of Congress" to make the First Step Act's changes to section 924(c) nonretroactive. *Rutherford* Pet. App. 29a. But the Third Circuit failed to grapple with the statutory text. And, although the Third Circuit recognized Congress' express delegation to the Commission, it refused to respect the Commission's interpretation of "extraordinary and compelling." *Id.* at 27a, 32a-36a. Those failures violated separation-of-powers principles.

1. As always, ascertaining Congress' intent begins with the text. *Staples v. United States*, 511 U.S. 600, 605

(1994). There is nothing about the plain meaning of "extraordinary and compelling" that categorically excludes changes in law. Although not every change in law will be extraordinary and compelling, some can be. As relevant to these cases, the magnitude of the changes to criminal penalties created by the First Step Act are rare. "The First Step Act's clarification of § 924(c) resulted in not just any sentencing change, but an exceptionally dramatic one." *United States v. McCoy*, 981 F.3d 271, 285 (4th Cir. 2020).

Even if changes in law are not themselves rare, in individual cases, changes in law may produce extreme and unjust disparities between similarly situated defendants such that those disparities, considered in the context of the defendant's personal circumstances, create an "extraordinary and compelling" reason. The same is true for aging or health-related challenges a defendant may face: those challenges may produce extraordinary and compelling reasons for a sentence reduction even if the medical condition or other personal circumstance is not rare in and of itself. *See United States v. Bricker*, 135 F.4th 427, 460 (6th Cir. 2025) (Stranch, J., dissenting) ("it is ordinary to have been sentenced under a law that subsequently changed, but it is not unreasonable to conclude that it is extraordinary to be so affected by such a change as to satisfy USSG § 1B1.13(b)(6)").

The rest of the statute confirms the breadth of "extraordinary and compelling reasons." Congress imposed only one limitation on the Commission's authority to describe "extraordinary and compelling reasons"—rehabilitation alone does not suffice. 28 U.S.C. § 994(t). Under the *expressio unius est exclusio alterius* canon, Congress' inclusion of this singular restriction weighs against reading others into the statute. *Bittner v. United*

States, 598 U.S. 85, 94-95 (2023)*; see also Ruvalcaba*, 26 F.4th at 26.

2. The Commission's exercise of its expressly delegated authority is entitled to respect. Congress expressly delegated the Commission authority to describe "extraordinary and compelling reasons" and placed only one limit on that authority. *Supra* pp. 7, 16. When Congress expressly delegates such authority, it authorizes the agency to "exercise a degree of discretion." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024). Courts must "respect such delegations of authority," and limit themselves to policing the "outer statutory boundaries of those delegations." *Id.* at 404. Put simply, *Loper Bright* does not prohibit deference to the Commission's exercise of its *expressly* delegated authority. *Contra Bricker*, 135 F.4th at 440-41; *see Carter* Petitioner Br. 18-31.

Because Congress expressly delegated authority to the Commission, the only question is whether the policy statement is "reasonable." *United States v. Black*, 131 F.4th 542, 549 (7th Cir. 2025) (Hamilton, J., dissenting); *accord Bricker*, 135 F.4th at 453 (Stranch, J., dissenting). That bar is met easily here. The policy statement strikes a carefully calibrated balance: changes in law alone are not enough; but they may be considered if they satisfy at least five additional guardrails. *Supra* p. 22. No statute prohibits this judicious approach.

In sum, this Court's precedent requires courts to respect the policy statement as an exercise of expressly delegated authority. Because the policy statement fits comfortably within the "outer statutory boundaries," it must be upheld. It is not the job of courts to engage in the "discretionary policymaking" properly "left to the political branches." *Loper Bright*, 603 U.S. at 404.

3. Disregarding these principles threatens the separation of powers and improperly substitutes courts' policymaking preferences for those of Congress. The Commission has done what Congress entrusted it, above all others, to do. *See* 28 U.S.C. §§ 994(a)(2)(C), (t). Consistent with "[t]he extraordinary powers and responsibilities vested in the Commission," S. Rep. No. 98-225, at 160, and the information-gathering tools Congress specified, *see* 28 U.S.C. § 995(a), the Commission consulted authorities and collected data. It then promulgated proposed amendments to its policy statement, considered and addressed substantial public comments, and submitted its proposal to Congress for review.

Moreover, the newly revised section 1B1.13(b)(6) advances the purposes Congress specified to guide the Commission's decisionmaking. One of the Commission's express purposes is to "avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted." 28 U.S.C. § 991(b)(1)(B). Section 1B1.13(b)(6) accomplishes this purpose by targeting gross sentencing disparities while emphasizing full consideration of the defendant's individualized circumstances. Another purpose Congress gave the Commission is to "reflect . . . advancement in knowledge of human behavior as it relates to the criminal justice process." *Id.* § 991(b)(1)(C). Congress contemplated that the Commission would update its description of "extraordinary and compelling reasons" to reflect evolving norms and understandings of criminal justice, as the Commission has done here.

Consequently, respect for separation of powers requires courts to regard both statutes—the Sentencing

Reform Act and the First Step Act—as fully effective, rather than picking and choosing between them. *See Me. Cmty. Health Options*, 590 U.S. at 315; *Epic Sys.*, 584 U.S. at 510-11. That's easy enough here: the First Step Act's nonretroactive changes to criminal penalties do not make defendants previously sentenced automatically eligible for resentencing, and the Commission retains its expressly delegated authority under section 994(t) to describe "extraordinary and compelling reasons" for compassionate release.

Below, the government argued that the policy statement contravenes separation-of-powers principles by supplanting Congress' legislative power to establish criminal penalties. That argument does not withstand scrutiny. No one disputes that Congress may restrict, or even eliminate, the Commission's authority to describe intervening changes in law as potential grounds for compassionate release. But Congress has not done that. To the contrary, Congress granted the Commission wide discretion (since left untouched) to describe "extraordinary and compelling reasons" for compassionate release.

Given this express congressional delegation, the Commission's guidance to courts to consider changes in law, within a larger discretionary analysis, as potentially presenting a reason for compassionate release does not tread on Congress' legislative role any more than considering a defendant's old age, declining health, or other personal circumstances, even though the defendant was sentenced under a statute that lacked special solicitude for those circumstances. As the First Circuit put it,

> There is a salient 'difference between automatic vacatur and resentencing of an entire class of sentences' on the one hand, 'and allowing for the provision of individual relief in the most grievous cases' on the other hand . . . Congress's judgment

> to prevent the former is not sullied by a district court's determination, on a case-by-case basis, that a particular defendant has presented an extraordinary and compelling reason due to his idiosyncratic circumstances . . . .

Ruvalcaba, 26 F.4th at 27 (citations omitted); *see also McCoy*, 981 F.3d at 286-87; *Chen*, 48 F.4th at 1100-01. Respect for separation of powers demands that Congress, not courts, determine how to balance the competing considerations underlying these legislative decisions. *See Epic Sys.*, 584 U.S. at 510-11.

In the forty years since Congress created the Sentencing Commission, our nation's criminal justice system has come to depend greatly upon it, including to implement landmark sentencing reform legislation such as the Sentencing Reform Act and the First Step Act and to exercise authority expressly delegated to it by Congress. No reason exists to invalidate the Commission's efforts here.

CONCLUSION

For the foregoing reasons, the judgments of the Third Circuit should be reversed.

Respectfully submitted,

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