

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

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DANIEL RUTHERFORD,)
 Petitioner,)
 v.) No. 24-820
UNITED STATES,)
 Respondent.)
- - - - -

JOHNNIE MARKEL CARTER,)
 Petitioner,)
 v.) No. 24-860
UNITED STATES,)
 Respondent.)
- - - - -

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1 P R O C E E D I N G S

2 (11:28 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 24-820, Rutherford versus
5 United States, and the consolidated case.

6 Mr. Frederick.

7 ORAL ARGUMENT OF DAVID C. FREDERICK
8 ON BEHALF OF THE PETITIONER IN CASE 24-820

9 MR. FREDERICK: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 The 1984 Sentencing Reform Act
12 confirmed that district courts have broad
13 discretion to consider relevant information in
14 imposing and modifying criminal sentences.
15 Section 994(t) limits only one category of
16 information in compassionate release cases,
17 rehabilitation alone. Section 3661 otherwise
18 imposes "no limitation on the information a
19 court may receive and consider during
20 sentencing."

21 The Third Circuit, however, imposed a
22 judicial limitation on compassionate release.
23 It precluded district courts from considering a
24 change in law that prospectively lowers
25 sentences for offenses like Mr. Rutherford's as

1 one fact in the total mix of information for
2 sentence modifications.

3 That categorical limitation should be
4 reversed. The government concedes that age and
5 illness are ordinary circumstances for inmates.
6 Yet, when combined with other factors, age and
7 illness may be extraordinary and compelling in
8 appropriate situations.

9 Whether a change of law is ordinary,
10 therefore, should not matter. Congress did not
11 expressly limit that as a factor in considering
12 modification of extremely long sentences. The
13 Court should reject the government's contention
14 that the 2018 First Step Act impliedly repealed
15 the many provisions of the 1984 Act conferring
16 broad discretion on district courts.

17 I welcome the Court's questions.

18 JUSTICE THOMAS: Mr. Frederick,
19 Congress -- it was Congress's choice not to
20 make this retroactive, and it would seem rather
21 odd that you would want to use that decision as
22 a basis or a compelling reason to reduce a
23 sentence that results from the prospective
24 nature of the law.

25 MR. FREDERICK: What Congress did in

1 Section 403(b) of the First Step Act, Justice
2 Thomas, was to apply it to pending cases. But
3 Congress did not speak to the question of how
4 that rule might apply in the 3582 situation.

5 So Congress was silent with respect to
6 that. It was, as I acknowledge, with respect
7 to pending cases, a narrowed rule about limited
8 retroactivity, but that just means that
9 Congress was leaving to the individual
10 decision-making process in these compassionate
11 release cases up to the discretion of the judge
12 looking at the totality of the circumstances
13 whether or not the length and duration of a
14 sentence and the disparity might be a relevant
15 circumstance for that particular inmate.

16 I want to point out that the
17 government's principle here is an atextual one
18 as it came up in the previous argument. Its
19 idea about personal circumstances is nowhere
20 found in the statute and the idea that
21 extraordinary and compelling depends on the
22 changed circumstances that arise after the
23 person has been sentenced.

24 Justice Kavanaugh, in the earlier
25 case, you inquired about the Sentencing

1 Commission. And I want our position to be very
2 clear about this. The Commission has spoken to
3 the situation that is in Mr. Rutherford and
4 Mr. Carter's cases.

5 If the Commission reversed its course
6 and took those changes of law that are
7 prospective for unusually long sentences, we
8 would have to respect that decision because
9 Congress said that for a compassionate release
10 motion, it had to be done consistent with the
11 Commission's policy statements.

12 So, under your hypothetical as you
13 posed it in the previous case, we win our case.
14 We could lose if the Commission were to change
15 its position.

16 JUSTICE KAVANAUGH: You win if Justice
17 Thomas's point, though, doesn't make the
18 Commission's judgment inconsistent with the
19 statute. You have an answer to that, but
20 there's an "if," I think, that goes after what
21 you just said.

22 MR. FREDERICK: And I'm happy to
23 provide that answer, which is that Congress
24 didn't intend to take the Commission's
25 discretion away, why -- when it never addressed

1 the issue of how compassionate release motions
2 should be treated in this gun situation when
3 they're taking the stacking away.

4 And it certainly has a profound effect
5 on the one issue we know Congress wanted in
6 compassionate release cases to be considered,
7 length of sentence. The whole idea of
8 compassion, obviously, is to bring compassion
9 by lowering the amount of time that a person is
10 incarcerated.

11 And so it makes logical sense that if
12 you're going to consider any legal change, it
13 would be one where society has demonstrated a
14 will to decrease the amount of incarceration
15 time for persons who might be subject to that
16 kind of principle.

17 And that makes sense for the totality
18 of the circumstances that a district court
19 would be obliged to take into account in
20 looking at the other individual circumstances
21 that are relevant for the person.

22 Mr. Chief Justice, you raised the
23 question about kind of a floodgate of problems,
24 but let me address that by saying the -- are
25 three institutions that are relevant here.

1 There's obviously the Sentencing Commission,
2 which takes into account data and looks at real
3 cases. There are district courts that are
4 entrusted with dealing with these kinds of
5 factual matters all the time. And then there
6 is appellate review under an abuse of
7 discretion standard.

8 Appellate courts have exercised the
9 reversal power under abuse of discretion where
10 district courts have gone too far. And I would
11 point the Court to a Sixth Circuit case called
12 United States versus Bass, in which the Sixth
13 Circuit said the district court had gone too
14 far in the post-COVID situation because it
15 allowed for the reduction of a sentence of
16 someone who had been committed to life
17 imprisonment for committing several murders and
18 involved in conspiracy for other violent acts,
19 and the Sixth Circuit said that was an abuse of
20 discretion.

21 So our view is that although there may
22 be some motions filed, and in the fiscal year
23 2025, approximately 2,000 motions for
24 compassionate release were filed, only 56 were
25 granted under this (b)(6) provision. That

1 statistic is in the clinical law professors'
2 brief at page 17.

3 JUSTICE BARRETT: And is that because
4 you think the compassionate release provision
5 would not permit -- or would not make you
6 eligible for a sentence reduction if this First
7 Step Act disparity was the only basis? Like,
8 here, your client also alleged the COVID-19 and
9 hypertension and obesity.

10 Is it the plus factors that then would
11 prevent it from becoming a huge loophole?

12 MR. FREDERICK: Justice Barrett, these
13 are always combination of factors. No one
14 factor, I think, arises to the level that it
15 would by itself be extraordinary and compelling
16 because the word "reasons" is in the statute.
17 So it's got to be multiple reasons.

18 Our client, of course, as you noted,
19 had a very good rehabilitation record, has
20 health issues, has family circumstances where
21 his earlier release would enable him to help
22 find and provide for his deceased sister's
23 children. So these are the kinds of
24 circumstances that a judge reasonably would
25 take into account.

1 JUSTICE BARRETT: Could a judge, let's
2 say, before the First Step Act was enacted, say
3 that in my judgment, I really feel like these
4 are excessively long sentences, and treat that
5 like the judge's -- let's just say it's
6 disquiet about the legal penalty that Congress
7 has chosen to impose? Would that be an
8 extraordinary and compelling reason, or is it
9 only the subsequent change?

10 MR. FREDERICK: Length of sentence is
11 a change -- is a factor, and it always has been
12 a factor. And we know that because the Diaco
13 case, the Bureau of Prisons, represented by the
14 Department of Justice, came to court and said
15 the long sentence should be reduced because of
16 these disparate circumstances.

17 The Senate --

18 JUSTICE BARRETT: Well, no, no, no.
19 I'm just saying just based on the judge's
20 disagreement, you know, the -- the judge's
21 disagreement with the length of sentence that
22 Congress chose to impose as a mandatory
23 minimum.

24 MR. FREDERICK: Mandatory minimums
25 have long been thought to fall within the rule

1 of compassionate release. So has life
2 imprisonment for that matter.

3 And the Department of Justice agrees
4 with that observation; filed a brief a couple
5 of months ago in the Sixth Circuit in a case
6 called Stricker in which it took that position.
7 So that is not an unusual feature of how
8 compassionate release works.

9 And that makes sense --

10 JUSTICE SOTOMAYOR: Mr. Frederick, I'm
11 hearing Justice Barrett's question differently,
12 and she'll correct me if I'm wrong.

13 I think her question is, standing
14 alone, could a judge use their unhappiness with
15 mandatory minimums to grant compassionate
16 release?

17 MR. FREDERICK: That would be, I
18 think, an abuse of discretion because the
19 mandatory minimums set forth by statute
20 indicates what Congress's judgment is.

21 The extraordinary and compelling
22 reasons are almost always plural. And, in
23 fact, the form that --

24 JUSTICE BARRETT: But, even if it
25 weren't plural, could the judge take disquiet

1 or disagreement with the statutory scheme
2 prescribed by the statute as one of the
3 reasons?

4 MR. FREDERICK: Certainly, the judge,
5 in looking at the range of factors, would take
6 into account that person's experience in
7 looking at like cases to determine whether
8 there was --

9 JUSTICE BARRETT: I'm just saying
10 disagreement. You keep going to disparity.
11 I'm just saying just disagreement, I think
12 Congress has been too harsh here.

13 MR. FREDERICK: I think Cong- -- a
14 judge is certainly not within his or her
15 discretion to disagree with an act of Congress.

16 JUSTICE BARRETT: Okay.

17 MR. FREDERICK: Where I think the
18 judges have addressed this particular issue and
19 where the Sentencing Commission addressed this
20 particular issue was to say that in the total
21 mix of circumstances and information, it could
22 be a factor.

23 And it is certainly a factor that we
24 would want to take into account because the
25 whole idea behind this provision was as a

1 safety valve against unusually harsh and long
2 sentences. The length of sentence is the key
3 fact in all of these situations.

4 JUSTICE ALITO: Mr. Frederick, I'm not
5 sure I understood your -- your answer to
6 Justice Barrett.

7 Is it a permissible factor for a judge
8 to include in -- in the determination a -- a
9 disapproval of the -- of -- of the mandatory
10 minimum?

11 MR. FREDERICK: A judge would be
12 committing an abuse of discretion to disagree
13 with a policy judgment made by Congress.
14 However, a judge would also be within his or
15 her discretion to say that for this particular
16 inmate, given the circumstances here, this
17 minimum would be subject to compassionate
18 release.

19 JUSTICE ALITO: I don't quite see the
20 difference between those two things.

21 MR. FREDERICK: Well, the difference,
22 Your Honor, is that we're looking at the
23 totality of the circumstances, the person's
24 age, how much time the person served, whether
25 the person has health issues, and the range of

1 rehabilitation, and other family circumstances.

2 And the Court could very well say, you
3 know, this mandatory minimum is too harsh, and
4 because of all these other factors --

5 JUSTICE ALITO: So the -- the answer
6 is that it can be considered. Disapproval of
7 mandatory minimums across the board can be
8 considered in a particular case if there is
9 something else?

10 MR. FREDERICK: I think that the --
11 part of where I'm going to challenge your
12 question's premise a little bit, Justice Alito,
13 if I might, is where you say "in all
14 circumstances," because the judge is always
15 looking at the one case before --

16 JUSTICE ALITO: Okay. So the judge --
17 there's a case where the mandatory minimum is
18 10 years, and the judge says, I know that's the
19 mandatory minimum for -- for the -- the run of
20 cases, but, in this particular case, I think
21 for a variety of reasons having to do -- that
22 that's too long. That's okay?

23 MR. FREDERICK: Well, if your question
24 is about original sentencing, I think that's
25 different than --

1 JUSTICE ALITO: No. On -- on this
2 motion.

3 MR. FREDERICK: On modification?

4 JUSTICE ALITO: On this modification.

5 MR. FREDERICK: If, under your
6 hypothetical, the person is 75 years old, has a
7 life-threatening disease, and the court says,
8 you know, this mandatory minimum is pretty
9 harsh, and the BOP is likely to be coming
10 back here to say we don't have the medical
11 facilities to deal with that person, it is not
12 an abuse of discretion for the court to say, in
13 this particular circumstance, that mandatory
14 minimum is too harsh.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas?

18 Well, just to continue the line of
19 questioning briefly, well, you really shouldn't
20 call it a mandatory minimum then. You probably
21 should call it something like the presumptive
22 minimum depending upon subsequent developments.

23 MR. FREDERICK: Well, it's not for me
24 to offer up words to Congress that Congress
25 wrote in its statutes, Mr. Chief Justice.

1 What I would say, that as a practical
2 matter, compassionate release is the rare
3 circumstance, whereas a safety valve, the Court
4 takes into account the total mix of information
5 in determining whether and a downward
6 adjustment in the length of time that the
7 person incarcerated should serve.

8 CHIEF JUSTICE ROBERTS: Well, in
9 second-guessing the judgment of Congress?

10 MR. FREDERICK: Well, Congress also
11 has -- has delegated this authority to the
12 Sentencing Commission. And the Sentencing
13 Commission has issued policy statements that
14 speak to this very question that's at issue
15 in our case. And district courts have
16 exercised their discretion in compassionate
17 release cases to deal with the mandatory
18 minimum concept.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 MR. FREDERICK: And so there's law on
22 this.

23 CHIEF JUSTICE ROBERTS: Justice Alito,
24 anything further?

25 JUSTICE ALITO: If -- if disquiet

1 about the mandatory minimum is a permissible
2 factor so long as it's linked with something
3 else, do you think there are going to be a lot
4 of cases in which defense attorneys are -- are
5 going to be totally unable to come up with some
6 other thing to link to it?

7 MR. FREDERICK: Well, Justice Alito, I
8 would say that we do have experience with this
9 question, that the Bureau of Prisons does have
10 a form that the prisoner has to fill out and go
11 through an administrative exhaustion procedure
12 before even going to court and that those
13 factors are baked into the facts before
14 typically a lawyer even gets involved in filing
15 a motion for compassionate release in the
16 district court. And district courts are free
17 and have denied 85 percent of these motions.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

20 JUSTICE SOTOMAYOR: You presented your
21 argument slightly different than Mr. Carter's
22 attorney, but I don't want to move away from
23 the fundamental question here, which is this --
24 your client's situation is consonant with the
25 Sentencing Commission's policy statement,

1 correct?

2 MR. FREDERICK: Yes.

3 JUSTICE SOTOMAYOR: And so we would
4 have to find that the Sentencing Commission
5 exceeded or violated the statute.

6 Why don't we deal with that, because
7 they're not saying disagreement with the
8 mandatory minimum is enough to get a change.
9 They're putting other qualifications.

10 Why do those qualifications count as
11 individual?

12 MR. FREDERICK: Because they're
13 extratextual. The Congress made very clear in
14 the 1984 Act, and that's why I would urge the
15 Court to consider the intent of the 1984
16 Congress, which delegated this authority to a
17 new creation, the Sentencing Commission, and it
18 said: We want the Commission to come up with
19 an explanation for the extraordinary and
20 compelling reasons that would underlie the
21 inmate's compassionate release motion.

22 And the Commission, after some period
23 of time, has done that. We now have a policy
24 statement. That policy statement is consistent
25 with our position.

1 The extraordinary and compelling
2 reasons do not have to be tied solely to the
3 personal circumstances, although how long a
4 person is being incarcerated is a personal
5 circumstance --

6 JUSTICE SOTOMAYOR: Exactly.

7 MR. FREDERICK: -- for anybody who
8 thinks about it.

9 And so the -- the Commission's role
10 here is to interpret those words. It has done
11 so. Our case fits within those structures
12 within the Commission's policy statement.

13 JUSTICE SOTOMAYOR: And why is it not
14 a violation of the statute?

15 MR. FREDERICK: It's not a violation
16 of the statute --

17 JUSTICE SOTOMAYOR: The government
18 says it is basically.

19 MR. FREDERICK: Well, we'll hear more,
20 I'm sure, about why the government thinks that.
21 But it is not a violation of the statute
22 because Congress made this delegation to the
23 Commission. It entrusted an expert agency, if
24 you will, designed to collect information, talk
25 to stakeholders, get district court input,

1 et cetera, and render a policy statement.

2 And, in fact, the -- the Commission's
3 work here is a little bit narrower than if you
4 were to take just simply the plain language of
5 extraordinary and compelling and those words by
6 themselves.

7 CHIEF JUSTICE ROBERTS: Justice Kagan?

8 JUSTICE KAGAN: Mr. Frederick, if your
9 position were accepted, would the inquiry in a
10 case like yours look pretty similar to the
11 compassionate release inquiry in a crack
12 cocaine case, where there is consideration of
13 the change in law that occurred in that area?

14 MR. FREDERICK: Not necessarily, and
15 the reason is that in the crack cocaine
16 context, there was a retroactive application in
17 a categorical context, and we know what that
18 did to the system because the federal defenders
19 and prosecutors had to get together to design
20 mechanisms for informing district courts about
21 how to deal with that.

22 Here, because we're dealing with a
23 changed circumstance for the gun offense, we're
24 typically dealing with inmates who have a
25 proclivity to do violence, likely did do

1 violence in prison, violated their
2 rehabilitation terms and other terms of
3 incarceration, and so their individual
4 circumstances, when viewed from the total mix,
5 are almost certainly going to be different in
6 most of these cases.

7 JUSTICE KAGAN: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch?

10 JUSTICE GORSUCH: Mr. Frederick, I
11 want your help with what the Sentencing
12 Commission has said. Put aside whether it can
13 say it.

14 It said that you should assume a
15 change in law applies retroactively when
16 Congress changes a law, but it says you cannot
17 make that assumption with respect to our work
18 in the Sentencing Guidelines unless we say so
19 expressly. That seems to have things a little
20 bit backwards, doesn't it?

21 MR. FREDERICK: Justice Gorsuch, I
22 would say that there are inconsistencies
23 throughout this particular area of law that
24 create conundrums for district courts to have
25 to grapple with.

1 JUSTICE GORSUCH: Well, this is a
2 conundrum for us, I think.

3 MR. FREDERICK: I appreciate that, but
4 what I would say is that in the particular
5 circumstance that we have here, we are not
6 talking about a retroactive application in any
7 kind of guise. You can reserve on that
8 question and say whatever the Commission --

9 JUSTICE GORSUCH: You want us to look
10 at a change in law and assume Congress wanted
11 us to do that --

12 MR. FREDERICK: Well --

13 JUSTICE GORSUCH: -- right? And --
14 and -- and the Commission is saying, yeah, go
15 ahead and do that, but don't do it with respect
16 to our work. And that seems rather
17 disrespectful of Congress's work and rather
18 solicitous to its own.

19 MR. FREDERICK: What I would say in
20 the compassionate release circumstance and that
21 is different than the -- or normal application
22 of the Sentencing Guidelines, which are
23 guidance to district courts in doing their
24 sentences, and the reason why the Commission
25 would apply a rule about non-retroactivity in

1 the initial sentencing is that it really will
2 roil pending cases in a manner that would
3 create more administrative burden.

4 Our proposal here for compassionate
5 release doesn't do that.

6 JUSTICE GORSUCH: Well, that --
7 that -- that gets back to all the questions
8 we've already had about whether or not this
9 opens up floodgates. And I guess I'm -- I'm
10 less concerned about that than -- than, again,
11 just the solicitude that the Commission shows
12 to its own work but not Congress, and if you
13 could address that.

14 MR. FREDERICK: I'm not here,
15 obviously, representing the Commission, but
16 what I would say is that there are
17 administrative reasons why the Commission would
18 determine that changes in its own guidelines or
19 policy statements would create more uncertainty
20 in application than where you were to take an
21 idea that with someone incarcerated like
22 Mr. Rutherford for 42-and-a-half years for a
23 sentence that should be 18 years less, you
24 might come to a different conclusion.

25 JUSTICE GORSUCH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh?

3 JUSTICE KAVANAUGH: Just to pick up on
4 that and Justice Thomas's original question
5 because the separation of powers issue concerns
6 me here a bit, which is the First Step Act was
7 obviously heavily negotiated and very
8 carefully, a lot of back-and-forth on that, and
9 retroactivity is, of course, always a key
10 element in the negotiations, as it was here
11 when you are making a change in the criminal
12 justice and criminal sentencing laws, and so
13 Congress specifically, I think, says this is
14 not going to be retroactive to those cases
15 where sentences have already been imposed.

16 And then the Commission, though, then
17 comes in and says we're now going to give a
18 second look for district judges to revisit
19 those sentences even though Congress in those
20 sentences did not want them made retroactive.
21 And that seems to be -- obviously, the
22 Commission was very divided on this question.
23 And the -- you know, the Commission dissenters
24 said this is a seismic structural change to our
25 criminal justice system that countermands

1 Congress's judgment.

2 And that's my concern on this case,
3 and I just want to give you an opportunity
4 again to summarize why you don't think the
5 Commission, by doing this, has kind of
6 countermanded Congress.

7 MR. FREDERICK: There -- there is
8 certainly a huge difference between a
9 categorical application of the rule, which we
10 know from the crack and -- and powder cocaine
11 context, and a more limited case-by-case
12 totality of the circumstances inquiry where you
13 look at the effect of the stacking of the gun
14 charges on the length of incarceration.

15 And I think it's reasonable to suppose
16 that in the context where you're dealing with a
17 categorical change that has a very large
18 systemic effect -- and -- and amicus briefs on
19 our side point to all the steps that had to be
20 taken -- none of those have been taken and need
21 to be taken in the 924(c) context.

22 And the reason for that, Justice
23 Kavanaugh, is that we're looking and we're
24 trusting district judges to look at this on a
25 case-by-case basis to decide whether or not a

1 sentence reduction is warranted in light of the
2 totality of the circumstances.

3 That kind of inquiry is some --

4 JUSTICE KAVANAUGH: Do the disparities
5 there worry you? Some district judges are
6 going to treat this wildly differently than
7 other district judges, one imagines, you know,
8 in the same courthouse even.

9 MR. FREDERICK: I think that the
10 disparities problem is one that ought to be
11 concerning to reasonable people. Where I think
12 that it is an inherent part of the system of
13 sentencing that's been part of our system for
14 200 years --

15 JUSTICE KAVANAUGH: Yeah. That's
16 fair.

17 MR. FREDERICK: -- it's -- it's
18 impossible to say there's complete uniformity.
19 And when you do, then we had our own problems
20 with that uniformity.

21 CHIEF JUSTICE ROBERTS: Justice
22 Barrett?

23 Justice Jackson?

24 JUSTICE JACKSON: So I think you're
25 saying in response to Justice Kavanaugh that

1 this isn't disrespectful from the Sentencing
2 Commission's perspective because it didn't take
3 Congress to be removing the ability for
4 individualized consideration in particular
5 cases.

6 MR. FREDERICK: That's correct.

7 JUSTICE JACKSON: And with respect to
8 Justice Barrett's point about how this would
9 operate with respect to a judge who had policy
10 disagreements with a mandatory minimum, I guess
11 I didn't take your argument in this case to
12 really be about that at all.

13 And -- and, by that, I mean I thought
14 what you were focusing on in this case is the
15 fact that there's a sentencing disparity that
16 has been created such that your client, if he
17 was sentenced today, would not have the same
18 sentencing exposure as Congress now has
19 determined it because Congress has changed the
20 statute. So it's not the court saying I don't
21 think people who do this sort of thing should
22 be subject to this length of sentence. It was
23 Congress who said that in this situation,
24 right?

25 MR. FREDERICK: That's correct. And

1 Mr. Rutherford here has served 19 years. He --
2 he falls within the policy guidance that says
3 you have to serve for more than 10 years before
4 you even become eligible to invoke this
5 particular argument.

6 JUSTICE JACKSON: Right. So, in some
7 sense, we're -- in some sense, this is giving
8 the opportunity for a consistency with what
9 Congress has determined about what people who
10 have done this sort of thing should get.

11 MR. FREDERICK: Yes, and doing it,
12 though, in a contextual way that takes into
13 account the very circumstances of that inmate's
14 behavior in prison, age, illness, family
15 circumstances, and the like.

16 JUSTICE JACKSON: And so -- so, in
17 some sense, the compelling circumstance here is
18 that the change -- this is kind of going back
19 to Justice Kagan's point in the first case --
20 that there's been a changed circumstance with
21 respect to how long Congress believes that
22 people in this circumstance should be
23 sentenced, and even though Congress didn't
24 necessarily want that to be applied
25 categorically, there's nothing to preclude

1 Congress -- there's nothing to preclude courts
2 from taking that into account in an
3 individualized way in combination with all
4 sorts of other factors if a person requests it?

5 MR. FREDERICK: That's correct. And
6 in 1984, Congress used the words that enabled
7 that particular outcome, Justice Jackson. And
8 I would just note, in the original appeal,
9 Judge Ambro affirmed the sentence but said it's
10 unthinkable that in any system the sentence
11 would be -- should be this long for the two
12 robbery offenses that my client committed.

13 JUSTICE JACKSON: Can I just ask you
14 one other thing? Because I notice that there
15 are differing views about the order of
16 operations, just as a practical matter, the
17 judge who is trying to entertain a
18 compassionate release motion.

19 And I think it might matter because
20 sentencing disparities are actually prescribed
21 by Congress as a consideration in 3553(a). So,
22 if you have to do 3553(a), then you're going to
23 take into account the kind of thing that the
24 government is now saying that you don't in --
25 in the extraordinary and compelling

1 circumstances world.

2 So what I mean is, what is -- what is
3 your view of how this works? Lower courts, I
4 think, are starting with the extraordinary and
5 compelling circumstances factor with the
6 Sentencing Commission's guide -- guidance, and
7 then they turn to 3553(a).

8 The government seems to suggest that
9 you start with extraordinary and compelling
10 factor without the Sentencing Commission's
11 guidance, then you go to 3553(a), and then you
12 consult the Sentencing Commission as a check
13 or, you know, a limitation.

14 But the statute suggests there's even
15 another way of doing it, which is that you
16 start with 3553(a) and then you go to
17 extraordinary and compelling with the
18 Sentencing Commission.

19 So what's your view on the -- the
20 order of operations in this?

21 MR. FREDERICK: Justice Jackson, I
22 confess that it has been a while since I did
23 sentencing cases in the government, but I would
24 say reading this particular statute, I don't
25 know where this two- or three-part step where

1 you just start negating things if they don't
2 meet a certain threshold.

3 The statute is worded as if certain
4 things happen, then such and such. And that to
5 me suggests that this is a gestalt. It is a
6 totality of circumstances kind of inquiry,
7 which order you do them in, we trust district
8 judges to get to the right outcome based on
9 those circumstances.

10 JUSTICE JACKSON: And you admit that
11 they're -- you see the 3553(a) does require
12 consideration of unwarranted sentencing
13 disparities?

14 MR. FREDERICK: Yes. And it seems --

15 JUSTICE JACKSON: And it's in this
16 statute too?

17 MR. FREDERICK: Yes. And it seems odd
18 that you would say well we're only going to
19 consider it, one, if we've nuked you out of a
20 position to be able to bring that argument
21 based on considering a different factor.

22 JUSTICE JACKSON: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. O'Neill.

1 ORAL ARGUMENT OF DAVID A. O'NEIL
2 ON BEHALF OF THE PETITIONER IN CASE 24-860
3 MR. O'NEIL: Thank you, Mr. Chief
4 Justice, and may it please the Court:
5 I'd actually like to begin directly
6 with Justice Gorsuch's question about the
7 language and the carveout that you referenced
8 in the -- in the Commission policy statement.
9 There is very good reason for that carveout.
10 And it does not show disrespect for Congress.
11 In fact, it shows the opposite.
12 There is a separate statutory
13 provision, Section 3582(c), that specifically
14 deals with reductions based on changed
15 sentencing guidelines. And that requires in
16 Section 994(u) specific findings that the
17 Commission needs to undertake.
18 So in response to public comment
19 during the very robust process that the
20 Sentencing Commission undertook, the sentencing
21 Commission thought it was necessary to clarify
22 how it's guidance in (b)(6) relates to that
23 other guidance, which is set forth separately
24 in Section 1.10.
25 I'd also like to address Justice

1 Kavanaugh, your question, and -- and the one
2 that Justice Thomas started with, because I
3 think it is the essential argument for the
4 government's position. Their argument is that
5 (b)(6) conflicts with the retroactivity
6 provision of the First Step Act. There is no
7 conflict.

8 Section (b)(6) does not purport to
9 make that law retroactively applicable to final
10 -- to -- to defendants serving final sentences.
11 Instead, it addresses a fundamentally different
12 issue.

13 When courts conduct an individualized
14 assessment of a prisoner's circumstances under
15 a separate statute, the question is, does the
16 court have to blind itself to one factor,
17 sentencing disparity, even though that factor
18 may be highly relevant to the court's assigned
19 task. We don't claim that our client could
20 come in here under 403(a) and seek relief.

21 But all that the Commission
22 instructed, all it decided is that courts may
23 in their discretion take that factor into
24 account. But they didn't -- but it allows that
25 only in narrow and unusual circumstances.

1 I also think it's very important,
2 Justice Kavanaugh, to recap how we got here,
3 how this issue arrived with the Commission and
4 how it arrived at the Court.

5 So after Congress eliminated BOP's
6 role as the gatekeeper in the First Step Act,
7 courts began to address prisoner-initiated
8 motions of the kind that congressional allowed.
9 And the courts disagreed about whether
10 consideration of legal changes should or should
11 not factor into the equation divided into two
12 camps. One camp said they should always be
13 taken into account and the other said they
14 should never be taken into account.

15 The case came here. This Court denied
16 cert after the government said this is the
17 Commission's job to address. The Commission
18 undertook that process. It was perhaps the
19 most -- the public was as interested in this
20 issue as it had ever been in any issue.

21 And the Commission adopted a middle
22 ground. It didn't adopt the "you can always
23 consider these." It didn't adopt the "you can
24 never consider these." It said you can
25 consider them but it responded to the

1 government's concerns about administrability by
2 putting in a ten-year bar before you could seek
3 relief.

4 And it required this multi-factor test
5 that incorporates the Section 3553(a) factors.
6 So, in fact --

7 JUSTICE GORSUCH: Mr. O'Neill, I --
8 I -- I -- how long was the Sentencing
9 Commission -- how long did it consider this?

10 MR. O'NEIL: I believe that this was
11 over about a six-month period.

12 JUSTICE GORSUCH: Okay. And I -- I
13 understand its -- your point about, well the
14 Commission before it's going to make something
15 retroactive has certain hoops to go through. I
16 get that point and I appreciate that.

17 But retroactive application of federal
18 law also has some hoops to go through. And
19 they're usually -- we think of Congress doing
20 those. And the evidence we have here is 40 --
21 40 -- well, what is it -- 403(b), it says it
22 shall apply. It tells us exactly when it
23 applies to pending cases, okay, where no
24 sentence has yet been imposed.

25 And then with respect to

1 retroactivity, it tells us it shall also apply
2 to those drug offenses in 404(b). That seems
3 like Congress thought pretty hard about this,
4 to Justice Kavanaugh's point.

5 And it is a bit of a leap to say oh,
6 Congress didn't think about this and
7 retroactivity of a criminal law in a sentence,
8 it just -- it just failed to consider it. It
9 seems a plausible possibility but perhaps a
10 little disrespectful?

11 MR. O'NEIL: No, Justice Gorsuch. The
12 question that Congress was considering in 403
13 was applicability to everybody. So does it
14 applied to everybody moving forward and does it
15 apply to everybody moving back? Retroactivity
16 would have meant that every defendant who had
17 committed an offense before the Act, whether
18 it's --

19 JUSTICE GORSUCH: It's pretty --
20 pretty clearly ruled out, right?

21 MR. O'NEIL: We agree that is ruled
22 out.

23 JUSTICE GORSUCH: Okay.

24 MR. O'NEIL: Mr. Carter, because he is
25 not in that class, he cannot claim relief under

1 Section 403(a). But Congress said nothing
2 about whether those -- the -- the impact of
3 those changes could be considered in the
4 context of materially separate --

5 JUSTICE GORSUCH: No, I under -- I
6 under -- I -- I understand that, hence we're
7 having to draw an inference. But, boy,
8 Congress spoke pretty clearly to -- to
9 retroactivity in 403 and 404.

10 MR. O'NEIL: So Justice Gorsuch, I
11 make two points. First, even the government
12 agrees that these changes actually can be taken
13 into account even for defendants serving final
14 sentences.

15 So the government agrees that when you
16 get to what it calls the sentencing determining
17 phase in this two-part stage that it imagines,
18 that the court can take into account how the
19 403 changes affect the calculus. So that blows
20 a hole in their idea that these -- that
21 Congress never wanted these changes to have any
22 effect on final sentences.

23 JUSTICE JACKSON: And you can take it
24 into account because the statute says so,
25 right?

1 MR. O'NEIL: Yes.

2 JUSTICE JACKSON: Is the government's
3 view that you can take it into account because
4 this statute requires the court to refer to
5 3553(a), and 3553(a) says sentencing
6 disparities have to be taken into account?

7 MR. O'NEIL: That's exactly right.
8 The other point I would make, Justice Gorsuch,
9 and it's baked into your question, is that this
10 is an inference. It is an inference from
11 congressional silence.

12 And all of the government's arguments
13 ultimately rest on trying to find implied
14 limitations from congressional silence. The
15 government wants to infer -- and it's not just
16 an implied limitation -- it wants to infer a
17 categorical bar against consideration of this
18 fact, the fact of sentencing disparity.

19 And it wants to infer not just a
20 categorical bar on that factor but a
21 categorical bar on that factor ever entering
22 into the equation, even though, in combination
23 with other factors or alone, even though
24 Congress didn't do that when it identified a
25 specific factor, rehabilitation, as one that's

1 off limits.

2 That is a lot of meaning and content
3 to read into congressional silence. There are
4 at least five statutory rules of construction
5 here that rule -- that -- that counsel against
6 exactly that inferred limitation.

7 The first is the most basic one that
8 this Court does not lightly assume that
9 Congress omitted from statutes text that it
10 meant to apply. That's Justice Scalia's
11 opinion in *Jama*.

12 The second one is the rule that where
13 Congress puts a specific limitation in a
14 particular provision, you don't infer another
15 one.

16 The third is the rule from *Kimbrough*,
17 we're dealing with the sentencing statute.
18 Congress has said Congress -- excuse me -- this
19 Court has said Congress knows how to direct
20 sentencing practices in express terms and has
21 shown that it has done so.

22 The fourth is the *Concepcion*
23 principle. You start with the premise that
24 Congress meant district courts to have the
25 broadest possible discretion unless the

1 Constitution or -- or Congress explicitly
2 limits it. It hasn't done so here.

3 And then, finally you add on top of
4 that because you have an express delegation to
5 an agency or here to the Commission, Justice
6 Thomas, your opinion in Little Sisters of the
7 Poor made clear that where there is that kind
8 of clear and express delegation, you rewrite
9 the statute, you don't apply it, if you start
10 inferring limitations on that discretion that
11 Congress did not apply.

12 I will just make one more point about
13 the scope of the Commission's discretion
14 because Justice Kavanaugh, I think, you got
15 that exactly right in the first argument today.
16 This case is much simpler because Congress gave
17 the Commission the responsibility to describe
18 what should be considered extraordinary and
19 compelling factors.

20 The Commission has done that. So the
21 question in this case is very simple and
22 straightforward. And the question is just, did
23 the Commission's policy statement, (b)(6), is
24 that a valid exercise of expressly delegated
25 authority?

1 JUSTICE KAVANAUGH: When you said
2 "middle ground earlier," you were really
3 focusing, I think, on the ten-year point; is
4 that accurate?

5 MR. O'NEIL: It's not just the
6 ten-year point. When the Commission first took
7 this issue, it was urged to adopt a provision
8 that would have said whenever changes are
9 inequitable in light of changes in the law,
10 that that would have allowed it. It didn't
11 adopt that provision.

12 JUSTICE KAVANAUGH: Do you think they
13 could have adopted that?

14 MR. O'NEIL: I think that that
15 probably would have been within the scope of
16 the Commission's discretion. But I'd like to
17 make two points about the government's parade
18 of horrors here.

19 The first is there's nothing in the
20 Commission's history or its composition that
21 would suggest it's going to adopt anything like
22 the kinds of proposals that the government
23 fears. In fact, the Commission's history is
24 that it has been quite cautious, not cavalier,
25 about the use of this power. If it did adopt

1 any of those outlandish proposals, the guidance
2 has to go in front of -- in front of Congress
3 for six months before it goes into effect, and
4 Congress could reject it during that time, as
5 Congress has done with previous Commission
6 guidance.

7 And then the second point is the fact
8 that -- that the Commission could have gone
9 farther but chose not to do so simply shows the
10 modesty and care with which it undertook this
11 task.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice Thomas, anything further?
15 Justice Alito?

16 JUSTICE ALITO: What do you think are
17 the limits on how far the Commission can go?

18 MR. O'NEIL: The Commission cannot
19 violate a specific directive of Congress. The
20 Commission needs to adopt purposes or reasons
21 that are grounded in the purposes of
22 sentencing. That's Section 994(a)(2).

23 The Commission's interpretation --

24 JUSTICE ALITO: What relevant -- what
25 factor -- you say it can't -- it can't

1 contradict a specific direction from Congress.

2 Which specific directions would limit it?

3 MR. O'NEIL: Well, for example, if the
4 Commission were to say that rehabilitation
5 alone were an adequate factor.

6 JUSTICE ALITO: Okay. What beyond
7 that?

8 MR. O'NEIL: There were questions
9 earlier about whether the Commission could say
10 you may -- you, district court, may disagree as
11 a matter of principle with mandatory minimums.
12 And we would say that would be a violation of
13 the specific directive of Congress that that is
14 a -- a reasonable punishment for that offense.

15 JUSTICE ALITO: Well, is there a
16 provision that says specifically that that the
17 Commission cannot do that?

18 MR. O'NEIL: There is a provision that
19 the -- it's a general principle that the
20 Commission obviously can't violate --

21 JUSTICE ALITO: It's an inference,
22 isn't it? It's an inference from the
23 imposition of a mandatory minimum, right?
24 That's -- that was what it would be based on?

25 MR. O'NEIL: No.

1 JUSTICE ALITO: No.

2 MR. O'NEIL: That would be based on
3 the fact that Congress said you may sentence
4 someone to this offense. If the -- if the
5 Commission said, District Court, you may -- you
6 may take your own disagreement with Congress
7 about the -- about that as a policy matter, not
8 in the context of the specific case or the --
9 or the circumstances of the prisoner's overall
10 situation, that that -- that would be in
11 conflict with an act of Congress.

12 JUSTICE ALITO: I'm not sure I
13 understood that. What is the difference
14 between the inference that is drawn -- that one
15 would draw from a provision that imposes a
16 mandatory minimum, namely, that Congress did
17 not want that to be disregarded in any case,
18 and the inference that one might draw from a
19 provision that says this change in the law will
20 apply retroactively to this limited class of
21 cases but no other? What is the difference
22 between those two inferences?

23 MR. O'NEIL: The difference is the
24 latter does not take into account all of the
25 circumstances that warrant the prisoner --

1 warrant relief in the prisoner's particular
2 case.

3 (b)(6) is all about the individual
4 circumstances, whether in context the sentence
5 is unusually long, whether it creates a gross
6 disparity, whether the circumstances warrant
7 it. The -- the one that you hypothesized is an
8 across-the-board non-contextual rule that
9 Congress can never consider --

10 JUSTICE ALITO: All right. Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Sotomayor?

13 JUSTICE SOTOMAYOR: Then I don't
14 understand your answer to Justice Kavanaugh.
15 You said that if the Commission said every
16 prisoner is entitled to compassionate release
17 because of the mandatory minimum, the --
18 whatever, that that's okay, that's within their
19 power?

20 MR. O'NEIL: If -- no, I think I was
21 answering a different question. If the --

22 JUSTICE SOTOMAYOR: How did you
23 understand -- because I understood your answer
24 to him that if the Commission had taken what
25 was the extreme position some people had

1 proposed.

2 MR. O'NEIL: Even --

3 JUSTICE SOTOMAYOR: That the mere
4 change in law was enough, that that's okay?

5 MR. O'NEIL: Thank you, Justice
6 Sotomayor. What -- what -- even that more
7 extreme position would have required an
8 evaluation of the -- of that --

9 JUSTICE SOTOMAYOR: Yeah. But why
10 wouldn't it be itself an abuse of discretion?
11 I'm very surprised at your answer to him,
12 because it seems to me that the logic of your
13 answer on the mandatory minimum is that if they
14 do something so extreme as to ignore that
15 Congress has not made this retroactive to all
16 prisoners --

17 MR. O'NEIL: That's --

18 JUSTICE SOTOMAYOR: -- why isn't that
19 equally an abuse of discretion?

20 MR. O'NEIL: Because the -- the -- the
21 proposal that I was addressing, the inequitable
22 in light of changes in the law, that
23 incorporated individualized considerations.
24 What I took Justice -- what I took the question
25 to be asking about was an across-the-board

1 non-contextual rule that a district court may
2 simply disagree with the policy of a mandatory
3 minimum and treat that as an extraordinary and
4 compelling reason. And that was Justice
5 Alito's question.

6 What I said in response to Justice
7 Kavanaugh was that the Commission could have
8 adopted a rule that didn't have all of the --
9 all of the limitations that (b)(6) ultimately
10 adopted and simply said that --

11 JUSTICE SOTOMAYOR: I don't understand
12 that. They had to have some limitations,
13 according to you.

14 MR. O'NEIL: Right. The --

15 JUSTICE SOTOMAYOR: They had to list
16 some individual factors, correct?

17 MR. O'NEIL: That's correct. That's
18 correct. And even --

19 JUSTICE SOTOMAYOR: So --

20 MR. O'NEIL: So even that proposal
21 would have been based on the particular
22 circumstances of the prisoner's condition and
23 circumstances --

24 JUSTICE SOTOMAYOR: So we're talking
25 -- we're talking past each other. We're not

1 talking about you arguing that they can say
2 this always constitutes a reason for
3 compassionate --

4 MR. O'NEIL: We believe that a rule --

5 JUSTICE SOTOMAYOR: Standing alone.

6 MR. O'NEIL: Standing alone, exactly.
7 We believe, standing alone, that that would be
8 coming very close to trying to treat 403(b) --
9 sorry, 403(a) as retroactive. And we concede
10 that that's further than the Commission could
11 go.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 JUSTICE KAGAN: Mr. O'Neill, same
14 question that I asked Mr. Frederick. If your
15 position is right, does the inquiry into
16 sentence disparities in these gun cases start
17 to look a lot like the inquiry in the
18 sentencing disparity in the crack cocaine
19 cases? And if it does, is that given the
20 textual difference between Section 403 and
21 Section 404?

22 MR. O'NEIL: The analysis is
23 completely different between the crack cocaine
24 cases and the kind that are covered in (b)(6).
25 The Federal Defenders' brief does an excellent

1 job of explaining how different these
2 procedures are.

3 With 404, which was an actually
4 retroactive law, district courts set up
5 standing orders. Defendants were waived
6 through because there was no question at the
7 eligibility -- as to eligibility. It was all
8 about the 3553(a) factors.

9 Here, every case is considered on its
10 individual facts. The judge -- the courts
11 exhaustively look at the prisoner's individual
12 circumstances. And the statistics bear out
13 this difference.

14 So during the time that -- as
15 Mr. Frederick said, I think, there have been
16 150 grants in total under (b)(6). During that
17 time, under 404 and the crack cocaine cases,
18 there were 4,000. And that is a demonstration
19 of how different these regimes are.

20 JUSTICE KAGAN: Thanks.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch?

23 Justice Kavanaugh?

24 Justice Barrett?

25 Justice Jackson?

1 Thank you, counsel.

2 MR. O'NEIL: Thanks very much.

3 CHIEF JUSTICE ROBERTS: Mr. Feigin.

4 ORAL ARGUMENT OF ERIC J. FEIGIN

5 ON BEHALF OF THE RESPONDENT

6 MR. FEIGIN: Thank you, Mr. Chief
7 Justice, and may it please the Court:

8 The core of the sentence reduction
9 motions that Petitioners are making in these
10 cases is they would have received lower
11 sentences if they were sentenced after the
12 First Step Act's changes to Section 924(c).

13 But in enacting those very changes,
14 Congress made a categorical judgment to, in the
15 words of the principal opinion in Hewitt, leave
16 Section 1924(c) offenders with final sentences
17 stuck with their old sentences. That
18 categorical judgment can't be leveraged into
19 extraordinary and compelling reasons that
20 warrant reduction in Petitioners' lawful,
21 indeed, legally mandated sentences.

22 The -- Section 3582(c)(1)(A)(i) isn't
23 a license for either individual judges or the
24 Sentencing Commission to create what's
25 effectively a new form of judicial parole where

1 someone who does not have extraordinary and
2 compelling reasons warranting a sentence
3 reduction can suddenly claim that they do in
4 light of an expressly non-retroactive change in
5 the law.

6 Now I think that's exactly what the
7 Commission's done here. So, to respond to the
8 suggestion that this is a moderate,
9 middle-ground solution, it is anything but a
10 moderate, middle-ground solution because, as to
11 924(c) offenders, which were top of mind when
12 this was adopted, it includes basically
13 everybody.

14 Take the 10-year limitation. The
15 minimum sentence for a stacked 924(c) offender
16 is going to be 30 years, five for the first
17 mandatory minimum and 25 for the consecutive.
18 That could be characterized -- the difference
19 between that and, say, a 10-year sentence under
20 the new regime could be -- easily be
21 characterized as a gross disparity.

22 And then we are down to, I think,
23 basically just the individualized
24 circumstances.

25 And then we have judicial parole. If

1 you -- if I may have one more second.

2 If you listen to the reasons that
3 Mr. Frederick gave for letting his client out,
4 family circumstances and rehabilitation, that
5 would be exactly the kind of reason that would
6 have gotten you out on parole.

7 I'm sorry, Justice Thomas. And thank
8 you.

9 JUSTICE THOMAS: The -- what limits
10 would you put on the Commission's authority to
11 describe what a compelling interest is or what
12 an extraordinary circumstance is?

13 MR. FEIGIN: Well, I don't think that
14 they can simply disagree with Congress or
15 authorize individual judges to disagree with
16 Congress.

17 JUSTICE THOMAS: Now can they do
18 that -- what I'm hearing is that in -- standing
19 alone, they cannot disagree with Congress.
20 That's what I'm hearing from the other side.

21 But, if it's a part of a totality of
22 the circumstances inquiry, then they can
23 disagree with Congress?

24 MR. FEIGIN: I -- I -- and I think the
25 fundamental problem with that, Justice Thomas,

1 is the -- is exactly what I just said, which is
2 that it's a form of judicial parole.

3 If you think back to what I said in
4 the last case, essentially, we are taking as a
5 given that the other circumstances, the other
6 reasons, are not in themselves something that
7 would warrant a sentence reduction. They're
8 not extraordinary and compelling enough.

9 What gets them over the line is the
10 fact that Congress adopted a non-retroactive
11 change in law that it explicitly decided not to
12 apply to prisoners in their circumstances, and
13 that is what gets them consideration of these
14 other factors that wouldn't be enough on their
15 own.

16 JUSTICE THOMAS: So what -- what do
17 you say to the argument that it's not
18 necessarily a direct attack, a disagreement
19 with Congress, but, rather, the effects of the
20 provision, the say, for example,
21 non-retroactivity?

22 MR. FEIGIN: Well, I think this is a
23 direct attack on what Congress did because
24 Congress drew a categorical line, and, as the
25 principal opinion in Hewitt recognized, that

1 was partly to prevent all the relitigation
2 concerns.

3 I think the fact that, as my opponents
4 acknowledge, these are even more burdensome to
5 litigate than Section 404 adjustments to
6 sentences, which Congress expressly did make
7 retroactive, is a strike against it.

8 When Congress makes categorical
9 judgments and it wants to allow for exceptions
10 to individualized circumstances, it will enact
11 something like the safety valve, which -- for
12 mandatory minimums, which it again adjusted.
13 That's in Section 402 of the First Step Act.

14 And, here, you have what the
15 Sentencing Commission in 2021 estimated was
16 2,412 offenders with stacked 924(c) sentences
17 who would be affected if this became
18 retroactive.

19 And, as I was just suggesting earlier,
20 this is essentially a -- a full retroactivity
21 provision in the sense that it opens the door
22 to things that were not extraordinary and
23 compelling reasons suddenly crossing that
24 threshold.

25 JUSTICE JACKSON: So, Mr. Feigin,

1 you've said that a couple of times, and that --
2 I don't know that that's actually consistent
3 with how this works in real life.

4 In other words, you -- you've set up
5 your argument both in the prior case and in
6 this one to suggest that the court is marching
7 in seriatim through these various criteria and
8 it starts with age and it says: Hmm, this is
9 not extraordinary and compelling enough, let me
10 add illness, oh, let me add, you know,
11 sentencing disparity, and that things that
12 previously would not be enough to get them over
13 the line suddenly become so when you add in
14 this other factor.

15 My understanding through Concepcion
16 and also experience is that that's not exactly
17 how it works. The court is looking at the
18 totality of the circumstances. It doesn't
19 necessarily go through and determine whether
20 each individual criteria itself is an
21 extraordinary and compelling circumstance.

22 So, for example, age would never be.
23 I mean, that's not extraordinary. Everybody
24 gets old. So it's not really doing an
25 individualized tick off the box for each

1 criteria and, therefore, it becomes problematic
2 when we look at something like sentencing
3 disparity.

4 So, if I reject that characterization
5 of how it works, do you lose?

6 MR. FEIGIN: Well, Your Honor, first
7 of all, let me just tell you that that's not
8 exactly what I'm saying that they do. They
9 don't just -- I'm not suggesting that anyone
10 ticks through --

11 JUSTICE JACKSON: But you've said many
12 times -- you've said many times that criteria
13 that would not in themselves qualify as
14 extraordinary and compelling circumstances
15 become so by adding in this, and that's the
16 problem.

17 MR. FEIGIN: So think of it -- think
18 of it this way, Justice Jackson. It's as
19 though you are weighing something and it has to
20 weigh enough, it has to be --

21 JUSTICE JACKSON: But I'm telling you
22 if I reject --

23 MR. FEIGIN: Yeah.

24 JUSTICE JACKSON: -- that
25 characterization. You're starting with the

1 empty scale and you're putting all the things
2 on --

3 MR. FEIGIN: Well --

4 JUSTICE JACKSON: -- not one at a time
5 and seeing whether or not each thing gets you
6 across the line.

7 MR. FEIGIN: -- Your Honor, I --
8 you're not doing -- necessarily doing it one at
9 a time, but I think even they would acknowledge
10 that their claim -- that they are not making
11 the claim that if the question presented didn't
12 matter, that is, if this were not a valid
13 consideration, they would be eligible for
14 relief.

15 JUSTICE JACKSON: They're saying you
16 should not restrict the district court from
17 doing a totality of the circumstances analysis
18 that takes into account all of the
19 circumstances, that the way you're setting
20 this up, you're suggesting that certain
21 circumstances should be left out because they
22 are inappropriate, and in that case, you know,
23 we -- the -- the -- the court should not have
24 any ability to consider them.

25 And what I guess I'm suggesting is

1 that we all seem to agree that this is a
2 totality of the circumstances. And so why
3 can't the court take this sort of thing into
4 account, especially in this case, where
5 Congress has made a policy determination that
6 indicates -- that -- that -- that creates a
7 sentencing disparity and indicates that this is
8 a really unfair circumstance?

9 MR. FEIGIN: Well, I -- I guess two
10 points to that, Your Honor.

11 It's not phrased as a totality of the
12 circumstances as such. It's extraordinary and
13 compelling reasons that warrant a sentence
14 reduction, and so you have to consider whether
15 something that is being put on the table can
16 contribute to that inquiry.

17 And I guess the second point, which
18 builds on the first, is, if you don't -- you
19 have a mix, and you don't have to, like, tease
20 it out into individualized reasons necessarily,
21 but, if you have a mix that is not going to be
22 sufficient, the other reasons that
23 Mr. Frederick mentioned this morning, and
24 they're not going to be sufficient on their
25 own, I think their claim in this case, the only

1 way they can succeed in this case is if they
2 are allowed to add this additional factor to
3 the mix.

4 Now that -- the upshot of adding that
5 additional factor is they are adding something
6 that is manifestly not extraordinary and not
7 compelling because it is the normal operation
8 and here the express operation of
9 non-retroactivity law. And --

10 JUSTICE BARRETT: Mr. Feigin -- sorry,
11 go ahead and finish.

12 MR. FEIGIN: And it also -- again,
13 I -- I hate to keep repeating myself, but I
14 think it's a point worth really driving home
15 yet again. It's effectively, if you think
16 about it in -- on the flip side of the coin,
17 creating judicial parole by unlocking the door
18 to things that would not be extraordinary and
19 compelling if that consideration were not on
20 the table, and all of a sudden they can become
21 a reason for release.

22 Thank you for your patience.

23 JUSTICE BARRETT: I just wanted to ask
24 you about your Loper Bright point and the
25 degree of discretion that the Sentencing

1 Commission does here -- has here.

2 Am I -- I'm going to state it, and
3 then you tell me if I'm understanding your
4 point correctly.

5 You don't dispute -- Justice Kavanaugh
6 pointed out that the terms "extraordinary and
7 compelling" are capacious terms, and so the
8 Sentencing Commission does have some discretion
9 within words like that to -- to enact policy
10 statements, right? Just -- just --

11 MR. FEIGIN: Correct.

12 JUSTICE BARRETT: Okay. I'm getting
13 to the point I think that -- that you want me
14 to.

15 Your point about Loper Bright is that
16 that discretion has to happen between certain
17 goalposts, and the fact that the First Step Act
18 has imposed a rule of non-retroactivity means
19 that the Commission has exceeded the limits on
20 its authority. So it's not that it doesn't
21 have a lot of discretion, but, here, it's
22 bumped beyond that.

23 MR. FEIGIN: That's exactly right,
24 Justice Barrett.

25 JUSTICE BARRETT: Okay.

1 MR. FEIGIN: And I think one problem
2 with their position -- and I think it's been
3 well illustrated in the -- the other arguments
4 in this case this morning -- is there's really
5 no limiting principle to what they're saying
6 the Commission could do.

7 They are -- I -- I -- I -- I -- I
8 admit I'm a little confused as to what their
9 answer is to the hypothetical where the
10 Commission just decides to allow courts to
11 disagree with mandatory minimums, but I think
12 the reason they're not giving you a clear
13 answer that the Commission couldn't do that is
14 because it logically torpedoes their argument
15 because, in their view, the Commission can say
16 anything it wants, as long as it hasn't
17 expressly precluded sentence reductions.

18 But, of course, a mandatory minimum
19 like the one in 924(c) just says the defendant
20 -- if you look at the language there, that it
21 just says the defendant "shall be sentenced to
22 a term of no less than five years." If you
23 could --

24 JUSTICE SOTOMAYOR: So define the
25 goalposts for me.

1 MR. FEIGIN: So --

2 JUSTICE SOTOMAYOR: I mean, you're
3 saying they've gone past some goalposts. But
4 Congress has not said anywhere you, Commission,
5 can't look at non-retroactive changes in law.
6 It hasn't said you can't look at changes in
7 mandatory minimums. It hasn't said -- the only
8 thing you can't look at alone, it said, is
9 rehabilitation. That's the only limitation
10 Congress has said.

11 MR. FEIGIN: Well, it has said, Your
12 Honor, under 994(a) that the Commission's
13 policy statements have to be consistent with
14 law. As for rehabilitation --

15 JUSTICE SOTOMAYOR: Well, there is no
16 law that says that. There's no law that --
17 that -- that limits what they can consider, as
18 a --

19 MR. FEIGIN: Well, your Honor, I think
20 even -- I'm sorry.

21 JUSTICE SOTOMAYOR: And 353 -- 53 --
22 3553 -- 3553(a) -- thank you -- I'm tongue-tied
23 on that one -- does permit courts to look at
24 disparity with co-defendants or with others.
25 So I don't know where you're defining that the

1 goalpost is defined by something that's not
2 specified in law.

3 MR. FEIGIN: So let me -- let me tease
4 that out a little bit. I think they're not
5 trying just to look at -- there are a few
6 points. Number one is the colloquy I was
7 having with Justice Kavanaugh in the first case
8 about why the 3553(a) factors aren't the
9 relevant consideration at this part of the
10 inquiry.

11 But even beyond that, they're not just
12 looking at disparities alone. They're looking
13 at disparities with offenders who were
14 sentenced under a non-retroactive law that
15 applied to them but didn't apply to these
16 offenders.

17 And I think even they -- even my
18 friends on the other side would have to agree
19 that there -- you can draw some implicit
20 lessons from Congress's enactments. To get to
21 Justice Gorsuch's questions, that's exactly why
22 the Commission claimed -- I think, would claim
23 that it has exempted its own non- -- it's own
24 non-retroactive amendments from its policy
25 statement.

1 It's because it believes that if it
2 didn't do that, it would be overriding the
3 limitations in 3582(c)(2). And if it can't
4 override 3582(c)(2), I don't understand why it
5 can override Section 403(b) of the First Step
6 Act.

7 Essentially, what they're saying is
8 that because none of these statutes expressly
9 speak to sentence reductions -- I guess,
10 3582(c)(2) does to some degree, but it doesn't
11 expressly preclude the use of 3582(c)(1)(A)(i),
12 when there are other circumstances involved --
13 because they don't expressly speak to sentence
14 reductions, they are automatically possibly on
15 the table. And the -- if that's true, then
16 there is substantial separation-of-powers
17 concerns because then they essentially have the
18 pen on sentencing law.

19 Now, if I could address rehabilitation
20 for a second, Justice Sotomayor, I think there
21 are a couple of points.

22 One is rehabilitation is something
23 that I think could otherwise have been
24 considered an extraordinary and compelling
25 reason. I think there are examples of many

1 prisoners who would claim that they have
2 extraordinary and compelling stories of
3 rehabilitation.

4 One thing that they're able to do
5 under their position is just to take that
6 rehabilitation, combine it with a
7 non-retroactive change in law, something we
8 know Congress didn't want to apply to these
9 kinds of offenders --

10 JUSTICE SOTOMAYOR: So do you think
11 that someone who has rehabilitated, been in
12 jail for 40 years, let's say, and is now 90
13 years old, and they have spent most of their
14 life in prison, could not have a claim for
15 compassionate release if they come in and said
16 I'm 90 years old, I'm going to die soon,
17 because rarely do you last very long after 90,
18 the chances are very slim, and now there's been
19 a change in law, I can't qualify under your
20 reading of this?

21 MR. FEIGIN: So, Your Honor, in the
22 absence of (b)(6), even the Commission wouldn't
23 allow release under those circumstances because
24 it's not age as such. It's limited -- I think
25 it's (b)(2) is limited to age-related

1 infirmities.

2 JUSTICE SOTOMAYOR: So your answer is
3 that wouldn't be enough.

4 MR. FEIGIN: I think it might within
5 the --

6 JUSTICE SOTOMAYOR: Even if -- and
7 there -- I didn't add that there was a change
8 in law, all right? Because that's what's at
9 issue here.

10 MR. FEIGIN: So, Your Honor, if those
11 -- I think that those may not be extraordinary
12 and compelling on their own. If they were
13 extraordinary and compelling on their own --

14 JUSTICE SOTOMAYOR: We're back to that
15 question.

16 MR. FEIGIN: -- we wouldn't be -- we
17 wouldn't have -- this question wouldn't ever
18 come up.

19 JUSTICE SOTOMAYOR: All right.

20 MR. FEIGIN: The other problem with
21 994(t) I think is a real -- that's a real
22 problem for them is they don't -- if they want
23 to follow the expressio unius principle from
24 the consideration of you can't consider just
25 rehabilitation alone to its logical conclusion,

1 then I -- I don't see how they're able to
2 maintain their position.

3 The -- what 994(t) says about
4 rehabilitation is that it's a consideration
5 that can be considered in conjunction with
6 other factors but not on its own. But that
7 seems to be exactly how they're treating
8 non-retroactive changes in law as well. So if
9 they think 994(t) is something that says only
10 rehabilitation can be treated in a particular
11 way, they're violating their own principle.

12 I think 994(t) is just about limiting
13 consideration of that one principle. If they
14 instead think that non-retroactive changes in
15 law can on their own be reasons why someone
16 could get a sentence reduction, then I think
17 there are even further problems with their
18 position.

19 But under their position, the
20 Sentencing Commission could, in theory, come
21 out with a rule that allows district courts
22 simply to disagree with mandatory minimums.
23 And then, as we specify in our brief, the
24 district court says at sentencing: Well, you
25 don't qualify for this safety valve.

1 Unfortunately, even though I'd rather not, I'm
2 forced to sentence you to this mandatory
3 minimum but I'd be very open to a compassionate
4 release motion.

5 The prisoner files one the next day.
6 He waits 30 days. And the district court --
7 because the BOP is not going to endorse it.
8 And then 30 days later, the district court's
9 able to reduce the sentence. That cannot be
10 the way this works.

11 Yet, if they say that that can't
12 happen, that that's somehow some kind of abuse
13 of discretion, that the Commission doesn't have
14 that authority, then I don't see how they have
15 the authority --

16 JUSTICE JACKSON: That's because it's
17 a direct --

18 MR. FEIGIN: -- they're asserting
19 here.

20 JUSTICE JACKSON: Their -- their
21 theory is that that is a direct conflict with
22 Congress's statement in the statute that this
23 is our policy choice with respect to what kind
24 of sentence applies in this circumstance. And
25 what I take them to be saying -- and this is, I

1 think, a really legitimate question -- is do we
2 have that same kind of conflict here?

3 You suggest and you -- I think the
4 linchpin of your argument is that Congress's
5 determination not to make this retroactive is a
6 statement that Congress did not want anybody
7 who was already serving these sentences to
8 benefit from this sentence reduction.

9 But I think there's also the
10 possibility that, instead of that inference
11 being drawn from the retroactivity
12 determination, there's the inference that
13 Congress did not want to impose all of the
14 administrative burdens that would apply or that
15 would arise if there was categorical
16 application of this to everyone without -- you
17 know, the -- the way in which retroactivity
18 works.

19 If we believe that that's what
20 Congress was saying, that's what Congress was
21 saying when it said no retroactivity, there
22 isn't a conflict with a circumstance in which
23 you look at 3553(a) and you look at 3582, the
24 -- the compassionate release, and take into
25 account something like sentencing disparity.

1 MR. FEIGIN: Well, Your Honor, I think
2 it's difficult to look at 403(b), particularly
3 in contexts where Congress did enact other
4 retroactivity mechanisms and plainly did so,
5 because in the entire interregnum period
6 between the Fair Sentencing Act and the
7 enactment of Section 404, which made the Fair
8 Sentencing Act of 2010's changes for crack
9 cocaine offenders retroactive, and during that
10 entire eight-year period no one ever thought
11 that Section 3582(c)(1)(A)(i) could do work for
12 at least some subset of those offenders, I
13 think it's a little difficult to look at 403(b)
14 in that context and see it as anything other
15 than as a policy judgment to leave offenders
16 who had final sentences stuck with their old
17 sentences.

18 JUSTICE JACKSON: What do we -- what
19 do we do with the fact that Congress did not
20 speak to its directive in the compassionate
21 release scenario that you look, as a judge, to
22 3553(a), which allows for consideration of
23 sentencing disparities? It seems to me that if
24 you're right, Congress would have needed to
25 amend the compassionate release statute, either

1 within the statute itself or taking out 3553(a)
2 or addressing it like it did in 90 -- 994(t) to
3 take the sentencing reductions out of it.

4 MR. FEIGIN: I don't think so, Your
5 Honor. I think that's imposing kind of a clear
6 statement rule on Congress to exclude
7 particular enactments of law from the operation
8 of 3582(c)(1)(A)(i). It certainly didn't do so
9 in 924(c) itself in saying a defendant shall be
10 sentenced to a particular offense.

11 And to your earlier point about
12 administrative burdens, I think what Congress
13 would have been creating if it allowed for this
14 kind of judicial parole system is an even
15 greater administrative burden on the courts
16 because what it's telling -- what it's
17 re-enacting is exactly what we had
18 pre-Sentencing Reform Act, where there's kind
19 of a forced rehabilitation scheme. We talked
20 about this a little bit in our brief in Rico,
21 the case the Court heard last Monday, where
22 offenders think that -- prisoners think that
23 they need to rehabilitate and that's how
24 they're going to get out, and so they work to
25 rehabilitate, and five years from now, we'll

1 see each of these 2412 affected 924(c)
2 offenders, to the extent they haven't already
3 been let out, claim rehabilitation.

4 And if that fails, they'll file
5 another one a couple years after that. And I
6 don't think that's the scheme that Congress was
7 creating, which is even more burdensome than
8 some of the streamlined schemes that were
9 developed under Section 404.

10 JUSTICE KAVANAUGH: Why -- why did
11 Congress distinguish, do you think or do you
12 know, the crack offense retroactivity from the
13 924(c) offense retroactivity?

14 MR. FEIGIN: Well, the crack offense
15 retroactivity was actually making up for a -- a
16 loop -- not a loophole but a problem it
17 perceived after the Fair Sentencing Act, where
18 it -- as the Court discussed in Dorsey, it had
19 made the changes effective from that day
20 forward, essentially, exactly what Congress
21 then decided to do in 403(b) and was making up
22 for that for the set of prisoners who were
23 still in prison for those offenses.

24 I think, actually, the fact that
25 Congress was deliberately doing that, that is,

1 truing up offenders where it had enacted a
2 403(b)-like scheme and at the same time
3 enacting 403(b), really does point up that
4 contextually Congress could not have meant to
5 be allowing the kind of thing that Petitioners
6 say they're allowing here.

7 Nor would it just be 403(b) because
8 Section 401 of the First Step Act made some
9 further changes to the drug sentencing
10 provisions of 21 U.S.C. 841, changing the
11 nature of the predicates, and for that, there
12 is a 401(b) that looks exactly like 403(b).

13 And there's another -- the Commission
14 estimated in 2021 3,742 offenders who would be
15 affected by that. So, to the extent they're
16 still in prison, it would be opening the door
17 to sentence reduction motions by them.

18 There's another level of the problem
19 here, which is that it -- the Commission's rule
20 (b)(6) also purports to authorize reliance on
21 other non-retroactive changes in law. So we --
22 we will get things like and are getting things
23 like claims under Booker, United States against
24 Booker, which is non-retroactive about the
25 changes to the guidelines, the advisory

1 guidelines, and any -- all sorts of other
2 claims about non-retroactive changes in law.

3 So you will get the -- some kinds of
4 things that would have been a problem -- that
5 would exhibit the sorts of problems I was
6 mentioning in the last case, where something
7 has to be retroactive in order to qualify as a
8 valid Section 2255 claim.

9 I mean, it's an overused --

10 JUSTICE JACKSON: Can I just ask you
11 one more thing about the Commission?

12 MR. FEIGIN: Yeah.

13 JUSTICE JACKSON: How is it that the
14 Commission is way out of line in a situation in
15 which the courts were deeply split on this
16 issue to begin with before the Commission even
17 entered?

18 MR. FEIGIN: Well, Your Honor, I don't
19 think the mere fact that the courts were split
20 reflected that the Commission could resolve
21 that reasonable policy disagreement because, as
22 we --

23 JUSTICE JACKSON: So you're saying the
24 Commission had to choose, it had to pick --

25 MR. FEIGIN: Well, as we express --

1 JUSTICE JACKSON: -- either you can
2 never use it or you -- you can always use it,
3 because that was the split?

4 MR. FEIGIN: Well, as we expressly
5 told the courts, like, once this became -- and
6 as the Third Circuit recognized in this case,
7 once one of the courts, the -- the six courts
8 that went in our favor as opposed to the four
9 that didn't, I mean, once they agree with us
10 that this is not a valid consideration under
11 the statute, the Commission doesn't have the
12 authority to adopt under the statute.

13 And this is also what the three
14 dissenting commissioners said. The Commission
15 doesn't have the authority to adopt under the
16 statute something that the statute doesn't in
17 the first place allow.

18 JUSTICE JACKSON: That just means you
19 disagree with the Commission's statutory
20 reading. I guess I'm just trying to understand
21 why it's unreasonable given that some courts
22 agreed or thought that it was okay under the
23 statute.

24 MR. FEIGIN: Well --

25 JUSTICE JACKSON: The Commission

1 just -- it seems to me the Commission agreed
2 with the courts that didn't agree with you,
3 said it was okay under the statute but only
4 under these limited circumstances.

5 Why is that just completely an abuse
6 of the Commission's authority?

7 MR. FEIGIN: Because we -- I mean -- I
8 mean, to put brass tacks to it, Your Honor, the
9 four courts that thought this was permissible
10 under the statute are wrong. And it's not just
11 a re -- it's not resolving some sort of, you
12 know, you could do it one way, you could do it
13 another way kind of disagreement between the
14 courts of appeals.

15 If you can't do it under the statute,
16 which is what the majority of courts had said,
17 then the Commission can't do it either. And
18 they can't do it in a purportedly limited way
19 that, as I mentioned earlier, is not
20 particularly limited.

21 But, as I was about to say, I mean, I
22 think it's an overused kind of homily that
23 Congress doesn't hide elephants in mouse holes,
24 but this is a -- a pretty big elephant to have
25 hidden in this mouse hole and -- for Congress

1 to have done with Section 3582(c)(1)(A)(i)
2 reductions. And I don't think there's any
3 evidence in the history, any evidence in the
4 context, that that's what Congress was
5 directing these things at.

6 I think this applies to both the cases
7 this morning, both Section 2255 claims and
8 non-retroactive changes in law. There are
9 often cases in which Congress decides to
10 ameliorate sentences going forward. The Court
11 has described those as perfectly ordinary
12 decisions by Congress. It's also the ordinary
13 business of the courts to reinterpret statutes
14 which can also be non-retroactive, particularly
15 where they're just dealing with procedural
16 matters.

17 And I don't think Congress was opening
18 the door up for those kinds of claims either.
19 Even if a lot of these claims are going to be
20 rejected, they are quite burdensome on courts.
21 That's true in the 2255 context, where you've
22 essentially got new habeas motions and -- or
23 post-conviction motions.

24 And it's going to be equally true in
25 this case, where the court has to go through

1 the individualized circumstances of each
2 defendant and try to combine all the apples and
3 oranges to figure out whether this particular
4 prisoner is deserving of relief.

5 JUSTICE KAGAN: I guess what strikes
6 me, Mr. Feigin, is that there is neither an
7 elephant nor a mouse hole here. Not a mouse
8 hole because Congress is perfectly well aware
9 of sentencing modification proceedings and
10 knows that this is an important part of the
11 criminal process and then not an -- not an
12 elephant in -- in -- in the following way.

13 I mean, what you are saying is that
14 when Congress set up a rule that says this
15 statute should apply prospectively, not
16 retroactively, Congress must have meant with
17 respect to everybody in all circumstances.

18 And that seems, you know, just --
19 I'm -- I -- I think I'm going to make you
20 repeat your argument about why that's true
21 because, if we take it as a given that the
22 Sentencing Commission could not say, of course,
23 if you come in in a sentencing proceeding,
24 we'll give you relief no matter what, all you
25 have to do is point to a sentencing disparity,

1 then I might say, okay, now you have an
2 elephant problem.

3 But that's not what the Sentencing
4 Commission did. The Sentencing Commission set
5 particular criteria and then, on top of that,
6 said only given all the surrounding
7 circumstances of your case.

8 So what the Sentencing Commission did
9 was to say we're respecting the rule that
10 Congress has set up, but the rule that Congress
11 set up is a categorical one that doesn't ask us
12 to say within an individual case that the
13 sentencing disparity can have no weight at all.

14 MR. FEIGIN: Well, let me address the
15 mouse hole and the elephant point separately.

16 As to the mouse hole point, I think we
17 did have a mouse hole here because neither they
18 nor any of their amici nor any of the parties
19 or amici in the previous case have ever pointed
20 to a single instance of Section
21 3582(c)(1)(A)(i) ever being used for these
22 kinds of legal changes that they're pointing to
23 in the -- in these set of cases. So I don't
24 think Congress had any reason to anticipate
25 that this was an option on the table.

1 And I realize I have -- I apologize --

2 CHIEF JUSTICE ROBERTS: Why don't you
3 finish and then we won't --

4 MR. FEIGIN: I'm sorry.

5 JUSTICE KAGAN: I won't ask any more
6 questions.

7 MR. FEIGIN: And we do have a stoppage
8 time. So the -- as to the elephant, Your
9 Honor, I do think that this would be
10 authorizing quite a lot because I think there's
11 been a lot of focus on what's going to get
12 granted and what isn't.

13 I think there are a lot of motions
14 that are going to get granted. It's not a huge
15 and significant difference, but we are seeing
16 higher percentages of grants in the circuits
17 that do allow consideration of non-retroactive
18 changes in law.

19 I think we have every reason to
20 believe that that could increase in the future
21 as prisoners decide to build up some kind of
22 record that might suggest rehabilitation and
23 then force the courts to evaluate whether
24 they've done enough. There is absolutely no
25 time limit on or numerical limit on the number

1 of these motions that we will see.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas, anything?

5 Justice Alito?

6 Justice Sotomayor? You don't get a
7 chance.

8 Justice Gorsuch?

9 Justice Kavanaugh?

10 Justice Barrett?

11 Justice Jackson?

12 Thank you, counsel.

13 MR. FEIGIN: Thank you.

14 CHIEF JUSTICE ROBERTS: Rebuttal,
15 Mr. Frederick?

16 REBUTTAL ARGUMENT OF DAVID C. FREDERICK
17 ON BEHALF OF THE PETITIONER IN CASE 24-820

18 MR. FREDERICK: I'd like to start with
19 Justice Barrett's question. To accept the idea
20 that Section 403(b) applies in the way the
21 government advocates here would be to accept
22 the proposition of implied repeal provisions of
23 the 1984 Act. Nothing in the 2018 Congress
24 suggested that Congress intended to limit the
25 scope of considerations that the Sentencing

1 Commission would authorize.

2 I would accept, though, that under
3 your hypothetical as you posed it, if the
4 Sentencing Commission came and said it shall
5 apply to pending cases, contrary to what
6 Congress said specifically in the 403
7 provision, that would be ultra vires and
8 outside what the Commission did.

9 But I would urge you to look at the
10 words in 994(t), which give the Sentencing
11 Commission very broad authority to come up with
12 factors, a list of criteria, and to explain the
13 circumstances in which "extraordinary and
14 compelling" would apply.

15 Justice Gorsuch, to your questions, I
16 would suggest that the standard for dealing
17 with an implied repeal are very strict. And so
18 to accept the government's notion here, you
19 would have to accept the idea that words that
20 had nothing to do with compassionate release,
21 nonetheless, were intended to impose limits and
22 that judges would be authorized to create
23 limits.

24 And yet, that goes against a number of
25 this Court's canons. One is the idea we don't

1 have implied repeal unless there's a strict
2 standard that is met. We don't ask for
3 judge-made rules that interfere with
4 congressional statutes that give broad
5 authority. And the third is the idea that we
6 would accept the -- the principle that a
7 statute that speaks directly to a question is
8 somehow going to be negated in some fashion sub
9 silentio by a later enactment.

10 I would urge you also to consider that
11 sentencing length is always part of these
12 compassionate release motions. That doesn't
13 mean that it is an automatic application of the
14 revocation of the stacking that occurred in the
15 2018 Act. It could very well be that a judge
16 says you automatically would have gotten 18
17 years lower, but because of your prison conduct
18 or because of other factors, I deem your
19 reduction only to be 5 years.

20 This Court doesn't need to decide what
21 the extraordinary and compelling circumstances
22 are. It should be for district courts to
23 decide that. All we're asking you to do is to
24 say that judges are not authorized to preclude
25 the consideration of factors that district

1 courts can take into account.

2 This is not a mechanical exercise. It
3 looks at the individual circumstances of every
4 inmate to determine whether, based on the
5 totality of the circumstances, that inmate is
6 entitled to a reduction.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 The case is submitted.

11 (Whereupon, at 12:49 p.m., the case
12 was submitted.)

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