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Notes

STACKING THE DECK: HOW THE EIGHTH CIRCUIT'S DECISION IN *UNITED STATES v. CRANDALL* THREATENS THE FIRST STEP ACT'S BIPARTISAN CRIMINAL JUSTICE REFORMS

ANTHONY PASSELA*

I. DEALT A BAD HAND: THE PLIGHT OF INCARCERATED PERSONS SENTENCED UNDER MANDATORY CHARGE-STACKING

Adam Clausen's life was essentially over when he was twenty-four years old.¹ Over the course of three weeks in 2000, the drug-addicted and homeless Clausen aided friends in committing nine robberies across Pennsylvania and New Jersey before being arrested.² While his co-conspirators accepted plea bargains to testify against him, Clausen exercised his constitutional right to a trial.³ This decision proved ill-fated, not only for the

* J.D. Candidate, 2024, Villanova University Charles Widger School of Law; B.A., 2020, Villanova University. This Note is dedicated to my family, whose support has been instrumental in shaping the person I am today. To my mother, Lucia, thank you for your unyielding love and tireless effort in encouraging my ambitions. To my father, Anthony, who instilled in me a love of reading and writing that has pushed me to expand my intellectual horizons. To my grandmother, Mary, whose warmth and kindness have helped me persevere through even the most challenging times. I would also like to thank my colleagues at the *Villanova Law Review* for their invaluable feedback and guidance throughout the writing process.

1. See generally Shon Hopwood, *I Got a Second Chance After Robbing Banks—and Others Should, Too*, THE ATLANTIC (Dec. 21, 2012), <https://www.theatlantic.com/national/archive/2012/12/i-got-a-second-chance-after-robbing-banks-and-others-should-too/266567/> [<https://perma.cc/ZG6J-YCGJ>] (describing the ordeal of Adam Clausen, who, at twenty-four years old, was sentenced to 213 years in prison).

2. See *United States v. Clausen*, 328 F.3d 708, 709 (3d Cir. 2003) (discussing the details of Clausen's participation in the robberies). In February 2000, Clausen and his accomplices committed nine gunpoint robberies at businesses in Pennsylvania and New Jersey. *Id.*; *The Case for Compassionate Release as a Second Look*, FAMS. AGAINST MANDATORY MINIMUMS, <https://famm.org/stories/the-case-for-compassionate-release-as-a-second-look/> [<https://perma.cc/PC2C-AJRV>] (last visited Mar. 27, 2023) [hereinafter FAMM, Second Look] (discussing Clausen's life leading up to the robberies and his subsequent conviction). Clausen's drug addiction and dire financial straits "propelled him" to commit the brazen armed robbery spree, spanning two states and lasting twenty days. *Id.*

3. See Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 707 (2017) (discussing the procedural background leading up to Adam Clausen's trial); Hopwood, *supra* note 1 (noting that several of Clausen's co-conspirators in his robbery trial accepted plea bargains to testify against him).

guilty verdict that the jury leveled against him, but also for the uniquely severe sentence that federal law required.⁴ Although no one was seriously injured or killed in the robberies, the trial judge imposed mandatory additional consecutive sentences for each robbery conviction because Clausen possessed a firearm during the crimes.⁵ Clausen was sentenced to 213 years in prison, a “de facto life sentence.”⁶

While the phrase “justice for all” is meant to capture the core essence of the American legal system’s egalitarian and democratic ideals, scholars debate whether the methods used and ends attained—like those in Clausen’s case—actually satisfy these principles.⁷ Criminal law—specifically, criminal sentencing—has served as a divisive battleground for this debate since the late 1960s when Congress, pressured by startling increases in crime rates and broader social unrest, created mandatory minimum sentencing guidelines for federal judges.⁸ In addition to increasing the mini-

4. See Hopwood, *supra* note 3, at 707 (discussing the unique severity of the mandatory minimum sentence under 18 U.S.C. § 924(c) (2018) required at the time Clausen was convicted). For a further discussion on this sentencing requirement, see *infra* Section II.A.

5. See United States v. Clausen, No. CR 00-291-2, 2020 WL 4260795, at *1 (E.D. Pa. July 24, 2020) (elaborating on the stacking requirement that the judge was required to impose). The court sentenced Clausen to ninety-seven months of imprisonment for the underlying federal offenses, “nine counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951,” and “nine counts of conspiracy to commit Hobbs Act robbery in violation of the same statute.” *Id.* As then-required by 18 U.S.C. § 924(c)(1), the judge imposed an additional minimum sentence of 205 years to run consecutively to the Hobbs Act sentence. *Id.*

6. See *id.* at *8 (noting that the mandatory stacking requirements resulted in Clausen’s ultimate sentence totaling approximately 213 years of imprisonment).

7. See Caroline Gillette, Student Article, *Do Mandatory Minimums Increase Racial Disparities in Federal Criminal Sentencing?*, UNDERGRADUATE ECONOMIC REV., Feb. 2020, at 1–2 (arguing that while the criminal justice system in the United States “seeks equal outcomes for equal offenses,” systemic racial inequities in sentencing have caused the federal justice system to fall short of this goal); see also Richard A. Bierschbach & Stephanos Bibas, *What’s Wrong with Sentencing Equality?*, 102 VA. L. REV. 1447, 1448 (2016) (emphasizing that, in the broader context of the debate surrounding the federal sentencing guidelines, “[o]ne concern dominates much of modern criminal justice: equality”). Bierschbach and Bibas describe equality as “a broad and nebulous concept” that, in the context of sentencing, is often applied differently in practice than in theory. *Id.* at 1449–50.

8. See Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 U. PA. L. REV. 637, 652 (2022) (linking the “the turmoil of the 1960s” to a shift in the goal of federal firearm legislation “that ended up cementing a focus on possession offenses and steep punishment”); Emma Luttrell Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation’s Centuries-Old Methods to Disarm Black Communities*, 21 CUNY L. REV. 143, 170–73 (2018) (discussing the political and social environment of the late 1960s which prompted Congress to enact the Gun Control Act of 1968). Shreefter notes that “[t]he Gun Control Act of 1968 was signed at the height of civil unrest and Black mobilization” and believes this “timing [to be] quite telling; the government needed to maintain law and order in an environment where Blacks armed themselves and demanded civil rights.” *Id.* at 170; see also Carl Wu, Comment, *Canceling Compassion: Nonretroactivity and the Narrowing of Postconviction Relief in Federal Courts*, 58 CRIM. L. BULLETIN (forthcoming

imum sentence an offender could receive, these new laws required prosecutors to bring multiple charges stemming from the same incident under one indictment in a practice known as “charge-stacking.”⁹ Because each charge carried its own mandatory minimum penalty, the law required judges to sentence convicted defendants to consecutive sentences, thus producing a significantly longer prison term.¹⁰

Mandatory sentencing guidelines have led to a dramatic increase in the prison population over the past fifty years.¹¹ This rapid acceleration of incarceration has gained both the attention of legislators and the public in the last decade, catapulting the topic of federal criminal sentencing statutes into the mainstream.¹² Critics of these sentencing practices note that

2023) (manuscript at 6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4116894 [<https://perma.cc/M8U6-4XX8>] (describing the shift in federal sentencing practices “away from rehabilitation and towards retribution, deterrence, and incapacitation.”). Wu emphasizes the social context that surrounded these changes, arguing that lawmakers “used political racism to rally popular support for such policies under the guise of promoting public safety.” *Id.* (manuscript at 7).

9. See Ryan Costello, Comment, *Stacked Injustice and an Avenue for Relief: The Interplay of “Stacked” 18 U.S.C. § 924(c) Convictions and Expanded Compassionate Release Under the First Step Act*, 100 OR. L. REV. 217, 221 (citing U.S. SENT’G COMM’N, 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 359 (2011)) (discussing charge-stacking in terms of § 924 sentencing). “The practice of stacking allowed prosecutors to bring multiple § 924(c) charges stemming from the same incident, which would trigger mandatory minimum penalties even if the defendant had no prior criminal record.” *Id.*

10. See generally *id.* at 232–42 (outlining several examples of cases where charge-stacking led to significantly disproportionate punishments).

11. See Anjelica Cappellino & John Meringolo, *The Federal Sentencing Guidelines and the Pursuit of Fair and Just Sentences*, 77 ALB. L. REV. 771, 771–72 (2014) (linking the changes in federal sentencing guidelines, with the rapid growth in the federal prison population over the past three decades). Cappellino and Meringolo note that mandatory sentencing guidelines have become powerful prosecutorial tools, resulting in a “91% conviction rate in the federal criminal system, with 97% of all cases entering a plea of guilty prior to trial,” making “imprisonment . . . a nearly unavoidable part of a criminal defendant’s experience in the federal system.” *Id.* at 771. Ultimately, this is a major cause for the total U.S. prison population growing to over 2.2 million, making the incarceration rate in the United States higher than any other country. *Id.* at 772; Michael T. Hamilton, Comment, *Opening the Safety Valve: A Second Look at Compassionate Release Under the First Step Act*, 90 FORDHAM L. REV. 1743, 1746–47 (2022) (describing the “breakneck speed” at which the United States prison population grew during the 1980s); Charles & Garrett, *supra* note 8, at 652–56 (noting the significant use of § 924 in federal firearms prosecutions following the creation of § 924). In the year before the enactment of § 924, roughly 1 in every 81 federal prosecutions were for weapons offenses. *Id.* at 653. By 2016, violations of § 924 accounted for about 1 in every 33 offenders sentenced. *Id.* at 656.

12. See Congressman John Conyers, Jr., *The Incarceration Explosion*, 31 YALE L. & POL’Y REV. 377, 379 (2013) (arguing for congressional action to be taken to remedy a dramatic rise in the federal prison population). Congressman Conyers describes how mandatory sentencing schemes have led to a 36% increase in the length of prison sentences since 1990, prompting a problem of “mass incarceration” in the United States. *Id.* at 379–80; see also Press Release, ACLU, 91% of Americans Support Criminal Justice Reform, ACLU Polling Finds (Nov. 16, 2017),

they have been disproportionately applied to racial minorities.¹³ In 2016, over 83% of offenders convicted for a firearm offense carrying a mandatory minimum penalty were either Black or Hispanic.¹⁴ Further troubling, Black defendants received longer prison sentences than white defendants convicted under the same statute.¹⁵ These disparities have had many negative consequences for communities of color which extend far beyond the prison walls.¹⁶

Both major political parties have recognized the need for action and reform in light of statistics reflecting prisoners serving mandatory minimum sentences.¹⁷ Congress passing the First Step Act (FSA) in 2018 rep-

<https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> [<https://perma.cc/MXU8-PMHS>] [hereinafter ACLU Reform Poll] (highlighting the broad support for criminal justice reform “across the ideological and political spectrum”). In 2017, 71% of Americans agreed that reducing the prison population was an “important” issue and 72% expressed that they would be “more likely to vote for an elected official who supports eliminating mandatory minimum laws.” *Id.*

13. See Gillette, *supra* note 7, at 1 (describing how, from 2012 to 2016, Black males on average “received sentences about [20%] longer than similarly situated white males”). Gillette contends that “this disparity concretely contributes to the mass incarceration of American men of color, which in turn reinforces racial economic inequality.” *Id.*; Costello, *supra* note 9, at 241 (characterizing the application of § 924 sentencing as being “rife with racial disparities”). “In fiscal year 2016, Black offenders were convicted of firearms offenses carrying mandatory minimum penalties more frequently than any other racial group.” *Id.*; see also Norman L. Reimer, *Prison Brake: Rethinking the Sentencing Status Quo*, 58 AM. CRIM. L. REV. 1585, 1597 (2021) (discussing the “weaponization of mandatory minimums to perpetuate racial disparity in sentencing”). Reimer notes the “well-documented racially disparate impact” of the mass incarceration movement, resulting in a federal inmate population today that is composed of over 50% African-American men. *Id.* at 1597, 1609.

14. See WILLIAM H. PRYOR, JR., RACHEL E. BARKOW, CHARLES R. BREYER, DANNY C. REEVES, J. PATRICIA WILSON SMOOT & ZACHARY C. BOLITHIO, U.S. SENT’G COMM’N, MANDATORY MINIMUM PENALTIES FOR FIREARMS OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 24–25, 40–41 (2018) [hereinafter U.S. SENT’G COMM’N, MANDATORY MINIMUMS FOR FIREARMS OFFENSES] (providing data on the racial demographics of § 924 offenders). “In fiscal year 2016, Black offenders continued to represent a majority of offenders (52.6%).” *Id.* at 24. Hispanic offenders represented an 29.5% of this group during the same time period. *Id.*

15. See *id.* at 33 (comparing the average length of sentences imposed under § 924 by the defendant’s race). Black defendants received an average sentence of 165 months compared with an average sentence of 140 months for white defendants. *Id.*

16. See Reimer, *supra* note 13, at 1613 (stating that “when a prison sentence is the ultimate outcome, the real costs of prison are incalculable for the individual sentenced and those in the communities, families, and loved ones from whom they are isolated”). Reimer further criticizes “the fundamental culture in which policy-makers divert resources to imprisonment that could be better spent on education, public health, and community development.” *Id.* at 1610.

17. See Hamilton, *supra* note 11, at 1753–54 (noting the “overwhelming bipartisan support” for the First Step Act (FSA) and characterizing the legislation as “the most significant criminal justice reform bill in a generation”); see also *Conservative Leaders’ Letter to President Trump Expressing Support for First Step Act*, 31 FED. SENT’G. REPORTER 160, 160 (2018) [hereinafter *Conservative Leaders’ Letter*]

resented a two-pronged, bipartisan approach to reforming federal criminal sentencing guidelines to decrease the federal inmate population while maintaining public safety.¹⁸ First, the FSA eliminated mandatory charge-stacking for future sentences under 18 U.S.C. § 924(c), the federal statute which penalizes firearm possession “in furtherance of a crime of violence.”¹⁹ Additionally, the FSA expanded the federal compassionate release program under 18 U.S.C. § 3582 (c) (1) (A), which allows a court to grant compassionate release to incarcerated persons for things like medical conditions, age, family circumstances, or if they demonstrate other “extraordinary and compelling reasons” for release.²⁰ Previously, the pathway for incarcerated persons to receive compassionate release was narrow because requests could only be brought to courts by the Director of the Bureau of Prisons (BOP).²¹ The FSA dramatically changed this process, allowing prisoners to file requests on their own behalf.²² This procedural alteration significantly increased the number of compassionate release requests being heard and granted by federal courts.²³

(describing the recognition “on both sides of the political aisle” a pressing need “to fix our criminal justice system”). The letter further espouses the desire of conservative lawmakers to “improve public safety, reduce costs and enhance human dignity” through the sentencing reforms of the FSA. *Id.*

18. See H.R. REP. NO. 115-699, at 22 (2018) (describing the FSA as intending to “control corrections spending, manage the prison population, and reduce recidivism”). Congress sought for the FSA to make “public safety expenditures smarter and more productive” and reverse the decades-long increase in the federal population, which by 2018 had grown to a point in which it threatened the “remarkable public safety achievements of the last 20 years.” *Id.* at 24.

19. See First Step Act of 2018, Pub. L. No. 115-391 § 403(a), 132 Stat. 5194, 5221–22, (2018) (amending Section 18 U.S.C. § 924(c)(1)(C) by removing the language “second or subsequent conviction under this subsection” from the statute and clarifying that a “violation of this subsection that occurs after a prior conviction under this subsection has become final”); Costello, *supra* note 9, at 243 (describing the FSA’s amendments to the § 924 statutory language). The FSA’s change to the § 924 statutory language meant that an offender was only eligible for charge-stacking if that offender had previously been convicted of a § 924 offense in a *separate* criminal case. *Id.* This modification in the existing law essentially made § 924 “a true recidivist statute” rather than a prosecutorial tool that could be used to increase the total sentence length stemming from a single indictment. *Id.*

20. See First Step Act § 603(b) (amending § 3582 by inserting language which permitted courts to consider compassionate release requests “upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf”).

21. See Kevin Trowel, *Statutory Interpretation, the First Step Act and Compassionate Release*, 74 BAYLOR L. REV. 197, 202 (2022) (highlighting that “[u]nder the original version of Section 3582(c)(1)(A), the absence of a motion from the BOP on behalf of an inmate seeking compassionate release was a jurisdictional defect that precluded relief in federal courts”).

22. See *id.* at 204 (outlining the effect of the FSA’s “procedural” modifications to the compassionate release program). For a further discussion on these procedural changes and their implications, see *infra* notes 62–63.

23. See Trowel, *supra* note 21, at 204 (describing how the FSA increased the number of compassionate release requests heard by courts because motions could

While passing the FSA was a significant accomplishment in the criminal justice reform movement, this bipartisan overhaul contained a notable gap because it did not retroactively overturn the sentences of prisoners previously sentenced under the § 924 charge-stacking requirement.²⁴ Subsequent efforts by Congress to retroactively extend the anti-stacking provisions of the FSA have stalled, forcing prisoners sentenced under the previous § 924 guidelines to turn to compassionate release as a means of bringing their cases to the courts.²⁵ While defendants argued that the resulting sentence disparity should be considered an “extraordinary and compelling” reason for release, the federal circuit courts have issued divergent rulings.²⁶ The First, Fourth, and Tenth Circuits held that federal judges could consider the disparity in sentences created by the non-retroactive change in the law as grounds for compassionate release.²⁷ Meanwhile, the Third, Sixth, and Seventh Circuits proffered a narrower reading

now be brought by the inmates themselves, and not solely by the Director of the BOP). *See generally* U.S. SENT’G COMM’N, COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC (2022) (providing data which shows a dramatic increase in both the number of compassionate release request motions brought before courts and the number of requests granted following the passage of the FSA).

24. *See* Costello, *supra* note 9, at 243–44 (calling Congress’s decision not to retroactively apply the statute to offenders previously sentenced under § 924’s charge-stacking requirement a “foreclosed avenue[] of relief”). Costello argues that this decision created a significant disparity between § 924 sentences imposed before and after the passage of the FSA that seems counterintuitive to the legislation’s goals of creating uniformity and fairness in federal criminal sentencing guidelines. *Id.* at 255–57.

25. *See generally* The First Step Implementation Act, S. 1014, 117th Cong. (2021) (proposing legislation that would retroactively extend the elimination of stacking for § 924 offenses to persons sentenced before the law’s passage). For a further discussion on the increase in compassionate release requests following the passage of the FSA, see *supra* note 23 and accompanying text.

26. *See* Hamilton, *supra* note 11, at 1755–57 (outlining the development of the current federal circuit court split on the proper interpretation of the “extraordinary and compelling” reasons language in § 3582 to cases concerning the FSA’s non-retroactive changes in the § 924 sentencing guidelines). For a further discussion on the differing opinions issued by the federal circuit courts on this issue, see *infra* Section II.D.

27. *See* United States v. McCoy, 981 F.3d 271, 286 (4th Cir. 2020) (finding that the sentencing disparities created by the non-retroactive changes to § 924 could constitute an extraordinary and compelling reason for sentence reduction); United States v. Maumau, 993 F.3d 821, 837 (10th Cir. 2021) (following the logic of *McCoy* in holding that judges should consider “a combination of factors” in evaluating a defendant’s request for compassionate release); United States v. Ruvalcaba, 26 F.4th 14, 28 (1st Cir. 2022) (reasoning that the “extraordinary and compelling” reasons criteria should be viewed broadly as granting district courts the ability to determine the proper grounds for a sentence reduction on a case-by-case basis).

of “extraordinary and compelling” reasons, holding that the FSA’s non-retroactive changes to sentencing guidelines were not grounds for compassionate release.²⁸

The Eighth Circuit sided with the narrower view of compassionate release in *United States v. Crandall*,²⁹ holding that the sentencing disparity between those convicted before and after the passage of the FSA was neither sufficiently “extraordinary” nor “compelling” to warrant sentence reduction.³⁰ The court interpreted Congress’s choice to only apply the anti-stacking amendments to future sentences as a deliberate attempt to limit the scope of the FSA.³¹ Furthermore, because the plight of these offenders was neither distinctly unique nor contrary to Congressional sentencing mores, it could not be considered “extraordinary” nor “compelling” under § 3582.³²

This Note contends that the Eighth Circuit mischaracterized the legislative intent of the FSA by analyzing the amendments to § 924 in isolation from the social policy goals of the broader legislation, which sought to serve as a literal “first step” in reducing the prison population; incrementally moving the federal sentencing regime away from unduly harsh practices like “stacking” in favor of more individualized sentencing.³³ Part

28. *See United States v. Andrews*, 12 F.4th 255, 260–61 (3d Cir. 2021) (holding that courts should interpret § 3582 narrowly to find that a “lawfully imposed sentence,” even in light of later changes to sentencing guidelines, cannot be considered an “extraordinary and compelling” circumstance for sentence reduction). The Third Circuit strongly diverged from the reasoning in *McCoy*, thus creating a circuit split. *See United States v. Thacker*, 4 F.4th 569, 573–76 (7th Cir. 2021) (following the reasoning of *Andrews* by declining to grant a reduction in sentence because of non-retroactive changes in sentencing guidelines); *United States v. Jarvis*, 999 F.3d 442, 444–46 (6th Cir. 2021) (determining that a sentence reduction based on a non-retroactive change in a federal criminal statute would impermissibly usurp Congress’s authority over sentencing guidelines and conflict with its intent to limit the FSA’s reforms to future sentencing hearings).

29. 25 F.4th 582 (8th Cir. 2022), *cert. denied*, 142 S. Ct. 2781 (2022).

30. *See id.* at 585–86 (holding that “a non-retroactive change in law, whether offered alone or in combination with other factors, cannot contribute to a finding of ‘extraordinary and compelling reasons’ for a reduction in sentence under § 3582(c)(1)(A)”).

31. *See id.* (finding that while Congress had “opted in 2018, to assign a new, less substantial, mandatory punishment for multiple violations” of § 924, it had stopped short of “declar[ing] that the previous Congress . . . prescribed an inappropriate punishment”). For a further discussion on the *Crandall* court’s interpretation of the FSA, see *infra* notes 110–113 and accompanying text.

32. For a further discussion on the *Crandall* court’s interpretation of § 3582’s “extraordinary and compelling” reasons standard, see *infra* notes 117–124 and accompanying text.

33. *See H.R. REP. NO. 115-699*, at 22–24 (2018) (recognizing that the “federal prison system needs to be reformed through the implementation of corrections policy reforms designed to enhance public safety by improving the effectiveness and efficiency of the federal prison system in order to control corrections spending, manage the prison population, and reduce recidivism”). The growing prison population was a major catalyst for the passage of the FSA, with lawmakers noting that the rising costs associated with maintaining the growing prison population

II of this Note discusses the historical development of § 924 and § 3582, highlighting the shortcomings of both statutes that ultimately led to the passage of the FSA and the ensuing circuit split regarding compassionate release requests. Part III summarizes the factual and procedural background of *Crandall*. Part IV details the reasoning behind the Eighth Circuit's holding. Part V provides a critical analysis of the holding in *Crandall* and asserts that, by failing to adequately consider both the historical background and overall goal of the FSA, the Eighth Circuit misapplied the "extraordinary and compelling" reasons standard. Finally, Part VI considers the impact that the holding in *Crandall*, along with the broader circuit split, has for our criminal justice system and looks at potential avenues for resolution.

II. LOST IN THE SHUFFLE: HOW CONGRESSIONAL EFFORTS TO FIGHT CRIME LED TO OVER-INCARCERATION

The social and political factors that led to sentences—like the one handed down to Adam Clausen—stem from a longstanding debate concerning federal sentencing guidelines.³⁴ The origins of charge-stacking date back to the 1960s when Congress sought to address a groundswell of civil unrest and rising violence by increasing federal penalties for weapons-related crimes.³⁵ Pushback to this philosophy emerged after a dramatic

created a resource drain in the Department of Justice that presented "a real and immediate threat to public safety." *Id.* at 22; *see also* *Concepcion v. United States*, 142 S. Ct. 2389, 2394 (2022) (finding that "Congress in [passing] the First Step Act did not contravene well-established practices" permitting broad judicial discretion in sentencing); Costello, *supra* note 9, at 248 (arguing that, based on the legislative history of the FSA, "ample evidence . . . exists to suggest that Congress did intend for a case-by-case analysis" by district court judges on whether an incarcerated person sentenced under the previous § 924 stacking requirement should be granted compassionate release). Costello emphasizes that while the FSA did not provide "blanket retroactive relief" to all those convicted under stacked § 924 charges, Congress did provide such inmates with access to relief on a "case-by-case basis" through the procedural expansions to the compassionate release program. *Id.* at 244; *see also* Hamilton, *supra* note 11, at 1751 (arguing that "by lodging the authority to review and reduce sentences in federal district courts, Congress intended to 'keep [] the sentencing power in the judiciary where it belongs.'" (alteration in original) (quoting S. REP. NO. 98-225, at 121 (1983))).

34. *See* Hopwood, *supra* note 3, at 695–96 (discussing the negative consequences associated with the increased number of federal criminal statutes carrying severe and determinate penalties). Hopwood argues that "[a]s the volume of criminal laws has increased, so has the level of ambiguity within those laws, leaving to federal prosecutors and the courts the task of defining the contours of the criminal code." *Id.* (footnote omitted); *see also* Charles & Garrett, *supra* note 8, at 646–52 (discussing the federal government's gradual development of laws governing firearm use and possession). Charles and Garrett track the development of these laws from initial attempts to stop organized crime in the 1930s by creating the first federal weapons criminal statutes to the Gun Control Act (GCA), which dramatically expanded both the scope of firearm regulation and the severity for violations of these laws. *Id.*

35. *See* Charles & Garret, *supra* note 8, at 653 (noting the various social and political factors which prompted Congress to pass the GCA). The late 1960s saw a

increase in the federal prison population, which disproportionately affected racial minorities.³⁶ While Congress would attempt to address this concern by creating the compassionate release program through § 3582, the procedurally narrow scope of the program precluded many incarcerated persons from relief.³⁷ In 2018, Republicans and Democrats in Congress, startled by the continuing and dramatic rise in the prison population and the harshness of mandatory criminal sentences, passed the FSA.³⁸ While the FSA was a monumental win for criminal justice reform advocates, the subsequent judicial interpretation of the law created a circuit split that excluded many incarcerated persons from relief.³⁹

A. *Laying the Cards on the Table: The Development of Charge-Stacking Under § 924*

For nearly a century, Congress used federal criminal statutes as a vehicle for addressing gun crime and related social policies.⁴⁰ Section 924, which was first passed as an amendment to the Gun Control Act of 1968

wave of “political protests and high-profile political assassinations” which made gun control a top priority among lawmakers. *Id.*; see also Shreefter, *supra* note 8, at 170–71, (highlighting that “[t]he Gun Control Act of 1968 was signed at the height of civil unrest and black mobilization”). Widespread racial protests and resulting riots led “police departments and governments [to perceive] a need for greater crime control,” ultimately culminating in the passage of the Gun Control Act of 1968. *Id.* at 172–73.

36. For a further discussion on the increase in prison population following the enactment of mandatory sentencing guidelines and the disproportionate use of these guidelines against racial minorities, see *supra* notes 11–16 and accompanying text.

37. See David E. Patton, *Guns, Crime Control, and A Systemic Approach to Federal Sentencing*, 32 CARDOZO L. REV. 1427, 1465–66 (2011) (discussing how a rapid growth in the prison population, coupled with noteworthy examples of disproportionately long criminal sentences prompted legislators to enact § 3582 and create the compassionate release program).

38. See Annie Wilt, *The Answer Can Be Yes: The First Step Act and Compassionate Release*, HARV. C.R.-C.L. L. REV. BLOG (Oct. 23, 2019), <https://harvardcrcl.org/the-answer-can-be-yes-the-first-step-act-and-compassionate-release/> [<https://perma.cc/W7KJ-HDF9>] (referencing how the FSA was “touted as [a] significant bi-partisan criminal justice reform”). For a further discussion on the bipartisan origins of the FSA, see *supra* note 17 and accompanying text.

39. See Wu, *supra* note 8 (manuscript at 1) (describing the disagreements among federal circuit courts as to the “scope of eligibility for compassionate release” under the FSA’s expanded procedures). Although the FSA “fundamentally changed the nature of compassionate release,” the circuit split regarding the Act’s statutory language “has eliminated an important category of relief for similarly situated individuals based solely on their geographic location.” *Id.* (manuscript at 12–13); see also Wilt, *supra* note 38 (discussing the discrepancies in outcomes among defendants seeking compassionate relief following the passage of the FSA). While the total number of compassionate release requests has increased, the reform-minded goals of the FSA have been hampered by “delays, uncertainty, and uneven implementation.” *Id.*

40. See Charles & Garrett, *supra* note 8, at 646–52 (discussing the federal government’s earliest criminal laws concerning firearm use and possession). Charles and Garrett note how the National Firearms Act of 1934 and the Federal Firearms

(the GCA), quickly grew to become a major federal enforcement mechanism for these criminal justice objectives.⁴¹ The statute required courts to impose mandatory minimum sentences for those convicted of carrying a firearm during the commission of a federal felony.⁴² Additionally, it required trial judges to impose consecutive sentences for each separate § 924 offense, even if the separate offenses were brought in the same indictment.⁴³ Remarkably, Congress adopted the amendment on the same day it was proposed with minimal floor debate and no corresponding committee hearings, thus leaving minimal legislative history surrounding the initial adoption of § 924.⁴⁴

Despite its hasty passage, § 924 quickly gained a “centrality in firearms prosecutions” amid growing public concerns about crime and congressional support for tougher sentences.⁴⁵ However, the statute’s lack of leg-

Act of 1938 reflect the beginning of the federal government’s jurisdictional expansion into the prosecution of firearms crimes, an area previously relegated to states. *Id.* at 646, 649; Shreefter, *supra* note 8, at 173 (describing the GCA, as “part of the government’s efforts to intensify ‘law and order,’ [and] disarm people who threatened this ‘order,’” particularly African-Americans). Shreefter believes that the GCA and other “anti-crime” measures passed by Congress during the late 1960’s were motivated largely by widespread civil rights protests among African-Americans and sought to target this group. *Id.*

41. See Charles & Garrett, *supra* note 8, at 675 (highlighting that “more firearms charges were brought in just one year, 1975, than in the entire twenty-year period from 1945 to 1965”); see also Shreefter, *supra* note 8, at 170, (noting that the GCA was “the first federal Act making it a crime for persons previously convicted of a nonviolent felony to possess a firearm and/or ammunition”). This element of the GCA “dramatically changed the federal laws that had existed before” by expanding the scope of persons eligible to be prosecuted and the severity of sentences that judges were required to sentence convicted offenders to. *Id.* at 171–73.

42. See Costello, *supra* note 9, at 221–23 (outlining the structure of § 924 as it was passed as part of the GCA). Under this initial iteration of the statute, judges were prohibited from suspending the penalties or granting probation on a discretionary basis. *Id.* at 224.

43. See Charles & Garrett, *supra* note 8, at 655 (describing the application of mandatory sentencing enhancements under the original iteration of § 924). A first conviction under § 924 would be “punishable by a mandatory minimum of one year of imprisonment and a maximum of ten years.” *Id.* “A second conviction for use or unlawful carrying under this subsection resulted in a mandatory minimum of two years and a maximum of 25 years in prison.” *Id.* Additionally, these sentences imposed under § 924 were required to “run consecutively upon the penalty imposed for the base crime.” Costello, *supra* note 9, at 224.

44. See *Simpson v. United States*, 435 U.S. 6, 13 (1978) (discussing the legislative history of § 924). In *Simpson*, the Court noted that the provision creating § 924 was not initially part of the original House version of the GCA, but was instead proposed as an amendment on the House floor. *Id.* “Because the provision was passed on the same day it was introduced on the House floor, it is the subject of no legislative hearings or committee reports.” *Id.* at 13 n.7; see also Costello, *supra* note 9, at 223 (noting that the absence of committee reports or Congressional hearings surrounding the passage of the GCA has left courts with a “limited record” of legislative history from which to infer Congress’s intent).

45. See Charles & Garrett, *supra* note 8, at 656 (noting the reliance of § 924 in federal criminal proceedings following the passage of the GCA). For further dis-

islative history left many trial courts unsure how to apply the charge-stacking provision properly, ultimately relying on Supreme Court intervention.⁴⁶ Congress, concerned that the Court's pro-defendant ruling in that case would inhibit the effectiveness of § 924 in deterring crime, responded by passing the Sentencing Reform Act of 1984 (the SRA).⁴⁷ The SRA increased the severity of mandatory sentences under § 924, established the U.S. Sentencing Commission as a new authority to develop sentencing guidelines, and abolished parole for federal prisoners.⁴⁸ The consequence left prosecutors with broad power to utilize charge-stacking in the courtroom, including against defendants who had no prior convictions or who may have only served as accessories to crimes of violence.⁴⁹

discussion on the significance of § 924 in federal prosecutions following the passage of the GCA, see *supra* note 40.

46. See *Simpson*, 435 U.S. at 12 (addressing the interaction between § 924 and the enhancement statute). The Court held that an inmate could not be sentenced under both the § 924 enhancement and the principal criminal statute for which that inmate was indicted. *Id.* at 12–13; Costello, *supra* note 9, at 225–27 (discussing how the interpretation of § 924's enhancement provision was at issue in several federal cases in the immediate wake of the statute's creation). Costello contends that the ambiguity in the legislative history and the increasing prominence that the statute began serving in federal prosecutions brought this issue to the forefront. *Id.* Some members of Congress saw the Supreme Court's holding in *Simpson* as limiting the effectiveness of the GCA sentencing mandates. *Id.* at 226–27.

47. See Costello, *supra* note 9, at 225–27 (noting Congress's dissatisfaction with the ruling in *Simpson*). Costello describes how Congress felt “the decisions had drastically reduced the effectiveness of the statute.” *Id.* at 226; see also Patton, *supra* note 37, at 1465–66 (discussing the political climate of the 1980s, which prompted legislators to pass the SRA). “The SRA was passed at a time of soaring crime rates, and during a period when crime had increasingly become a national political issue.” *Id.* Patton notes the bipartisan support for the passage of the SRA, with Democrats hoping to lessen judicial discretion that was resulting in a harsher treatment of African-American defendants compared with white defendants, while Republicans generally looked to increase the severity of sentences. *Id.* at 1466.

48. See Charles & Garrett, *supra* note 8, at 656–57 (describing how the SRA “changed the applicable sentences [under § 924] to a flat mandatory five-year term for first time offenders and a ten-year term for a second or subsequent conviction”). The Sentencing Reform Act abolished federal parole and replaced the U.S. Parole Commission with the newly formed U.S. Sentencing Commission. Hamilton, *supra* note 11, at 1750–51. This change was intended to bring “to bring uniformity and certainty to federal sentencing.” *Id.* at 1750.

49. See Patton, *supra* note 37, at 1466–67 (describing how the totality of the SRA bound “judges to a narrow sentencing range based on two factors—the Offense Level and the defendant's Criminal History Category”); Costello, *supra* note 9, at 221 (describing how charge-stacking evolved into a “powerful prosecutorial tool that could be used indiscriminately against recidivist and first-time offenders”).

B. *An Ace in the Hole: The Creation of Compassionate Release as a “Safety Valve” for the Federal Prison System*

While the SRA increased the severity and frequency of stacked § 924 sentences, it also introduced a new pathway for sentence reduction.⁵⁰ Although Congress chose to abolish federal parole, it nevertheless recognized the need for a “safety valve” that would provide relief to incarcerated persons whose case for sentence reduction was exceptionally compelling.⁵¹ This safety valve came about in the form of § 3582, which permitted a court to “modify [an incarcerated person’s] term of imprisonment” when, following the exhaustion of administrative appeals, the court “finds that extraordinary and compelling reasons warrant [a sentence] reduction.”⁵² This determination was to be made in consideration of the factors set forth by Congress in 18 U.S.C. § 3553(a), which broadly govern the imposition of all federal criminal sentences, along with any other applicable policy statements issued by the newly created U.S. Sentencing Commission.⁵³

50. See Hamilton, *supra* note 11, at 1751–52 (describing generally the origins of the compassionate release program devised under § 3582). For a further discussion on the legislative history behind § 3582, see *infra* note 51 and accompanying text.

51. See Hamilton, *supra* note 11, at 1751–52 (noting that, although Congress eliminated federal parole to create “certainty” in sentencing, it nevertheless recognized the need for alternative methods to serve as relief in cases where a sentence was clearly unduly harsh). Congress thus “carved out a ‘safety valve,’ colloquially known as compassionate release” which allowed “federal courts [to] reduce a sentence when ‘extraordinary and compelling reasons’ warranted release.” *Id.* at 1751 (quoting S. REP. NO. 98-225, at 121 (1983)). See generally S. REP. NO. 98-225, at 121 (1983) (describing the ‘safety valve’ function and the situations in which it permits judges to modify sentences). The legislative history behind the SRA further states that the goal of this judicial “safety valve” function is to offer an avenue for sentence reduction in “unusual case[s] in which the defendant’s circumstances are so changed [A]nd the court could grant a reduction if it found that the reduction was justified by ‘extraordinary and compelling reasons’ and was consistent with applicable policy statements issued by the Sentencing Commission.” *Id.* Furthermore, the legislative history expounds that this safety valve function will “assure the availability of specific review and reduction of a term of imprisonment for extraordinary and compelling reasons.” *Id.*

52. See 18 U.S.C. § 3582(c) (2018) (describing the circumstances under which a district court judge may grant compassionate release for “extraordinary and compelling reasons”); see also Trowel, *supra* note 21, at 197–201 (summarizing the creation of the federal compassionate release program under the Sentencing Reform Act of 1984). Congress permitted courts to “grant ‘compassionate release’ to an inmate . . . where (1) the court found ‘extraordinary and compelling reasons’ warranted relief, (2) the relief was consistent with the factors listed in 18 U.S.C. § 3553(a), and (3) the relief was consistent with any ‘applicable policy statements issued by the Sentencing Commission.’” *Id.* at 198 (quoting Sentencing Reform Act of 1984, Pub. L. 98-473, 98 Stat. (1998)).

53. See 18 U.S.C. § 3582(a) (specifying “in determining the length of the term, [courts] shall consider the factors set forth in section 3553(a) to the extent that they are applicable”). 18 U.S.C. § 3553(a) outlines the general factors that all federal courts are to consider when imposing a criminal sentence. 18 U.S.C. § 3553(a) (2018). It instructs courts to “impose a sentence sufficient, but not

The creation of the federal compassionate release program was intended to shift sentencing power away from the Department of Justice and to the judiciary, but confusion over how courts were to analyze compassionate release requests hindered it from serving as a genuine “safety valve.”⁵⁴ While § 3582 instructs courts to consult the factors outlined in § 3553 to determine whether a prisoner has demonstrated “extraordinary and compelling” reasons for release, § 3553 does not provide any specific definitions or enumerated examples of these reasons.⁵⁵ Furthermore, although the U.S. Sentencing Commission was supposed to offer guidance to the courts on this matter, the agency did not offer a substantive description of the “extraordinary and compelling” language until 2007 when it released U.S. Sentencing Guidelines (U.S.S.G.) section 1B1.13.⁵⁶ This policy statement enumerated specific categories of health and family circumstances that qualify as “extraordinary and compelling” reasons for release as well as a “catch-all provision” which permitted the BOP Director to bring a motion for sentence reduction based on other reasons that they determine to be “extraordinary and compelling.”⁵⁷ However, the BOP’s

greater than necessary[] to comply with [the need for the sentence imposed].” *Id.* Factors to be considered in making this determination include the “nature and circumstances of the offense and the history and characteristics of the defendant, the need for the sentence imposed . . . the kinds of sentences available . . . pertinent policy statements . . . the need to avoid unwarranted sentencing disparities . . . [and] the need to provide restitution to any victims of the offense.” *Id.*

54. For a further discussion on this “safety valve” purpose, see *infra* note 128.

55. See John F. Ferraro, Note, *Compelling Compassion: Navigating Federal Compassionate Release After the First Step Act*, 62 B.C. L. REV. 2463, 2481 (2021) (discussing how, in their determination of compassionate release, judges are “also required to consider whether an inmate’s release was appropriate in light of the [§ 3553] sentencing factors”). However, most of these § 3553 factors are “not binding constraints on judges or definitive measures.” *Id.* at 2481 n.117.

56. See U.S. SENT’G GUIDELINES MANUAL § 1B1.13 (U.S. SENT’G COMM’N 2018) [hereinafter U.S.S.G.] (enumerating several circumstances which may be considered under the “extraordinary and compelling reasons” standard); see also Hamilton, *supra* note 11, at 1752 (noting the more than twenty-year delay between the creation of the U.S. Sentencing Commission and the Commission’s promulgation of any specific guidance related to the extraordinary and compelling reasons standard).

57. See U.S.S.G., *supra* note 56, § 1B1.13(1)(A) (stating that “[u]pon motion of the Director of the Bureau of Prisons under [§ 3582][] the court may reduce a term of imprisonment [if] . . . the court determines that [e]xtraordinary and compelling reasons warrant the reduction”); see also Costello, *supra* note 9, at 245 (describing the additional “catch-all” provision contained in § 1B1.13 that permitted courts to consider “an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C)” (quoting U.S.S.G., *supra* note 56, § 1B1.13 cmt. n.1(D))). Costello argues the “catch-all clause” would become “the most important aspect of [the new sentencing guidelines]” and provide the basis for many defendants’ compassionate relief requests moving forward. *Id.*

cumbersome approval process for compassionate release requests prevented most of these “catch-all” cases from reaching courts, thus continuing the ineffectiveness of the compassionate release program.⁵⁸

C. *Reshuffling the Deck: Congress Enacts Reform-Minded Changes to § 924 Stacking and the Compassionate Release Program Through the FSA*

The issues of mass incarceration and judicial discretion in criminal sentencing converged when Congress passed the FSA in 2018.⁵⁹ The FSA eliminated the mandatory stacking of § 924 charges stemming from one indictment, thus precluding prosecutors from enhancing sentences based on convictions brought in the same indictment.⁶⁰ This change, however, only applied to cases where a criminal sentence had yet to be imposed and did not retroactively shorten the prison terms of those already sentenced under the stacking requirement.⁶¹

58. See Wu, *supra* note 8 (manuscript at 11) (describing U.S.S.G. § 1B1.13 as providing little more than “illusory relief” to inmates seeking compassionate release). U.S.S.G. section 1B1.13 left the BOP itself “in control over what ‘extraordinary and compelling’ reasons were” and the department continued to “narrowly construe[] these policy statements” to favor keeping inmates imprisoned. *Id.* The BOP’s lengthy approval process which “require[d] approval at the facility level all the way up to the Office of the General Counsel” meant that few applications made it to courts for review. *Id.*; see also Hamilton, *supra* note 11, at 1752 (arguing that U.S.S.G. § 1B1.13 “mattered little” in aiding district courts’ analysis of compassionate release requests given the continued limited procedural scope of § 3582). While legal scholars and jurists had hoped the Sentencing Commission’s guidance would provide needed clarity regarding compassionate release requests, U.S.S.G. section 1B1.13 did not alter the sluggish pace of relief requests reaching courts because only the BOP Director could bring a request for relief under the new catch-all provision. *Id.* Thus, the BOP maintained its role as the “absolute gatekeeping authority” and retained exclusive power over all avenues of compassionate release. *Id.* (quoting *United States v. Brooker*, 976 F.3d 228, 232 (2d Cir. 2020)).

59. See Wu, *supra* note 8 (manuscript at 30) (describing how Congress sought to “address some harms of the criminal justice system, including granting relief for those with long-term sentences” that Congressional legislation has changed). The FSA “fundamentally changed the nature of compassionate release” by “permit[ting] prisoners to seek a sentence reduction directly from district courts”, thus offering inmates with unduly long prison terms a chance for early release. *Id.* (manuscript at 12).

60. See First Step Act of 2018, Pub. L. No. 115-391, § 403, 132 Stat. 5194, 5221 (2018) (eliminating the charge-stacking requirement by clarifying that a “violation of this subsection that occurs after [a] prior conviction under this subsection has become final”); Costello, *supra* note 9, at 243 (explaining the effect of the language changes to § 924). By removing the “second or subsequent conviction” language from § 924, Congress eliminated the mandatory stacking requirement that had been the subject of controversial sentences since the enactment of § 924 in 1968. *Id.*

61. See § 403, 132 Stat. at 5222 (clarifying that “[t]his section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment”); Costello, *supra* note 9, at 222 (describing the non-retroactive nature of the FSA’s changes to § 924). Costello labels Congress’s

The FSA also greatly expanded the federal compassionate release program.⁶² Motivated by the BOP's sluggishness in bringing release motions to court, Congress changed the procedural provisions for compassionate release under § 3582 to allow prisoners to file the motions themselves.⁶³ While this procedural change did not directly alter statutory language in § 3582, questions soon arose as to whether the change permitted judges to consider reasons for release outside those health and family factors explicitly enumerated in the U.S.S.G. section 1B1.13.⁶⁴

D. *Wild Card: How Courts Have Offered Varying Interpretations of the First Step Act's Implications for Previously Sentenced Offenders*

While the FSA was heralded as a major bipartisan effort to advance criminal justice reform, the non-retroactive changes to § 924 still left many incarcerated people subject to the “odious” practice of charge-stacking and presented federal circuit courts with tough questions on how to reconcile these sentences with the newly expanded compassionate release program.⁶⁵ One point of contention was the instructiveness of the

decision to not retroactively apply the FSA's anti-stacking provision a crucial “foreclos[ure] [of] categorical retroactive relief”).

62. See 164 CONG. REC. S7774 (daily ed. Dec. 18, 2018) (expressing that Congress intended to both “expand” and “expedite[] compassionate release applications” through the passage of the FSA); 164 CONG. REC. H10,362 (daily ed. Dec. 20, 2018) (arguing that the FSA will “improv[e] [the] application of compassionate release”); Wu, *supra* note 8 (discussing the significant impact the FSA's procedural changes to the compassionate release program had on federal inmates). Wu contends that by removing the requirement that the BOP Director file compassionate release motions, the FSA offered previously disenfranchised inmates a significantly greater opportunity for early release. *Id.*

63. See Costello, *supra* note 9, at 244–45 (noting how the BOP “exercised [its] power infrequently”). During one five-year span, the BOP only brought twenty-four compassionate release motions to court, even though it oversaw a population of 218,000 federal prisoners. *Id.* The modifications to § 3582 would remove the BOP as the sole “gatekeeper” in compassionate release requests and allow a larger number of requests to reach the district courts. *Id.* at 222. Congress recognized that requiring all motions for compassionate release to first go through the Director of the BOP created a massive backlog and was the main reason that courts granted so few requests before. *Id.* at 244; Trowel, *supra* note 21, at 204 (outlining the specific procedural reforms that the FSA brought to the compassionate release program).

64. See *United States v. McCoy*, 981 F.3d 271, 274–76 (4th Cir. 2020) (noting the conflict created by the FSA's procedural changes to the filing of compassionate release requests). For a further discussion on this conflict, see *infra* notes 68–69 and accompanying text.

65. See Costello, *supra* note 9, at 243–44 (characterizing the FSA as falling short of its intended goal to alleviate the injustice created by decades of mandatory minimum sentencing guidelines). Costello criticizes the paradoxical nature of the FSA, which simultaneously reduced sentences for future offenders while “foreclos[ing] avenues of relief” for those currently in prison. *Id.* at 244; see also Ferraro, *supra* note 55, at 2467 (discussing the inundation of compassionate release requests following the passage of the FSA). Ferraro notes that “[t]he combined forces of the First Step Act and the COVID-19 pandemic . . . [have] sown

U.S.S.G. section 1B1.13 policy statement following the FSA.⁶⁶ In *United States v. Brooker*,⁶⁷ the Second Circuit held that the policy statement's guidelines did not apply to motions filed by defendants because the language of U.S.S.G. section 1B1.13 only refers to requests brought "upon motion by the Director of the Bureau of Prisons."⁶⁸ Thus, courts were free to assume the role of the BOP in defendant-filed motions and make their own determination of whether "extraordinary and compelling" reasons existed.⁶⁹ While the Eleventh Circuit diverged from this understanding in *United States v. Bryant*,⁷⁰ a majority of federal circuit courts have supported the logic in *Brooker*.⁷¹

division among federal courts" about how to analyze compassionate release requests for "extraordinary and compelling" reasons. *Id.* at 2503.

66. See Recent Case, *Sentencing—Statutory Interpretation—Eleventh Circuit Creates Circuit Split by Holding that the First Step Act does not Grant Courts the Authority to Determine what Circumstances Justify Compassionate Release—United States v. Bryant*, 996 F.3d 1243 (11th Cir. 2021), 135 HARV. L. REV. 1182, 1182–83 (2022) (analyzing the *Bryant* decision, which diverged from other federal circuit courts on the instructiveness of U.S.S.G. § 1B1.13). *Harvard Law Review's* unsigned author is critical of the Eleventh Circuit's holding, arguing that it "defies both the text of 1B1.13 and the purpose of the First Step Act, resulting in a consequential and unjustified circuit split." *Id.* at 1182–83.

67. 976 F.3d 228 (2d Cir. 2020).

68. See *id.* at 232–36 (determining that the specific mention of the motions brought by the Director of the Board of Prisons evidenced that the Sentencing Commission only intended for U.S.S.G. § 1B1.13 to guide a courts analysis of that type of motion, rather than any compassionate release motion). The policy statement's guidance, therefore, cannot be binding on courts when considering compassionate release requests brought by prisoners themselves. *Id.* at 234; see also *United States v. Cooper*, 996 F.3d 283, 286–89 (5th Cir. 2021) (holding that U.S.S.G. § 1B1.13 was inapplicable to motions for compassionate release brought directly by federal prisoners). Therefore, district courts have the discretion to consider all factors raised as grounds for compassionate relief, including the First Step Act's non-retroactive change in the sentencing scheme for § 924. *Id.* at 289.

69. See *Brooker*, 976 F.3d at 237 (holding that, in compassionate release motions brought by criminal defendants themselves, courts could consider "the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release").

70. 996 F.3d 1243 (11th Cir. 2021), *cert. denied*, *Bryant v. United States* 142 S. Ct. 583 (2021).

71. See *id.* at 1254 (holding that the finite list of "extraordinary and compelling" reasons for sentence reduction in § 1B1.13 was still applicable following the First Step Act). The court emphasized that the applicability of a policy statement depends on whether it is still "capable of being applied" following new Congressional legislation and whether the policy statement is still "relevant" given the cumulative effect of the statutory changes. *Id.* at 1253–54. The court ultimately determined that the procedural changes to the filing process for compassionate release requests did not render U.S.S.G. § 1B1.13 less "capable of application, relevant, or helpful" in guiding district court judges in their compassionate release decisions. *Id.* at 1253; see also Trowel, *supra* note 21, at 199–202 (discussing the Eleventh Circuit's position in *Bryant* as an outlier among federal circuit courts in finding that U.S.S.G. § 1B1.13 "is an applicable policy statement which governs all [compassionate release] motions" (emphasis added)).

The *Brooker* court's endorsement of judicial discretion in compassionate release cases opened the floodgates for divergent judicial opinions on how to interpret the "extraordinary and compelling" reasons language in § 3582.⁷² In *United States v. McCoy*,⁷³ the Fourth Circuit considered whether the severe disparity in sentences under § 924 following the FSA's non-retroactive change to the law constituted sufficient grounds for release.⁷⁴ The court determined that the "enormous disparities" between a defendant's sentence and the one they would receive for the same offense today could be a compelling justification for sentence reduction.⁷⁵ The Tenth Circuit reached a similar conclusion in *United States v. Maumau*,⁷⁶ holding that judges should consider the entire spectrum of factors underlying the inmate's past and current situation in determining whether to grant compassionate release under § 3582.⁷⁷ While the court cautioned that district courts should not grant compassionate release based solely on a "general disagreement with [a] mandatory sentencing scheme," it determined that sentencing disparities could be considered as part of an "indi-

72. See Wu, *supra* note 8 (manuscript at 14) (describing the significance of *Brooker* in framing the analysis of compassionate release requests by other courts). "While not part of the current split regarding nonretroactivity itself, the Second Circuit, in *United States v. Brooker*, laid the groundwork for providing district courts expansive authority to determine what an 'extraordinary and compelling' reason is in the realm of compassionate release." *Id.*; see also Ferraro, *supra* note 55, at 2463–64 (discussing how the differing interpretations of extraordinary and compelling reasons language following *Brooker* "have created an inconsistent patchwork of case law across the federal judiciary").

73. 981 F.3d 271 (4th Cir. 2020).

74. See *id.* at 274 (outlining the issue before the court). "The defendants moved for reductions in their sentences under § 3582(c)(1)(A), resting their case for 'extraordinary and compelling reasons' primarily on the length of their § 924(c) sentences and the disparity between their sentences and those that Congress deemed appropriate in the First Step Act." *Id.*

75. See *id.* at 285 (holding that the "the severity of a § 924(c) sentence, combined with the enormous disparity between that sentence and the sentence a defendant would receive today, can constitute an 'extraordinary and compelling' reason for relief"). The Fourth Circuit noted that the FSA created "an exceptionally dramatic" sentencing change for many incarcerated persons (in the case of McCoy, a thirty-year difference between the mandatory minimum length of his sentence had he been sentenced following the passage of the FSA). *Id.* This "sheer and unusual length" of the incarcerated persons sentence, coupled with the "'gross disparity' between those sentences and the sentences Congress now believes to be an appropriate penalty for the defendant's conduct" sufficiently met the criteria for extraordinary and compelling reasons. *Id.* (quoting *United States v. Redd*, 444 F. Supp. 3d 717, 723 (E.D. Va. 2020)).

76. 993 F.3d 821 (10th Cir. 2021).

77. See *id.* at 837 (upholding a district court finding that a combination of a defendant's youth at the time of sentencing and the elimination of the § 924 stacking requirement satisfied the definition of "extraordinary and compelling" reasons under § 3582). The Tenth Circuit found that district court judges were within their discretion to conduct "individualized review of all the circumstances" of a defendant's case when deciding whether to grant compassionate release, including whether they would have received a lighter sentence under the current sentencing regime. *Id.*

vidualized review of all the circumstances” surrounding the defendant’s case.⁷⁸ The First Circuit also echoed this reasoning in *United States v. Ruvalcaba*,⁷⁹ holding that the “extraordinary and compelling” reasons criteria should be viewed broadly as granting district courts the ability to determine the proper grounds for a sentence reduction on a case-by-case basis.⁸⁰ The court reasoned that because the FSA’s primary purpose was to phase out mandatory minimum sentencing practices, judges had the discretion to “consider any complex of circumstances raised by a defendant as forming an extraordinary and compelling reason warranting relief.”⁸¹

While the First, Fourth, and Tenth Circuits have read § 3582 broadly in light of the FSA’s statutory changes, other federal circuit courts have proffered a narrower reading of the “extraordinary and compelling” reasons language.⁸²

In *United States v. Jarvis*,⁸³ the Sixth Circuit broke with the reasoning espoused in *McCoy* and determined that that a sentence reduction based on a non-retroactive change in a federal criminal statute would impermis-

78. *See id.* at 837; *see also id.* at 823–34 (holding the district court was justified in granting compassionate release when it broadly considered the entire range of circumstances in the defendant’s case, including his youth at time of sentencing, the length of his mandatory stacked sentence, and the disparity between his sentence and what he would have been sentenced to under the current law). Like *Brooker* and *McCoy*, the *Maumau* court found that “the Sentencing Commission’s existing policy statement” which limited courts the determination of “extraordinary and compelling reasons” to the BOP Director, was “applicable only to motions filed by the Director of the BOP, and not to motions filed directly by defendants.” *Id.* at 837. 28 U.S.C. § 994(t) delegates authority to the U.S. Sentencing Commission to “describe what should be considered extraordinary and compelling reasons for sentence reduction.” *Id.* at 832 (quoting 28 U.S.C. § 994(t) (2018)). The *Maumau* court interpreted the use of the term “describe” rather than “define” in 28 U.S.C. § 994(t) as being inclusive, permitting the Commission to list specific examples while also giving federal courts the ability to make their own independent determinations. *Id.*

79. 26 F.4th 14 (1st Cir. 2022).

80. *See id.* at 25 (determining that no provision of the FSA “indicates that Congress meant to deny the possibility of a sentence reduction, on a case-by-case basis, to a defendant premised in part on the fact that he may not have been subject to a mandatory sentence of life imprisonment had he been sentenced after passage of the FSA”). The First Circuit determined that the district court had erred by failing to conduct “an individualized assessment of whether the FSA’s non-retroactive changes, coupled with the defendant’s individualized circumstances, warranted compassionate release.” *Id.* at 28.

81. *Id.* at 28 (analyzing the FSA’s amendments to § 924 in conjunction with the compassionate release programs “safety valve” purpose). The court refused to accept the government’s argument that “changes in the law may never constitute part of a basis for an extraordinary and compelling reason.” *Id.* at 26. Rather, district courts should be given broad latitude in evaluating compassionate release requests. *Id.*

82. For a further discussion of these cases, see *infra* notes 84–90 and accompanying text.

83. 999 F.3d 442 (6th Cir. 2021).

sibly usurp Congress's authority over sentencing guidelines and conflict with its intent to limit the FSA's reforms to future sentencing hearings.⁸⁴ Similarly, in *United States v. Thacker*,⁸⁵ the Seventh Circuit declined to grant a reduction in sentence because of non-retroactive changes in sentencing guidelines.⁸⁶ The court focused closely on congressional intent in making its ruling and found it particularly instructive that Congress had chosen not to make the anti-stacking changes to § 924 retroactive.⁸⁷ Because the lawmakers tasked with drafting the FSA did not consider the existence of stricter sentences for earlier offenders "compelling" enough to warrant making the changes retroactive, it followed that district court judges should not consider these discrepancies in their analysis of compassionate release requests.⁸⁸ This divergence of rationale between the circuit courts would grow further entrenched following the Third Circuit's decision in *United States v. Andrews*.⁸⁹ There, the court held that the "duration of a lawfully imposed sentence" could not be an "extraordinary and compelling" circumstance for sentence reduction because this would effectively permit district court judges to circumvent Congress's legislative authority to set federal criminal penalties.⁹⁰

84. *See id.* at 444–46 (determining that the non-retroactive language in the FSA indicated a clear intent on the part of Congress to consider the resulting disparity in sentences as an "extraordinary and compelling" reason for reduction). While the court recognized the noble goal of the *McCoy* decision in "alleviating unfair and unnecessary sentences as judged by today's sentencing laws," it determined that "these fairness concerns" must nevertheless "[honor] the choices Congress made through the laws it enacted." *Id.* at 445. Thus, even if the U.S.S.G. § 1B1.13 still applies, the nonretroactive amendments to the FSA provide a basis for precluding relief. *Id.* at 446.

85. 4 F.4th 569 (7th Cir. 2021).

86. *See id.* at 575–76 (holding that a district court judge could only grant compassionate release to a defendant sentenced under the previous § 924 stacking requirement if they determined that reasons "independent" of the disparity, such as the health and family reasons proffered by U.S.S.G. § 1B1.13, existed).

87. *See id.* at 573 (analyzing congressional intent in amending § 924 through the FSA). Congress made a deliberate and calculated choice through its express legislative power over sentencing laws to not retroactively extend the changes to § 924's stacking provision. *Id.* "Interpreting [the changes] to apply retroactively would unwind and disregard Congress's clear direction that the amendment apply[s] prospectively." *Id.*

88. *See id.* at 573–76 (reasoning that district courts were bound to heavily weigh Congress's choice not to retroactively extend sentencing relief as a factor against granting compassionate release). Congress itself recognized its passage of the FSA would not provide relief to previously sentenced offenders. *Id.* at 573. Legislators, therefore, did not consider the plight of these inmates compelling enough to alter the language of the FSA, and the district courts should give proper deference to that determination. *Id.*

89. 12 F.4th 255 (3d Cir. 2021).

90. *See id.* at 260–61 (declining to construe "Congress's nonretroactivity directive as simultaneously creating an extraordinary and compelling reason for early release" because such a view would "sow conflict within the statute"). The Third Circuit reasoned that allowing to consider "the length of a statutorily mandated sentence" in determining whether "extraordinary and compelling" reasons exist "would infringe on Congress's authority to set penalties." *Id.* at 261.

Although the Supreme Court has not heard appeals from any of these cases, its recent holding in *Concepcion v. United States*⁹¹ offered insight as to how courts should view the congressional intent behind FSA.⁹² In *Concepcion*, the defendant was convicted of cocaine distribution in 2008 under a mandatory minimum sentencing guideline that was eliminated prospectively but not retroactively in 2010.⁹³ The FSA contained a provision that granted district courts discretion to reduce sentences imposed under these previous drug offense guidelines, and the Court considered whether judges may consider intervening changes of law as a factor in favor of sentence reduction.⁹⁴ The Court primarily looked to the broad policy goals that Congress espoused in passing the FSA and determined that the legislature had intended for the Act to reorient the federal criminal justice system towards a more individualized approach to criminal sentencing.⁹⁵ As such, the FSA gives district court judges broad discretion to “consider all relevant information” not explicitly precluded by either the Constitution or Congress, including subsequent changes to criminal statutes.⁹⁶ While this case did not address the prisoners sentenced under the previous iteration of § 924, the Court’s holding that the FSA permits judges to

91. 142 S. Ct. 2389 (2022).

92. *See id.* at 2404 (holding that the FSA allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence). The narrow issue before the Court was whether the FSA’s statutory modification to the compassionate release program permits district court judges to weigh intervening changes of sentencing guidelines in granting compassionate release. *Id.* While this case did not directly address inmates sentenced under § 924, the Court upheld the argument that federal courts have broad discretion to “consider all relevant information,” including non-retroactive changes in the law, to determine if a sentence modification is warranted. *Id.* at 2398.

93. *See id.* at 2396–97 (explaining how the defendant had received a mandatory minimum sentence for cocaine distribution in 2008). Congress changed the law in 2010 to eliminate this mandatory minimum requirement, but the change was not retroactive. *Id.*

94. *See id.* at 2397 (discussing how Section 404(b) of the FSA, authorized district courts to “impose a reduced sentence” on defendants serving sentences for certain crack-cocaine offenses “as if sections 2 and 3 of the Fair Sentencing Act . . . were in effect at the time the covered offense was committed” (alteration in original) (quoting First Step Act of 2018 Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222 (2018))).

95. *See id.* at 2399 (describing the compatibility between the FSA’s reforms and “the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study”). The Court found that the First Step Act sought to preserve the “wide discretion” that district courts have traditionally had at all phases of sentencing. *Id.* at 2398–99.

96. *See id.* at 2401 (determining that “nothing in the text and structure of the First Step Act expressly, or even implicitly, overcomes the established tradition of district courts’ sentencing discretion”); *see also id.* at 2400 (finding that “the only limitations on a court’s discretion to consider any relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution”).

consider non-retroactive changes in the law seems to stand in stark contrast to the holdings of *Jarvis*, *Thacker*, and *Andrews*, which determined that such changes could not serve as grounds for relief.⁹⁷

III. HIGH STAKES: THE FACTS OF *UNITED STATES V. CRANDALL*

In 1989, Barton Crandall was convicted of felonies related to two bank robberies, including possessing a handgun in the commission of both robberies.⁹⁸ The fact that Crandall's codefendant carried a weapon during the commission of the crimes meant that they were considered "crimes of violence" under § 924.⁹⁹ The trial court sentenced Crandall to forty-six years and ten months in prison—twenty-one years and ten months for the robbery charges and twenty-five years for the § 924 violation.¹⁰⁰ The stacking requirement more than doubled Crandall's sentence.¹⁰¹

Crandall had spent nearly thirty years in prison by the time Congress eliminated the "stacking" provisions of § 924 through the passage of the FSA in 2018.¹⁰² Had Crandall been sentenced under the post-FSA guide-

97. Compare *id.* at 2398 ("Federal courts historically have exercised this broad discretion to consider all relevant information at an initial sentencing hearing, consistent with their responsibility to sentence the whole person before them. That discretion also carries forward to later proceedings that may modify an original sentence."), with *United States v. Andrews* 12 F.4th 255, 260–61 (3d Cir. 2021) (holding that courts should interpret § 3582 narrowly to find that a "lawfully imposed sentence," even in light of later changes to sentencing guidelines, cannot be considered an "extraordinary and compelling" circumstance for sentence reduction).

98. See *United States v. Crandall*, No. 89-CR-21-CJW-MAR, 2020 WL 7080309, at *1 (N.D. Iowa Dec. 3, 2020) (providing background on the two bank robberies that Crandall was charged with and his level of involvement in each crime). Crandall and a co-conspirator robbed two separate banks in Iowa over a three-month span, netting several thousand dollars in each instance. *Id.* Although Crandall's co-conspirator brandished a shotgun during each robbery, he never discharged the weapon, and nobody was injured. *Id.*

99. See *United States v. Crandall*, No. CR89-0021, 1999 WL 33656814, at *4 (N.D. Iowa Jan. 14, 1999) (denying Crandall's appeal regarding the jury instructions at his trial concerning the § 924 offense). The court determined that although "the record is uncontradicted that [Crandall's] codefendant carried the firearm in both bank robberies," Crandall "was properly indicted and convicted on an aiding and abetting theory." *Id.* at *2–3.

100. See *id.* (describing the breakdown of Crandall's sentence on each count of the indictment). The district court sentenced Crandall to "262 months for the bank robbery and gun possession charges, and mandatory consecutive terms of 60 months and 240 months, respectively, for the two offenses of using and carrying a firearm during a crime of violence" under § 924. *United States v. Crandall*, 25 F.4th 582, 583 (8th Cir. 2022). Crandall's sentence later was reduced by three years on separate grounds in 2005, making his new total sentence 526 months' imprisonment. *Id.*

101. See Wu, *supra* note 8 (manuscript at 21) (discussing Crandall's initial sentence under the original § 924 charge-stacking requirements).

102. See *Crandall*, 2020 WL 7080309, at *2 (stating that Crandall's sentencing date was April 2, 1990). For a further discussion on the FSA's elimination of the § 924 charge-stacking requirement, see *supra* note 19 and accompanying text.

lines, the trial judge would not have been required to impose the penalties for the two § 924 charges consecutively, and Crandall's sentence could have been reduced by more than half.¹⁰³ However, because the removal of charge stacking only applied to future sentences, Crandall's sentence remained unchanged.¹⁰⁴

In 2020, Crandall filed a Motion for Compassionate Release, arguing that the non-retroactive change in the sentencing guidelines constituted extraordinary and compelling circumstances that warranted his release.¹⁰⁵ In conducting its analysis, the district court determined that, while U.S.S.G. section 1B1.13 was inapplicable, courts should not "stray far" from the policy statement's specifically enumerated categories of medical conditions, age, and family circumstances.¹⁰⁶ Doing so, the district court reasoned, would impermissibly expand the compassionate release program beyond what was authorized by Congress.¹⁰⁷ With this logic in mind, the court determined that Crandall's plight was not "similarly personal and individualized" to be compatible with the compassionate release framework proffered by the Sentencing Commission.¹⁰⁸ As such, the district court held that non-retroactive changes to the FSA could not consti-

103. *See Crandall*, 2020 WL 7080309, at *2 (noting that "if sentenced today, Crandall's [sentencing] guideline range would be only 220 to 245 months, less than half of what he was previously sentenced to"). In his motion for compassionate release, Crandall emphasized that his sentences for the two § 924 offenses "would not be required to run consecutively if rendered today." *Id.* at *4. Instead, the trial court judge would have had the option to impose these sentences concurrently, potentially reducing his total imprisonment term by as much as 300 months. *Id.* at *2, *4.

104. *See id.* at *8.

105. *See id.* at *4 (describing the basis for Crandall's Motion for Compassionate Release).

106. *See id.* at *6 (holding that, although U.S.S.G. § 1B1.13 was no longer a binding policy statement for compassionate release requests, courts should not stray from "the grounds listed" there and should primarily consider the enumerated health and family reasons or other "circumstances which are similarly personal and individualized").

107. *See id.* (arguing that while U.S.S.G. § 1B1.13 no longer restrains federal courts in considering compassionate release, judges should nevertheless be "highly skeptical of expanding the compassionate release system into, essentially, a discretionary parole system").

108. *See id.* (analyzing Crandall's circumstances in the context of its prior analysis of the "extraordinary and compelling reasons" standard). The non-retroactive changes to § 924 which resulted in the sentencing disparity affected thousands of other federal inmates and were not unique to Crandall's own circumstances. *Id.* at *7-8. The court thus reasoned that his circumstances could not, by definition, be considered "extraordinary." *Id.* at *7.

tute “extraordinary and compelling” reasons for sentence reduction.¹⁰⁹ Crandall subsequently appealed this decision to the Eighth Circuit Court of Appeals.¹¹⁰

IV. DOUBLING DOWN: THE CRANDALL COURT HOLDS THAT
NON-RETROACTIVE CHANGES ARE NOT EXTRAORDINARY
AND COMPELLING

The issue on appeal before the Eighth Circuit concerned whether a district court could consider the FSA’s non-retroactive change to the § 924 sentencing guidelines as an “extraordinary and compelling” reason for sentence reduction.¹¹¹ The first part of the court’s analysis focused on the legislative intent behind the FSA.¹¹² The court echoed the findings of *Jarvis*, *Thacker*, and *Andrews*, interpreting Congress’s choice to limit application of the FSA’s changes to § 924 to future sentences as a deliberate attempt to limit the scope of the Act.¹¹³ The court reasoned that by opting to leave existing sentences in place, Congress did not “declare that the previous Congress—decades earlier—prescribed an inappropriate punishment.”¹¹⁴ Instead, the FSA’s limited scope demonstrated that Congress considered the previous stacking guidelines appropriate “under the circumstances that confronted that legislative body.”¹¹⁵

The court also looked beyond the congressional intent to conduct a lexiconic analysis of the statutory language of § 3582.¹¹⁶ Broadly, the court cautioned that the terms “extraordinary and compelling” should be

109. *See id.* at *8 (denying Crandall’s Motion for Compassionate Release). The court found “it improper to effectively make non-retroactive changes in the law retroactive by deeming them to be extraordinary and compelling circumstances.” *Id.* at *7.

110. *See United States v. Crandall*, 25 F.4th 582, 583–84 (8th Cir. 2022) (summarizing the procedural history of the case and Crandall’s grounds for appeal).

111. *See id.* (explaining the narrow issue before the court was the consideration of whether the district court had properly held that the non-retroactive changes to the FSA could not constitute “extraordinary and compelling” reasons for sentence reduction).

112. *See id.* at 585–86 (evaluating Congress’s choice to leave the existing sentences under § 924 in place). The district court determined that this issue would be the focus of its analysis and chose not to weigh in on the “academic” debate of whether U.S.S.G. § 1B1.13 remains an “applicable” policy statement after the FSA. *Id.* at 585. While recognizing the divergence between the *Brooker* and *Bryant* courts on the issue of whether U.S.S.G. § 1B1.13 remains an “applicable” policy statement after the FSA, the court determined that resolving this divergence was an unnecessary matter if it determined that the district court had properly denied relief on other grounds afforded by § 3582. *Id.* at 584–85.

113. *See id.* 585 (relying on the findings of *Jarvis*, *Thacker*, and *Andrews* to infer that Congress deliberately intended to keep the previously issued sentences of § 924 offenders in place following the passage of the FSA).

114. *See id.* at 586.

115. *See id.*

116. *See id.* (outlining the court’s analysis that looked at the terms “extraordinary” and “compelling” as “empirical matter[s]”).

understood narrowly and not be used by judges as a “freewheeling opportunity for resentencing based on prospective changes in the sentencing policy or philosophy.”¹¹⁷ The court determined that the use of the term “extraordinary” in § 3582 requires a defendant to demonstrate a distinct uniqueness in their circumstances.¹¹⁸ In Crandall’s case, because Congress’s choice to modify sentencing guidelines prospectively rather than retroactively was not novel or uncommon, such changes could not be considered “‘extraordinary’ as an empirical matter.”¹¹⁹

Similarly, the court also determined that the resulting sentence discrepancies were not “compelling” as contemplated by § 3582 given the absence of express disapproval by Congress.¹²⁰ In order to be sufficiently “compelling,” a defendant’s unique circumstances must create conditions that are incompatible with the current congressional mores on sentencing.¹²¹ The court reasoned that a non-retroactive change by a modern Congress to a law passed by a previous Congress did not necessarily express disapproval or demonstrate the erroneousness of the previously enacted law.¹²² Instead, Congress deliberately eliminated charge stacking for future and not-previously-sentenced offenders, much like a federal judge can decide to impose a lighter sentence than a predecessor did for the same offense decades prior.¹²³ Thus, following the lead of the Third, Sixth, and Seventh Circuits, the Eighth Circuit held that disparities in the

117. *See id.* (emphasizing that courts should give deference to legislative decisions regarding criminal sentencing). To stray far from express statutory language would risk usurping congressional power and “expanding the compassionate release system into, essentially, a discretionary parole system.” *Id.* at 584.

118. *See id.* at 586 (noting that because “Congress from time to time prospectively increases or decreases existing criminal penalties,” such changes were not “extraordinary”).

119. *See id.* at 585–86.

120. *See id.* at 586 (denying relief to Crandall, whose compassionate release request was couched on the argument that the severe disparity in his sentence was, by itself, “extraordinary and compelling”).

121. *See id.* (reasoning that, for a reason to be sufficiently “compelling” to warrant compassionate release, the defendant’s circumstances must be so acute that Congress would “disapprove” of continued imprisonment). A defendant must therefore show that continued imprisonment would be grossly contrary to the broad sentencing philosophy that Congress supported in § 3582. *Id.*

122. *See id.* (finding that, in passing the FSA “the [current] Congress did not disapprove of the penalties established by the prior Congress for a different era”).

123. *See id.* (comparing Congress’s non-retroactive change to § 924 with “the decision of a sentencing judge in 2018 to impose a lesser sentence than a predecessor imposed in 1990 for the same offense”). The court reasoned that because the latter would be permissible under federal sentencing guidelines, it would be counterintuitive to place additional scrutiny on a similar decision made by Congress itself. *Id.* Thus, the non-retroactive change in law was not sufficient grounds for compassionate release. *Id.*

“appropriate punishment for a present-day offense do not establish an ‘extraordinary and compelling’ reason for reducing a sentence imposed years ago.”¹²⁴

V. CALLING THE BLUFF: THE EIGHTH CIRCUIT MISCONSTRUES THE INTENT OF THE FSA IN *CRANDALL*

This Note contends that the Eighth Circuit misconstrued the legislative intent behind the FSA by failing to consider the legislative reasoning behind the non-retroactive changes to § 924 and the legislation’s broader goal to expand judicial discretion in criminal sentencing.¹²⁵ The opinion in *Crandall*, like the others that compose its side of the circuit split, relied principally on the restrictive text of the FSA to infer that Congress deliberately drafted the legislation to exclude previously sentenced offenders, thus rendering their situations neither “extraordinary” nor “compelling” enough for release.¹²⁶ Such a view ignores that Congress’s goal in passing the FSA was not to instantly overhaul the criminal justice system, nor was it to address all the ills that resulted from decades of harsh mandatory sentencing practices.¹²⁷ Instead, when viewed *together* with the changes to § 3582, Congress intended for the FSA to *limit*, but not necessarily *exclude*, all previously sentenced offenders from reductions, thereby avoiding a blanket release of § 924 offenders in favor of providing judges with broad discretion to reduce unjust criminal sentences in the most extreme cases.¹²⁸

124. *See id.* at 585–86 (stating that “we find ourselves in agreement with [the decisions of *Andrews*, *Thacker*, and *Jarvis*]” regarding the issue of whether a non-retroactive change in law can be considered an “extraordinary and compelling reason” in favor of compassionate release).

125. *Compare id.* at 586 (following the reasoning of the *Andrews*, holding that Congress’s choice to “le[ave] existing sentences in place” demonstrate that it “did not declare that the previous Congress—decades earlier—prescribed an inappropriate punishment”), *with Costello*, *supra* note 9, at 248–51 (arguing that courts following the holding in *Andrews*, as the *Crandall* court did, have confused Congress’s desire to “[not] open the floodgates for post-conviction relief” with a specific intent “to entirely foreclose a reduction in sentence to those defendants”).

126. *See Crandall*, 25 F.4th at 586 (finding that Congress deliberately decided to eliminate charge stacking for future and not previously sentenced offenders, much like a federal judge can decide to impose a lighter sentence than a predecessor did for the same offense decades prior). Thus, the court reasoned that disparities in the “appropriate punishment for a present-day offense do not establish an extraordinary and compelling reason for reducing a sentence imposed years ago.” *Id.*

127. *See Costello*, *supra* note 9 at 244 (characterizing the passage of the FSA as an attempt to implement criminal justice reform in a “simultaneously monumental and incremental way” (quoting *United States v. Brooker*, 976 F.3d 228, 230 (2d Cir. 2020))).

128. *See id.* (describing Congress’s goal to create a “safety valve” that would offer relief to inmates whose individual circumstances warranted sentence reduction). With the elimination of the federal parole board in the Sentencing Reform Act of 1984, Congress intended to shift that “safety valve” function to the judiciary. *Id.*; *Concepcion v. United States*, 142 S. Ct. 2389, 2401, 2404 (2022) (determining

In *Crandall*, the Eighth Circuit emphasized the non-retroactive nature of the FSA's amendments to § 924 in reasoning that Congress did not view the previously administered stacked sentences as unduly harsh.¹²⁹ However, the political environment and legislative history surrounding the FSA's passage demonstrate that Congress now considers *at least some* of these sentences "dramatically longer than necessary or fair."¹³⁰ Advocacy for the FSA was spurred by the growing criticism of harsh charge-stacking practices, which were disproportionately used against minorities and led to a ballooning prison population.¹³¹ The initial debates over the FSA further indicate that while Congress recognized the entrenched nature of these problems, it viewed the issue of existing § 924 sentences as particularly complex given the large number of inmates sentenced under the statute and the varying nature of their crimes.¹³² The judiciary was therefore the most rational mechanism for determining which sentencing disparities truly qualified as "extraordinary and compelling" and achieving reform that was simultaneously "monumental and incremental."¹³³ Thus, the limited scope of the FSA's amendments to § 924 was not evidence of Congress

that the FSA "allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence," consistent with our country's "well-established" principles of individualized sentencing). The Supreme Court therefore determined that the FSA allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence. *Id.* at 2404. While the Court did not directly address inmates sentenced under § 924, the Court upheld the argument that federal courts have broad discretion to "consider all relevant information," including non-retroactive changes in the law, to determine if a sentence modification is warranted. *Id.* at 2398; *United States v. McCoy*, 981 F.3d 271, 286–87 (4th Cir. 2020) (noting that "there is a significant difference between automatic vacatur and resentencing of an entire class of sentences . . . and allowing for the provision of individual relief in the most grievous cases").

129. *See Crandall*, 25 F.4th at 586 (determining Congress's decision to not retroactively extend the FSA's anti-stacking provisions as evidence that it "did not disapprove" of these prior sentences).

130. *See McCoy*, 981 F.3d at 286.

131. *See U.S. SENT'G COMM'N, MANDATORY MINIMUMS FOR FIREARMS OFFENSES, supra* note 14, at 6 (finding that those serving mandatory minimum sentences under § 924 were disproportionately Black or Hispanic). "In fiscal year 2016, Black offenders accounted for 52.6[%] of offenders convicted under Section 924(c), followed by Hispanic offenders (29.5%) . . ." *Id.*

132. *See McCoy*, 981 F.3d at 287 (finding that Congress arrived at two distinct, but not inconsistent "judgments" in passing the FSA.) While "not *all* defendants convicted under § 924(c) should receive new sentences," Congress nevertheless determined that "courts should be empowered to 'relieve *some* defendants of those sentences on a case-by-case basis.'" *Id.* (quoting *United States v. Bryant*, No. CR 95-202-CCB-3, 2020 WL 2085471, at *3 (D. Md. Apr. 30, 2020)).

133. *See United States v. Brooker*, 976 F.3d 228, 230 (2d Cir. 2020) (describing Congress's goal in passing the FSA to arrive at a mechanism for sentencing reform that balanced the concerns associated with a widespread release of thousands of incarcerated persons with the recognition by legislators that many of these people "did not need to be incarcerated").

approving the continued existence of previously administered stacked sentences but rather a pragmatic tool that was crafted to initiate a gradual and effective overhaul of the federal criminal justice system.¹³⁴

The Eighth Circuit's narrow reading of the FSA further ignores the historical evolution of federal sentencing practices and the inefficiencies which encouraged Congress to expand access to compassionate release through the FSA.¹³⁵ Historically, judges were primarily responsible for sentencing decisions, confined only by the statutory maximums and minimums established by Congress.¹³⁶ Even when Congress increased the severity of § 924 sentences through the SRA, it was cognizant to create the compassionate release program as a "safety valve" to still permit judges to exercise individualized sentencing discretion.¹³⁷ However, the BOP's sluggishness in bringing motions and the U.S. Sentencing Commission's refusal to update its policy rendered this safety valve ineffective.¹³⁸ Congress thus jettisoned the "gatekeeping" requirement that compassionate release requests had to be brought by the BOP Director to strengthen the judicial avenue for sentence reduction and allow incarcerated persons autonomy in the process.¹³⁹ Ultimately, the FSA reflects an intent to reinforce the compassionate release program's historical purpose to act as a "safety valve" by providing judges with broad sentencing discretion to reduce criminal sentences that are contrary to the principles of justice.¹⁴⁰

134. See Costello, *supra* note 9, at 221 (describing how Congress "recogniz[ed] that the current interpretation of § 924(c) frequently resulted in controversial sentences . . . [and] acted to make the statute a true recidivist statute").

135. See Hamilton, *supra* note 11, at 1750–53 (outlining how the origins of the "safety valve" function that the compassionate release program serves).

136. See Patton, *supra* note 37, at 1465 (discussing the history of broad judicial discretion in federal criminal sentencing). "Before 1984, the overwhelming majority of federal criminal statutes contained only a maximum sentence, allowing judges to sentence defendants to terms of imprisonment or monetary fines anywhere from zero to the maximum with virtually no appellate review." *Id.* Even in the "rare instances in which statutes contained mandatory minimums," judges were able to suspend those minimums and grant probation instead. *Id.*

137. See *McCoy*, 981 F.3d at 286 (citing *United States v. Jones*, 482 F. Supp. 3d 969, 980–81 (N.D. Cal. 2020)) (discussing how Congress intended to create a safety valve that allows for sentence reductions when there is not a specific statute that already affords relief, but "extraordinary and compelling reasons" nevertheless justify a reduction).

138. See *id.* (discussing the connection between "safety valves" and the history of broad judicial discretion in criminal justice sentencing).

139. See Hamilton, *supra* note 11, at 1751–56 (arguing that today's compassionate release program is the result of decades-long efforts by Congress to create uniformity and fairness in criminal sentencing); *United States v. Maumau* 993 F.3d 821, 836 (10th Cir. 2021) (describing the FSA as an attempt to "expand the use of compassionate release"). Congress also declined to pass amendments to the FSA which would have specifically prevented certain § 924 offenders from applying for compassionate relief. *Id.*

140. See Hamilton, *supra* note 11, at 1750–53 (outlining how the origins of the "safety valve" function that the compassionate release program serves).

These primary objectives of the FSA were lost in the *Crandall* court's textually focused analysis, resulting in a misguided and muddled application of the "extraordinary and compelling" reasons standard.¹⁴¹ The Eighth Circuit's interpretation of "extraordinary" as requiring defendants to demonstrate that their circumstances are distinctly unique is unduly restrictive.¹⁴² The relevant legislative history indicates that one of the foremost concerns which led Congress to pass the FSA was a desire for more individualized sentencing, which by definition considers the inmates individual circumstances outside the context of others.¹⁴³

Additionally, the Eighth Circuit's mischaracterization of legislative history led them to erroneously reason that it would be contradictory for district courts to find "compelling" reasons based on a change in law that Congress made inapplicable to the previously sentenced offenders.¹⁴⁴ This view conflates Congress's intent to shift release power to the judiciary with an intent to deny relief to all previously sentenced offenders.¹⁴⁵ As the legislative history highlights, Congress determined that the proper means for reform would be through expanded judicial discretion rather

141. See *United States v. Crandall*, 25 F.4th 582, 586 (8th Cir. 2022) ("Congress from time to time prospectively increases or decreases existing criminal penalties, so that the circumstance may not be 'extraordinary' as an empirical matter.").

142. See *Costello*, *supra* note 9, at 253 (arguing that "in light of clear congressional intent, courts should first consider the fact that these defendants, if sentenced today, would receive a dramatically lower sentence than what they are now serving"). While the *Crandall* court had reasoned that a non-retroactive change in sentencing guidelines could not be considered "extraordinary" because such legislative action was not rare or unprecedented, it is the sentence itself and the resulting disparity that § 3582 requires courts to consider when determining extraordinary and compelling reasons. *Id.* Thus, the massive difference in sentences handed down to § 924 offenders before and after the passage of the FSA "surpasses the threshold for extraordinary and compelling reasons, as elucidated by the Congress that enacted the first compassionate release statute." *Id.*

143. See *Concepcion v. United States*, 142 S. Ct. 2389, 2395 (2022) (noting the "longstanding tradition in American law, dating back to the dawn of the Republic, that a judge at sentencing considers the whole person before him or her 'as an individual'" (citing *Koon v. United States*, 518 U.S. 81, 113 (1996))). Although changes to federal sentencing guidelines may not be uncommon, such changes may still factor into a judge's sentencing decision. *Id.* For instance, the court observed "when a defendant's sentence is set aside on appeal, the district court at resentencing can (and in many cases, must) consider the defendant's conduct and changes in the Federal Sentencing Guidelines since the original sentencing." *Id.* at 2396.

144. See *United States v. Brooker*, 976 F.3d 228, 230 (2d Cir. 2020) (holding that the FSA represents an "incremental" change that does not mandate more lenient sentences across the board but instead gives new discretion to the courts to consider leniency); see also *Concepcion* 142 S. Ct. at 2401 (finding that "Congress in [passing] the First Step Act simply did not contravene well-established sentencing practice[s]" permitting broad judicial discretion in sentencing).

145. For a further discussion on this distinction between providing blanket and individualized relief to previously sentenced offenders, see *supra* note 128 and accompanying text.

than blanket release.¹⁴⁶ Limiting the changes to prospective sentences serves as an incremental step toward criminal justice reform while simultaneously expanding avenues for incarcerated people to apply for sentence reduction on an individualized basis.¹⁴⁷

Such a characterization of the FSA is supported by the Supreme Court's recent holding in *Concepcion*, which came just months after the *Crandall* decision.¹⁴⁸ While not directly on point with the issue in *Crandall*, the case highlights that the Supreme Court views the FSA as a measure to protect the "established tradition of district courts' sentencing discretion" and expand their flexibility in modifying sentences.¹⁴⁹ Within this discretionary power is the ability to consider intervening changes of law as possible grounds for relief, so long as they are not "expressly limit[ed]" by "Congress or the Constitution."¹⁵⁰ This rationale casts further doubt on the Eighth Circuit's holding that non-retroactive changes in sentencing law cannot provide a basis for compassion release.¹⁵¹

146. For a further discussion of Congress's choice to make the changes to § 924 non-retroactive while expanding the ability of district courts to consider previously sentenced offenders cases on an individualized basis, see *supra* notes 132–134 and accompanying text.

147. See *Costello*, *supra* note 9, at 253 (discussing Congress's intent "to allow for individualized determinations for reduction in sentence" as a central hallmark of the FSA").

148. See *Concepcion*, 142 S. Ct. at 2401 (determining the Congressional reforms advanced by the FSA were compatible with broad judicial sentencing discretion). "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.*

149. See *id.* at 2401, 2404 (framing the court's holding on the narrow issue of Section 404(b) of the FSA in the context of the entirety of the legislation, which broadly protects the sentencing discretion of district courts).

150. See *id.* at 2398 (finding that the history of broad discretion of federal courts "to consider all relevant information at an initial sentencing hearing . . . also carries forward to later proceedings that may modify an original sentence"). Although Congress may limit this discretion, as it had done with initial creation of mandatory minimum guidelines, the FSA sought to revert to this tradition of discretion and defer sentencing modification decisions to judges. *Id.* at 2400.

151. Compare *id.* at 2400 (holding that "the only limitations on a court's discretion to consider relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution"), with *United States v. Crandall*, 25 F.4th 582, 586 (8th Cir. 2022) (holding that "that a non-retroactive change in law, whether offered alone or in combination with other factors, cannot contribute to a finding of 'extraordinary and compelling reasons' for a reduction in sentence under § 3582(c)(1)(A)").

VI. CALL A SPADE A SPADE: THE NEED FOR CONGRESSIONAL OR SUPREME COURT ACTION TO RESOLVE THE EXISTING CIRCUIT SPLIT

Adam Clausen's tumultuous case reached an encouraging resolution in 2020 when a federal judge granted his request for compassionate release.¹⁵² The district court noted that the "astounding progress" Clausen had made in prison rendered his de facto life sentence "off the charts" of what could be considered just in his circumstances.¹⁵³ The court reduced his sentence to time served, and the forty-four-year-old returned home to his family, prepared to take advantage of this second chance at life.¹⁵⁴ While this decision marked a victory for criminal justice reform advocates, the outcome could have been quite different had the district court heard Clausen's motion just a year later, because it would have been bound to the Third Circuit's restrictive ruling in *Andrews*.¹⁵⁵

Clausen's story demonstrates how the Eighth Circuit's decision in *Crandall* further entrenches a circuit split which has problematic implications for the thousands of other federal inmates ensnared in the debate over the FSA's non-retroactive reforms.¹⁵⁶ First, the diverging judicial interpretations of "extraordinary and compelling" reasons have further worsened the disparity in sentences under § 924.¹⁵⁷ As the law currently stands, the length of sentences served for § 924 offenders varies greatly based not only on the date of their sentence, but also by the specific court

152. See *United States v. Clausen*, No. CR 00-291-2, 2020 WL 4601247, at *3 (E.D. Pa. Aug. 10, 2020) (reducing Clausen's sentence "to a period of time served followed by three years of supervised release"). In granting compassionate release, the court emphasized Clausen's "virtually unprecedented and unmatched record" while in prison and concluded that "he has transformed himself while incarcerated and has channeled his abilities to improve the lives of other inmates." *Id.*

153. See *id.* at *1–3 (describing Clausen's experience in prison and efforts to rehabilitate himself). The court noted that, despite the "seriousness" of his crimes, this "underlying offense conduct must also be considered relative to the sentence he originally received and any reduced sentence he would receive." *Id.* at *1–2. During his time in prison, Clausen had completed education programs and served as a mentor for other inmates. *Id.* at *2.

154. See *id.* at *3 (reducing Clausen's sentence to "a period of time served followed by three years of supervised release"); see also FAMM, *Second Look*, *supra* note 2 (highlighting Clausen's lack of recidivism and continued activism following his release). Clausen currently serves in a leadership position for a non-profit that aids prisoners in reentering the workforce following their release. *Id.*

155. See *United States v. Andrews*, 12 F.4th 255, 260–61 (3d Cir. 2021) (holding that courts should interpret § 3582 narrowly to find that a "lawfully imposed sentence," even in light of later changes to sentencing guidelines, cannot be considered an "extraordinary and compelling" circumstance for sentence reduction).

156. See Costello, *supra* note 9, at 247 (analyzing the impact that the circuit split has had on the intended reforms of the FSA).

157. See U.S. SENT'G COMM'N, *supra* note 23, at 4 (noting the likelihood of an offender receiving compassionate release "substantially varied by circuit, from a grant-rate high of 47.5[%] in the First Circuit to a low of 13.7[%] in the Fifth Circuit"); see also Wilt, *supra* note 38 (arguing that the differential treatment of compassionate release requests based solely on jurisdiction threatens to undermine the FSA's reforms).

in which they were tried.¹⁵⁸ Equally concerning is that this divergence in judicial interpretation coincides with an unprecedented increase in requests for compassionate release.¹⁵⁹

These effects are contrary to the reform-minded goals of the FSA, which sought to provide more equitable outcomes in criminal sentencing by expanding the compassionate release program.¹⁶⁰ Compassionate release offers mutual benefits to inmates themselves and the broader society.¹⁶¹ Individuals given compassionate release are “ten times less likely to recidivate,” thus freeing up taxpayer money and permitting them to reenter productive society.¹⁶² The circuit split and the resulting sentencing

158. See Wilt, *supra* note 38 (comparing two distinct motions for compassionate release brought by defendants in different federal circuit courts). Wilt describes how defendants in both cases were serving lengthy prison sentences for serious crimes and made similar arguments about the length of their sentences being unduly harsh, yet only one received compassionate release. *Id.* Such a discrepancy demonstrates that “a sweeping update to the Sentencing Commission’s policy statement defining extraordinary and compelling circumstances” is necessary to prevent “inmates with identical circumstances [from being] treated differently solely based on the jurisdiction in which their case is brought.” *Id.*; Wu, *supra* note 8 (manuscript at 28) (arguing that “incarcerated individuals should not be held in limbo based on their geographic location in the federal system”).

159. See U.S. SENT’G COMM’N, *supra* note 23, at 3 (detailing how compassionate release requests have surged due to the procedural changes created by the FSA and the recent onset of the COVID-19 pandemic); see also David Roper, *Pandemic Compassionate Release and the Case for Improving Judicial Discretion Over Early Release Decisions*, 33 FED. SENT’G REP. 27, 27 (2020) (describing the “deluge of new requests for compassionate release in federal district courts across the country”). Roper notes that both the FSA’s procedural change to the compassionate release request process, along with general concerns among older inmates who faced large health risks in prison due to the spread of COVID-19, has inundated district courts with compassionate release requests. *Id.*

160. See *id.* (describing how the FSA’s reforms have fallen short of the reform criminal justice advocates have long sought). “[A]dvocates for sentencing reform were hopeful that courts would begin to develop new, broader criteria for compassionate release that would go beyond traditionally rigid and limiting age requirements, thresholds for time served, extreme family circumstances, and terminal illness.” *Id.*; see also Durbin, *Grassley Introduce Bipartisan Legislation to Advance the First Step Act’s Goals*, U.S. SENATE COMM. ON THE JUDICIARY (Mar. 26, 2021), <https://www.judiciary.senate.gov/press/dem/releases/durbin-grassley-introduce-bipartisan-legislation-to-advance-the-first-step-acts-goals> [<https://perma.cc/Y3J6-V23B>] (reiterating that the overarching goal of the FSA is to “to make our justice system fairer and our communities safer by reforming sentencing laws and providing opportunities for those who are incarcerated to prepare to reenter society successfully”).

161. See Wu, *supra* note 8 (manuscript at 30) (discussing the social and financial benefits compassionate release offers for both formerly incarcerated persons and the broader criminal justice system).

162. See *id.* (highlighting the low recidivism rate among offenders granted compassionate release); U.S. DEP’T OF JUST., OFF. OF THE INSPECTOR GEN., THE FEDERAL BUREAU OF PRISON’S COMPASSIONATE RELEASE PROGRAM iv. (2013) (finding a “recidivism rate of 3.5[%] for inmates” granted compassionate release, which was significantly lower than the “the general recidivism rate for federal prisoners [which] has been estimated to be as high as 41[%]”). The Office of the Inspector General noted in its findings that while the possibility of releasing more prisoners

disparities have prevented these benefits from being fully realized, leaving individual defendants in penal purgatory and undermining the FSA's mission to gradually reform the criminal justice system.¹⁶³

Such stark discrepancies are likely to continue until the Supreme Court directly weighs in on the issue.¹⁶⁴ While the Court offered some useful insight in *Concepcion* when it held that the FSA allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence, a clearly defined and workable standard is necessary to ensure uniformity and fairness in compassionate release.¹⁶⁵ First, the Court should rule unambiguously that U.S.S.G. section 1B1.13 is not binding on motions filed by defendants because the Sentencing Commission did not contemplate Congress's vast expansion of compassionate release when formulating that policy statement.¹⁶⁶ Second, in interpreting the "extraordinary and compelling" reasons provision of § 3582, the Court should combine the reasoning of the First, Fourth, and Tenth Circuits and permit judges to consider the entire spectrum of factors unique to each

through compassionate release could lead to an increase in recidivism rates, their data "demonstrates that a carefully and effectively managed program can minimize that risk if careful consideration is given to an inmate's potential risk to the community as part of the assessment process." *Id.* The report further concluded that expanding the compassionate release program would also benefit the BOP from a budgetary standpoint, providing cost savings of up to \$57,962 per inmate. *Id.* at 46 n.55.

163. *See* Wilt, *supra* note 38 (arguing that the differential treatment of compassionate release requests based solely on jurisdiction threatens to undermine the FSA's reforms). *See generally* Wu, *supra* note 8 (highlighting the problematic nature the current circuit split has for the compassionate release program). Wu questions why "incarcerated individuals' relief . . . [should] be subject to [the] disputed and questionable legal doctrines" proffered by the Third, Sixth, Seventh, and Eighth Circuits. *Id.* (manuscript at 31).

164. *See* Wu, *supra* note 8 (manuscript at 31) (arguing that Supreme Court action is necessary to resolve the issues implicated by the existing circuit split). Wu believes that a resolution of the circuit split by the Court would provide the best means for adequately defining the "extraordinary and compelling" reasons standard. *Id.*

165. *See* *Concepcion v. United States*, 142 S. Ct. 2389, 2398 (2022) (upholding the argument that federal courts have broad discretion to "consider all relevant information," including non-retroactive changes in the law, to determine if a sentence modification is warranted).

166. *See* *United States v. Brooker*, 976 F.3d 228, 232–34 (2d Cir. 2020) (noting the incompatibility of the restrictive and outdated policy statement with the new procedures that Congress provided federal inmates through the FSA).

defendant.¹⁶⁷ Such a case-by-case test would be compatible with the policy goals of the FSA and the Supreme Court's support of individualized sentencing, which the Court recently espoused in *Concepcion*.¹⁶⁸

The opportunity to resolve this issue may also be available outside the context of the courts.¹⁶⁹ As recently as 2021, lawmakers introduced legislation to retroactively extend the elimination of stacking for § 924 offenses to persons sentenced before the law's passage.¹⁷⁰ Such efforts reflect a still-existing mission of Congress to go beyond the initial reforms of the FSA and further modify sentencing guidelines to provide more equitable outcomes and reduce the prison population.¹⁷¹ Ultimately, the true impact of the FSA's changes to federal sentencing guidelines will either play out in a Supreme Court grant of certiorari or through new Congressional legislation. Only by expanding the FSA's anti-stacking provisions to previously sentenced offenders can the Act achieve its true purpose of serving as a conduit for meaningful criminal justice reform.¹⁷²

167. See *United States v. McCoy*, 981 F.3d 271, 286 (4th Cir. 2020) (finding that the sentencing disparities created by the non-retroactive changes to § 924 could constitute an extraordinary and compelling reason for sentence reduction); *United States v. Maumau*, 993 F.3d 821, 837 (10th Cir. 2021) (upholding the district court's grant of compassionate release when the court determined, following an "individualized review of all the circumstances" surrounding the defendant's sentence, "that a combination of factors warranted relief").

168. See *Concepcion*, 142 S. Ct. at 2399, 2401 (describing the "unbroken tradition" in the American judiciary of considering every convicted person as an individual when evaluating sentencing factors).

169. See Wilt, *supra* note 38 (arguing that "an update to [the FSA's] guidelines is crucial to the fair and equitable implementation of compassionate release"). Wilt believes the most promising opportunity for clearing up the divergence in judicial opinions lies with Congress, which must apply the FSA retroactively to achieve the desired objective of providing meaningful criminal justice reform. *Id.*

170. See The First Step Implementation Act, S. 1014, 117th Cong. (2021) (proposing legislation that would retroactively extend the elimination of stacking for § 924 offenses to persons sentenced before the law's passage).

171. See *id.* (noting the still disproportionately high incarceration rates in the federal system following the passage of the FSA); see also Conyers, Jr., *supra* note 12, at 377–79 (drawing a connection between Congressional inaction on criminal justice reform and the rapid acceleration in the American prison population during the last thirty years).

172. See Wilt, *supra* note 38 (noting that the FSA has aided but not fully remedied the inequities in criminal justice sentences and time served). Wilt emphasizes that "unifying updates" to the FSA, either in the form of clarification from the U.S. Sentencing Commission or Congress, are essential to address over-incarceration and unduly harsh sentences. *Id.*

