

ANYTHING BUT COMPASSION: THE CONFLICT BETWEEN EXHAUSTION AND COMPASSIONATE RELEASE

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INTRODUCTION

Horacio Estrada-Elias was a ninety-year-old prisoner with less than eighteen months to live due to congestive heart failure, atrial fibrillation, and chronic kidney disease when he requested compassionate release.¹ He was serving a life sentence for conspiracy to distribute large quantities of marijuana.² A non-violent offense that nonetheless carried a mandatory life term because of the quantity involved.³ Despite recognizing Estrada-Elias' dire health conditions, the federal judge in the Eastern District of Kentucky denied his request for compassionate release.⁴

Incarceration in the United States is neither compassionate nor rehabilitative. From 1988 to 2012, the average length of federal prison sentences more than doubled, without any accompanying demonstration that longer sentences deter crime.⁵ And the conditions of confinement are "designed to diminish the self and weaken the individual."⁶ Prisoners are exposed to abuse, assault, and unrestrained violence; denied treatment for mental and physical illnesses; isolated from their loved ones and, in some instances, from all human contact; and subjected to the whims of corrupt and abusive correctional staff.⁷

After parole was abolished for federal prisoners, compassionate release became one of the few avenues for relief from incarceration.⁸ This sentencing reconsideration procedure allows courts to reduce an incarcerated person's sentence for extraordinary and compelling reasons when the court is assured that such a reduction complies with federal sentencing factors, including public safety.⁹ However, the compassionate release process is anything but compassionate.

1. *United States v. Estrada-Elias*, No. 06-096, 2021 U.S. Dist. LEXIS 229318, at *7–9 (E.D. Ky. July 9, 2021); *see also* Casey Tolan, *Compassionate Release Became a Life-or-Death Lottery for Thousands of Federal Inmates During the Pandemic*, CNN (Sept. 30, 2021, 7:05 AM), <https://www.cnn.com/2021/09/30/us/covid-prison-inmates-compassionate-release-invs/index.html> (describing Estrada-Elias' condition).

2. *Estrada-Elias*, 2021 U.S. Dist. LEXIS 229318, at *1.

3. *Id.* at *4, *12–13.

4. *Id.* at *11–14 (denying compassionate release due to the seriousness of the non-violent offense and the risk of Estrada-Elias reoffending).

5. *See* PEW CHARITABLE TRS., *PRISON TIME SURGES FOR FEDERAL INMATES 1–2* (2015), https://www.pewtrusts.org/-/media/assets/2015/11/prison_time_surges_for_federal_inmates.pdf ("The average length of time served by federal inmates more than doubled from 1988 to 2012, rising from 17.9 to 37.5 months . . . [R]esearch shows that longer prison terms have had little or no effect as a crime prevention strategy . . .").

6. RUTH DELANEY, RAM SUBRAMANIAN, ALISON SHAMES & NICHOLAS TURNER, *VERA INST. OF JUST., REIMAGINING PRISON 20* (2018), https://www.vera.org/downloads/publications/Reimagining-Prison_FINAL3_digital.pdf.

7. *See Prison Conditions*, EQUAL JUST. INITIATIVE, <https://eji.org/issues/prison-conditions/> (last visited Oct. 21, 2023); *see also* Shon Hopwood, *How Atrocious Prisons Conditions Make Us All Less Safe*, BRENNAN CTR. FOR JUST. (Aug. 9, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/how-atrocious-prisons-conditions-make-us-all-less-safe> (explaining that prevalent violence, failure to prioritize rehabilitation, and social isolation in prisons fail to prepare people to successfully return to society).

8. *See* Michael T. Hamilton, *Opening the Safety Valve: A Second Look at Compassionate Release Under the First Step Act*, 90 *FORDHAM L. REV.* 1743, 1751 (2022).

9. *See* 18 U.S.C. §§ 3582(c)(1)(A), 3553(a) (identifying factors a court shall consider in imposing a sentence).

In Horacio Estrada-Elias' case, the Sixth Circuit thankfully determined the denial of his compassionate release request was an abuse of discretion.¹⁰ After an additional five-month incarceration during the appeals process, Estrada-Elias was released in December 2021.¹¹ It is a perverse reflection of the compassionate release process that Estrada-Elias' case is a success story. His claim was heard on the merits.¹² Unfortunately, this is frequently not the case. Sean McQuiddy, a fifty-four-year-old man with multiple underlying health conditions serving a life sentence for a drug offense, died from COVID-19 while waiting for a decision on his compassionate release request.¹³ McQuiddy is not alone. Of the prisoners who died from COVID-19, at least one in four filed a motion for compassionate release.¹⁴ And a March 2022 analysis by NPR found that at least thirty-five prisoners died while waiting for the Bureau of Prisons ("BOP") to review their compassionate release requests, and three people had their requests granted but died before they were released.¹⁵

Compassionate release is supposed to operate as a safety valve that removes individuals from confinement when it would be inequitable to continue such confinement.¹⁶ Unfortunately, procedures governing compassionate release, namely exhaustion, prevent it from fulfilling this purpose.

Compassionate release was first established in the Sentencing Reform Act of 1984¹⁷ and most recently amended by the First Step Act of 2018.¹⁸ As the procedure currently stands, an incarcerated individual may obtain compassionate release either:

[U]pon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal . . . or the lapse of 30 days from the receipt of [a compassionate release] request by the warden of the defendant's facility.¹⁹

10. *United States v. Estrada-Elias*, No. 21-5680, 2021 WL 5505499, at *1-3 (6th Cir. Nov. 24, 2021).

11. See Casey Tolan, *A 90-Year-Old Was Serving Life for Marijuana Despite Serious Illness. Now He's Going Home*, CNN (Dec. 16, 2021, 6:55 AM), <https://www.cnn.com/2021/12/16/us/covid-prison-inmates-compassionate-release-invs/index.html>.

12. *See id.*

13. Keri Blakinger & Joseph Neff, *31,000 Prisoners Sought Compassionate Release During COVID-19. The Bureau of Prisons Approved 36.*, MARSHALL PROJECT (June 11, 2021, 6:00 AM), <https://www.themarshallproject.org/2021/06/11/31-000-prisoners-sought-compassionate-release-during-covid-19-the-bureau-of-prisons-approved-36>.

14. Meg Anderson & Huo Jingnan, *As COVID Spread in Federal Prisons, Many At-Risk Inmates Tried and Failed To Get Out*, NPR (Mar. 7, 2022, 5:00 AM), <https://www.npr.org/2022/03/07/1083983516/as-covid-spread-in-federal-prisons-many-at-risk-inmates-tried-and-failed-to-get->.

15. *Id.*

16. S. REP. NO. 98-225, at 121 (1983).

17. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a), 98 Stat. 1987, 1987-2011 (codified as amended in scattered sections of 18 and 28 U.S.C.).

18. First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239-41.

19. 18 U.S.C. § 3582(c)(1)(A).

The first avenue, a motion by the BOP, is almost nonexistent in practice. In 2013, the U.S. Department of Justice's ("DOJ") Office of the Inspector General ("OIG") found that on average only twenty-four prisoners were released each year through this method of compassionate release.²⁰ In 2020, when 31,000 prisoners sought compassionate release, the BOP granted only thirty-six requests.²¹ But the second avenue grants prisoners a right "to file a motion seeking compassionate release directly in federal court after satisfying an administrative exhaustion requirement."²²

Despite direct access to the courts, the exhaustion requirement continues to limit prisoners' ability to obtain review of their requests on the merits. Requiring individuals to jump through procedural hoops that prolong incarceration is contrary to the statute's principal purpose: releasing individuals for whom ongoing incarceration is unnecessary and harmful.²³ Even more concerning is the inconsistent application of exhaustion within the compassionate release framework. The standard for satisfying exhaustion varies between jurisdictions and amongst judges, prosecutors' offices, and wardens.²⁴ This places incarcerated individuals in an impossible situation. They must exhaust, but determining what satisfies exhaustion is unclear. As a result, individuals with mere months to live, debilitating illnesses, untenable personal situations, or other unjust circumstances remain incarcerated for failure to satisfy an ill-defined procedural requirement.

This Note argues that exhaustion is contradictory to the purpose of compassionate release and is applied in an inconsistent and unfair manner. People are needlessly dying behind bars because of this policy. Part I of this Note identifies the legal framework governing compassionate release claims, including the pertinent statutory provision, 18 U.S.C. § 3582(c)(1)(A); the U.S. Sentencing Commission's policy guidance; the BOP's procedures; and the general exhaustion doctrine. Part II argues that the exhaustion requirement of § 3582(c)(1)(A) is legally misapplied and generates inconsistent outcomes, fails to serve the policy goals of exhaustion, and is contrary to the purpose of compassionate release. In light of these legal and policy failures, Part III proposes feasible actions by legislative, executive, judicial,

20. OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM 1 (2013) [hereinafter OIG 2013 REPORT], <https://oig.justice.gov/reports/2013/e1306.pdf>; Michael E. Horowitz, Inspector General, U.S. Dep't of Just., Compassionate Release and the Conditions of Supervision, Statement Before the U.S. Sent'g Comm'n (Feb. 17, 2016).

21. Blakinger & Neff, *supra* note 13 (noting that the Director of the BOP approved only thirty-six requests in the thirteen months following March 2020).

22. U.S. SENT'G COMM'N, COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC 7 (2022) [hereinafter U.S. SENT'G COMM'N IMPACT REPORT], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220310_compassionate-release.pdf.

23. See Fred Clasen-Kelly, *Frail People Are Left to Die in Prison as Judges Fail to Act on a Law to Free Them*, NPR (Feb. 21, 2023, 5:00 AM), <https://www.npr.org/sections/health-shots/2023/02/21/1157058152/sick-elderly-people-left-to-die-federal-prison-law-judges> (discussing compassionate release and the First Step Act's purpose to "help free people in federal prisons who are terminally ill or aging and who pose little or no threat to public safety").

24. See *infra* Section II.A.

and private actors to redress the harms caused by exhaustion in the compassionate release scheme.

I. THE LEGAL FRAMEWORK GOVERNING COMPASSIONATE RELEASE

Compassionate release authorizes courts to grant “early release for incarcerated people when circumstances emerge that make continued imprisonment unjustifiable.”²⁵ Some form of compassionate release exists in nearly every state and the District of Columbia,²⁶ however, this Note focuses on compassionate release within the federal carceral system.²⁷ After providing a brief overview of the historical foundation of compassionate release, this Part explains the federal code provision, the U.S. Sentencing Commission’s policies, and the BOP’s procedures governing compassionate release. Finally, this Part explains the exhaustion doctrine and its application to compassionate release.

A. *The History of Compassionate Release in the Federal System*

The federal criminal justice system formally recognized sentencing reconsideration and early release as early as 1910 through the parole system.²⁸ In 1984, Congress enacted a sweeping package of federal criminal laws and procedures through the Comprehensive Crime Control Act (“CCCA”).²⁹ The Sentencing Reform Act of 1984,³⁰ one component of the CCCA, abolished the federal parole system³¹

25. *Compassionate Release*, FAMM, <https://famm.org/our-work/compassionate-release/> (last visited Oct. 22, 2023).

26. *Id.*; see also Lindsey E. Wylie, Alexis K. Knutson & Edie Greene, *Extraordinary and Compelling: The Use of Compassionate Release Laws in the United States*, 24 PSYCH., PUB. POL’Y, & L. 216, 218–25 (2018) (comparing state compassionate release provisions).

27. For an analysis of compassionate release in the States and the District of Columbia see Wylie et al., *supra* note 26, at 218–25; MARY PRICE, FAMS. AGAINST MANDATORY MINIMUMS, EVERYWHERE AND NOWHERE: COMPASSIONATE RELEASE IN THE STATES (2018), <https://famm.org/wp-content/uploads/Exec-Summary-Report.pdf>.

28. See PETER B. HOFFMAN, U.S. PAROLE COMM’N, HISTORY OF THE FEDERAL PAROLE SYSTEM 1 (2003), <https://www.justice.gov/sites/default/files/uspc/legacy/2009/10/07/history.pdf> (“Parole of federal prisoners began after enactment of legislation on June 25, 1910.”); see also 18 U.S.C. § 4205(g) (repealed 1987) (authorizing courts, upon motion of the BOP, to reduce any minimum term required for eligibility for parole to time served); Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 91–92 (2019) (explaining that second look provisions existed in the federal system through parole, sentencing reconsideration under Federal Rule of Criminal Procedure 35(b), and compassionate release provisions).

29. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (enacting the Bail Reform Act, Armed Career Criminal Act, Comprehensive Forfeiture Act, Insanity Defense Reform Act, Controlled Substances Penalties Amendments Act, Credit Card Fraud Act, Sentencing Reform Act, and additional criminal codes).

30. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

31. See PAUL J. HOFER, CHARLES LOEFFLER, KEVIN BLACKWELL & PATRICIA VALENTINO, U.S. SENT’G COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING 11–12, D-5 (2004) (explaining that the Sentencing Reform Act achieved the goal of “[a]ssuring certainty and severity of punishment” through the elimination of parole); HOFFMAN, *supra* note 28, at 26–27 (explaining that the CCCA abolished the Parole Commission five

and formally codified an independent compassionate release provision in 18 U.S.C. § 3582(c)(1).³²

For the next thirty-five years, the sole avenue for incarcerated persons in the federal system to seek sentencing reconsideration on equitable grounds was a motion by the Director of the BOP for compassionate release.³³ Upon the motion of the Director of the BOP, a court was authorized to reduce the term of imprisonment if it found “extraordinary and compelling reasons” warranted the reduction.³⁴ Congress delegated responsibility for defining “extraordinary and compelling reasons” to the newly formed Sentencing Commission.³⁵ Even if prisoners could satisfy the extraordinary and compelling reasons standard, incarcerated people lacked the ability to reach the courts to raise their compassionate release claim. Prisoners could file a request for compassionate release with the BOP, but there was no right to appeal the BOP’s decision.³⁶

In 2013, the OIG released a scathing assessment of the BOP’s poor management and inconsistent implementation of the compassionate release program.³⁷ The 2013 OIG report found the existing program “likely result[ed] in eligible inmates not being considered for release and in terminally ill inmates dying before their requests were decided.”³⁸ Among other issues, the report criticized the BOP for failing to review compassionate release requests in a timely manner; to consider relevant circumstances, such as terminal illnesses and limited life expectancy; to track compassionate release requests; and to identify cost savings associated with

years from the effective date of the sentencing guidelines promulgated by the newly created Sentencing Commission).

32. Sentencing Reform Act of 1984, § 212(a), 98 Stat. at 1998–99 (codified as amended at 18 U.S.C. § 3582(c)(1)(A)).

33. See S. REP. NO. 98-225, at 121 (1983) (“[A] court may not modify a sentence except as described in [§ 3582(c)].”); HOFER ET AL., *supra* note 31, at D-5 (“Under the SRA, parole was abolished”); see, e.g., FED. R. CRIM. P. 35(a) (permitting a court to “correct a sentence that resulted from arithmetical, technical, or other clear error”); FED. R. CRIM. P. 35(b) (permitting a court to reduce a defendant’s sentence only when the defendant provided “substantial assistance in investigating or prosecuting another person”); 28 U.S.C. § 2255(a) (permitting a defendant to move to vacate, set aside, or correct a sentence that “was imposed in violation of the Constitution or laws of the United States”).

34. Sentencing Reform Act of 1984, § 212(a), 98 Stat. at 1998–99.

35. *Id.* § 217(a), 98 Stat. at 2023 (current version at 28 U.S.C. § 994(t)); see also John F. Ferraro, *Compelling Compassion: Navigating Federal Compassionate Release After the First Step Act*, 62 B.C. L. REV. 2463, 2477 (2021) (“Rather than embarking on the tedious journey of defining ‘extraordinary and compelling’ itself, Congress delegated this task to the Sentencing Commission. Congress offered two pieces of affirmative guidance to the Sentencing Commission: first, an inmate’s rehabilitation is not ‘an extraordinary and compelling reason’ by itself. Second, judges granting compassionate release must act consistently with the Sentencing Commission’s regulations and policy statements.” (footnotes omitted)).

36. FAMM, COMPASSIONATE RELEASE AND THE FIRST STEP ACT: THEN AND NOW 1, <https://famm.org/wp-content/uploads/Compassionate-Release-in-the-First-Step-Act-Explained-FAMM.pdf>.

37. OIG 2013 REPORT, *supra* note 20, at i–iv.

38. *Id.* at i.

release.³⁹ Compassionate release was failing and even contributing to mass incarceration.⁴⁰

B. Compassionate Release Under the First Step Act

Four interlocking legal authorities govern compassionate release today: 18 U.S.C. § 3582(c)(1)(A); policy guidelines issued by the Sentencing Commission; federal regulations promulgated and interpreted by the BOP; and case law interpreting each of these authorities. In December 2018, the First Step Act (“FSA”) amended 18 U.S.C. § 3582(c)(1)(A)⁴¹ and enacted the first meaningful change to compassionate release procedures.⁴² Specifically, the changes brought by the FSA sought to increase access to compassionate release.⁴³ But the corresponding administrative law and case law have failed to reflect the changes made by the FSA comprehensively.

1. 18 U.S.C. § 3582(c)(1)(A)

The statutory provision governing compassionate release is 18 U.S.C. § 3582(c)(1)(A). As discussed *supra*, the statute originally allowed a court to modify a prison sentence for extraordinary and compelling reasons *only* upon the motion of the Director of the BOP.⁴⁴ The FSA amended § 3582(c)(1)(A) “to allow a defendant to file a motion seeking compassionate release directly in federal court after satisfying an administrative exhaustion requirement.”⁴⁵ Prior to filing a motion, the defendant must “fully exhaust[] all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf” or wait “30 days from the receipt of [a compassionate release] request by the warden of the

39. *Id.* at i–iv.

40. *See, e.g.*, Stephen R. Sady & Lynn Deffebach, *Second Look Resentencing Under 18 U.S.C. § 3582(c) as an Example of Bureau of Prisons Policies That Result in Overincarceration*, 21 FED. SENT’G REP. 167, 167 (2009) (arguing that the BOP contributes to “[o]verincarceration of federal prisoners” through its failure to “implement[] the Sentencing Commission’s Guideline on sentence reductions for ‘extraordinary and compelling circumstances’”); OIG 2013 REPORT, *supra* note 20, at 43 (“Release of inmates through the compassionate release program provides cost savings for the BOP and helps the BOP with its growing prison population and significant capacity issues.”).

41. U.S. SENT’G COMM’N, COMPASSIONATE RELEASE DATA REPORT: FISCAL YEARS 2020 TO 2022 n.4 (2022) [hereinafter U.S. SENT’G COMM’N 2020–2022 DATA REPORT], <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20221219-Compassionate-Release.pdf>.

42. *See* FAMM, *supra* note 36, at 2 (“The First Step Act . . . changes . . . how federal compassionate release works. It changes and expands the compassionate release eligibility criteria; ensures the prisoners have the right to appeal the BOP’s denial or neglect of the prisoner’s request for a compassionate release directly to court; and provides . . . notification, assistance, and visitation rules.”). *But see* Ferraro, *supra* note 35, at 2477–81 (explaining the shifting definition of “extraordinary and compelling reasons” under Sentencing Commission and BOP policy guidance from 2006–2018).

43. *See* NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW 18 (2019) (stating the FSA intended to “[i]ncreas[e] the [u]se and [t]ransparency of [c]ompassionate [r]elease”).

44. *See supra* Section I.A.

45. U.S. SENT’G COMM’N IMPACT REPORT, *supra* note 22, at 7.

defendant's facility, whichever is earlier."⁴⁶ The court may then reduce the term of imprisonment if it finds that "extraordinary and compelling reasons warrant such a reduction."⁴⁷ The court must also consider the sentencing factors set forth in 18 U.S.C. § 3553(a), such as public safety and the nature of the offense,⁴⁸ and ensure any reduction is "consistent with applicable policy statements issued by the Sentencing Commission."⁴⁹ By granting prisoners a direct avenue to appeal compassionate release claims, the FSA intended to "[i]ncreas[e] the [u]se and [t]ransparency of [c]ompassionate [r]elease."⁵⁰

2. Sentencing Commission Policy Statements

In 2023, the Sentencing Commission achieved a quorum for the first time since 2018 and subsequently promulgated amendments to reconcile the compassionate release policy statement with 18 U.S.C. § 3582(c)(1)(A).⁵¹ These amendments took effect on November 1, 2023,⁵² and the operative policy statement can be found at § 1B1.13 of the U.S. Guidelines Manual.⁵³ Section 1B1.13 now states: "Upon motion of the Director of the Bureau of Prisons or the defendant pursuant to 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment" if, after considering the § 3553(a) factors, the court determines that "extraordinary and compelling reasons warrant the reduction," the defendant is not a danger to the community, and the reduction is consistent with this policy statement.⁵⁴ The policy statement then identifies circumstances constituting extraordinary and compelling reasons, such as illness, family dynamics, abuse during incarceration, changes in

46. 18 U.S.C. § 3582(c)(1)(A).

47. *Id.* § 3582(c)(1)(A)(i). Compassionate release may also be granted if "the defendant is at least 70 years of age, has served at least 30 years in prison" of a sentence for certain violent felonies, "and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community." *Id.* § 3582(c)(1)(A)(ii).

48. *See id.* § 3553(a) (setting forth factors courts shall consider in imposing sentences).

49. *Id.* § 3582(c)(1)(A).

50. *See JAMES, supra* note 43, at 18.

51. Press Release, U.S. Sent'g Comm'n, "Back in Business" U.S. Sentencing Commission Acts to Make Communities Safer & Stronger (Apr. 5, 2023), <https://www.uscc.gov/about/news/press-releases/april-5-2023>. Although the FSA was enacted in December 2018, the Sentencing Commission was unable to reconcile the policy statement with current law because it lacked a quorum. *See* Madison Alder, *Biden Names Seven to Restock US Sentencing Commission*, BL, https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XBH8L2DO000000?bna_news_filter=us-law-week#jcite (May 11, 2022, 2:25 AM). The prior policy statement failed to recognize a defendant's ability to file a motion for compassionate release directly with the court and incorrectly stated "[a] reduction under this policy statement may be granted only upon motion by the Director of the Bureau of Prisons." *Compare* U.S. SENT'G GUIDELINES MANUAL § 1B1.13, cmt. n.4 (U.S. SENT'G COMM'N 2018) (permitting only the Director of the BOP to file compassionate release motion), *with* § 3582(c)(1)(A) (permitting a defendant to file compassionate release motion). *See also* Hopwood, *supra* note 28, at 108 (explaining that the prior policy statement was "a relic of the prior procedure that is now inconsistent with the First Step Act's amendment of § 3582(c)(1)(A)").

52. U.S. SENT'G GUIDELINES MANUAL (U.S. SENT'G COMM'N 2023); *see also* Sentencing Guidelines for United States Courts, 88 Fed. Reg. 28254, 28254 (May 3, 2023).

53. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2023).

54. *Id.* § 1B1.13(a).

law, or a catchall “other reasons” similar in gravity.⁵⁵ The amendments do not expressly address the exhaustion requirement in § 3582(c)(1)(A).⁵⁶

3. BOP Regulations and Implementing Statements

The BOP promulgates rules and issues an accompanying program statement to implement the compassionate release program.⁵⁷ The BOP’s rules implementing compassionate release, codified in the Code of Federal Regulations, have not been amended since 2013 and do not reflect the procedural changes under the FSA.⁵⁸ Significantly, the regulations indicate a “motion of the Director of the Bureau of Prisons” is required to reduce a sentence under § 3582(c)(1)(A).⁵⁹

The program statement issued by the BOP in January 2019, after the passage of the FSA, recognizes the inconsistency between the regulations and the governing statute and explains the current procedure for prisoners seeking compassionate release.⁶⁰ A prisoner initiates a request for compassionate release by submitting a request, ordinarily in writing, to the Warden.⁶¹ The request must include the “extraordinary or compelling circumstances” and the prisoner’s “[p]roposed release plans.”⁶² The proposed release plans must include where the prisoner will reside, how they will support themselves, and, if the request relates to the prisoner’s health, where they will receive medical treatment and how they will pay for the treatment.⁶³

Once a prisoner files a request for compassionate release, the Warden determines whether to approve or deny the request.⁶⁴ If approved, the Warden refers the matter to the Office of General Counsel.⁶⁵ The request is then reviewed by at least three additional levels of bureaucracy: the Office of General Counsel, the U.S. Attorney from the prisoner’s sentencing jurisdiction, and, finally, the Director of the BOP.⁶⁶ If the Director grants the request, the Director contacts the U.S.

55. *Id.* § 1B1.13(b). The amendments notably expanded what may constitute extraordinary and compelling reasons and granted judges with greater discretion. See Sarah N. Lynch & Nate Raymond, *U.S. Panel Votes to Expand Compassionate Release for Prisoners*, REUTERS (Apr. 6, 2023, 9:21 AM), <https://www.reuters.com/world/us/us-panel-consider-expanding-compassionate-release-prisoners-2023-04-05/>.

56. See U.S. SENT’G GUIDELINES MANUAL § 1B1.13 (U.S. SENT’G COMM’N 2023).

57. See 28 C.F.R. §§ 571.60–64 (2023); FED. BUREAU OF PRISONS, U.S. DEP’T OF JUST., PROGRAM STATEMENT NO. 5050.50, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582 AND 4205(G) (2019) [hereinafter BOP 2019 COMPASSIONATE RELEASE PROGRAM STATEMENT], https://www.bop.gov/policy/progstat/5050_050_EN.pdf.

58. Compare Compassionate Release, 78 Fed. Reg. 73083, 73083–84 (Dec. 5, 2013) (to be codified at 28 C.F.R. pt. 571), with First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239–41.

59. 28 C.F.R. § 571.60 (2023).

60. See BOP 2019 COMPASSIONATE RELEASE PROGRAM STATEMENT, *supra* note 57, at 1–3 (“18 U.S.C. 3582 was amended by the First Step Act of 2018, revisions noted . . . in [the] Summary of Changes.”).

61. 28 C.F.R. § 571.61(a); BOP 2019 COMPASSIONATE RELEASE PROGRAM STATEMENT, *supra* note 57, at 3.

62. 28 C.F.R. § 571.61(a)(1)–(2).

63. *Id.* § 571.61(a)(2).

64. *Id.* § 571.62(a)(1).

65. *Id.*

66. *Id.* § 571.62(a)(2)–(3).

Attorney in the sentencing court to file a motion to reduce the term of imprisonment to time served.⁶⁷

If the Warden denies the prisoner's request, the Warden shall provide "written notice and a statement of reasons for the denial," and the prisoner may appeal through the "Administrative Remedy Procedure,"⁶⁸ which is determined by each Warden pursuant to BOP guidance.⁶⁹ Generally, the appeal process is time consuming and burdensome. The correct avenue for appeal depends on who denied the prisoner's request. If the Warden denies the request, the prisoner must appeal to the Regional Director within twenty calendar days, and the Regional Director has thirty days to respond.⁷⁰ If the Regional Director denies the prisoner's request, the prisoner must appeal to the General Counsel within thirty days, and the General Counsel has forty days to respond.⁷¹ The "[a]ppel to the General Counsel is the final administrative appeal."⁷² Essentially, once a decision is made by the Office of General Counsel or the Director of the BOP, the decision "constitutes a final administrative decision" with no internal appeal process.⁷³

The timeline for the BOP to review and respond to compassionate release requests is largely unspecified. Requests from terminally ill offenders must be processed within fourteen days,⁷⁴ and if the Director of the BOP denies the request following a referral from the Office of General Counsel, the denial must occur within twenty workdays of the receipt of the referral.⁷⁵ Otherwise, the BOP does not specify timeliness expectations for the initial review of compassionate release requests. The BOP's policy statement does recognize that prisoners "may file directly to court after exhaustion of administrative remedies, or 30 days from receipt of a request by the Warden's Office."⁷⁶

C. *The Exhaustion Doctrine*

The exhaustion doctrine instructs that parties must "exhaust prescribed administrative remedies before seeking relief from the federal courts."⁷⁷ Exhaustion serves two purposes: protecting administrative agency authority and promoting judicial

67. *Id.*

68. *Id.* § 571.63(a).

69. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., PROGRAM STATEMENT NO. 1330.18, ADMINISTRATIVE REMEDY PROGRAM 2 (2014), https://www.bop.gov/policy/progstat/1330_018.pdf.

70. 28 C.F.R. §§ 542.15, 542.18.

71. *Id.*

72. *Id.* § 542.15(a).

73. *Id.* § 571.63(b)–(c).

74. 18 U.S.C. § 3582(d)(2)(A)(iv); BOP 2019 COMPASSIONATE RELEASE PROGRAM STATEMENT, *supra* note 57, at 3.

75. 28 C.F.R. § 571.63(b).

76. BOP 2019 COMPASSIONATE RELEASE PROGRAM STATEMENT, *supra* note 57, at 3.

77. *McCarthy v. Madigan*, 503 U.S. 140, 144–45 (1992); *see also* *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938) (recognizing "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted").

efficiency.⁷⁸ By requiring claims to progress through an agency’s internal process, courts exercise deference to the agency and preserve agency authority over the matter. This deference is justified by separation of powers principles. The judicial branch is effectively respecting Congress’ decision to delegate authority over specific matters to the agency.⁷⁹ And judicial efficiency is promoted in two ways. First, an agency may avoid litigation by “correct[ing] its own errors.”⁸⁰ Second, even when agency procedures are exhausted and litigation ensues, the “exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration.”⁸¹

As discussed above, prisoners may not file a motion for compassionate release until they have “fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier.”⁸² The statute does not define exhaustion, leaving interpretation of the statute to the administering agencies and the Sentencing Commission. As discussed above, the Sentencing Commission’s policy statement fails to provide any guidance on the exhaustion requirement created by the FSA.⁸³ While the BOP does not explicitly define exhaustion, it identifies three possible scenarios which would grant a prisoner the right to file a request with the sentencing court: (1) the General Counsel’s denial of the prisoner’s original request for compassionate release;⁸⁴ (2) the prisoner’s receipt of the General Counsel’s response to their appeal;⁸⁵ or (3) the lapse of thirty days from the Warden’s receipt of a request for compassionate release, “whichever is earlier.”⁸⁶ The BOP correctly states that a prisoner may file a motion with the sentencing court as soon as one of the three scenarios occurs. Section 3582(c)(1)(A) unambiguously states the requirement is satisfied by exhaustion of administrative appeals or the lapse of thirty days from the

78. *McCarthy*, 503 U.S. at 145.

79. *Id.*; see also *McKart v. United States*, 395 U.S. 185, 194 (1969) (“The administrative agency is created as a separate entity and invested with certain powers and duties. The courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction.”); Peter A. Devlin, *Jurisdiction, Exhaustion of Administrative Remedies, and Constitutional Claims*, 93 N.Y.U. L. REV. 1234, 1241 (2018) (explaining that the protection of administrative agency authority is “based on judicial deference to the congressional delegation that agencies, not the courts, should have primary responsibility over the programs they administer”).

80. *McCarthy*, 503 U.S. at 145.

81. *Id.* at 145–46 (citing *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975)).

82. 18 U.S.C. § 3582(c)(1)(A).

83. See *supra* notes 51–56 and accompanying text.

84. See BOP 2019 COMPASSIONATE RELEASE PROGRAM STATEMENT, *supra* note 57, at 15. The General Counsel would only deny a prisoner’s original request for compassionate release if the Warden reviewed the request, recommended approval, and then referred the request to the General Counsel’s office. *Id.* at 13.

85. See *id.* at 15 (stating a prisoner “may file a request for a reduction in sentence with the sentencing court after receiving a BP-11 response” following an appeal through the Administrative Remedy Procedure); 28 C.F.R. § 542.15 (2023) (stating “[a]ppeals to the General Counsel shall be submitted on the form designed for Central Office Appeals (BP-11)”).

86. BOP 2019 COMPASSIONATE RELEASE PROGRAM STATEMENT, *supra* note 57, at 15.

Warden's receipt of the request, "whichever is earlier."⁸⁷ The government may raise failure to exhaust as an affirmative defense to the prisoner's motion.⁸⁸

II. EXHAUSTION AND COMPASSIONATE RELEASE ARE FOUNDATIONALLY INCOMPATIBLE

Exhaustion of administrative remedies is inappropriate for compassionate release requests under § 3582(c)(1)(A). This Part will identify the legal and practical issues with an exhaustion requirement for compassionate release. First, the exhaustion requirement has been applied in a legally incorrect and inconsistent manner, resulting in arbitrary outcomes and unclear guidance for individuals urgently seeking relief. Second, even if courts were correctly and consistently applying the exhaustion provision, the purposes of exhaustion are not served in the compassionate release framework. Rather, exhaustion of compassionate release claims undermines administrative agency authority and results in judicial waste. Finally, a rigid exhaustion requirement subverts the statutory intent and policy goals of compassionate release.

A. Exhaustion Is Applied to Compassionate Release Claims in a Legally Incorrect and Inconsistent Manner

Courts have misinterpreted the scope and requirements of exhaustion under 18 U.S.C. § 3582(c)(1)(A). Two erroneous approaches have occurred with some frequency. First, some courts have conflated the two avenues to judicial review under § 3582(c)(1)(A) by requiring exhaustion of administrative appeals even when thirty days have passed since the initial request.⁸⁹ Second, courts have adopted inconsistent standards for what constitutes exhaustion of a compassionate release claim. Some courts erroneously require stringent compliance with formal administrative-request procedures to satisfy exhaustion.⁹⁰ Others atextually mandate exhaustion of each basis for compassionate release.⁹¹ Courts' incorrect and inconsistent approaches to exhaustion have resulted in unclear guidance and arbitrary outcomes for prisoners seeking compassionate release.

1. Conflating Exhaustion of Administrative Appeals with the Thirty-Day Waiting Period

Rather than mandating exhaustion in all instances, § 3582(c)(1)(A) creates two possible avenues for an individual to seek judicial review: (1) fully exhausting administrative rights of appeal or (2) "the lapse of 30 days from the receipt of [a

87. 18 U.S.C. § 3582(c)(1)(A).

88. See 33 CHARLES ALAN WRIGHT, CHARLES H. KOCH, JR. & RICHARD MURPHY, FEDERAL PRACTICE AND PROCEDURE § 8363, at 216 (2d ed. 2018) ("Courts regard exhaustion as an affirmative defense.").

89. See, e.g., *United States v. Greenlove*, 469 F. Supp. 3d 341, 343–44 (M.D. Pa. 2020).

90. See, e.g., *United States v. Lee*, 848 F. App'x 872, 873–74 (11th Cir. 2021).

91. See, e.g., *United States v. Williams*, 987 F.3d 700, 703 (7th Cir. 2021).

compassionate release] request by the warden of the defendant's facility, whichever is earlier."⁹² Many courts have correctly held that these avenues are independent of each other.⁹³ Based on traditional statutory interpretation, "[t]he words 'or' and 'whichever' make it unambiguously clear that Congress has provided defendants with two alternative ways to satisfy the threshold requirement."⁹⁴ Significantly, the individual may file a motion with the sentencing court as soon as thirty days have passed since their request to the warden and they are under no obligation to appeal a denial or proceed through the BOP's administrative process.⁹⁵

Despite this clear statutory construction, some courts have erroneously ignored the automatic right of appeal after the passage of thirty days and required defendants to pursue administrative remedies to their conclusion. In *United States v. Greenlove*, the defendant filed his motion with the sentencing court "over 30 days after he submitted his first and second requests [for compassionate release] to the [w]arden."⁹⁶ The court determined the Government's concession that Greenlove satisfied the exhaustion requirement by waiting thirty days was "misplaced."⁹⁷ The court found Greenlove had failed to exhaust because he did not respond to requests for "additional information" and failed to appeal the responses from the warden through the administrative remedy process.⁹⁸ In *United States v. Bolze*, the court determined the defendant failed to exhaust his request for compassionate release because he did not appeal the warden's denial, reasoning that a "warden's negative response to [a compassionate release] request represents an explicit denial, thus eliminating the elapse of thirty (30) days as a path to judicial review."⁹⁹ These are not unique holdings.¹⁰⁰

92. 18 U.S.C. § 3582(c)(1)(A).

93. *See, e.g.*, *United States v. Garrett*, 15 F.4th 335, 339 (5th Cir. 2021) ("Once 30 days has 'lapse[d] . . . from the receipt of such a request by the warden,' the prisoner may file his motion in the district court. § 3582(c)(1) (A). That is so irrespective of whether the BOP has responded to the request or whether the inmate has administrative appeals available to him."); *United States v. Alam*, 960 F.3d 831, 834 (6th Cir. 2020) ("Prisoners who seek compassionate release have the option to take their claim to federal court within 30 days, no matter the appeals available to them."); *United States v. Harris*, 973 F.3d 170, 171 (3d Cir. 2020) (finding the defendant was not required to completely exhaust the administrative remedy process after the warden denied the compassionate release request).

94. *United States v. Muhammad*, 16 F.4th 126, 130 (4th Cir. 2021) (citing *Garrett*, 15 F.4th at 338).

95. *See Garrett*, 15 F.4th at 339; *Alam*, 960 F.3d at 834; *Harris*, 973 F.3d at 171.

96. *United States v. Greenlove*, 469 F. Supp. 3d 341, 344 (M.D. Pa. 2020).

97. *Id.* at 344–45.

98. *Id.*

99. *United States v. Bolze*, 460 F. Supp. 3d 697, 701–02 (E.D. Tenn. 2020).

100. *See, e.g.*, *United States v. Early*, No. 19-92, 2020 WL 2572276, at *3 (W.D. Pa. May 21, 2020) (holding defendant "is obligated to complete the administrative appeal process" to satisfy the exhaustion requirement); *United States v. Brummett*, No. 07-103, 2020 WL 1492763, at *1–2 (E.D. Ky. Mar. 27, 2020) (denying request for compassionate release on exhaustion grounds because defendant failed to appeal warden's denial); *United States v. Smith*, No. 15-cr-19, 2020 WL 2063417, at *2 (N.D. Ohio Apr. 29, 2020) (denying request for compassionate release because "Smith needed to exhaust by appealing the Warden's decision"); *United States v. Pinson*, No. H-08-283, 2020 WL 2771343, at *3 (S.D. Tex. May 28, 2020) (finding defendant failed to "fully exhaust administrative rights" where he "did not appeal" the warden's denial).

Conflating the two avenues for defendants to file a motion for compassionate release is contrary to the text of the statute. The FSA changed compassionate release procedures to guarantee that prisoners could access judicial review on the merits of their claim after thirty days. The direct right of appeal eliminates the BOP's ability to indefinitely delay decisions on compassionate release claims. By reimposing a requirement that the defendant pursue administrative appeals to their conclusion, courts are reintroducing the BOP as a blockade, contrary to the text and purpose of the FSA.¹⁰¹ Also, given the lengthy timeline for appeals within the BOP,¹⁰² requiring defendants to pursue all appeals could, in practice, permanently foreclose their ability to obtain judicial review.

2. Inconsistent Standards for Exhaustion Under § 3582(c)(1)(A)

Courts cannot agree on what actions a defendant must take to sufficiently exhaust a request for compassionate release. The simplest answer, and the one favored by the statutory text, is that filing a request for compassionate release with the warden and waiting thirty days satisfies the statute and grants a right of judicial review. But courts have not universally accepted the simple answer. Instead, courts have required defendants to comply with exacting and technical requirements regarding the form and contents of the request to the warden.¹⁰³

In *United States v. Lee*, the Eleventh Circuit held that the defendant failed to exhaust administrative remedies because they did not follow “prison regulations” requiring a detailed explanation of the extraordinary or compelling reasons and failed to include a proposed release plan.¹⁰⁴ While the absence of a detailed explanation of extraordinary or compelling reasons may justify denial by the warden during the administrative process, it does not warrant dismissal by the sentencing court for failure to exhaust. The statute distinguishes exhaustion and the passage of thirty days as two distinct paths to file a motion for compassionate release. The fact that the contents of a defendant's request failed to meet the BOP's standards for consideration is irrelevant to whether a request was filed and thirty days subsequently passed. The latter triggers a right to file a motion with the sentencing court—there is no statutory obligation that the request for compassionate release meet the BOP's specifications. Requiring defendants to meet the BOP's standard for detailing extraordinary or compelling reasons prior to filing a motion with the sentencing court reinstates the framework the FSA sought to eliminate.

Courts also disagree on whether defendants must exhaust each issue raised for compassionate release. Some courts have determined § 3582(c)(1)(A) does not

101. See *JAMES*, *supra* note 43, at 18 (stating the FSA intended to “[i]ncreas[e] the [u]se and [t]ransparency of [c]ompassionate [r]elease”).

102. See *supra* notes 70–76 and accompanying text.

103. See *United States v. Lee*, 848 F. App'x 872, 874–75 (11th Cir. 2021) (finding a failure to exhaust where the defendant did not file request according to appropriate procedures, even though thirty days had lapsed).

104. *Id.* at 874–75; see also *United States v. Blackstock*, 471 F. Supp. 3d 1175, 1177–78 (finding failure to exhaust where defendant had “requested home confinement from BOP—not a sentence modification”).

require issue-level exhaustion such that a defendant's motion to the court need not be based on facts identical in detail or specificity to those in the request to the warden.¹⁰⁵ This conclusion makes sense because "there is no indication whatsoever in the statutory text that issue exhaustion is required."¹⁰⁶ Section 3582(c)(1)(A)'s text does not contain a requirement that "specific 'arguments' or 'claims' be raised" in the defendant's request to the warden.¹⁰⁷ In the absence of a statutory requirement of issue exhaustion, an agency may require issue exhaustion through its regulations.¹⁰⁸ However, neither the Sentencing Guidelines policy statement, § 1B1.13, nor the BOP regulations governing compassionate release, 28 C.F.R. §§ 571.60–.64, require issue-level exhaustion.¹⁰⁹

Despite no issue-level exhaustion requirement in the governing statutory and regulatory law, some courts have read one into the compassionate release framework by mandating uniformity between the request to the warden and the motion in court.¹¹⁰ For instance, in *United States v. Williams*, the Seventh Circuit rejected Williams' compassionate release motion because he never asked the warden to consider his release "based on the presence of COVID-19 at his prison and his risk of infection."¹¹¹ The Seventh Circuit determined issue-level exhaustion was necessary based on the BOP's "regulations implementing an earlier version of the statute (which did not permit inmates to move for release on their own)."¹¹² Those regulations are now outdated and preempted by federal statute because Congress

105. *See, e.g.*, *United States v. Torres*, 464 F. Supp. 3d 651, 655–57 (S.D.N.Y. 2020) (holding "issue exhaustion is not required" under § 3582(c)(1)(A)); *United States v. Brown*, 457 F. Supp. 3d 691, 697 (S.D. Iowa 2020) (holding "issue exhaustion is inappropriate because § 3582 contains no such requirement and BOP compassionate release requests are not adversarial proceedings"); *United States v. Dillard*, 456 F. Supp. 3d 1210, 1212 (D. Idaho 2020) (holding "[t]he statute does not require issue exhaustion").

106. *Torres*, 464 F. Supp. 3d at 655.

107. *Id.*

108. *Sims v. Apfel*, 530 U.S. 103, 108 (2000) (explaining "it is common for an agency's regulations to require issue exhaustion" and courts then "refus[e] to consider unexhausted issues").

109. *See Torres*, 464 F. Supp. 3d at 655–56 (explaining issue exhaustion is not mandated by statute, Sentencing Guidelines, or BOP regulations).

110. *See, e.g.*, *United States v. Williams*, 987 F.3d 700, 703–04 (7th Cir. 2021); *United States v. Kanohokula*, 572 F. Supp. 3d 895, 899–900 (D. Haw. 2021) (finding defendant failed to exhaust where the request to the warden did not mention the COVID-19 pandemic or conditions of confinement); *United States v. Mogavero*, No. 15-CR-00074, 2020 WL 1853754, at *2 (D. Nev. Apr. 13, 2020) (finding defendant failed to exhaust where she filed a request for compassionate release, but did not mention COVID-19 concerns raised in motion to the court); *United States v. Douglas*, No. 10-171-4, 2020 WL 5816244, at *2 (D.D.C. Sept. 30, 2020) (finding defendant failed to exhaust where the request to the warden did not cite any specific medical conditions, even though some conditions had not been diagnosed at the time of the request to BOP); *United States v. Asmar*, 465 F. Supp. 3d 716, 719 (E.D. Mich. 2020) (finding defendant did not satisfy the exhaustion requirement where the administrative request did not reference the health conditions relied on before the court).

111. *Williams*, 987 F.3d at 703–04.

112. *Id.* at 703.

intentionally amended § 3582 to increase, not continue to restrict, the use of compassionate release.¹¹³

The incorrect interpretation that § 3582(c)(1)(A) requires issue-level exhaustion has foreclosed judicial review of the merits of individuals' compassionate release claims.

B. The Twin Purposes of Exhaustion Are Not Served Within Compassionate Release Claims

The twin purposes of exhaustion are to protect administrative agency authority and to promote judicial efficiency.¹¹⁴ Section 3582(c)(1)(A)'s exhaustion requirement not only fails to serve these purposes, but detracts from these goals by highlighting administrative agency incompetence and creating judicial waste.

1. Exhaustion Fails to Enhance Administrative Agency Authority

Exhaustion serves administrative agency authority by recognizing that agencies "ought to have primary responsibility for the programs that Congress has charged them to administer" and that an agency "ought to have an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court."¹¹⁵ The BOP abdicated primary responsibility for administering the compassionate release program by failing to review and refer qualified applicants for compassionate release. And the BOP has refused to correct these mistakes.

The Sentencing Commission released a report detailing the volume and origins of compassionate release requests from fiscal years 2020 to 2022.¹¹⁶ From October 2019 to September 2022, 27,789 compassionate release motions were filed in federal court.¹¹⁷ Courts granted relief to just over 16% of requests or 4,502 motions.¹¹⁸ Of the motions granted, the BOP filed the motion in just 1% of cases or 45 motions.¹¹⁹

The stark disparity between motions granted by the court that were filed by the BOP (45) versus filed by defendants (4,318)¹²⁰ demonstrates that the BOP fails to review and identify meritorious claims for compassionate release. It is worth emphasizing that this subcategory of data is exclusively granted motions, meaning a federal court determined the application satisfied the criteria for compassionate release. Courts reviewed and denied 23,287 motions during the same time frame.¹²¹ The BOP's failure has shifted primary responsibility for reviewing

113. See JAMES, *supra* note 43, at 18.

114. *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992).

115. *Id.*

116. U.S. SENT'G COMM'N 2020–2022 DATA REPORT, *supra* note 41.

117. *Id.* tbl. 1.

118. *Id.*

119. *Id.* tbl. 5.

120. *Id.*

121. *Id.* tbl. 1.

compassionate release claims from the administrative agency to the courts. The BOP is not conducting a good faith preliminary review. Rather, the courts have assumed the role of reviewing the claims, without the benefit of an agency's meaningful initial consideration and report.

The BOP's inability to recommend individuals for compassionate release is a persistent problem. In 2013, the OIG released a report harshly criticizing the BOP's administration of the compassionate release program.¹²² The report found the Director of the BOP approved only 142 prisoners for compassionate release from 2006 through 2011.¹²³ The FSA sought to "[i]ncrease the [u]se . . . of [c]ompassionate [r]elease."¹²⁴ Rather than respond to a clear directive from Congress to increase the number of applicants referred for compassionate release, the data on motions from 2020 through 2022 demonstrate the BOP has persisted in referring a minuscule percentage of applicants.¹²⁵ Despite years of warnings and criticism, the BOP has refused to correct its mistakes.

Furthermore, the BOP's obstinate refusal to encourage compassionate release is contrary to the Sentencing Commission's policy guidance. The Sentencing Commission provides clear guidance that "an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment."¹²⁶ In contrast, the BOP's regulations and program statement only permit a motion for a modification of a sentence in "particularly extraordinary or compelling circumstances which *could not* reasonably have been foreseen by the court at the time of sentencing."¹²⁷ The BOP has created an additional requirement, unforeseen circumstances, for a successful compassionate release claim. This is not required by statute or policy guidance.

Congress sought to diminish the BOP's control over compassionate release by permitting defendants to file sentence reduction motions directly with the sentencing court.¹²⁸ Requiring defendants to exhaust compassionate release claims fails to serve agency authority or autonomy because the BOP has abdicated responsibility for administering the compassionate release program and failed to address its past mistakes in reviewing compassionate release requests.

122. See OIG 2013 REPORT, *supra* note 20, at i–iv.

123. *Id.* at 36.

124. See JAMES, *supra* note 43, at 18.

125. Of the 4,491 compassionate release motions granted from 2020 through 2022, the BOP initiated the motion in only 45 cases. See U.S. SENT'G COMM'N 2020–2022 DATA REPORT, *supra* note 41, tbl. 5.

126. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.2 (U.S. SENT'G COMM'N 2018).

127. BOP 2019 COMPASSIONATE RELEASE PROGRAM STATEMENT, *supra* note 57, at 3 (emphasis added); 28 C.F.R. § 571.61(a) (2023) (emphasis added).

128. See STEPHEN R. SADY & ELIZABETH G. DAILY, COMPASSIONATE RELEASE BASICS FOR FEDERAL DEFENDERS, OFF. OF THE FED. PUB. DEF., DIST. OF OR. 11 (2019), https://or.fd.org/sites/or/files/case-documents/Compassionate%20Release%20Basics_REVISED_2templates.pdf.

2. Exhaustion Results in Judicial Waste

Exhaustion creates judicial waste because the statutory structure opens the door for expedited review, which renders exhaustion duplicative, and stringently enforcing exhaustion generates excess litigation.

According to the Sentencing Commission, in 2020, courts denied 31.9% of prisoners' motions for compassionate release due to the failure to exhaust administrative remedies.¹²⁹ And "for more than half of these offenders, failure to exhaust was the *only* reason for denial . . ."¹³⁰ This means nearly one third of denials are based on a technical, claim-processing rule that is moot. By the time the court addresses a motion for compassionate release, it is almost certain thirty days will have passed from the original request. Therefore, the claimant would be entitled under the statute to file their motion directly with the court. Instead, the claimant must return to the administrative procedure, file another request, and wait an additional thirty days, before returning to the court with the same request that the court previously dismissed due to failure to exhaust. The court must then decide the same claim on the merits.

Courts have, in rare instances, recognized the inefficiency of denying compassionate release claims purely for exhaustion and, instead, granted a stay which "favors the interests of judicial economy."¹³¹ But too frequently defendants are required to engage in repetitive litigation to reach a decision on the merits. For instance, in *United States v. Garrett*,¹³² the Fifth Circuit imposed a stringent and circular exhaustion requirement on the defendant. The district court denied the defendant's initial motion for compassionate release for failure to exhaust.¹³³ Garrett satisfied the exhaustion requirement and filed a motion for reconsideration, but the Fifth Circuit determined this was not a proper basis for a motion for reconsideration.¹³⁴ Instead, the court instructed Garrett to file a new motion for compassionate release, which the dissent astutely pointed out "serve[s] no purpose."¹³⁵

The exhaustion requirement results in judicial waste because it obligates courts to process identical requests multiple times. This increases the volume of cases pending and is the epitome of inefficiency. As a result, judicial review is prolonged for ripe claims, and a revolving door of compassionate release claims clogs up both the judicial and administrative docket.

129. U.S. SENT'G COMM'N IMPACT REPORT, *supra* note 22, at 42.

130. *Id.*

131. *See* *United States v. Route*, 458 F. Supp. 3d 1285, 1290 (W.D. Wash. 2020); *see also* *United States v. Reid*, No. 17-CR-00175-CRB-1, 2020 WL 1904598, at *4 (N.D. Cal. Apr. 18, 2020) (staying the motion for compassionate release pending exhaustion).

132. 15 F.4th 335 (5th Cir. 2021).

133. *Id.* at 337.

134. *Id.* at 339–40.

135. *Id.* at 342 (Graves, J., dissenting).

*C. Exhaustion Subverts the Statutory Intent and Policy Goals of
Compassionate Release*

Exhaustion has been weaponized to subvert the statutory intent and policy goals of § 3582(c)(1)(A), as amended by the FSA. The purpose of compassionate release is to provide “early release for incarcerated people when circumstances emerge that make continued imprisonment unjustifiable.”¹³⁶ Even from its earliest enactment in 1984, Congress intended for compassionate release to operate as a safeguard against inequitable confinement due to changed circumstances.¹³⁷

Prior to the passage of the FSA, the BOP was harshly criticized for its failure to manage and implement the compassionate release program.¹³⁸ In 2016, Michael E. Horowitz, the U.S. Inspector General, reported to the Sentencing Commission during a public hearing on compassionate release and conditions of supervision that “the BOP’s compassionate release program had been poorly managed and implemented inconsistently resulting in, among other things, deaths of inmates waiting to have their applications considered.”¹³⁹ An analysis of federal data by *The Marshall Project* and *The New York Times* confirmed this horrific landscape: “[f]rom 2013 to 2017, the Bureau of Prisons approved 6 percent of the 5,400 applications received, while 266 inmates who requested compassionate release died in custody.”¹⁴⁰

By amending § 3582 to grant prisoners an avenue to appeal compassionate release claims, among other changes to compassionate release procedures, the FSA intended to “[i]ncreas[e] the [u]se and [t]ransparency of [c]ompassionate [r]elease.”¹⁴¹ The congressional record further reflects Congress’ intent to expand use of and reduce procedural barriers to compassionate release. Speaking in support of the FSA, Representative Nadler identified “improving application of compassionate release” as a “positive change[.]” intended to “improve the welfare of Federal inmates.”¹⁴² Senator Cardin also emphasized that the FSA “expands compassionate release,” “expedites compassionate release applications,” and “limits the discretion of the Bureau of Prisons to deny release to individuals who meet all

136. *Compassionate Release*, FAMM, <https://famm.org/our-work/compassionate-release/> (last visited Oct. 22, 2023).

137. S. REP. NO. 98-225, at 121 (1983) (explaining the legislative intent behind § 3582(c)(1)(A) as providing a “safety valve” to modify sentences where “the defendant’s circumstances are so changed, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner”).

138. OIG 2013 REPORT, *supra* note 20, at i (finding the “BOP compassionate release program ha[d] been poorly managed and implemented inconsistently, likely resulting in eligible inmates not being considered for release and in terminally ill inmates dying before their requests were decided”).

139. *Public Hearing on Compassionate Release and Conditions of Supervision Before the U.S. Sent’g Comm’n* 66 (2016) (statement of Michael Horowitz, Inspector General, U.S. Department of Justice).

140. Christie Thompson, *Frail, Old and Dying, but Their Only Way Out of Prison Is a Coffin*, N.Y. TIMES (Mar. 7, 2018), <https://www.nytimes.com/2018/03/07/us/prisons-compassionate-release-.html>.

141. See JAMES, *supra* note 43, at 18.

142. 164 CONG. REC. H10361–62 (daily ed. Dec. 20, 2018) (statement of Rep. Jerrold Nadler).

eligibility criteria.”¹⁴³ Rigid enforcement of an exhaustion, claim-processing rule runs contrary to the purpose of compassionate release generally and fails to comprehend the significance of the FSA’s amendments.

This issue has the severest consequences—individuals are dying while their claims are processing. During the COVID-19 pandemic, finite prison sentences became death sentences for incarcerated people.¹⁴⁴ Prisoners seeking compassionate release quickly learned “that compassionate release is not a transparent and linear process, but an unpredictably ordered series of obstacles,” which means many applicants “die before their cases are resolved.”¹⁴⁵ According to NPR, of the 31,000 individuals who had requested compassionate release from their warden by April 2021, “[a]t least 35 died waiting for the Bureau of Prisons to review their case” and “[u]ltimately the bureau approved just 36 of that initial 31,000.”¹⁴⁶ The total loss of life due to COVID-19 in BOP facilities remains unclear because the BOP has failed to provide reliable, cumulative data on COVID-19 deaths and infections.¹⁴⁷ The total number of infections from COVID-19 reported by the BOP and non-profit watchdogs ranges from 44,049 to over 60,000.¹⁴⁸ And the total number of deaths in BOP facilities due to COVID-19 ranges from 296 to 317.¹⁴⁹ This loss of life might have been reduced by efficient review of compassionate release claims. “Of the prisoners who died from COVID-19, at least 1 in 4 filed a motion in court for compassionate release” and “[a]t least three people had their requests granted, yet contracted COVID-19 and died before they could actually be released.”¹⁵⁰ In addition to the delay caused by the BOP, prisoners face a lengthy process within the judicial system, in part because courts irrationally insist on exhaustion, which results in repetitive litigation of the same claim.¹⁵¹ Compassionate

143. 164 CONG. REC. S7774–75 (daily ed. Dec. 18, 2018) (statement of Sen. Ben Cardin).

144. See Emily Widra & Wandra Betram, *Compassionate Release Was Never Designed to Release Large Numbers of People*, PRISON POL’Y INITIATIVE (May 29, 2020), <https://www.prisonpolicy.org/blog/2020/05/29/compassionate-release/>.

145. *Id.*

146. Meg Anderson & Huo Jingnan, *As COVID Spread in Federal Prisons, Many At-Risk Inmates Tried and Failed to Get Out*, NPR (Mar. 7, 2022, 5:00 AM), <https://www.npr.org/2022/03/07/1083983516/as-covid-spread-in-federal-prisons-many-at-risk-inmates-tried-and-failed-to-get->.

147. See Jennifer Valentino-DeVries & Allie Pitchon, *As the Pandemic Swept America, Deaths in Prisons Rose Nearly 50 Percent*, N.Y. TIMES (Feb. 19, 2023), <https://www.nytimes.com/2023/02/19/us/covid-prison-deaths.html>; see also *Federal Facilities in the United States*, UCLA LAW COVID BEHIND BARS DATA PROJECT (Dec. 29, 2022), <https://uclacovidbehindbars.org/federal/#scorecard> (giving the Federal Bureau of Prisons an F on the Data Reporting & Quality Scorecard).

148. See OFF. OF INSPECTOR GEN., U.S. DEP’T OF JUST., CAPSTONE REVIEW OF THE FEDERAL BUREAU OF PRISONS’ RESPONSE TO THE CORONAVIRUS DISEASE 2019 PANDEMIC 1 (2023) [hereinafter *OIG COVID CAPSTONE REVIEW*] (estimating over 60,000 infections); UCLA LAW COVID BEHIND BARS DATA PROJECT, *supra* note 147 (reporting 55,312 infections); *National COVID-19 Statistics*, THE COVID PRISON PROJECT, <https://covidprisonproject.com/data/national-overview/> (last visited June 20, 2023) (reporting 44,049 infections).

149. See *OIG COVID CAPSTONE REVIEW*, *supra* note 148, at 1 (reporting 296 COVID-19 deaths); UCLA LAW COVID BEHIND BARS DATA PROJECT, *supra* note 147 (reporting 321 COVID-19 deaths); THE COVID PRISON PROJECT, *supra* note 148 (reporting 317 COVID-19 deaths).

150. See Anderson & Jingnan, *supra* note 146.

151. See *supra* Section II.B.2.

release could save lives.¹⁵² Requiring exhaustion, without any consideration of individual circumstances and effects, is inhumane and contrary to the clear objectives of the FSA.

III. PROPOSED SOLUTIONS

The harm caused by the erroneous application of exhaustion to compassionate release motions can and should be addressed by each of the relevant institutional actors. This Part will propose solutions for legislative, executive, judicial, and private actors. Each solution addresses a different aspect of the problem, and the proposals work in conjunction. Congress should eliminate the exhaustion requirement by amending § 3582(c)(1)(A). The executive branch should exempt compassionate release claims from exhaustion requirements. This entails the Sentencing Commission updating policy guidance, the DOJ waiving exhaustion as an affirmative defense, and the BOP changing its regulations and implementing program statements to redefine exhaustion of compassionate release requests. Courts should apply the judicially recognized equitable exceptions to compassionate release. Finally, private actors can assist individuals seeking compassionate release by providing legal counsel.

A. Legislative Action: Eliminate the Exhaustion Requirement of § 3582(c)(1)(A)

Congress established the statutory framework that allows a defendant to file a motion for compassionate release with the sentencing court after (1) “the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf” or (2) “the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, *whichever is earlier*.”¹⁵³ The bifurcated path for defendants to obtain judicial review has resulted in courts conflating the two avenues (exhaustion or the lapse of thirty days), unclear parameters of exhaustion, uncertain agency authority over the program, judicial inefficiency and waste, and burdensome procedural hurdles for defendants—particularly terminally and severely ill defendants who are urgently seeking compassionate release.

Congress enacted the problematic statute. Therefore, Congress can remedy the issue by amending § 3582(c)(1)(A). Congress should strike the language requiring exhaustion and creating the two avenues to the court. Specifically, Congress should strike the language stating “the defendant has fully exhausted all administrative

152. See Colleen M. Berryessa, *Compassionate Release as a “Right” in the Age of COVID-19*, 20 AM. J. BIOETHICS 185, 186 (2020) (arguing the BOP should accelerate and maximize compassionate release because “unless action is taken, [elderly and sick inmates] will die of COVID-19 while waiting on their compassionate release decisions in the coming months, and many more will die if their applications are stalled or denied for political reasons”).

153. 18 U.S.C. § 3582(c)(1)(A) (emphasis added).

rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or" and "whichever is earlier."¹⁵⁴ The statute would then read:

(c) **Modification of an imposed term of imprisonment . . .** (1) . . . (A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant, after the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, may reduce the term of imprisonment . . . after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—(i) extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.¹⁵⁵

While this solution would uniformly and permanently address the incorrect application and unjust outcomes of the exhaustion requirement, legislation on criminal justice reform faces political barriers. Major media institutions¹⁵⁶ and politicians¹⁵⁷ have been using their public platforms to decry rising crime, particularly homicides and violent crime. Respected policy institutes, such as The Brennan Center for Justice and The Brookings Institute, however, rationally point out that there is no reputable evidence to suggest recent criminal justice reforms have contributed to increases in crime.¹⁵⁸ While violent crime and homicide rates did increase in 2020, the rates remain "substantially lower than rates seen in the '90s and early 2000s."¹⁵⁹ Also, The Brennan Center explains it is highly unlikely recent criminal justice reforms caused the spike in violent crimes because (1) the rise in homicide rates was a national phenomenon, not specific to jurisdictions that adopted criminal justice reforms; (2) data indicates social and economic disruptions driven by the

154. *Id.*

155. *Cf. id.*

156. See, e.g., Tucker Carlson on America's Crime Crisis as Democrats Criticized Over Soft-on-Crime Policies, FOX NEWS (Apr. 18, 2022), <https://video.foxnews.com/v/6304293073001#sp=show-clips>; Louis Casiano, NYC Soaring Crime Rate in First Months of 2022 Fueled by Repeat Offenders, FOX NEWS (Apr. 7, 2022, 8:02 PM), <https://www.foxnews.com/us/nyc-crime-rate-2022-repeat-offenders>; German Lopez, A Violent Crisis, N.Y. TIMES (Apr. 17, 2022), <https://www.nytimes.com/2022/04/17/briefing/violent-crime-ukraine-war-week-ahead.html>.

157. See, e.g., Paul Kane, Republicans, After Years of Pushing for Softer Criminal Sentences, Return to the Party's Law-and-Order Posture in Jackson's Confirmation Hearing, WASH. POST. (Mar. 23, 2022, 2:55 PM), <https://www.washingtonpost.com/politics/2022/03/23/grassley-crime/>.

158. See Anthony Barr & Kristen Broady, *Dramatically Increasing Incarceration Is the Wrong Response to the Recent Uptick in Homicides and Violent Crime*, BROOKINGS INST. (Nov. 2, 2021), <https://www.brookings.edu/blog/the-avenue/2021/11/02/dramatically-increasing-incarceration-is-the-wrong-response-to-the-recent-uptick-in-homicides-and-violent-crime/> (explaining "we do not have to choose between efforts to decrease crime and efforts to decrease incarceration" and a data-driven approach does not suggest mass incarceration is the correct response to "the most recent upticks in homicide and violent crime"); Ames Grawert & Alexander Horwitz, *2020 Uptick in Homicides Doesn't Mean Criminal Justice Reforms Aren't Working*, BRENNAN CTR. FOR JUST. (Oct. 7, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/2020-uptick-homicides-doesnt-mean-criminal-justice-reforms-arent-working> (explaining "[i]t would be wrong and harmful to the country to blame the spike in homicides on commonsense criminal justice reforms" because data "demonstrated that these types of reforms make communities safer").

159. Barr & Broady, *supra* note 158.

pandemic likely led to the increase; and (3) the rise in homicides coincided with a dramatic increase in gun sales.¹⁶⁰

Although the link between criminal justice reform and crime rates has been largely debunked, crime has become a political wedge issue for Republicans and Democrats.¹⁶¹ Therefore, it is unfortunately unlikely there will be any political will to amend § 3582(c)(1)(A) in the near future.¹⁶²

B. Executive Action: Exempt Compassionate Release Requests from Exhaustion

Three agencies within the executive branch engage with the compassionate release program: the Sentencing Commission, the BOP, and the DOJ. Any one of these institutions could eliminate the problems posed by exhaustion under § 3582(c)(1)(A).

First, the Sentencing Commission should define exhaustion of compassionate release claims in the policy statement at § 1B1.13. Section 3582(c)(1)(A) requires reductions to be “consistent with applicable policy statements issued by the Sentencing Commission.”¹⁶³ Although the recently amended policy statement recognizes that defendants may directly move for compassionate release, it fails to address exhaustion.¹⁶⁴ The Sentencing Commission should add a Commentary Application Note providing guidance on the exhaustion requirement. First, it should clarify that exhaustion is not required for a defendant to obtain judicial review; rather, a claimant may seek judicial review as soon as thirty days has lapsed from submission of a request for compassionate release.¹⁶⁵ Second, it should adopt a uniform standard for what actions a defendant must take to exhaust, including whether strict compliance with formalities and issue-level exhaustion are required.¹⁶⁶ Newly equipped with a quorum, the Sentencing Commission has the ability to further amend its policy statements, and the recent amendments reflect an interest in increasing access to compassionate release.¹⁶⁷

160. Grawert & Horwitz, *supra* note 158.

161. See, e.g., Blake Hounshell & Leah Askarinam, *Republicans and Democrats Begin to Sharply Diverge on Crime*, N.Y. TIMES, (Mar. 25, 2022), <https://www.nytimes.com/2022/03/25/us/politics/republicans-democrats-criminal-justice-reform.html>.

162. See Marianne Levine, *Criminal Justice Reform Faces Political Buzzsaw as GOP Hones Its Midterm Message*, POLITICO (Apr. 14, 2022, 4:31 AM), <https://www.politico.com/news/2022/04/14/criminal-justice-reform-midterms-00024991> (reporting Senators Dick Durbin and Chuck Grassley both acknowledged that a prison and sentencing reform bill faces challenges, “particularly given the GOP messaging on rising crime ahead of the 2022 midterms”).

163. 18 U.S.C. § 3582(c)(1)(A).

164. See U.S. SENT’G GUIDELINES MANUAL § 1B1.13 (U.S. SENT’G COMM’N 2023).

165. See *supra* Part II.A.1.

166. See *supra* Part II.A.2.

167. See Press Release, U.S. Sent’g Comm’n, “Back in Business” U.S. Sentencing Commission Acts to Make Communities Safer & Stronger (Apr. 5, 2023), <https://www.usc.gov/about/news/press-releases/april-5-2023>; Lynch & Raymond, *supra* note 55.

Second, the BOP should amend its governing regulations and accompanying program statement¹⁶⁸ to redefine exhaustion. Currently, BOP policy does not explicitly define exhaustion. But the BOP implicitly defines exhaustion by listing three scenarios that grant a prisoner the right to file a request with the sentencing court: (1) the receipt of the General Counsel's response to a prisoner's appeal;¹⁶⁹ (2) the General Counsel's denial of the prisoner's original request for compassionate release;¹⁷⁰ or (3) the lapse of thirty days from the warden's receipt of a request for compassionate release by, "whichever is earlier."¹⁷¹

The BOP should amend the regulations and policy statement to simply state that a defendant has fully exhausted administrative remedies after the lapse of thirty days from the warden's receipt of a request for compassionate release. The statement should further clarify that exhaustion does not require issue-level exhaustion or formalistic compliance with the exacting procedures of the BOP. The BOP is not engaging in a meaningful review of applications for compassionate release, as demonstrated by the fact the BOP filed thirty-two—or less than one percent—of the motions granted for compassionate release from 2020 to 2021.¹⁷² Congress deliberately reduced the BOP's authority over compassionate release in the FSA.¹⁷³ Defining exhaustion in this manner would eliminate the inconsistent conflation of exhaustion and the timing avenue, provide clear guidance to applicants, and reduce judicial waste as defendants would not be required to engage in repetitive and unnecessary litigation.

Third, the DOJ should adopt a policy to waive exhaustion as an affirmative defense. Courts have recognized exhaustion is a non-jurisdictional, claim-processing rule such that the government may waive its requirements under § 3582(c)(1)(A).¹⁷⁴

168. 28 C.F.R. §§ 571.60–.64; BOP 2019 COMPASSIONATE RELEASE PROGRAM STATEMENT, *supra* note 57.

169. *See* BOP 2019 COMPASSIONATE RELEASE PROGRAM STATEMENT, *supra* note 57, at 15 (stating a prisoner "may file a request for a reduction in sentence with the sentencing court after receiving a BP-11 response" following an appeal through the Administrative Remedy Procedure); 28 C.F.R. § 542.15 (stating "[a]ppeals to the General Counsel shall be submitted on the form designed for Central Office Appeals (BP-11)").

170. *See* BOP 2019 COMPASSIONATE RELEASE PROGRAM STATEMENT, *supra* note 57, at 15. Note, the General Counsel would only deny a prisoner's original request for compassionate release if the Warden reviewed the request, recommended approval, and referred the request to the General Counsel's office. *Id.* at 13.

171. *Id.* at 15.

172. U.S. SENT'G COMM'N, COMPASSIONATE RELEASE DATA REPORT: CALENDAR YEARS 2020 TO 2021, at 7 (2021), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210928-Compassionate-Release.pdf>.

173. *See* SADY & DAILY, *supra* note 128, at 11 ("[T]he First Step Act's amendment to § 3582(c)(1)(A) clearly reflects the congressional aim to diminish the BOP's control over compassionate release by permitting defendants to file sentence reduction motions directly with the sentencing court."); Hopwood, *supra* note 28, at 108 ("[T]he First Step Act has expressly changed the statutory text to allow courts to consider and grant sentence reductions even in the face of an adverse or unresolved BOP determination concerning whether a prisoner's case is extraordinary or compelling.");

174. *See, e.g.,* United States v. Saladino, 7 F.4th 120, 123 (2d Cir. 2021) (quoting Hamer v. Neighborhood Hous. Servs., 583 U.S. 17, 20 (2017)) (finding exhaustion is "[n]ot a jurisdictional limitation . . . and accordingly 'may be waived or forfeited' by the government"); United States v. Manzano, 505 F. Supp. 3d 739, 743 (E.D. Mich. 2020) (finding the government waived exhaustion when it "failed to raise exhaustion in either of its briefing or during oral argument"); United States v. Thomas, 471 F. Supp. 3d 745, 748 (W.D. Va. 2020) (finding

Therefore, the DOJ can adopt a blanket policy to not raise exhaustion as an affirmative defense to compassionate release claims. This solution is particularly appealing because the DOJ recently demonstrated a willingness to modify its compassionate release policies in response to public criticism. Federal prosecutors had been “seeking to limit defendants’ rights to win compassionate release from prison in plea negotiations across the country, a practice that [Families Against Mandatory Minimums and the National Association of Criminal Defense Lawyers] say undermines the intent of Congress and produces cruel outcomes.”¹⁷⁵ In response to the backlash from advocates and prominent politicians, the DOJ directed “prosecutors to stop limiting defendants’ ability to seek compassionate release in most federal plea agreements.”¹⁷⁶ The DOJ can and should issue a similar directive to stop raising exhaustion as an affirmative defense to compassionate release.

*C. Judicial Action: Apply Equitable Exceptions to Motions for
Compassionate Release*

The Supreme Court has recognized exhaustion of administrative remedies is not always appropriate and “federal courts are vested with a ‘virtually unflagging obligation’ to exercise” their jurisdiction, meaning courts may decline to require exhaustion.¹⁷⁷ In *McCarthy v. Madigan*, the Court established a balancing test for applying exhaustion.¹⁷⁸ “In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion.”¹⁷⁹ *McCarthy* identified three exceptions where exhaustion is not required because the individual’s interest outweighs the government’s interest in exhaustion.¹⁸⁰ Exhaustion is not required when the administrative process may result in undue prejudice or irreparable harm, when the administrative remedy is inadequate because the agency cannot grant effective relief, or when the “administrative body is shown to be biased or has otherwise predetermined the issue.”¹⁸¹

the government waived the exhaustion requirement when it did not contest that the defendant had exhausted administrative remedies).

175. Carrie Johnson, *The U.S. Is Limiting Compassionate Release in Plea Deals. Many Say That’s Cruel*, NPR (Feb. 16, 2022, 5:00 AM), <https://www.npr.org/2022/02/16/1080863822/the-u-s-is-limiting-compassionate-release-in-plea-deals-many-say-thats-cruel>.

176. Carrie Johnson, *Justice Department Ends Limiting Compassionate Release in Plea Deals After NPR Story*, NPR (Mar. 11, 2022, 5:23 PM), <https://www.npr.org/2022/03/11/1086140965/justice-department-ends-limiting-compassionate-release-in-plea-deals-after-npr-s>.

177. *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992) (citing *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817–18 (1976)).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 146–49.

The exhaustion framework developed under common law, but Congress can impose an exhaustion requirement in a statute,¹⁸² as seen in § 3582(c)(1)(A). Where an exhaustion requirement created by statute is jurisdictional, courts cannot excuse the requirement¹⁸³ or impose the equitable exceptions established under *McCarthy*.¹⁸⁴ But “a statutory limit on bringing suit, ‘even if important and mandatory,’ does not enjoy jurisdictional status unless Congress has made a clear statement to this effect.”¹⁸⁵ Courts have nearly universally found the exhaustion requirement of § 3582(c)(1)(A) is non-jurisdictional and, instead, is a mandatory, claim-processing rule.¹⁸⁶ Courts have read equitable exceptions into such statutorily imposed, non-jurisdictional exhaustion requirements.¹⁸⁷

The judicially created equitable exceptions are uniquely applicable to compassionate release claims. A defendant is likely to suffer undue prejudice or irreparable harm by requiring exhaustion where their application for compassionate release may be based on life-threatening or severely debilitating medical conditions or familial circumstances. The BOP is incapable of providing effective relief to prisoners seeking compassionate release. Even if the BOP decides to approve the request for compassionate release, the sentencing court must ultimately grant the relief.¹⁸⁸ The BOP lacks the institutional competence to make a final decision on the issue. Finally, the BOP is demonstrably biased and exhaustion would be futile, as demonstrated by the BOP’s failure to refer more than one percent of the granted motions for compassionate release.¹⁸⁹

The law is currently unsettled on this issue. Some courts refuse to recognize equitable exceptions, arguing courts may not modify an exhaustion requirement codified in a statute.¹⁹⁰ However, other courts have found equitable exceptions do and should apply to exhaustion under § 3582(c)(1)(A).¹⁹¹ The exhaustion requirement

182. See generally Devlin, *supra* note 79, at 1242–43.

183. WRIGHT ET AL., *supra* note 88, at 216.

184. See Devlin, *supra* note 79, at 1243.

185. WRIGHT ET AL., *supra* note 88, at 217 (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435–36 (2011)).

186. See, e.g., *United States v. Keller*, 2 F.4th 1278, 1282 (9th Cir. 2021); *United States v. Alam*, 960 F.3d 831, 833–34 (6th Cir. 2020). *But see* *United States v. Bolze*, 460 F. Supp. 3d 697, 703 (E.D. Tenn. 2020) (finding administrative exhaustion requirement was jurisdictional in nature so failure to exhaust barred district court from exercising jurisdiction).

187. See Devlin, *supra* note 79, at 1242 & n.50.

188. See 18 U.S.C. § 3582(c).

189. See U.S. SENT’G COMM’N, COMPASSIONATE RELEASE DATA REPORT: CALENDAR YEARS 2020 TO 2021, at 7 (2021), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210928-Compassionate-Release.pdf>.

190. See, e.g., *United States v. Williams*, 458 F. Supp. 3d 939, 947 (W.D. Tenn. 2020); *United States v. Holden*, 452 F. Supp. 3d 964, 973 (D. Or. 2020).

191. See, e.g., *United States v. Bess*, 455 F. Supp. 3d 53, 63 (W.D.N.Y. 2020); *United States v. Scparta*, 567 F. Supp. 3d 416, 426 (S.D.N.Y. 2020); *United States v. Perez*, 451 F. Supp. 3d 288, 291–92 (S.D.N.Y. 2020); *United States v. Greene*, 516 F. Supp. 3d 1, 21 (D.D.C. 2021); *United States v. Johnson*, 464 F. Supp. 3d 22, 28 (D.D.C. 2020); *Bellamy v. United States*, 474 F. Supp. 3d 777, 780–81 n.1 (E.D. Va. 2020); *Coleman v. United States*, 465 F. Supp. 3d 453, 545–46 (E.D. Va. 2020); *United States v. Anderson*, 460 F. Supp. 3d 711, 717 (C.D. Ill. 2020).

under § 3582(c)(1)(A) is “like no other” exhaustion requirement codified by Congress, and courts should interpret the requirement with regard to the specific statute.¹⁹² The unique statutory structure contains both an administrative exhaustion requirement and a timeliness element—waiting thirty days.¹⁹³ Equitable exceptions regularly apply to timeliness requirements.¹⁹⁴ Courts have concluded equitable exceptions should thus apply based on the timeliness features and the purpose of the statute.¹⁹⁵ The statute was “designed to ‘enhance public safety’ and ‘make[] . . . changes to Bureau of Prisons’ policies and procedures to ensure prisoner and guard safety and security.’”¹⁹⁶ Equitable exceptions serve these purposes and promote efficient processing of compassionate release claims.

D. Private and Non-Profit Partnerships: Expand Legal Representation for Prisoners Seeking Compassionate Release

As a final backstop to guard against abuses by the BOP, the government, or the courts, applicants seeking compassionate release should be entitled to legal representation throughout the administrative and judicial procedure. As the Federal Public Defender, Lisa C. Hay, and Chief Deputy Public Defender, Stephen R. Sady, of the District of Oregon argue, “[w]ithout the BOP as the gatekeeper of compassionate release, attorneys will play a critical role in ensuring that our clients with ‘extraordinary and compelling reasons’ for a second look at their sentences are identified and that their cases are properly developed and presented to the courts.”¹⁹⁷ In addition to assisting clients with the administrative process and the motion filed to the sentencing court, attorneys can ensure courts apply the exhaustion doctrine in a legal and just manner. Particularly, attorneys can ensure courts do not conflate exhaustion and the lapse of thirty days and can forcefully advocate for equitable exceptions to exhaustion when appropriate. The FSA envisions the involvement of the defendant’s attorney as it requires the BOP to “notify the defendant’s attorney . . . that they may prepare and submit on the defendant’s behalf a request” for compassionate release in the case of a defendant diagnosed with a terminal illness.¹⁹⁸

Public defense organizations, legal aid organizations, and pro-bono departments at private law firms should commit to or increase their representations of prisoners seeking compassionate release. The Compassionate Release Clearinghouse, created by Families Against Mandatory Minimums, the Washington Lawyers’ Committee,

192. See *Scparta*, 567 F. Supp. 3d at 423–24.

193. *Id.*

194. See *Bess*, 455 F. Supp. 3d at 62 (collecting cases).

195. *Scparta*, 567 F. Supp. 3d at 423–24; see also *Bess*, 455 F. Supp. 3d at 62 (holding equitable exceptions apply to 18 U.S.C. § 3582(c)(1)(A) because “equitable exceptions plainly apply” to timeliness statutes and there is “little if anything to be gained through enforcement but much may be lost”).

196. *Scparta*, 567 F. Supp. 3d at 425 (alteration in original) (quoting H.R. Rep. No. 115-699, at 22 (2018)).

197. See SADY & DAILY, *supra* note 128, at 2.

198. 18 U.S.C. § 3582(d)(2).

and the National Association of Criminal Defense Lawyers, “was formed after the passage of the FSA in order to support those seeking relief under the new law.”¹⁹⁹ These efforts should be celebrated and expanded on to ensure individuals seeking compassionate release enjoy the fundamental right to effective assistance of counsel.

CONCLUSION

Compassionate release is a narrow path to release when continued incarceration is inequitable and the individual does not pose a threat to public safety. Applicants must satisfy the high bar of extraordinary and compelling reasons for release and convince the court that sentencing factors support a sentence reduction. The FSA sought to increase the use of compassionate release, reduce the BOP’s absolute gatekeeping authority, and expand defendants’ access to judicial consideration of compassionate release requests. The exhaustion requirement of § 3582(c)(1)(A) has been applied in a legally incorrect manner, resulted in inconsistent outcomes, failed to serve agency authority, created judicial waste, and subverted congressional intent. To remedy the harmful effects of exhaustion, the relevant institutional actors must change their conduct to align with the motivating purpose of compassionate release. Congress should amend § 3582(c)(1)(A) to eliminate the exhaustion requirement; the executive branch should redefine exhaustion of administrative remedies for compassionate release and waive exhaustion as an affirmative defense; courts should apply equitable exceptions; and non-profit and private actors should expand access to legal counsel. For incarcerated individuals, compassionate release truly may be a matter of life or death.

199. *The Compassionate Release Clearinghouse*, FAMM, <https://famm.org/our-work/compassionate-release/#clearinghouse> (last visited Oct. 7, 2023).