

**FALLING SHORT OF THE FIRST STEP  
ACT’S POTENTIAL: THE CURRENT  
BARRIER EXHAUSTING ADMINISTRATIVE  
REMEDIES SERVES TO COMPASSIONATE  
RELEASES**

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## INTRODUCTION

On November 4, 2020, Waylon Young Bird died while incarcerated at the Medical Center for Federal Prisoners.<sup>1</sup> Earlier in 2020, Young Bird requested a sentence modification in federal court because of his medical conditions and two recent sentencing decisions by the same court.<sup>2</sup> In his request, Young Bird explained he suffered from various medical conditions, including diabetes and stage-five chronic kidney disease.<sup>3</sup> The federal court considered whether a compassionate release was warranted due to his health conditions possibly putting him at a higher risk of complications from COVID-19.<sup>4</sup> The federal court denied his compassionate release because it was unaware of the full effects of the virus and could not decide to what extent Young Bird's life would be threatened if he contracted COVID-19.<sup>5</sup> Unfortunately, Young Bird died a few months later.<sup>6</sup>

There have been reports of at least twenty-five other individuals who have died either while waiting for their day in court or after being denied compassionate release.<sup>7</sup> There are many others who, like Young Bird, felt ignored after hand-writing letters to judges pleading for a reconsideration because of the severity of their health conditions.<sup>8</sup> If there was a statutorily-recognized procedure for rapidly-advancing health conditions, some individuals may have the chance at a different outcome. Currently, Title 18, Section 3582(d)(2)(A) does provide a narrow exception for

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<sup>1</sup> Press Release, Fed. Bureau of Prisons Off. of Pub. Affairs, Inmate Death at MCFP Springfield (Nov. 6, 2020) (published online at [https://www.bop.gov/resources/news/pdfs/20201106\\_press\\_release\\_spg\\_bird.pdf](https://www.bop.gov/resources/news/pdfs/20201106_press_release_spg_bird.pdf) [<https://perma.cc/7NBQ-LF39>]).

<sup>2</sup> United States v. Bird, No. 3:18-CR-30061-RAL, 2020 WL 2903904, at \*1 (D.S.D. June 3, 2020).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at \*4.

<sup>5</sup> *Id.*

<sup>6</sup> Fed. Bureau of Prisons Off. of Pub. Affairs, *supra* note 1.

<sup>7</sup> See generally, *The Covid-19 Crisis in Federal Detention*, SENT'G RES. COUNS. FOR THE FED. PUB. CMTY. DEFS. (Dec. 01, 2020), [https://www.fd.org/sites/default/files/covid19/bop\\_jail\\_policies\\_and\\_information/sentencing\\_resource\\_counsel\\_fact\\_sheet-december.pdf](https://www.fd.org/sites/default/files/covid19/bop_jail_policies_and_information/sentencing_resource_counsel_fact_sheet-december.pdf) [<https://perma.cc/RW9H-PR97>].

<sup>8</sup> *Id.* (discussing other incarcerated individuals who wrote letters to federal judges begging for compassionate release due to their medical conditions).

individuals with a “terminal illness,”<sup>9</sup> but this comment is focusing on implementing a more-encompassing exception within Title 18, Section 3582(c)(1)(A), also referenced as the Federal Compassionate Release Standard.<sup>10</sup> The proposed solution focuses on enacting an exception at the administrative remedies step for individuals with significantly declining health conditions who may not meet the requirements of “terminally ill.”

This comment focuses on the disparity in statutory interpretation of the Federal Compassionate Release Standard, and its effects on compassionate releases. Part I provides background information about the First Step Act’s impact on compassionate releases and its current statutory standard. Part II will outline the difficulties courts may face because of varying interpretation of the waivability of administrative exhaustion requirements. Part III will propose a statutory change that aims to provide courts with more discretion and guidance when interpreting the Federal Compassionate Release Standard when considering compassionate releases. Part IV will provide three reasons in support of the proposed statutory change based on (1) certain courts seeing success with similar standards, (2) legislative history behind exhaustion requirements supporting the proposed change, and (3) congressional intent for compassionate releases under the First Step Act. Lastly, Part V will recognize the lack of adequate health-care resources currently available to incarcerated individuals and how that lack of resources available could hinder the accessibility of the proposed solution in this comment.

## I. BACKGROUND

### A. *What Is the First Step Act of 2018?*

The First Step Act was enacted in 2018 with bi-partisan support as Public Law 115-391.<sup>11</sup> The First Step Act has been a significantly impactful federal prison reform, and some of the main changes include altering the sentencing guidelines, providing educational programming reform, and expanding the criteria for

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<sup>9</sup> See 18 U.S.C. 3582(d)(2)(A).

<sup>10</sup> See 18 U.S.C. 3582(c)(1)(A).

<sup>11</sup> First Step Act of 2018, Pub. L. No. 115-391, 132 Stat 5194.

compassionate releases.<sup>12</sup> The federal criminal statute that applies to compassionate release, also known as “sentence reduction” or “sentence modification,” is the Federal Compassionate Release Standard. A compassionate release, following the implementation of the First Step Act, is a way incarcerated individuals can claim they are entitled to an early release from prison once they meet specific criteria.<sup>13</sup>

There were two main purposes for the First Step Act: (1) combat the extensively long sentences given to federal prisoners and (2) develop an initiative to improve the overall quality and condition of federal prisons.<sup>14</sup> The Federal Bureau of Prisons hoped that expanding the compassionate release standard would thereby reduce some overly long sentences and improving the conditions because it will decrease the total amount of people in prisons.<sup>15</sup>

In discussing the First Step Act, it is important to be familiar with the United States Sentencing Commission (“Sentencing Commission”) and its role in compassionate releases and other judicial decisions. The Sentencing Commission’s purpose is to “reduce sentencing disparities and promote transparency and proportionality in sentencing,” and in doing so it amends and effectuates sentencing guidelines.<sup>16</sup> More specifically, the Sentencing Commission has and will continue to release policy statements, propose amendments to Congress, and provide other persuasive materials regarding sentencing.<sup>17</sup>

Another helpful insight is the retroactive changes found in the First Step Act. In many cases for compassionate release, defendants often advocate that their initial sentence is much longer than it

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<sup>12</sup> Emily M. Smachetti & Alix I. Cohen, *Introduction to the First Step Act*, 69 DOJ J. FED. L. & PRAC. 39, 52 (2021).

<sup>13</sup> *Compassionate Release*, A.B.A. (Apr. 27, 2023), [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/publications/washingtonletter/april-23-wl/sentencing-comm-0423wl/?login](https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/april-23-wl/sentencing-comm-0423wl/?login) [https://perma.cc/5WDG-4QNG].

<sup>14</sup> Smachetti & Cohen, *supra* note 12, at 39.

<sup>15</sup> An Overview of the First Step Act, Fed. Bureau of Prisons <https://www.bop.gov/inmates/fsa/overview.jsp#:~:text=The%20act%20was%20the%20culmination,mechanisms%20to%20maintain%20public%20safety> [https://perma.cc/A84P-ZR4P] (last visited Nov. 3, 2023).

<sup>16</sup> *About the Commission*, U.S. SENT’G COMM’N, <https://www.ussc.gov> [https://perma.cc/7AT6-BECJ] (last visited Nov. 3, 2023).

<sup>17</sup> *Id.*

would be if they were sentenced today because of the changes in sentencing. For example, the First Step Act amended the sentencing guidelines for crimes involving controlled substances, which changed mandatory minimum sentences for many defendants.<sup>18</sup> One major goal of the First Step Act was to apply the Fair Sentencing Act of 2010 retroactively, which focused heavily on reducing the sentencing disparity for crack cocaine versus powder cocaine.<sup>19</sup> But, many of the mandatory minimums that changed were not explicitly made to be retroactive like the sentencing disparity for crack cocaine and powder cocaine; so they would only be applied moving forward.<sup>20</sup> The nonretroactivity of the amended sentencing guidelines is significant because defendants often compare their sentencing to what it would have been after the First Step Act.

Over the last four years, although courts have seen an increase in motions for compassionate releases,<sup>21</sup> there is inconsistent application of how courts are denying or granting compassionate releases, as discussed subsequently in this comment. As our prison population grows older and new legislation provides avenues for more effective alternatives, hopefully more courts will grant compassionate releases. One hindrance to courts fully utilizing the First Step Act's change to compassionate releases is the exhaustion requirement, which is required before a defendant can properly plead their case to the court.<sup>22</sup> This comment focuses on providing an alternative route for defendants to utilize to obtain compassionate releases.

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<sup>18</sup> Claire Griffin, *An Extraordinary and Compelling Case for Judicial Discretion: Nonretroactive Sentencing Changes and Compassionate Release*, 54 U. TOL. L. REV. 237, 237 (2023).

<sup>19</sup> *Id.* at 242.

<sup>20</sup> *Id.* at 239.

<sup>21</sup> Sarah N. Lynch & Nate Raymond, *U.S. Panel Votes to Expand Compassionate Release for Prisoners*, REUTERS (Apr. 06, 2023, 8:21 AM), <https://www.reuters.com/world/us/us-panel-consider-expanding-compassionate-release-prisoners-2023-04-05/> [<https://perma.cc/2DXZ-XMNK>].

<sup>22</sup> 18 U.S.C. 3582(c)(1)(A).

### B. Compassionate Release Standard

In the Sentencing Reform Act of 1984, Congress mandated that an incarcerated individual's sentence could be reduced or modified only in "extraordinary and compelling" circumstances.<sup>23</sup> Following the Sentencing Reform Act of 1984, the Sentencing Commission was tasked with determining what "extraordinary and compelling" meant.<sup>24</sup> Then, the Bureau of Prisons ("BOP") identified incarcerated individuals who met the standard and petitioned on their behalf for sentence modifications.<sup>25</sup> From there, the sentencing court reviewed the factors laid out in Title 18, Section 3553(a)<sup>26</sup> and the "extraordinary and compelling" standard to determine if a reduction was warranted.<sup>27</sup> However, under that

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<sup>23</sup> *Compassionate Release and the First Step Act: Then and Now*, FAMS. AGAINST MANDATORY MINIMUMS, <https://famm.org/wp-content/uploads/2019/02/Compassionate-Release-in-the-First-Step-Act-Explained-FAMM.pdf> [https://perma.cc/99FV-6WZ3] (last visited Nov. 3, 2023).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> These factors are first considered when the original sentencing court initially sentenced the defendant so that each defendant's sentence is individualized based on the crime. Kielan Barua, *The First Step Act and Individualized Review: Must Judges Apply the 18 U.S.C. § 3553(a) Factors to Section 404 Petitioners?*, 90 FORDHAM L. REV. 1665, 1677 (2022). The factors are as follows:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; . . . to afford adequate deterrence to criminal conduct; . . . to protect the public from further crimes of the defendant; and . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . ; (5) any pertinent policy statement issued by the Sentencing Commission . . . subject to any amendments made to such policy statement by act of Congress . . . ; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.

*Id.* (citing to 18 U.S.C. § 3553(a)(1)-(7)).

<sup>27</sup> FAMS. AGAINST MANDATORY MINIMUMS, *supra* note 23.

system, the BOP served as a gatekeeper by either refusing to or neglecting to bring motions for qualifying individuals.<sup>28</sup>

Now, under the First Step Act, judges have more discretion to order modifications of a defendant's prison sentence.<sup>29</sup> Previously, judges often could not reduce a defendant's sentence after it had been imposed except in specific circumstances laid out by statute.<sup>30</sup> The First Step Act's initiative now allowed for defendants to motion for compassionate releases themselves, rather than the BOP doing so on their behalf.<sup>31</sup> Defendants are able to file on their own behalf if the BOP fails to motion for a modification of their prison sentence within the designated statutory time frame.<sup>32</sup>

This change was significant for incarcerated individuals because it decreased the barrier which only allowed the BOP to motion for these releases. Now, defendants have an increased power that allows them to advocate for themselves rather than waiting on the BOP to motion for them. Even still, many other challenges and obstacles arise when a defendant makes their own motion for a compassionate release.

### C. "Extraordinary and Compelling" Standard

Generally, when a defendant is petitioning for a compassionate release under the Federal Compassionate Release Standard, there are four main elements they must meet: "(1) [the defendant] has met the statutory exhaustion requirements; (2) "extraordinary and compelling reasons" warrant a reduction; (3) [the defendant] is not a danger to the community; and (4) a reduction is consistent with the factors set forth in 18 U.S.C. § 3553(a)."<sup>33</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> Michael T. Hamilton, *Opening the Safety Valve: A Second Look at Compassionate Release Under the First Step Act*, 90 FORDHAM L. REV. 1743, 1755 (2022).

<sup>30</sup> *Id.*

<sup>31</sup> 18 U.S.C. § 3582(c)(1)(A).

<sup>32</sup> *Id.*

<sup>33</sup> United States v. Gonzales, No. 15-CR-06085-FPG, 2023 WL 6386139, at \*1 (W.D.N.Y. Oct. 2, 2023), *see also* U.S.S.G. § 1B1.13 [https://www.uscc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202305\\_Amendments.pdf](https://www.uscc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202305_Amendments.pdf) [<https://perma.cc/9M3M-3CP9>] (the United States Sentencing Guidelines Policy Statement on compassionate release from 2023).

While courts consider the factors laid out in Title 18, Section 3553(a), the dangerousness of the defendant to the community, and if the reduction is consistent with the Sentencing Commission's applicable policy statements,<sup>34</sup> this section will focus on what "extraordinary and compelling" means under 18 U.S.C. § 3582(c)(1)(A)(i). The reason for the specific focus on this one portion of the statute is because the solution this comment offers is based on this already-existing standard currently used by courts.

"The "extraordinary and compelling" standard created so much ambiguity in the court of law, various circuit are split as to what are "extraordinary and compelling" reasons.<sup>35</sup> Federal courts have used the plain language within the statute, definitions from the dictionary, and commentary from the Sentencing Commission's policy statements to determine what this standard means.<sup>36</sup>

But, in April of 2023, when the Sentencing Commission had quorum for the first time since the First Step Act had been enacted, they proposed amendments to the Federal Compassionate Release Standard.<sup>37</sup> One main reason for these amendments was to provide courts with more clarity when they were deciding compassionate releases.<sup>38</sup> The Sentencing Commission explained that in its proposed amendments, it sought to expand what this standard covered.<sup>39</sup> The approved amendments became effective as of November 1, 2023.<sup>40</sup> These promulgated amendments included broadening the scope of medical conditions and family circumstances that could warrant a compassionate release.<sup>41</sup> Additionally, they afforded judges the discretion to consider a defendant's abuse in prison and whether a change in law makes a defendant's sentence unusually long.<sup>42</sup>

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<sup>34</sup> 18 U.S.C. § 3582(c)(1)(A)(i).

<sup>35</sup> Siobhan A. O'Carroll, "Extraordinary and Compelling" Circumstances: Revisiting the Role of Compassionate Release in the Federal Criminal Justice System in the Wake of the First Step Act, 98 WASH. U.L. REV. 1543, 1561-62 (2021).

<sup>36</sup> Hamilton, *supra* note 29, at 1758.

<sup>37</sup> 2023 Amendments in Brief, U.S. SENT'G COMM'N, [https://www.ussc.gov/sites/default/files/pdf/amendment-process/amendments-in-brief/AIB\\_814.pdf](https://www.ussc.gov/sites/default/files/pdf/amendment-process/amendments-in-brief/AIB_814.pdf) [<https://perma.cc/Y3GD-G986>] (last visited Nov. 3, 2023).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> A.B.A., *supra* note 13.

<sup>42</sup> *Id.*

One of the changes included in the amendment provided more examples of specific situations to the medical conditions category in §1B1.13(b)(1).<sup>43</sup> In its amendment, the Sentencing Commission provided heavy considerations for individuals needing long-term care that could not be provided for properly in a prison facility and new language as it pertains to a health outbreak and the defendant's personal health risks associated with it.<sup>44</sup> The Sentencing Commission explained that many of the additions proposed were based on federal case law that has developed since the last time quorum was present.<sup>45</sup> Their explanation exemplified how federal judges can influence the Sentencing Commission, which supports this comment's solution.

## II. THE CURRENT IMPACT

Between 2013 and 2017, at least 266 incarcerated individuals died while waiting for the BOP to decide their request for compassionate release.<sup>46</sup> One of Congress's main goals in passing the First Step Act was to combat extensively long federal prison sentences for incarcerated individuals.<sup>47</sup> One way to combat these extensively long sentences is through compassionate releases. Also, others have explained that changes made by the First Step Act to compassionate releases have provided courts the opportunity to have a "second look" at sentences.<sup>48</sup> Even with Congress's intent being to reduce long sentences,<sup>49</sup> the BOP may still serve as an initial gatekeeper between federally incarcerated individuals and their right to a compassionate release.<sup>50</sup>

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<sup>43</sup> *Amendments to the Sentencing Guidelines, Policy Statements, Official Commentary, and Statutory Index*, U.S. SENT'G COMM'N, [https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202305\\_Amendments.pdf](https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202305_Amendments.pdf) [https://perma.cc/MM25-DKYF] (last visited Nov. 3, 2023).

<sup>44</sup> *Id.*

<sup>45</sup> U.S. SENT'G COMM'N, *supra* note 16.

<sup>46</sup> Marielle Paloma Greenblatt, *In Search of Judicial Compassion: The Cantu-Lynn Divide over Compassionate Release for Federal Prisoners*, 52 COLUM. HUM. RTS. L. REV. 140, 142-43 (2020).

<sup>47</sup> Smachetti & Cohen, *supra* note 12, at 39.

<sup>48</sup> Hamilton, *supra* note 29, at 1754.

<sup>49</sup> Smachetti & Cohen, *supra* note 12, at 39.

<sup>50</sup> O'Carroll, *supra* note 35, at 1567.

There are federal circuit courts, including the D.C. Circuit, First Circuit, Second Circuit, and the Ninth Circuit Court of Appeals, whose approval rate of compassionate releases is approximately 27%.<sup>51</sup> There are other federal circuit courts, including the Fifth Circuit and the Eighth Circuit, whose approval rates of compassionate releases are approximately 9.6%.<sup>52</sup> While there are likely a multitude of contributing factors that could explain the difference, this comment proposes that one reason could be the difference in statutory interpretation of the Federal Compassionate Release Standard.

#### A. *Bureau of Prisons as Initial Gatekeepers*

Prior to the First Step Act, the BOP had total power over the decision of compassionate releases because all motions could only be made by the BOP.<sup>53</sup> This controlling mechanism of the BOP provided them with the ability to severely limit the number of compassionate releases brought before federal courts.<sup>54</sup> Now, because of the First Step Act, under the Federal Compassionate Release Standard, a incarcerated individual can move for a compassionate release after meeting one of two criteria: (1) if they have fully exhausted all administrative rights to appeal the BOP's decision to bring a motion or (2) wait until thirty days have lapsed since the warden of the incarcerated individual's facility has received the request.<sup>55</sup> But, either avenue requires the incarcerated

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<sup>51</sup> U.S. SENT'G COMM'N, COMPASSIONATE RELEASE DATA REPORT FISCAL YEARS 2020 TO 2022, 7-9 tbl.3 (2022).

<sup>52</sup> *Id.*

<sup>53</sup> Hamilton, *supra* note 29, at 1752.

<sup>54</sup> *Id.*

<sup>55</sup> 18 U.S.C. § 3582(c)(1)(A). Throughout this paper, the author refers to both exhaustion remedies collectively and interchangeably as the "exhaustion requirements." Because defendants can utilize either option to show that administrative remedies have been exhausted, the solution this paper proposes should be applicable to both avenues. Also, 18 U.S.C. § 3582(d)(2)(A) provides specific criteria regarding "terminally ill" individuals and compassionate releases. Even though that section does pertain to terminally ill individuals, this paper seeks to expand the medical criteria under the exhaustion requirement of the federal statute. As a note Congress implemented the statute with some medical-based exceptions. 18 U.S.C. § 3582(d)(2)(A).

individual to first file their request for compassionate release with the BOP.<sup>56</sup>

At face value, a thirty-day “waiting period” might not seem like much of a hindrance, but with an influx of requests, it makes it nearly impossible for these releases to receive a substantive review. A federal district court in New York went as far to say that in its opinion, Congress was aware that the BOP would provide a “superficial review” at most, to a defendant’s request for a compassionate release.<sup>57</sup>

Aside from receiving a superficial review, there are many instances where there are discrepancies when a defendant’s request was “received.”<sup>58</sup> For example, in a case before the District Court of the Southern District Court of New York, the government opposed the compassionate release because the defendant had allegedly filed prior to meeting the exhaustion requirements.<sup>59</sup> In its finding, the court discovered the defendant did file the request with their counselor two weeks earlier than when the warden stamped it as “received.”<sup>60</sup> The court held that the statute “does not say, ‘30 days, plus an additional 2.5 weeks until the form is formally accepted by the warden’s office,’” so the court granted the defendant’s compassionate release.<sup>61</sup> The previous case is one example of how errors by the BOP can create discrepancies as to when exactly the thirty-day waiting period ends, which results in an additional barrier for incarcerated individuals.

### *B. What Are Federal Court Decisions Showing?*

It might seem that the statute provides for a clear procedure, but federal courts have been slightly divided on whether the exhaustion requirements under 18 U.S.C. 3582(c)(1)(A) are

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<sup>56</sup> 18 U.S.C. § 3582(c)(1)(A).

<sup>57</sup> Thomas R. Hutchison, *Compassionate Release, Covid-19, and the Dangerous Futility of the First Step Act’s Administrative Exhaustion Requirement*, 25 J. GENDER RACE & JUST. 279, 302 (2022) (citing *United States v. Haney*, 454 F. Supp. 3d 316, 321-22 (S.D.N.Y. 2020)).

<sup>58</sup> See *United States v. Resnick*, 451 F. Supp. 3d 262, 269-70 (S.D.N.Y. 2020).

<sup>59</sup> *Id.* at 269.

<sup>60</sup> *Id.* at 268-69.

<sup>61</sup> *Id.* at 269.

mandatory.<sup>62</sup> In a case before the Fifth Circuit Court of Appeals, a defendant challenged the textual requirement that she should have to file a petition first with the BOP before making her own request before a court.<sup>63</sup> In that case, where the defendant failed to file any request first with the BOP, the Fifth Circuit joined three other federal circuits stating that the exhaustion requirements for a compassionate release are mandatory, not just one considerable factor.<sup>64</sup> The Sixth Circuit also ruled that the exhaustion requirements are mandatory, and the court said it is not the role of the judiciary to create exceptions unless Congress instructs them to do so.<sup>65</sup>

In contrast, in a federal district court case within the Second Circuit, a defendant's compassionate release was granted after only waiting nine days to file his own petition.<sup>66</sup> Mr. Pena motioned for a compassionate release because he had served two-thirds of his sentence and his health conditions put him at an increased risk of contracting COVID-19.<sup>67</sup> At trial, both parties agreed that Mr. Pena failed to comply with the applicable statute's exhaustion requirements, but the court granted his compassionate release.<sup>68</sup> The court explained that the Supreme Court and the Second Circuit have allowed equitable exceptions to "unforgiving time requirements," where the decision is strongly supported.<sup>69</sup> The court found the decision was strongly supported for Mr. Pena.

### III. THE PROPOSED SOLUTION

Seeing differing federal court decisions because of differing statutory interpretations exemplifies how a statutory amendment could benefit those petitioning for a compassionate release. Even though the current statute has an explicit exception for terminally ill individuals,<sup>70</sup> federal courts have denied release to other severely

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<sup>62</sup> Hutchison, *supra* note 57, at 297.

<sup>63</sup> United States v. Franco, 973 F.3d 465, 467 (5th Cir. 2020).

<sup>64</sup> *Id.* at 468.

<sup>65</sup> United States v. Alam, 960 F.3d 831, 834 (6th Cir. 2020).

<sup>66</sup> *See generally* United States v. Pena, 459 F. Supp. 3d 544 (S.D.N.Y. 2020).

<sup>67</sup> *Id.* at 547-48.

<sup>68</sup> *Id.* at 548.

<sup>69</sup> *Id.* at 549.

<sup>70</sup> 18 U.S.C. § 3582(d)(2)(A).

sick and elderly individuals, which is essentially “permanently label[ing]” them as undeserving of compassion.<sup>71</sup> If courts are unable to decide that discretion for administrative exhaustion requirements should be available in severe medical circumstances, then the legislature should amend the statute to provide an express standard as to when administrative exhaustion requirements under the Federal Compassionate Release Standard should be waivable.

The First Step Act has improved and impacted various areas of federal criminal law, but without considering Congress’s intent and making a change to the Federal Compassionate Release Standard, incarcerated individuals will be unable to ever reap the full possible benefits of the First Step Act. In *Pena*, the district court proposed persuasive arguments demonstrating a need for exceptions to the exhaustion requirement.<sup>72</sup>

Sparked by the reasoning in *Pena*, this comment proposes that a legal standard for medical exceptions be implemented into the first statutory section for administrative exhaustion requirements. Under this proposed standard, if a defendant has a severe medical condition when the federal court first considers if all exhaustion requirements have been met, the exhaustion requirements under the Federal Compassionate Release Standard should be waivable. The standard this comment proposes aims to resolve situations in which individuals with severe medical conditions might die while waiting to meet the statutory administrative requirements under the Federal Compassionate Release Standard.<sup>73</sup> The proposed

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<sup>71</sup> Eda Katharine Tinto & Jenny Roberts, *Expanding Compassion Beyond the COVID-19 Pandemic*, 18 OHIO ST. J. CRIM. L. 575, 596 (2021).

<sup>72</sup> See generally *Pena*, 459 F. Supp. 3d 544 (S.D.N.Y. 2020).

<sup>73</sup> For example, Marie Neba, a fifty-six-year-old woman who was diagnosed with stage four breast cancer while incarcerated at Carswell medical prison. Joseph Neff & Keri Blakinger, *Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent Were Denied*, THE MARSHALL PROJECT (Oct. 07, 2020), <https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied#:~:text=When%20COVID%2D19%20hit%2C%20she,Neba%20in%20a%20family%20photo.&text=In%20total%2C%20349%20women%2C%20about,three%20months%20of%20the%20pandemic> [https://perma.cc/Z3GL-PQJW]. Even after filing for a release under 18 U.S.C. 3582(d)(2)(A), stating that she was entitled to a release for being “terminally ill” due to her breast cancer diagnosis, her warden

standard advocates for an avenue available to incarcerated individuals with medical conditions that might not fall clearly under the “terminally ill” exception under a different section of the Federal Compassionate Release statute.<sup>74</sup> In urgent situations, these incarcerated individuals should have a way to expedite their case without needing to exhaust all administrative remedies, like *Pena*. This would be consistent with the First Step Act’s aim and would eliminate one of the barriers found in several federal jurisdictions where the exhaustion requirements have been found to be mandatory in all circumstances.<sup>75</sup>

#### A. *Proposing the New Standard*

First, as a note, this comment is not seeking to add an amendment providing full discretion to courts in waiving the exhaustion requirement in all circumstances; rather, it is proposing discretion in instances where a defendant’s death is imminent due to their health conditions.<sup>76</sup> Federal courts should have the discretion to grant a special waiver for exhausting administrative remedies. This standard would be merely an initial consideration in a court’s compassionate release analysis, so the court would continue considering the other factors for a compassionate release.

Along with proposing an amendment to federal criminal law comes the fear of possible ambiguity and inconsistent application by federal courts, which is why this comment is proposing a standard with which the federal courts are mostly familiar. This standard would essentially be akin to the “extraordinary and compelling circumstances” standard enumerated under 18 U.S.C. § 3582(c)(1)(A)(i). However, this proposed solution would advocate that courts should undertake an “extraordinary and compelling

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ignored the request. *Id.* Three months later, Neba’s lawyer pleaded with the prosecutors to stop opposing her motion due to COVID-19, but they refused. *Id.* The day after Neba’s attorney begged a judge to reduce her sentence because of her worsening condition, her attorney learned that Neba had died the day prior. *Id.* Neba FaceTimed her children in a nearly comatose state to say goodbye. *Id.* Her children watched their mother take her final breaths through FaceTime. *Id.*

<sup>74</sup> 18 U.S.C. § 3582(d).

<sup>75</sup> *United States v. Franco*, 973 F.3d 465, 468 (5th Cir. 2020).

<sup>76</sup> The author recognizes that there are instances outside of medical necessity in which a court could reasonably determine that the exhaustion requirements should be waivable.

medical condition” analysis at the time the exhaustion requirements are considered. Federal courts that have granted compassionate releases, despite the incarcerated individual’s failure to meet the exhaustion requirement, have done so because the person’s medical condition(s) warranted the release.<sup>77</sup> What this comment is proposing is a similar application of an already-created standard, just slightly modified and under an earlier statutory section for a compassionate release.

An incarcerated individual can petition the court for a compassionate release after exhausting all administrative remedies under the statute.<sup>78</sup> From there, a court will use the following analysis to determine if the defendant is eligible for compassionate release: (1) consider the factors laid out in Section 3553(a), (2) determine if any “extraordinary and compelling” reasons justify the defendant’s release, and (3) consider if the release would be consistent with policy considerations of the Sentencing Commission.<sup>79</sup> In 2016, the Sentencing Commission noticed the scarcity of compassionate releases, so it released additional criteria that courts should consider when analyzing if the defendant’s circumstances were “extraordinary and compelling.”<sup>80</sup> One of these expanded circumstances was focused on the defendant’s medical condition.<sup>81</sup>

An amendment to the current procedure is necessary because currently the exhaustion requirements under the Federal Compassionate Release Standard create an additional hurdle for defendants whose health is rapidly declining. From October 2019 to September 2022, courts only granted 4,502 of the 27,789 motions for compassionate release.<sup>82</sup> However, of the 4,491 compassionate releases that were granted, only 45 of those motions originated from the BOP.<sup>83</sup> That is only one percent. Of the 4,491, there were only 120 joint motions that originated from the government and

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<sup>77</sup> See *Pena*, 459 F. Supp. 3d at 549.

<sup>78</sup> O’Carroll, *supra* note 35, at 1549.

<sup>79</sup> Griffin, *supra* note 18, at 244-46.

<sup>80</sup> *Id.* at 243.

<sup>81</sup> *Id.*

<sup>82</sup> U.S. SENT’G COMM’N, *supra* note 51, at tbl.1.

<sup>83</sup> *Id.* at tbl.5. Note that 11 cases were excluded from the analysis due to the inability to determine where the motion originated from.

defendant, but only one percent of the total compassionate releases granted originated solely from the motion of the BOP.<sup>84</sup> This data exemplifies the barrier that administrative exhaustion requirements can create, because over ninety six percent of motions originate from the defendant, meaning defendants must meet all administrative exhaustion requirements.<sup>85</sup>

The *Pena* court mentioned that waiting the additional twenty-one days was “futile” and would cause “irreparable harm” to Mr. Pena.<sup>86</sup> Another district court in the Southern District of Florida said the exhaustion requirements are waivable where it would unduly prejudice the defendant and expose the defendant to unnecessary risk.<sup>87</sup>

The “extraordinary and compelling” standard has created much ambiguity since 2018 because the Sentencing Commission had not explicitly defined or explained in depth what this standard looks like following the First Step Act.<sup>88</sup> The amendments included broadening the scope of medical conditions under the “extraordinary and compelling” standard.<sup>89</sup>

Currently 18 U.S.C. § 3582(c)(1)(A) reads as follows:

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *United States v. Pena*, 459 F. Supp. 3d 544, 549 (S.D.N.Y. 2020).

<sup>87</sup> *See United States v. Camacho-Duque*, No. 18-80238-CR, 2020 WL 5951340, at \*3 (S.D. Fla. Oct. 5, 2020).

<sup>88</sup> O’Carroll, *supra* note 35, at 1561-62.

<sup>89</sup> U.S. SENT’G COMM’N, *supra* note 16.

The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) . . . .<sup>90</sup>

This comment proposes that Congress should amend the statute to create the following language under the Federal Compassionate Release Standard's subsection (iii): "if the defendant presents extraordinary and compelling medical circumstances, where waiting for administrative exhaustion requirements to be satisfied would be detrimental to the defendant's health. . . the court has the discretion to determine that administrative exhaustion requirements should be waived."

Because there is a current "extraordinary and compelling" standard that courts consider when reviewing a motion for a compassionate release, requiring courts to evaluate the defendant's medical condition earlier in their opinion would not be burdensome. A revised standard is needed because courts have recognized that these administrative requirements are ineffective in serving the goals of the First Step Act.<sup>91</sup>

It is imperative to recognize that the desperate need for legislation is driven by the handful of appellate federal courts that have found the exhaustion requirement mandatory.<sup>92</sup> The Third, Fifth, Sixth, Seventh, and Tenth Circuit Courts of Appeals have all held that the exhaustion requirements under the Federal

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<sup>90</sup> 18 U.S.C. § 3582(c)(1)(A).

<sup>91</sup> Hutchison, *supra* note 57, at 301-02.

<sup>92</sup> *Id.* at 296.

Compassionate Release Standard are mandatory,<sup>93</sup> which means those decisions are binding on thirty-nine other federal district courts. Without a change in the law or a Supreme Court decision stating otherwise, the federal appellate courts can continue to limit the discretionary power of district courts inherent in the statute, which was not the intent of Congress in passing the First Step Act.<sup>94</sup> The current exhaustion requirements are tiresome and detrimental to people with severe but non-terminal medical conditions who are waiting for their day in court, which is why this comment advocates for a change.

### *B. U.S. Sentencing Commission's Role*

For the proposed standard to be most effective,<sup>95</sup> the Sentencing Commission should prepare a policy statement in favor of a proposed amendment. Under the Federal Compassionate Release Standard, after the court considers exhaustion requirements and the extraordinary and compelling circumstances, the statute then requires that the modification or reduction in the sentence be “consistent with applicable policy statements” from the Sentencing Commission.<sup>96</sup>

Since Congress worked diligently to include this portion of the statute where defendants can now motion for their own compassionate release rather than leaving it only in the hands of the BOP, it is reasonable to infer that strict adherence to the statute’s plain language may not had been their intent. In a different subsection, Congress also included when a compassionate release is being considered, the court should consider whether a modification is consistent with the Sentencing Commission’s policy statement.<sup>97</sup> Even though the statute itself provides that federal courts should review the applicable policy statements,<sup>98</sup> some

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<sup>93</sup> *Id.* at 296-300.

<sup>94</sup> Erica Zunkel & Jaden M. Lessnick, *Putting The “Compassion” In Compassionate Release: The Need for a Policy Statement Codifying Judicial Discretion*, 35 FED. SENT’G. REP. 164, 164 (2023).

<sup>95</sup> *See supra* Part II.A.

<sup>96</sup> 18 U.S.C. § 3582(c)(1)(A)(ii).

<sup>97</sup> 18 U.S.C. § 3582(c)(2).

<sup>98</sup> *Id.*

federal courts have refused to look at any congressional intent at all.<sup>99</sup>

If the Sentencing Commission released a policy statement advocating for judicial discretion when determining whether administrative exhaustion requirements could be waivable in severe medical circumstances, it would provide additional support for this amendment to the Federal Compassionate Release Standard. Alternatively, the same goal could be achieved if following the amendment, the Sentencing Commission released a policy statement explaining that federal courts are intended to have judicial discretion for administrative exhaustion remedies. Doing so could provide a clearer and more defined guideline for federal courts to consider.

As previously mentioned, there has been some ambiguity within the courts as to what exactly “extraordinary and compelling circumstances” meant for courts when considering compassionate releases.<sup>100</sup> However, with the Sentencing Commission’s previous policy statement’s thorough guidelines as to what this standard looked like, it provided federal courts with the expanding discretion to release more defendants because of the COVID-19 Pandemic.<sup>101</sup> Courts had so much discretion that when the Sentencing Commission proposed amendments to the “extraordinary and compelling circumstances” standard, a portion of those amendments were influenced by federal courts’ decisions following the First Step Act.<sup>102</sup>

Following the First Step Act, but prior to the April 2023 quorum of the Sentencing Commission, many advocated for the Sentencing Commission to release a policy statement and proposed amendments to provide courts with clarity on what “extraordinary and compelling” meant.<sup>103</sup> The calls for those statements were

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<sup>99</sup> See *United States v. Franco*, 973 F.3d 465, 468 (5th Cir. 2020) (where the Fifth Circuit Court of Appeals explicitly stated: “. . . [n]or are we inclined to deviate from this clear text in pursuit of the statute’s broader ‘purpose’ or ‘intent.’ We need not dive ‘inside Congress’s mind’ to determine statutory intent here.”).

<sup>100</sup> O’Carroll, *supra* note 35, at 1561-62.

<sup>101</sup> Zunkel & Lessnick, *supra* note 93, at 164.

<sup>102</sup> U.S. SENT’G COMM’N, *supra* note 16.

<sup>103</sup> O’Carroll, *supra* note 35, at 1567. See also *Amendments to the Sentencing Guidelines, Policy Statements, Official Commentary, and Statutory Index*, U.S.

motivated on the basis that the Sentencing Commission could exemplify to federal courts the intent of the First Step Act to provide for judicial discretion and minimize “restrictive circuit case law.”<sup>104</sup> Providing courts with expanded judicial discretion would not cause the overuse of compassionate releases because of the other extensive requirements a defendant must meet for this type of release.<sup>105</sup>

For similar reasons, many hope the Sentencing Commission would consider discussing the impact that expanding the judicial discretion for exhaustion requirements could have in these extreme cases of extraordinary and compelling medical circumstances. Because the statute already includes some deference to applicable policy statements,<sup>106</sup> this would provide defendants with even more support as to the desperate need for exhaustion requirements to be waivable. Ultimately, if the Sentencing Commission would release a policy statement in support of a statutory amendment, it would strengthen a court’s reasoning when considering if the exhaustion requirements should be waivable.

#### IV. WHY THIS PROPOSED STANDARD WORKS

Proposing a new way to apply a similar standard might cause skepticism, but this comment asserts are at least three reasons the proposed standard would be effective: (1) as seen in *Pena*, a similar standard was successful; (2) the history of exhaustion requirements in the judicial system supports this amendment; and (3) Congress’s intent behind the First Step Act directly supports the intended benefits of this standard.

##### A. *Judicial Decisions Support This Standard*

First, *Pena* serves as a great example as to why this medical standard would work.<sup>107</sup> In that case, where there wasn’t an official

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SENT’G COMM’N, [https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202305\\_Amendments.pdf](https://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/202305_Amendments.pdf) [https://perma.cc/REK8-MN8Z] (last visited Nov. 3, 2023).

<sup>104</sup> Zunkel & Lessnick, *supra* note 93, at 164.

<sup>105</sup> *Id.*

<sup>106</sup> See 18 U.S.C. 3582(a).

<sup>107</sup> See generally *United States v. Pena*, 459 F. Supp. 3d 544 (S.D.N.Y. 2020).

“extraordinary and compelling medical circumstances” standard in place, the Court recognized that in some circumstances, an equitable solution of waiver would present itself.<sup>108</sup> While it might initially seem that this proposed solution would reach too far, a case from the Southern District Court of New York shows a way it could work with certain parameters the defendant was twenty years younger than Mr. Pena and had no medical condition that placed him at a higher medical risk. Due to his good health and the nature of the crime, the court failed to grant his release and extended the same reasoning as in *Pena*.<sup>109</sup>

The Southern District Court of New York, that decided *Pena*, did not find equitable solutions frequently or with little persuasive value for doing so. Rather, the court relied on Congress’s intent and the individual circumstances of the defendant to determine that an equitable solution may be available in circumstances like this.<sup>110</sup> There is a need for a more defined legal standard that federal courts could consider in exhausting administrative remedies; also, a more defined legal standard would provide defendants with better knowledge of their legal rights for a compassionate release.

Additionally, in another federal district court in Connecticut, a defendant petitioned for a compassionate release because she believed that waiting for the exhaustion requirements to be satisfied would be futile due to her health.<sup>111</sup> In this case, the court recognized that if the defendant were to contract Covid-19 before she fully exhausts her appeals, it could have a “catastrophic” effect on her health.<sup>112</sup> Additionally, the court recognized she had little time left to serve and that having her wait for the duration of the exhaustion period would cause her undue delay and place her at a heightened risk for health and safety concerns.<sup>113</sup> Therefore, the court recognized that based on the defendant’s health circumstances and the small amount of time remaining in her

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<sup>108</sup> *Id.* at 548-49.

<sup>109</sup> *United States v. Hilliard*, No. 17 CR 35-01 (VB), 2020 WL 3182778 at \*2-3 (S.D.N.Y. June 15, 2020).

<sup>110</sup> *United States v. Pena*, 459 F. Supp. 3d 544, 549 (S.D.N.Y. 2020).

<sup>111</sup> *United States v. Colvin*, 451 F. Supp. 3d 237, 239 (D. Conn. 2020).

<sup>112</sup> *Id.* at 240.

<sup>113</sup> *Id.*

sentence, an equitable exception was justified in waiving the exhaustion requirement.<sup>114</sup>

The Second Circuit Court of Appeals analyzed when the use of exceptions for exhausting administrative remedies is appropriate.<sup>115</sup> In *Washington*, while not a case for compassionate release, the Second Circuit provided insightful guidance behind the importance of exhaustion requirements.<sup>116</sup> The court explained that one important purpose exhaustion requirements serve is to give the government agency, in this case the BOP, the main responsibility over the program Congress put that government agency over.<sup>117</sup> The court found that requiring the plaintiff to exhaust administrative remedies was proper based upon congressional intent for the Controlled Substances Act because it aligns with the Supreme Court's purpose in requiring exhaustion requirements.<sup>118</sup>

In the same case, even though the Second Circuit found that full administrative exhaustion was required, the court went on to say that even if exhaustion requirements seem mandatory, the requirement is not definite.<sup>119</sup> The Court stated that even though the exceptions did not apply, the Supreme Court's *McCarthy* decision provided three exceptions.<sup>120</sup> So, even though the Second Circuit explained that exhausting administrative remedies are required, it recognized the significance of congressional intent of enacting the Controlled Substances Act.<sup>121</sup>

What is most significant is how the Supreme Court of the United States has proclaimed that exhausting claims through administrative remedies can lead to a quick resolution if done before an agency rather than a federal court.<sup>122</sup> While that might

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<sup>114</sup> *Id.*

<sup>115</sup> *See generally* *Washington v. Barr*, 925 F.3d 109 (2d Cir. 2019).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 117. (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)).

<sup>118</sup> *Id.* at 118.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 118-19. In *McCarthy*, the Supreme Court said that exhaustion may be unnecessary where: (1) a defendant is subject to agency review it would subject them to undue prejudice; (2) the agency's process cannot provide the defendant with adequate relief; or (3) it would be futile to the defendant because the agency is biased or the agency previously decided the issue. *McCarthy*, 503 U.S. at 145-47.

<sup>121</sup> *Barr*, 925 F.3d at 116.

<sup>122</sup> *Woodford v. Ngo*, 548 U.S. 81, 89 (2006).

be the case for some administrative processes in other agencies, it would be mistaken to say that all defendants who have attempted to exhaust administrative remedies with the correlating agency have found a quick answer. If it is clear that staffing issues or a lack of capable resources causes the administrative process to not be efficient for a defendant whose health is rapidly declining, then there should be alternative routes more readily available.

The First Step Act was enacted before COVID-19, so Congress could not have perceived a global emergency.<sup>123</sup> Because of COVID-19 and the influx of compassionate release motions, Congress may not have fully perceived how the plain language of the statute might cause ambiguity as to whether exhaustion requirements are mandatory. The Second Circuit reviewed congressional and legislative intent for the Controlled Substances Act to determine whether exhaustion should be mandatory;<sup>124</sup> courts should do the same for the First Step Act. Since one goal of the First Step Act was to reduce extensively long sentences for incarcerated individuals,<sup>125</sup> courts should consider congressional and legislative intent in compassionate release cases.

In *Pena*, the court recognized that applying an equitable exception to grant Mr. Pena's compassionate release was consistent with Congress's intent of the First Step Act even though he failed to meet the exhaustion requirement.<sup>126</sup> Ultimately, besides the exhaustion requirement, Mr. Pena met all other substantive requirements for a compassionate release, so the court found it was equitable to reduce his sentence.<sup>127</sup>

### *B. Legislative History of Exhaustion Requirements*

Historically, federal exhaustion requirements have been established to serve two main purposes: provide the agency with autonomy and authority and to encourage judicial efficiency.<sup>128</sup> The

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<sup>123</sup> Yolanda Bustillo, *Compassionate Release During Crises: Expanding Federal Court Powers*, 40 YALE L. & POL'Y REV. 223, 247 (2021).

<sup>124</sup> *Barr*, 925 F.3d at 116.

<sup>125</sup> Smachetti & Cohen, *supra* note 12, at 39.

<sup>126</sup> *United States v. Pena*, 459 F. Supp. 3d 544, 549 (S.D.N.Y. 2020).

<sup>127</sup> *Id.* at 552.

<sup>128</sup> Peter A. Devlin, *Jurisdiction, Exhaustion of Administrative Remedies, and Constitutional Claims*, 93 N.Y.U. L. REV. 1234, 1241 (2018).

first purpose is more relevant here because Congress's intent in implementing exhaustion requirements has been to provide judicial deference to federal agencies so that they are responsible for executing the process.<sup>129</sup>

If one of the main purposes behind exhaustion requirements is focused on the agency taking responsibility over the matter,<sup>130</sup> then why are defendants able to bring their case before a court under the First Step Act before fully litigating their case with the BOP?<sup>131</sup> This is one reason that courts have identified the exhaustion requirements under the First Step Act as being unique compared to others because they “contain[ed] elements of both a traditional exhaustion scheme and a timeliness requirement.”<sup>132</sup> The exhaustion requirement under the Federal Compassionate Release Standard is different from many other federal exhaustion requirements,<sup>133</sup> which means the application and exceptions to it should be different as well.

Because the Federal Compassionate Release Standard requires the defendant to either exhaust all administrative remedies or wait thirty days for the chance of no response or denial by the BOP before the defendant can bring their own motion,<sup>134</sup> it heavily minimizes one of Congress's intents for exhaustion requirements.<sup>135</sup> The lack of focus on administrative agency authority under the Federal Compassionate Release Standard can create reasons for why exhaustion requirements under the First Step Act should be waivable in specific circumstances. With the understanding that there has been an influx of motions for compassionate releases due to COVID-19,<sup>136</sup> it could be that congressional intent for the exhaustion requirement has changed since its original implementation in 2018.

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Bustillo, *supra* note 122, at 247.

<sup>132</sup> United States v. Pena, 459 F. Supp. 3d 544, 549 (S.D.N.Y. 2020).

<sup>133</sup> United States v. Haney, 454 F. Supp. 3d 316, 321 (S.D.N.Y. 2020).

<sup>134</sup> 18 U.S.C. § 3582(c)(1)(A).

<sup>135</sup> Devlin, *supra* note 127, at 1241.

<sup>136</sup> Hutchison, *supra* note 57, at 311-12.

So, based on legislative history, the compassionate release exhaustion requirement for the First Step Act were likely drafted with this goal in mind, but a slight modification of the statute is needed to reach the full effects of the First Step Act. Based on the legislative history of exhaustive administrative remedies, it might seem that when the First Step Act was enacted, Congress may have intended to minimize the gatekeeping abilities from the BOP when considering compassionate releases, and one way to do that was to expand the scope of compassionate releases.

Based on the historical uses of statutory exhaustion requirements and the differences between those and the one laid out in the Federal Compassionate Release Standard, this new solution would work. The new standard can stand against the argument that the exhaustion requirement cannot have exceptions unless created by statute, because it is implicitly implemented within the statute. Providing a narrow “extraordinary and compelling medical standard” under the exhaustion requirement would signal to the judiciary that, in compelling circumstances, there is room for judicial discretion as to the interpretation.

*C. The Proposed Amendment Aligns with Congress’s Intent in Passing the First Step Act*

Congress’s intent supports the argument that this new standard would work and receive positive feedback. If Congress intended to provide defendants with the broader ability to get compassionate release, why would Congress continue to utilize the BOP as a gatekeeper? The Second Circuit has alluded that the BOP and its wardens have “absolute gatekeeping authority.”<sup>137</sup> Prior to the First Step Act, compassionate releases were rarely utilized and even more rarely granted.<sup>138</sup> Between the years of 2013-2017, there were 5,400 requests for compassionate releases and only about six percent of those requests were granted.<sup>139</sup> These statistics show just

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<sup>137</sup> United States v. Brooker, 976 F.3d 228, 232 (2d Cir. 2020).

<sup>138</sup> Ashley Nellis & Liz Komar, *The First Step Act: Ending Mass Incarceration in Federal Prisons*, THE SENTENCING PROJECT (Aug. 22, 2023), <https://www.sentencingproject.org/policy-brief/the-first-step-act-ending-mass-incarceration-in-federal-prisons/> [https://perma.cc/ZE8T-J33Q].

<sup>139</sup> *Id.*

one reason for the bi-partisan effort for the First Step Act in changing these procedures.<sup>140</sup>

It seems, Congress tried to reduce or even fully eliminate the gatekeeping role of the BOP with the First Step Act.<sup>141</sup> One Attorney General stated that one initiative of the First Step Act was to “promise[] a path for an early return home for eligible incarcerated people who invest their time and energy in programs that reduce recidivism.”<sup>142</sup> The positive feedback following the implementation of the First Step Act and its hope to make significant and impactful reforms for incarcerated individuals shows the desire for a less restrictive interpretation on the exhaustion requirement under the Federal Compassionate Release Standard. One way to make the First Step Act even more impactful could be achieved by implementing a new and less restrictive standard like the one proposed in this comment.

Placing the thirty-day requirement suggested Congress intended for thirty days to be a cap, not the general standard.<sup>143</sup> It would seem that in accordance with the intent behind the First Step Act, there would be many instances where the BOP should move quicker in motioning for a compassionate release on behalf of the defendant due to the urgency of their situation.<sup>144</sup> Even in these extremely urgent cases where each day of the thirty days is significant to their release, there is very little BOP support for these releases.<sup>145</sup> The incarcerated individuals are essentially left in an “administrative limbo” where they hope to live to see the day of

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<sup>140</sup> *An Overview of the First Step Act*, FED. BUREAU OF PRISONS 15 <https://www.bop.gov/inmates/fsa/overview.jsp#:~:text=The%20act%20was%20the%20culmination,mechanisms%20to%20maintain%20public%20safety> [https://perma.cc/2XL8-B925] (last visited Nov. 3, 2023).

<sup>141</sup> Allison Cheney, *Procedural Pitfalls: The Eleventh Circuit Holds That the Sentencing Commission’s Policy Statement on Sentence Reduction Is Binding on Defendant-Filed Motions*, 63 B.C. L. REV. E. SUPP. II.-61, II.-75 (2022).

<sup>142</sup> *Justice Department Announces New Rule Implementing Federal Time Credits Program Established by the First Step Act*, U.S. DEPT OF JUST. OFF. OF PUB. AFFAIRS (Jan. 13, 2022), <https://www.justice.gov/opa/pr/justice-department-announces-new-rule-implementing-federal-time-credits-program-established#:~:text=“The%20First%20Step%20Act%2C%20a,Attorney%20General%20Merrick%20B.%20Garland> [https://perma.cc/JD3H-MVN8].

<sup>143</sup> *United States v. Somerville*, 463 F. Supp. 3d 585, 593 (W.D. Pa. 2020).

<sup>144</sup> *Id.*

<sup>145</sup> U.S. SENT’G COMM’N, *supra* note 51, at tbl.5.

their compassionate release hearing.<sup>146</sup> One court stated that it believes Congress would not have intended to apply this thirty-day exhaustion period “rigidly.”<sup>147</sup>

Another reason this standard would alleviate the ambiguity in the varying judicial interpretation is because of the Sentencing Commission’s quorum in April of 2023. In this quorum, the Sentencing Commission voted to promulgate amendments to various guidelines.<sup>148</sup> What is most significant is the reasoning given by the Chair of the Sentencing Commission, Judge Carlton W. Reeves, who said “[t]oday, we are listening to Congress and the public by increasing first steps toward second chances . . . .”<sup>149</sup>

The Sentencing Commission expanded and provided examples as to what constitutes “extraordinary and compelling” under the Federal Compassionate Release Standard.<sup>150</sup> One change included in the amendment was providing more specific yet somewhat broad situations to the medical conditions category in the 2023 Amendments in Brief.<sup>151</sup> The Sentencing Commission, explaining that based on federal case law, provided heavy considerations for individuals needing long-term care that cannot be provided properly in a prison facility.<sup>152</sup> Lastly, the amendments also included new language pertaining to a health outbreak and a defendant’s personal health risks that are associated with the “extraordinary and compelling” criteria.<sup>153</sup>

A member of the Sentencing Commission explained that judges are the best indicators of determining if a sentencing reduction is warranted.<sup>154</sup> In a press release, the Sentencing Commission explained how, during COVID-19, “federal judges saved lives” using their discretion to determine what extraordinary

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<sup>146</sup> *United States v. Pena*, 459 F. Supp. 3d 544, 549 (S.D.N.Y. 2020).

<sup>147</sup> *United States v. Haney*, 454 F. Supp. 3d 316, 321 (S.D.N.Y. 2020).

<sup>148</sup> “*Back in Business*” U.S. Sentencing Commission Acts to Make Communities Safer & Stronger, U.S. SENT’G COMM’N (Apr. 5, 2023), <https://www.ussc.gov/about/news/press-releases/april-5-2023> [https://perma.cc/SZ7F-WLAM].

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> U.S. SENT’G COMM’N, *supra* note 16.

<sup>152</sup> U.S. SENT’G COMM’N, *supra* note 43.

<sup>153</sup> *Id.* U.S. SENT’G COMM’N, *supra* note 16.

<sup>154</sup> *Id.*

and compelling meant.<sup>155</sup> In other words, the Sentencing Commission recognized how imperative judicial discretion was and how some circumstances could warrant a compassionate release even if the statutory language might be unclear.

If the First Step Act intended to utilize a safety valve for federally incarcerated individuals, then what would the rationale be behind courts limiting compassionate releases due to administrative remedies? The difference between exhausting these administrative remedies could mean the difference between someone dying in a jail cell versus being surrounded by their loved ones, which is why an amendment is needed.

#### V. CRITIQUE

This comment's solution focuses on exhausting administrative remedies, which is the earliest decision a court makes when considering a compassionate release. A court should provide equitable exceptions to the exhaustion requirements in severe medical circumstances. While this solution is a step in the right direction, it could be met with skepticism about how this would be implemented after a change in statute. "For a defendant's administrative exhaustion requirements to be waived, the courts may require some confirmation by a medical professional or nurse within the facility, this opens an avenue for critique, which poses the question of how this would be implemented effectively so as not to cause any additional delay. Skepticism might focus on how this solution requires careful consideration of the current healthcare resources available to defendants while incarcerated. But, the hope of implementing a new change like this is that due to the defendant's significantly worsening condition, there would be a proper record of the defendant's medical care received. Therefore, it would be enough to satisfy the court's proof for recognizing that there is an extraordinary and compelling reason to waive a defendant's exhaustion requirement for their compassionate release.

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<sup>155</sup> U.S. SENT'G COMM'N, *supra* note 147.

COVID-19 solidified the ongoing problem that prisons clearly lack resources needed to provide adequate medical care to incarcerated individuals, especially those who are terminally ill.<sup>156</sup> Prisons especially neglect care for elderly individuals within prisons, and some even state that their care should be considered a “low priority.”<sup>157</sup> The lack of resources available to adequately care for the elderly prison population<sup>158</sup> supports the contention that these incarcerated individuals should be given compassionate release to spend the rest of their time at home surrounded by their loved ones rather than within a prison facility.<sup>159</sup> While this comment is not predominantly focused on the lack of adequate health care available to incarcerated individuals, it is important to the consideration for compassionate releases.<sup>160</sup>

#### CONCLUSION

Because of ambiguity in statutory interpretation, incarcerated individuals may die waiting for their day in court either waiting for their thirty days to pass or for the extensive appeals process with the BOP to conclude. Because the law does not acknowledge that there should be an exception to the exhaustion requirement in extraordinary and compelling medical circumstances under the Federal Compassionate Release Standard, these individuals might never get the chance to properly advocate before a federal court that their medical condition warrants them a compassionate release.

Even though the legislative history of exhaustion requirements, the gatekeeping role of the BOP, congressional intent, and current federal court opinions support equitable waiver of the exhaustion requirements, individuals like Maria Neba<sup>161</sup> and

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<sup>156</sup> Jalila Jefferson-Bullock, *Let My People Go: A Call for the Swift Release of Elderly Federal Prisoners in the Wake of Covid-19*, 32 FED. SENT’G REP. 286, 286 (2020).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 287.

<sup>159</sup> *See supra* Part III, pp. 10-11.

<sup>160</sup> The next step in research and writing for this proposed statutory standard could be considering if federal courts would require a physician’s diagnosis in determining if the defendant’s condition meets the proposed standard. In conducting such research, there is a chance that it may show the implementing this procedure of having a medical professional confirm the defendant’s worsening condition, could cause undue delay based on medical resources for defendants.

<sup>161</sup> Neff & Blakinger, *supra* note 73.

Waylon Young Bird<sup>162</sup> may die in prison because of the failed application and procedure of a compassionate release. Neba, Young Bird and many others demonstrate the desperate need for a change in federal criminal law to better equip federally incarcerated individuals with the capability to fighting and advocate for themselves. Implementation an enhanced and broad statutory medical compelling standard that would be considered with the exhaustion requirement under the Federal Compassionate Release Standard would provide federal courts with the discretion to waive exhaustion requirements in dire situations where the defendant's medical needs are so severe. It would also provide incarcerated individuals with life-saving advocacy that is in clear alignment with the First Step Act's intent for compassionate releases.

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<sup>162</sup> FED. BUREAU OF PRISONS OFF. OF PUB. AFFAIRS, *supra* note 1.