

STATUTORY INTERPRETATION, THE FIRST STEP ACT AND
COMPASSIONATE RELEASE

Kevin Trowel*

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I. INTRODUCTION

The First Step Act (FSA), enacted on December 21, 2018, was described by one of its more than thirty Senate co-sponsors as “the most significant criminal justice reform legislation in a generation.”¹ Among other reforms, the FSA expanded the availability of “safety valve” relief under 18 U.S.C. § 3553(f), reduced the mandatory minimum penalties applicable to multiple offenses under 18 U.S.C. § 924(c), and made the Fair Sentencing Act of 2010

*Kevin Trowel is the Deputy Chief of the Criminal Appeals Division at the United States Attorney’s Office for the Eastern District of New York. He earned a B.A. from the University of Maryland, College Park, *cum laude*, in 1998, a M.Phil. from the University of Oxford, St. Antony’s College, in Russian and Eastern European Studies in 2003, and a J.D. from Georgetown University Law Center, *magna cum laude*, in 2007. The views set forth in this article are my own and not necessarily those of the United States Department of Justice.

¹*Grassley Celebrates The Accomplishments of The First Step Act on 2 Year Anniversary*, SENATOR CHUCK GRASSLEY (Dec. 15, 2020), <https://www.grassley.senate.gov/news/news-releases/grassley-celebrates-accomplishments-first-step-act-2-year-anniversary>.

retroactive.² These provisions have led to the release of thousands of federal inmates in the years since the FSA's passage.³

But the sponsors and supporters of the FSA could not have predicted the impact of Section 603(b) of the FSA, which modified the "compassionate release" provision in 18 U.S.C. § 3582(c)(1)(A). Section 3582(c)(1)(A), which was first enacted as part of the Sentencing Reform Act of 1984, had, for more than thirty years, provided that a court could grant "compassionate release" to an inmate "upon motion of the Director of the Bureau of Prisons" (BOP) where (1) the court found "extraordinary and compelling reasons" warranting relief, (2) the relief was consistent with the factors listed in 18 U.S.C. § 3553(a), and (3) the relief was consistent with any "applicable policy statements issued by the Sentencing Commission."⁴ In Section 603(b) of the FSA, Congress removed the Director of the BOP as gatekeeper to this form of relief and authorized inmates to move on their own behalf in district court provided they had satisfied the FSA's revised exhaustion provision, codified in Section 3582(c)(1)(A).⁵ Following the enactment of the FSA and as a result of the COVID-19 pandemic, "10,940 [inmates] applied for compassionate release in the first three months of the pandemic alone."⁶

In the surge of compassionate release cases during the COVID-19 pandemic, courts split on the scope of their authority to define "extraordinary and compelling reasons" warranting relief under Section 3582(c)(1)(A)(i).⁷

²First Step Act of 2018, Pub. L. No. 115-391, §§ 402–404, 132 Stat. 5221–22 [hereinafter FSA].

³For example, as of January 15, 2020, some 2,471 inmates had their sentences reduced under Section 404 of the FSA, which made the Fair Sentencing Act retroactive, and 3,100 inmates were released as a result of the FSA's increase in "good conduct time." U.S. DEP'T OF JUST., *Department of Justice Announces Enhancements to the Risk Assessment System and Updates on First Step Act Implementation* (Jan. 15, 2020), <https://www.justice.gov/opa/pr/departments-justice-announces-enhancements-risk-assessment-system-and-updates-first-step-act>.

⁴Sentencing Reform Act of 1984, Pub. L. 98-473, 98 Stat. 1998 [hereinafter SRA].

⁵FSA, § 603(b), 132 Stat. 5239.

⁶*United States v. Jones*, 980 F.3d 1098, 1100–01 (6th Cir. 2020).

⁷Section 3582(c)(1)(A) provides, in relevant part, that:

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

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One group of district courts held that courts' authority to grant compassionate release was circumscribed by the "applicable policy statement" found in U.S.S.G. § 1B1.13 and its application notes, in which the Sentencing Commission defined "extraordinary and compelling reasons" pursuant to a Congressional grant of authority in 28 U.S.C. § 994(t).⁸ Another group of district courts held that, after the FSA, district courts were no longer bound by the Commission's definition of "extraordinary and compelling reasons" in Section 1B1.13 and were instead free to grant "compassionate release" at their discretion.⁹

This split over the scope of courts' authority under Section 3582(c)(1)(A)(i) is now reflected at the circuit level, albeit with a decided majority in favor of the latter view. Ten circuits have considered courts' authority to grant compassionate release under Section 3582(c)(1)(A)(i), and nine—the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits—have held that:

the First Step Act freed district courts to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release. Neither Application Note 1(D), nor anything else in the now-outdated version of Guideline §

that does not exceed the unserved portion of the original 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.

18 U.S.C. § 3582(c)(1)(A).

⁸ *See, e.g.*, *United States v. Ebbers*, 432 F. Supp. 3d 421, 427 (S.D.N.Y. 2020) ("Congress did not revise the statute's substantive text or alter the [Sentencing Commission]'s authority to define 'extraordinary and compelling reasons.'"); *United States v. Lynn*, No. CR 89-0072, 2019 WL 3805349, at *4 (S.D. Ala. Aug. 13, 2019) ("Should the Commission so amend its policy statement, the courts will of course be bound by Section 3582(c)(1)(A) to follow the amended version. Until that day, however, the Court must follow the policy statement as it stands.").

⁹ *See, e.g.*, *United States v. Young*, 458 F. Supp. 3d 838, 845 (M.D. Tenn. 2020) (collecting cases and explaining that "a majority of the district courts that have considered the issue have likewise held, based on the First Step Act, that they have the authority to reduce a prisoner's sentence upon the court's independent finding of extraordinary or compelling reasons"); *United States v. Brown*, 457 F. Supp. 3d 691, 701 (S.D. Iowa 2020).

1B1.13, limits [a] district court's discretion to grant such relief.¹⁰

Only the Eleventh Circuit has held that “[Section] 1B1.13 is an applicable policy statement that governs all motions under Section 3582(c)(1)(A). Accordingly, district courts may not reduce a sentence under Section 3582(c)(1)(A) unless a reduction would be consistent with [§] 1B1.13.”¹¹ The First and Eighth Circuits have yet to expressly address this issue.¹²

This article argues that the majority view among the circuits—that is, that courts are no longer bound by Section 1B1.13 in construing the phrase “extraordinary and compelling reasons” in Section 3582(c)(1)(A)(i)—is inconsistent with basic principles of administrative delegation and statutory interpretation. First, in 28 U.S.C. § 994(t), Congress expressly delegated authority to the Sentencing Commission, not the courts, to define the phrase “extraordinary and compelling reasons” as used in Section 3582(c)(1)(A)(i), and the FSA did not modify, much less repeal, that delegation of authority. As discussed below, to the extent the courts that have adopted the majority view have addressed Section 994(t) in their analysis, their arguments are unpersuasive. Further, even assuming that the congressional delegation of authority in Section 994(t) does not mean what it says, the courts that have adopted the majority view have not acknowledged that rejecting the Commission's definition of “extraordinary and compelling reasons” does not end their interpretive task. In the absence of Section 1B1.13, courts must discern Congress's intent in Section 3582(c)(1)(A)(i) using the ordinary tools

¹⁰United States v. *Brooker*, 976 F.3d 228, 237 (2d Cir. 2020). Application note 1(D) to Section 1B1.13 includes the Sentencing Commission's definition of “extraordinary and compelling reasons.” The Second Circuit's decision in *Brooker* was the first circuit case to hold that Section 1B1.13 no longer constrained district courts in considering motions for compassionate release. The other eight circuits to have adopted that view have relied on *Brooker* in doing so. See United States v. *Andrews*, 12 F.4th 255, 259 (3d Cir. 2021); United States v. *Long*, 997 F.3d 342, 355 (D.C. Cir. 2021); United States v. *McCoy*, 981 F.3d 271, 282 (4th Cir. 2020); United States v. *Shkambi*, 993 F.3d 388, 392–93 (5th Cir. 2021); *Jones*, 980 F.3d at 1109–11; United States v. *Gunn*, 980 F.3d 1178, 1180–81 (7th Cir. 2020); United States v. *Aruda*, 993 F.3d 797, 802 (9th Cir. 2021); United States v. *McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021).

¹¹United States v. *Bryant*, 996 F.3d 1243, 1262 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 583 (2021).

¹²See United States v. *Crandall*, No. 20-3611, 2022 WL 385920, at *2 (8th Cir. Feb. 9, 2022) (acknowledging issue but explaining that “it is unnecessary in this case to address whether a district court is constrained by the policy statement at USSG § 1B1.13 in determining what circumstances are ‘extraordinary and compelling’”); United States v. *Saccoccia*, 10 F.4th 1, 10 (1st Cir. 2021) (collecting cases and declining to resolve issue).

of statutory interpretation—tools that do not support the majority view that courts may define the operative phrase for themselves.

II. THE HISTORY OF COMPASSIONATE RELEASE

“A district court may not generally modify a term of imprisonment once it has been imposed,” except pursuant to a statutory grant of authority.¹³ The “compassionate release” provision in Section 3582(c)(1)(A) is one source of such authority. The provision has two subparts: paragraph (i)—the focus of this article—which authorizes relief upon, inter alia, a showing of “extraordinary and compelling reasons,” and paragraph (ii), which relates to defendants who are at least seventy years old and who have served at least thirty years of their sentence.¹⁴

A. *Compassionate release before the FSA*

Title 18, U.S.C. § 4205(g) was the first federal statute providing a mechanism for “compassionate release.”¹⁵ The statute was enacted as part of the Parole Commission and Reorganization Act of 1976, and it provided that “[a]t any time upon motion of the Bureau of Prisons, the court may reduce any minimum term to the time the defendant has served.”¹⁶ The court shall have jurisdiction to act upon the application at any time and no hearing shall be required.¹⁷ The BOP issued regulations related to Section 4205(g) in 1980, which provided that such relief was only available in “particularly meritorious or unusual circumstances. . . . The Section may be used, for example, if there is an extraordinary change in an inmate’s personal or family situation or if an inmate becomes severely ill.”¹⁸

In the SRA, Congress repealed and replaced Section 4205(g) with Section 3582(c)(1)(A), which contained the first use of the phrase “extraordinary and compelling reasons.”¹⁹ From the enactment of the SRA to the present, Section 3582(c)(1)(A)(i) has provided that a court may “modify a term of

¹³United States v. Savoy, 567 F.3d 71, 72 (2d Cir. 2009) (internal quotation marks omitted); see also United States v. Bernabal, 22 F. App’x 37, 41 (2d Cir. 2001) (not precedential) (quoting United States v. Mendoza, 118 F.3d 707, 709 (10th Cir. 1997) and collecting cases).

¹⁴18 U.S.C. § 3582(c)(1)(A)(i)–(ii).

¹⁵Pub. L. No. 94-233, § 4205(g), 90 Stat. 233 (repealed 1984).

¹⁶*Id.*

¹⁷*Id.*

¹⁸45 Fed. Reg. 23364, 23366 § 572.40 (Apr. 4, 1980).

¹⁹SRA, Pub. L. 98-473, 98 Stat. 1837.

imprisonment” when, “after considering the factors set forth in Section 3553(a) to the extent that they are applicable,” and to the extent a reduction is consistent with the “applicable policy statements issued by the Sentencing Commission,” the court “finds that extraordinary and compelling reasons warrant such a reduction.”²⁰ The version of Section 3582(c)(1)(A) enacted in the SRA also included a gatekeeping provision that limited courts’ authority to grant relief under Section 3582(c)(1)(A)(i) or (ii) to those cases in which the Director of the BOP moved in district court on the inmate’s behalf.²¹ Under the original version of Section 3582(c)(1)(A), the absence of a motion from the BOP on behalf of an inmate seeking compassionate release was a jurisdictional defect that precluded relief in federal courts.²²

As part of the SRA, Congress also instructed the then-new Sentencing Commission to “describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.”²³ This statutory delegation is codified at 28 U.S.C. § 994(t).²⁴

The Sentencing Commission took an “initial step toward implementing” the Congressional mandate in Section 994(t) in its original version of Section 1B1.13, which became effective on November 1, 2006, and generally tracked the statutory language.²⁵ The Sentencing Commission took a further step in 2007 when it provided the following list of “specific examples” that constitute “extraordinary and compelling reasons” for purposes of Section 3582(c)(1)(A):

- (i) The defendant is suffering from a terminal illness.
- (ii) The defendant is suffering from a permanent physical or medical condition, or is experiencing deteriorating physical

²⁰ 18 U.S.C. § 3582(c)(1)(A).

²¹ *See id.*

²² *See, e.g.,* Rodriguez-Aguirre v. Hudgins, 739 F. App’x 489, 491 (10th Cir. 2018) (not precedential) (holding that pre-FSA version of Section 3582(c) gave “the BOP absolute discretion regarding whether to file a motion, and the BOP’s denial of a defendant’s compassionate release/reduction in sentence request and declination to file a motion [wa]s not a judicially reviewable decision” and collecting cases); Garafola v. United States, 909 F. Supp. 2d 313, 339 (S.D.N.Y. 2012) (same and collecting cases).

²³ §994(s), 98 Stat. 2023.

²⁴ 28 U.S.C. § 994(t).

²⁵ *See* U.S. SENTENCING GUIDELINES MANUAL AMEND. 683, § 1B1.13, cmt. n.1 (U.S. SENTENCING COMM’N 2006).[hereinafter U.S.S.G.].

or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement.

(iii) The death or incapacitation of the defendant's only family member capable of caring for the defendant's minor child or minor children.

(iv) As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (i), (ii), and (iii).²⁶

In 2016, the Commission reformatted and expanded the 2007 version of Section 1B1.13 to the version currently found in the Guidelines.²⁷ Section 1B1.13 now provides that the court may reduce the term of imprisonment if "extraordinary and compelling reasons warrant the reduction;"²⁸ "the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g);"²⁹ and "the reduction is consistent with this policy statement."³⁰

Consistent with Congress's delegation of authority in Section 994(t) to the Sentencing Commission to define the term "extraordinary and compelling reasons," application note 1 to Section 1B1.13 defines that phrase.³¹ The application note provides that "extraordinary and compelling reasons exist

²⁶ U.S.S.G. AMEND. 698, § 1B1.13, cmt. n.1 (U.S. SENTENCING COMM'N 2007).

²⁷ See U.S.S.G. AMEND. 799, § 1B1.13 cmt. n.1 (U.S. SENTENCING COMM'N 2016). The BOP also developed criteria for the implementation of Section 3582(c)(1)(A) in several program statements that provided that:

a sentence reduction may be based on the defendant's medical circumstances (e.g., a terminal or debilitating medical condition) or on certain non-medical circumstances (e.g., an elderly defendant, the death or incapacitation of the family member caregiver of an inmate's minor child, or the incapacitation of the defendant's spouse or registered partner when the inmate would be the only available caregiver).

U.S.S.G. AMEND. 799 (Nov. 1, 2016) (internal citations omitted) (describing BOP Program Statement 5050.49).

²⁸ U.S.S.G. § 1B1.13(1)(A) (U.S. SENTENCING COMM'N 2018).

²⁹ U.S.S.G. § 1B1.13(2) (U.S. SENTENCING COMM'N 2018).

³⁰ U.S.S.G. § 1B1.13(3) (U.S. SENTENCING COMM'N 2018).

³¹ U.S.S.G. § 1B1.13, cmt. n.1(A)–(D) (U.S. SENTENCING COMM'N 2018).

under any of the circumstances set forth below,” and it sets forth four categories: the “Medical Condition of the Defendant;” the “Age of the Defendant;” “Family Circumstances;” and “Other Reasons . . . [a]s determined by the Director of the Bureau of Prisons.”³² The “other reasons” clause further provides that relief may be appropriate where, “[a]s determined by the Director of the Bureau of Prisons, there exists in the defendant’s case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).”³³

B. Compassionate release after the FSA

The FSA modified only the procedural provision in Section 3582(c)(1)(A). Rather than requiring a motion from the Director of the BOP, Section 3582(c)(1)(A) as modified by the FSA now provides that a federal court has jurisdiction to review a request for relief under the following circumstances:

[(1)] upon motion of the Director of the Bureau of Prisons, or [(2)] 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 [(3)] the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier[.]³⁴

This amendment to Section 3582(c)(1)(A) was included in the FSA under the heading “Increasing the Use and Transparency of Compassionate Release.”³⁵

After the FSA, where a defendant has satisfied the revised exhaustion provision of Section 3582(c)(1)(A), a district court may grant a motion for compassionate release only where it has undertaken the same analysis as before the FSA.³⁶ The court “may not modify a term of imprisonment” unless

³² *Id.*

³³ U.S.S.G. § 1B1.13, cmt. n.1(D) (U.S. SENTENCING COMM’N 2018).

³⁴ 18 U.S.C. § 3582(c)(1)(A).

³⁵ FSA, § 3582, 132 Stat. 5239.

³⁶ *See* 18 U.S.C. § 3582(c)(1)(A); FSA, § 603(b), 132 Stat. 5239. The revised exhaustion provision in Section 3582(c)(1)(A) has also led to a split among district and circuit courts, with one group of courts holding that, if the warden of an inmate’s institution denies an inmate’s request within thirty days, the inmate must thereafter “satisfy ‘the same exhaustion procedure’ that applies to ‘routine administrative grievances,’” *United States v. Samuels*, No. 08CR789-6 (RJS), 2020 WL

(1) it is consistent with “the factors set forth in [S]ection 3553(a) to the extent that they are applicable,” (2) “it finds that . . . extraordinary and compelling reasons warrant such a reduction . . . and” (3) “such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.”³⁷

III. CONGRESS DID NOT INTEND TO GIVE DISTRICT COURTS AUTHORITY TO DEFINE “EXTRAORDINARY AND COMPELLING REASONS”

I. *The majority view is inconsistent with the congressional delegation of authority in Section 994(t)*

At the highest level of analysis, the majority view that the definition of “extraordinary and compelling reasons” in Section 1B1.13 is no longer binding runs headlong into Section 994(t). In Section 994(t)—enacted in the SRA at the same time Congress first used the phrase “extraordinary and compelling reasons”³⁸—Congress expressly delegated authority to the Sentencing Commission to “describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.”³⁹ The FSA did not amend, much less repeal, Section 994(t) and none of the circuit cases adopting the majority view have identified any legislative history in which a sponsor or supporter of the FSA suggested that Congress intended to remove this authority from the Commission, or vest the judiciary with the authority to define “extraordinary and compelling reasons.”

Indeed, the majority view all but ignores Section 994(t) and its obvious relevance to the task of discerning Congress’s intent in Section 3582(c)(1)(A)(i). *United States v. Brooker*, the first in the majority line of

7696004, at *3 (S.D.N.Y. Dec. 28, 2020), and the other group holding that the FSA’s exhaustion provision serves as a “waiting period,” such that a defendant may move in district court after thirty days had passed since he made his request to the warden, regardless of whether the warden acts on his request, *United States v. Haney*, 454 F. Supp. 3d 316, 321 (S.D.N.Y. 2020). This split is now reflected in the circuits, with the Second and Seventh Circuits suggesting that the former view is correct, and the Third, Fifth, and Sixth Circuits suggesting suggested that latter view is correct. *See United States v. Harris*, 505 F. Supp. 3d 1152, 1155–57 (D. Kan. 2020) (discussing split of authority and collecting cases).

³⁷ 18 U.S.C. § 3582(c)(1)(A).

³⁸ SRA, H.R.J. Res. 648, 98th Cong. (1984), Pub. L. 98-473, 98 Stat. 1999. The provision now codified at Section 994(t) was originally codified at Section 994(s).

³⁹ 28 U.S.C. § 994(t).

cases, cites Section 994(t) by way of background, but makes no effort to explain why courts are entitled to exercise authority that Congress delegated to the Commission.⁴⁰ *Jones*, the next in the majority line of cases, also cited to Section 994(t) in its background discussion of Section 1B1.13 and went further than *Brooker* in acknowledging that the statute is a Congressional delegation of authority to the Sentencing Commission.⁴¹ In *Jones*, the Sixth Circuit nevertheless avoided the implications of the delegation by misquoting it and incorrectly suggesting that, in Section 994(t), Congress merely “command[ed] the Sentencing Commission to provide” a non-exhaustive “list of specific examples” of “what should be considered extraordinary and compelling circumstances.”⁴² The Tenth Circuit also acknowledged Section 994(t) in *McGee* but, without elaboration, held that the “most plausible interpretation” of the statute is that “Congress intended to afford district courts with discretion . . . to independently determine the existence of ‘extraordinary and compelling reasons.’”⁴³ In *Gunn* and *Long*, the Seventh and D.C. Circuits, respectively, did not acknowledge Section 994(t).⁴⁴

In *Maumau*, the Tenth Circuit relied on a flawed premise to conclude that Section 994(t) is not, in fact, a congressional delegation of authority.⁴⁵ The court explained that Congress’s use of the word “describe” in Section 994(t), rather than the word “define,” together with the fact that Section 994(t) instructs the Commission to issue a policy statement, indicates that Congress merely intended in Section 994(t) “to advise the public prospectively of the

⁴⁰ See 976 F.3d 228, 232 (2d Cir. 2020). The Fourth Circuit in *United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020), the Fifth Circuit in *United States v. Shkambi*, 993 F.3d 388 (5th Cir. 2021), and the Ninth Circuit in *United States v. Aruda*, 993 F.3d 797 (9th Cir. 2021) each took a similar approach, insofar as they acknowledged that Section 994(t) is a congressional delegation of authority to the Sentencing Commission but did not explain the significance of that fact. See *McCoy*, 981 F.3d at 276; *Shkambi*, 993 F.3d at 391; *Aruda*, 993 F.3d at 800.

⁴¹ See *United States v. Jones*, 980 F.3d 1098, 1108 (6th Cir. 2020).

⁴² Compare *id.* at 1111 n.18 (“Section 994(t) commands the Sentencing Commission to provide a ‘list of specific examples’ of ‘what should be considered extraordinary and compelling circumstances.’ We do not read § 994(t)’s text as allowing the Sentencing Commission to prescribe an exhaustive list of examples of extraordinary and compelling reasons.”), with 28 U.S.C. § 994(t) (“The Commission . . . shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples.”) (emphasis added).

⁴³ *United States v. McGee*, 992 F.3d 1035, 1044 (10th Cir. 2021); see also *United States v. Maumau*, 993 F.3d 821, 832 (10th Cir. 2021).

⁴⁴ See *United States v. Long*, 997 F.3d 342 (D.C. Cir. 2021); *United States v. Gunn*, 980 F.3d 1178 (7th Cir. 2020).

⁴⁵ 993 F.3d at 834.

manner in which the agency intends for a discretionary power to be exercised.”⁴⁶

But Congress’s word choice cannot bear the weight the Tenth Circuit placed on it. At the time Congress enacted Section 994(t) in 1984, Congress and the courts understood the Guidelines to be mandatory,⁴⁷ and Section 3582(c)(1)(A) authorized only the BOP to move for compassionate release on an inmate’s behalf.⁴⁸ Given that context, it is not plausible that Congress’s use of the word “describe” in Section 994(t) was intended merely to “advise the public” of the Commission’s understanding—in the pre-*Booker* and pre-FSA regime, Section 994(t) was plainly intended to limit the discretion of the courts and the BOP. Moreover, the Tenth Circuit’s dismissive approach to the Commission’s policy statements was rejected in *Dillon v. United States*, in which the Supreme Court explained that proceedings under Section 3582(c) do not implicate the Sixth Amendment, and therefore, the Commission’s policy statements issued in that context remain binding on courts even after *Booker*.⁴⁹

In *Jones*, the Sixth Circuit suggested, without elaboration, that Section 994(t) should not be understood as a delegation of authority because to do so would “raise[] a whole host of administrative-law concerns.”⁵⁰ But those concerns are far from obvious;⁵¹ they have not been fully addressed in any of the circuit cases in which courts have adopted the majority view, and they would, in any event, be an insufficient reason to ignore a statutory command from Congress that applies to an act of Congressional lenity in an area of

⁴⁶*Id.* at 833.

⁴⁷*See* *United States v. Booker*, 543 U.S. 220, 233–34 (2005) (citing 18 U.S.C. § 3553(b)).

⁴⁸*See* 18 U.S.C. § 3582(c)(1)(A).

⁴⁹*See* 560 U.S. 817, 830 (2010); *see also* *United States v. Jones*, 980 F.3d 1098, 1107 (6th Cir. 2020) (stating that “compassionate release hearings are sentence-modification proceedings and . . . courts considering motions filed under § 3582(c)(1) must follow a *Dillon*-style test”); *United States v. Ruffin*, 978 F.3d 1000, 1007 (6th Cir. 2020) (stating that “the Supreme Court has already held that courts must follow the Commission’s policy statements in this *sentence-modification* context even after it made the guidelines advisory in the *sentencing* context”). In *Maumau*, the Tenth Circuit cited *Dillon* once parenthetically, but did not acknowledge this aspect of its holding. *See* 993 F.3d at 831.

⁵⁰*See Jones*, 980 F.3d at 1111 n.18.

⁵¹*See, e.g., Ruffin*, 978 F.3d at 1007 (noting that “a delegation to the Commission to identify the circumstances in which courts may grant a discretionary *benefit* to defendants (a reduction in their otherwise final sentences) raises fewer constitutional concerns”) (citing *Dillon*, 993 F.3d at 831, and *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 9–11 (1979)).

Congress's constitutional authority.⁵² Moreover, even if such administrative law concerns were fatal to the Commission's exercise of the delegated authority in application note 1 of Section 1B.13, it does not follow that the authority Congress delegated to the Commission, an agency that is accountable to Congress, would redound to the judiciary.⁵³ Rather, if the Commission's exercise of the delegated authority could not be salvaged, "the entire application note would fall," and it would be left to Congress to address the issue by statute or to the Sentencing Commission (assuming a quorum) to properly exercise the authority found in Section 994(t).⁵⁴

The majority's failure to appreciate the Congressional delegation in the *first* sentence of Section 994(t) is made more conspicuous by the majority's concession that the *second* sentence of Section 994(t) remains binding even after the FSA. In the second sentence of Section 994(t), Congress instructed courts that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason" warranting relief under Section 3582(c)(1)(A)(i).⁵⁵ *Brooker* acknowledged that the second sentence serves as a "statutory limit on what a court may consider to be extraordinary and compelling," but failed to explain how that concession can be harmonized with its rejection of the obvious and more fundamental limitation in the first sentence of Section 994(t).⁵⁶ The Fourth, Fifth, Sixth, and Tenth Circuits have similarly held or suggested that the second sentence of Section 944(t) is binding, notwithstanding their holding that the first sentence of Section 994(t) is not.⁵⁷

⁵² See *Jackson v. Vannoy*, 981 F.3d 408, 414 (5th Cir. 2020) (citing *United States v. Evans*, 333 U.S. 483, 486 (1948), for the proposition that, "[i]n our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions"); *United States v. Martin*, 974 F.3d 124, 135 (2d Cir. 2020) (citing *Mistretta v. United States*, 488 U.S. 361, 364 (1989), for the proposition that, "Congress, of course, has the power to fix the sentence for a federal crime, and the scope of judicial discretion with respect to a sentence is subject to congressional control").

⁵³ *Mistretta*, 488 U.S. at 393–94 ("In contrast to a court's exercising judicial power, the Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit either within the 180-day waiting period . . . or at any time.").

⁵⁴ See *United States v. Bryant*, 996 F.3d 1243, 1264 n.6. (11th Cir.), *cert. denied*, 142 S. Ct. 583 (2021).

⁵⁵ 28 U.S.C. § 994(t).

⁵⁶ See *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020).

⁵⁷ See, e.g., *United States v. Shkambi*, 993 F.3d 388, 391 (5th Cir. 2021) ("[Congress] provided just one restriction: 'Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.'"); *United States v. Maumau*, 993 F.3d 821, 832 (10th Cir. 2021).

The majority's approach to Section 1B1.13 is also incompatible with the circuits' unanimous approach to the Congressional delegation of authority in 28 U.S.C. § 994(u) and the Sentencing Commission's exercise of that authority in Section 1B1.10. In Section 994(u), enacted along with Section 994(t) in the SRA, Congress instructed that, "[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."⁵⁸ As the Second Circuit explained, this provision "requires the Commission to specify [by what amount sentences may be reduced based on retroactive amendments, and] § 994(a)(2)(C) requires that this specification be in the form of a policy statement, and § 3582(c)(2) makes those policy statements binding."⁵⁹ The Sentencing Commission discharged its authority under Section 994(u) in Section 1B1.10.⁶⁰

Every circuit to consider a challenge to Section 1B1.10 has rejected it in light of the Congressional delegation of authority in Section 994(u). The Second Circuit did so in *Erskine*, explaining that "[t]he judiciary's discretion in sentencing is not absolute. In *Mistretta*, the Supreme Court stated that 'Congress . . . has the power to fix the sentence for a federal crime, and the scope of judicial discretion with respect to a sentence is subject to congressional control.'"⁶¹ The court further explained that "Congress has delegated to the Commission the power it exercised both in creating and

("Rehabilitation of the defendant alone,' Congress has stated, 'shall not be considered an extraordinary and compelling reason.'") (quoting Section 994(t)); *United States v. McCoy*, 981 F.3d 271, 286 n.9 (4th Cir. 2020) ("In 28 U.S.C. § 994(t) . . . Congress specifies that '[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.'"); *United States v. Jones*, 980 F.3d 1098, 1109 n.16 (6th Cir. 2020) ("Congress's only other guidance is that '[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.'"). The Seventh, Ninth, and D.C. Circuits did not cite the second sentence of Section 994(t). See *United States v. Aruda*, 993 F.3d 797, 800 (9th Cir. 2021); *United States v. Long*, 997 F.3d 342 (D.C. Cir. 2021); *United States v. Gunn*, 980 F.3d 1178 (7th Cir. 2020).

⁵⁸ 28 U.S.C. § 994(u); see also SRA, H.R.J. Res. 648, 98th Cong. (1984), Pub. L. 98-473, 98 Stat. 1999. The provision now codified at Section 994(u) was originally codified at Section 994(t).

⁵⁹ *United States v. Erskine*, 717 F.3d 131, 137 n.8 (2d Cir. 2013) (quoting *United States v. Horn*, 679 F.3d 397, 401–02 (6th Cir. 2012)).

⁶⁰ *Id.* at 136 ("Section 1B1.10 was enacted and amended pursuant to the power granted to the Commission in 28 U.S.C. § 994(a) and (u).") (quoting *United States v. Horn*, 679 F.3d 397, 401–02 (6th Cir. 2012)).

⁶¹ *Id.* at 139 (quoting *Mistretta v. United States*, 488 U.S. 361, 364 (1989) (internal citations omitted)).

amending § 1B1.10,” and it was therefore “Congress that bound courts to the limitation in § 1B1.10, by expressly requiring that sentence reductions based on amendments to the Guidelines be consistent with the Commission’s policy statements.”⁶² The court concluded by noting that, “though it is the Commission that crafts the policy statements, it is Congress that has made them both available as a general matter and binding on the courts that employ them.”⁶³ As the Tenth Circuit put it, “the Commission adopted § 1B1.10 because of an express delegation from Congress, which enjoys the power to curtail the judiciary’s discretion over sentencing.”⁶⁴

The unanimous approach of the circuits in this context applies with equal force to the congressional delegation of authority in Section 994(t). First, Section 3582(c)(1), like Section 3582(c)(2), is a “congressional act of lenity” that is “a narrow exception to the rule of finality” and “not constitutionally compelled.”⁶⁵ Further, proceedings under Section 3582(c)(1), like proceedings under Section 3582(c)(2), do not require the presence of the defendant, and in this way they differ materially from plenary sentencing proceedings.⁶⁶ Accordingly, there can be no doubt that “the scope of judicial discretion” with respect to a sentence reduction under Section 3582(c)(1) “is subject to congressional control” just as surely as is a sentence reduction under Section 3582(c)(2). Indeed, the majority view implicitly concedes this point when it acknowledges that the Sentencing Commission can revoke the judiciary’s purported authority to define the phrase “extraordinary and compelling reasons” under Section 3582(c)(1)(A)(i) by simply “updat[ing] [the] policy statement on compassionate release.”⁶⁷

⁶²*Id.* at 136, 139 (internal quotation marks omitted).

⁶³*Id.* at 139.

⁶⁴*United States v. Holcomb*, 853 F.3d 1098, 1101 (10th Cir. 2017) (noting that “every circuit court to address the issue has held that the Sentencing Commission did not usurp the judiciary’s sentencing authority by amending § 1B1.10” and collecting cases).

⁶⁵*Cf. Dillon v. United States*, 560 U.S. 817, 827–28 (2010); *see also United States v. Brooker*, 976 F.3d 228, 231 (2d Cir. 2020) (describing Section 3582(c)(1)(A) as a “mechanism for lenity”).

⁶⁶*See* FED. R. CRIM. P. 43(b)(4) (“A defendant need not be present under any of the following circumstances: . . . The proceeding involves the correction or reduction of sentence under . . . 18 U.S.C. § 3582(c).”); *see also Dillon*, 560 U.S. at 828.

⁶⁷*Brooker*, 976 F.3d at 233–34; *see also United States v. McCoy*, 981 F.3d 271, 282 (4th Cir. 2020) (“That policy statement was adopted before the First Step Act, and the Sentencing Commission has not updated it to account for the fact that the Act now allows defendants to file their own motions for compassionate release.”); *United States v. Jones*, 980 F.3d 1098, 1109 (6th Cir. 2020) (“Until the Sentencing Commission updates § 1B1.13 to reflect the First Step Act, district courts have full discretion in the interim to determine whether an ‘extraordinary and compelling’

What follows from this analysis, then, is that the congressional delegation of authority in Section 994(t) is as worthy of judicial respect as the delegation of authority in Section 994(u). But the courts that have adopted the majority view have failed to meaningfully address the obvious import of this delegation in discerning congressional intent. Instead, as demonstrated in the next Section, courts in the majority have sidestepped this key issue and premised their analysis on an unpersuasive and unsupported interpretation of the word “applicable” in Section 3582(c)(1)(A).

II. The word “applicable” in Section 3582(c)(1) does not support the majority’s analysis

Rather than address the statutory scheme and its implications, the courts that have adopted the majority view have premised their holding on an unpersuasive interpretation of the word “applicable” in Section 3582(c)(1)(A). This aspect of the analysis originates in *Brooker*, in which the Second Circuit quoted from Section 3582(c)(1)(A) and then identified the “question before us” as “whether Guideline § 1B1.13, and specifically Application Note 1(D), remains ‘applicable’ after the changes made in the First Step Act.”⁶⁸ In addressing this question, the court looked only to the “text of Guideline § 1B1.13”—and not to Section 994(t)—and observed that “[t]he very first words of the Guideline are ‘[u]pon motion of the Director of the Bureau of Prisons,’” which “is precisely the requirement that the First Step Act expressly removed.”⁶⁹ As a result, the court concluded that “it is manifest that [§ 1B1.13’s] language is clearly outdated and cannot be fully

reason justifies compassionate release when an imprisoned person files a § 3582(c)(1)(A) motion.”); *United States v. McGee*, 992 F.3d 1035, 1050 (10th Cir. 2021) (rejecting the argument that Section 1B1.13 remains binding on district courts in part because “the Sentencing Commission has failed to fulfill its statutory duty to issue a post-First Step Act policy statement recognizing the ability of defendants to file their own motions for sentence reductions”). This is one of the most unusual aspects of the majority approach to statutory interpretation, insofar as it suggests that Congress’s intent in using the phrase “extraordinary and compelling reasons” depends in substantial part on whether the Commission is empowered to act. That analysis has the respective roles reversed—the relevant authority (and therefore the relevant intent in interpreting the statute) emanates from Congress’s constitutional role, not from the Commission.

⁶⁸ *Brooker*, 976 F.3d at 235.

⁶⁹ *Id.*

applicable.”⁷⁰ Each of the circuits that have adopted the majority view have adopted this reasoning.⁷¹

This analysis is flawed. First, it focuses exclusively on the text of Section 1B1.13 and fails to account for the congressional delegation of authority in Section 994(t). It is a significant oversight that no court that has adopted the majority view has considered whether Section 1B1.13 is made “applicable”—that is “‘capable of being applied: having relevance’ or ‘fit, suitable, or right to be applied: appropriate’”⁷²—by virtue of Congress’s delegation of authority in Section 994(t) and the Sentencing Commission’s discharge of that authority in application note 1 to Section 1B1.13. And the majority’s focus on Section 1B1.13 is counterintuitive because the courts’ interpretive task is to discern *Congress’s* intent, not the Commission’s, and the latter reveals nothing about the former.

Application note 1 stands alone as a self-contained exercise of congressionally delegated authority and, accordingly, it would seem obvious that it has relevance to motions filed under Section 3582(c)(1)(A).⁷³ Similarly, application note 1 does not contain the prefatory language found in the first clause of Section 1B1.13 that undergirds the Second Circuit’s holding in *Brooker*, and numerous district courts across the country have found that it is “capable of being applied” in addressing motions for compassionate release.⁷⁴ Indeed, even circuits that have adopted the majority

⁷⁰ *Id.*

⁷¹ *United States v. Long*, 997 F.3d 342, 347, 355 (D.C. Cir. 2021); *United States v. Aruda*, 993 F.3d 797, 801–02 (9th Cir. 2021); *United States v. Maumau*, 993 F.3d 821, 836–37 (10th Cir. 2021); *United States v. Shkambi*, 993 F.3d 388, 392 (5th Cir. 2021); *McCoy*, 981 F.3d at 284; *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020); *Jones*, 980 F.3d at 1109–10.

⁷² *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011) (defining “applicable”).

⁷³ *See Stinson v. United States*, 508 U.S. 36, 45 (1993) (holding that Sentencing Commission commentary must be given “controlling weight unless it is plainly erroneous or inconsistent with the regulation”) (citations omitted).

⁷⁴ *See, e.g., United States v. Carroll*, No. 18-CR-112, 2021 WL 807483, at *3 (N.D. Ala. Mar. 3, 2021); *United States v. Winner*, 464 F. Supp. 3d 1375, 1378 (S.D. Ga. 2020); *United States v. Shelton*, No. 18-CR-00058 (JNP), 2020 WL 5993911, at *4 (D. Utah Oct. 9, 2020) (“Congress plainly chose to delegate to the Sentencing Commission the task of creating standards for reducing an inmate’s sentence.”); *United States v. Lynn*, No. CR 89-0072, 2019 WL 3805349, at *4 (S.D. Ala. Aug. 13, 2019); *United States v. Gross*, No. 2:04-CR-32-RMP, 2019 WL 2437463, at *2 (E.D. Wash. June 11, 2019); *United States v. Strain*, No. 97-CR-00004 (TMB), 2020 WL 1977114, at *4 (D. Alaska Apr. 24, 2020) (“Congress delegated the authority to the Sentencing Commission to define ‘extraordinary and compelling reasons.’ . . . Nothing in the First Step Act nullifies, amends, or expressly contradicts the definition of ‘extraordinary and compelling reasons’ provided by U.S.S.G. § 1B1.13.”); *United States v. Heromin*, No. 8:11-cr-550-T-33SPF, 2019 WL 2411311, at

view have acknowledged this point. The Seventh Circuit explained in *Gunn*, for example, that “[t]he substantive aspects of the Sentencing Commission’s analysis in § 1B1.13 and its Application Notes provide a working definition of ‘extraordinary and compelling reasons’ In this way the Commission’s analysis can guide discretion without being conclusive.”⁷⁵ As the Eleventh Circuit explained in *Bryant*, “[b]ecause courts have consistently applied the substantive standards in [Section] 1B1.13 to defendant-filed motions, it is impossible to say that [Section] 1B1.13 cannot be applied.”⁷⁶

The argument, adopted by several circuits, that courts are authorized to define the phrase “extraordinary and compelling reasons” themselves because those same courts are powerless to excise the anachronistic clause in Section 1B1.13, falls away when the analysis is properly focused on Section 994(t).⁷⁷ No court has suggested that Congress’s delegation of authority in

*1 (M.D. Fla. June 7, 2019); *United States v. Willis*, 382 F. Supp. 3d 1185, 1187 (D.N.M. 2019); *United States v. Shields*, No. 12-cr-00410-BLF-1, 2019 WL 2359231, at *4 (N.D. Cal. June 4, 2019) (stating that there is no “authority for the proposition that the Court may disregard guidance provided by the Sentencing Commission where it appears that such guidance has not kept pace with statutory amendments”); *United States v. Overcash*, No. 15-CR-263 (FDW), 2019 WL 1472104, at *2 (W.D.N.C. Apr. 3, 2019) (“Defendant has failed to demonstrate how the policy statement addressing extraordinary and compelling reasons conflicts with the First Step Act’s amendments to § 3582.”).

⁷⁵ *Gunn*, 980 F.3d at 1180; *see also* *United States v. Bryant*, 996 F.3d 1243, 1253–54 (11th Cir.), *cert. denied*, 142 S. Ct. 583 (2021) (collecting cases in the majority that have suggested Section 1B1.13 nevertheless remains helpful guidance); *United States v. Tomes*, 990 F.3d 500, 503 n.1 (6th Cir. 2021) (“That is not to say a district court cannot permissively consider those four categories as part of its discretionary inquiry into whether a case presents extraordinary and compelling reasons for release. . . . [B]ecause district courts are free to define ‘extraordinary and compelling’ on their own initiative, they may look to § 1B1.13 as relevant, even if no longer binding.”) (internal quotation marks omitted) (citations omitted); *Aruda*, 993 F.3d at 801; *United States v. McGee*, 992 F.3d 1035, 1048 (10th Cir. 2021).

⁷⁶ *Bryant*, 996 F.3d at 1253. It is also inconsistent to hold, as courts in the majority have, that application note 1 is *not* capable of being applied to motions made in district court, but that it *is* capable of being applied by district courts to motions brought by BOP. *See, e.g.*, *United States v. Brooker*, 976 F.3d 228, 235–36 (2nd Cir. 2020) (“[A]s a result, though motions by the BOP still remain under the First Step Act, they are no longer exclusive, and we read the Guideline as surviving, but now applying only to those motions that the BOP has made.”); *McCoy*, 981 F.3d at 282 n.7 (“[T]he existing policy statement continues to govern BOP-filed motions for compassionate release.”); *McGee*, 992 F.3d at 1050 (same).

⁷⁷ The Fifth Circuit, for example, addressed this issue by analyzing “the context of the policy statement,” without any reference to the “context” of the statutory delegation in § 994(t). *United States v. Shkambi*, 993 F.3d 388, 392 (5th Cir. 2021). Contrary to the Fifth Circuit’s suggestion, acknowledging the Commission’s exercise of congressionally delegated authority in application

Section 994(t) has become invalid or improper merely because the prefatory clause of Section 1B1.13 is now outdated. And the courts in the majority cite no legal authority to support their implicit premise that courts are powerless to address that anachronistic prefatory clause in the policy statement to preserve Congress's obvious intent to delegate the relevant authority to the Commission, rather than to the courts.⁷⁸ Indeed, this change in focus fatally undermines the assertion made by the D.C. Circuit in *Long* that the position described in this article is premised on mere "speculation as to Congress'[s] intent."⁷⁹

III. The tools of statutory construction do not support the majority's view

Independent of the express congressional delegation in Section 994(t), the majority view also runs afoul of the basic tenets of statutory construction. Even if, in other words, the courts that have adopted the majority view were correct to disregard Section 994(t), and even if those courts correctly understood the word "applicable" as used in Section 3582(c)(1)(A), it does not follow, as the Second Circuit suggested in *Brooker*, that courts are free to define the term "extraordinary and compelling reasons" for themselves.⁸⁰ Basic principles of statutory construction make clear that, when Congress enacted the FSA, it intended for that phrase to have its settled meaning and

note 1 to Section 1B1.13 is quite unlike applying a "money-laundering guideline in a murder case." *Id.*

⁷⁸*McCoy*, 981 F.3d at 282 (citing no legal authority in rejecting the government's argument that the court should excise the anachronistic clause); *United States v. Long*, 997 F.3d 342, 356 (D.C. Cir. 2021) (citing only *McCoy*, 981 F.3d at 282, for the proposition that courts have no license under the First Step Act to perform "quick judicial surgery on [U.S.S.G.] § 1B1.13, . . . editing out the language" in the first clause of the guideline); *Shkambi*, 993 F.3d at 392 (same). As the Second Circuit has explained, when a Guideline conflicts with the authorizing statute, the statute controls only "to the extent" of the conflict; it does not permit a court to reject an otherwise binding Guideline's provision in its entirety, or to usurp authority that Congress has expressly delegated elsewhere. *United States v. Gowing*, 683 F.3d 406, 410 (2d Cir. 2012). In *Gowing*, for example, the Second Circuit concluded that, "to the extent" part of the background commentary in Section 3C1.3 conflicted with 18 U.S.C. § 3147, the latter controlled as to that portion of the commentary. *Id.* That conclusion did not lead the court to reject any other part of Section 3C1.3, and the court approvingly referenced the district court's application of Section 3C1.3 elsewhere in its opinion. *Id.* at 411.

⁷⁹*Long*, 997 F.3d at 356 (quoting *Magwood v. Patterson*, 561 U.S. 320, 334 (2010)). As noted above, the D.C. Circuit did not cite to Section 994(t) in *Long*. See generally 997 F.3d 342.

⁸⁰*Brooker*, 976 F.3d at 237.

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to apply only to a discrete set of personal circumstances other than rehabilitation.

First, the holding that Section 1B1.13 no longer binds district courts answers only the first part of the interpretive question. A court addressing a motion under Section 3582(c)(1)(A)(i) must still determine what Congress meant when it used the phrase “extraordinary and compelling reasons” in Section 3582(c)(1)(A)(i). That, too, is question of statutory interpretation and, “[a]s with most cases of statutory interpretation, [courts must] begin with the text” to answer it.⁸¹

The majority view approaches this part of the interpretive task as if the concept of “compassionate release” and the phrase “extraordinary and compelling reasons” originated in the FSA. But, as set forth above, since Congress enacted Section 4205(g) in 1976 the concept of “compassionate release” has referred to a discrete set of personal circumstances unrelated to the inmate’s case.⁸² That understanding was reaffirmed in 2007 when the Sentencing Commission issued Amendment 698 and again in 2016 when it promulgated the current version of Section 1B1.13 in Amendment 799.⁸³ The BOP regulations construing Section 3582(c)(1)(A) provide further support for this understanding.⁸⁴

The failure of the majority view to account for the historical understanding of “compassionate release” or the administrative understanding of “extraordinary and compelling reasons” is inconsistent with the basic tools of statutory interpretation. As the Supreme Court has explained in an analogous context, where “Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.”⁸⁵ The “congressional failure to revise or repeal the agency’s interpretation is persuasive evidence that the interpretation is the one intended by Congress.”⁸⁶ In the FSA, Congress was

⁸¹ *Id.* at 234.

⁸² *See supra* at Part II.

⁸³ *See* U.S. SENTENCING COMM’N 2007, *supra* note 26; U.S. SENTENCING COMM’N 2016, *supra* note 27.

⁸⁴ FED. BUREAU OF PRISONS, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582(C)(1)(A) AND 4205(G) (2015), https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf.

⁸⁵ *Lorillard v. Pons*, 434 U.S. 575, 581 (1978).

⁸⁶ *Fed. Deposit Ins. Corp. v. Phila. Gear Corp.*, 476 U.S. 426, 437 (1986) (quoting *NLRB v. Bell Aerospace*, 416 U.S. 267, 275 (1974)).

not writing on a blank slate, and when it retained the phrase “extraordinary and compelling reasons” in Section 3582(c)(1)(A)(i) and titled Section 603(b) “increasing the use and transparency of compassionate release,” it plainly intended those terms to have their settled meanings.⁸⁷ It is axiomatic that where, as here, Congress “use[s] . . . the *same* language—in essentially the same context—[that language] carri[e]s with it the meaning” previously ascribed to it.⁸⁸

That this method of discerning congressional intent is intuitive is clear from the Seventh Circuit’s approach to Section 1B1.13 in *Gunn*. *Gunn* relied principally on *Brooker* in holding that Section 1B1.13 no longer binds district courts, but in *Gunn*, unlike in *Brooker*, the Seventh Circuit explained that the absence of “an applicable policy statement” does not “creat[e] a sort of Wild West in court, with every district judge having an idiosyncratic release policy.”⁸⁹ Rather, the court explained, “[t]he substantive aspects of the Sentencing Commission’s analysis in § 1B1.13 and its Application Notes provide a working definition of ‘extraordinary and compelling reasons’ In this way the Commission’s analysis can guide discretion without being conclusive.”⁹⁰ In so holding, the Seventh Circuit roughly approximated the method of statutory interpretation described in cases like *Lorillard v. Pons* without explicitly acknowledging it as such.⁹¹

But this rough approximation of the normal method of statutory interpretation does not adequately reflect congressional intent and, in any event, the Seventh Circuit’s view is not shared by all of the courts that have

⁸⁷FSA, Pub. L. No. 115-391, 132 Stat 5239 (2018).

⁸⁸*United States v. Palozie*, 166 F.3d 502, 504 (2d Cir. 1999).

⁸⁹*United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020).

⁹⁰*Id.*

⁹¹As noted above, other circuits that have adopted the majority view have likewise suggested that Section 1B1.13 may be relevant to discerning congressional intent in Section 3582(c)(1)(A)(i), even if Section 1B1.13 is no longer binding. *See supra* note 76. In *United States v. Long*, the D.C. Circuit briefly discussed this method of statutory interpretation but focused on Congress’s presumed knowledge of Section 1B1.13, rather than on Congress’s obvious awareness of its own delegation in Section 994(t) and the settled understanding of “extraordinary and compassionate release” derived from that delegation. *See* 997 F.3d 342, 356 (D.C. Cir. 2021) (rejecting this canon of construction because “we would equally have to presume that Congress was aware that the preexisting policy statement applied exclusively to motions filed by the Bureau of Prisons”). With the focus properly on the expression of congressional intent in Section 994(t), rather than on Section 1B1.13, it is clear that Congress was aware of its own decision to delegate the relevant definitional authority to the Commission and of the Commission’s discharge of that authority in application note 1 to Section 1B1.13.

adopted the majority position. Indeed, in *Brooker* the Second Circuit has gone so far as to suggest that a district court's disagreement with a "lengthy" but otherwise lawful sentence could constitute an "extraordinary and compelling reason" warranting relief.⁹² Other courts in the majority have made similar suggestions, even if they have not gone as far as the Second Circuit in describing the breadth of courts' discretion in this area.⁹³

The majority analysis also disregards the canon of "consistent usage," which "seeks consistent interpretations of a statutory term."⁹⁴ That canon instructs that "identical words used in different parts of the same statute,"⁹⁵ or even in "two [different] statutes having similar purposes, particularly when one is enacted shortly after the other,"⁹⁶ are presumed to have the same meaning. This common sense approach to statutory interpretation would seem to apply with greater force to a *single usage* of a particular term of phrase in a single statute, and to preclude the conclusion—adopted by the courts in the majority—that the phrase "extraordinary and compelling reasons" means one (very narrow) thing in motions brought by the BOP and an entirely different (and much broader) thing in motions brought directly by inmates. None of the circuits that have adopted the majority view have cited any legal authority for the contrary proposition.

The application of these canons of statutory construction is straightforward: Section 3582(c)(1)(A)(i) has contained the phrase "extraordinary and compelling reasons" since 1984 and that phrase has come to have a settled meaning. When, in the FSA, Congress altered the procedural clause in Section 3582(c)(1)(A), it intended to expand *access* to compassionate release by permitting an inmate to file his motion in district court under certain circumstances; but when Congress chose *not* to alter the substantive provision in Section 3582(c)(1)(A)(i), it adopted the existing

⁹²United States v. Brooker, 976 F.3d 228, 238 (2nd Cir. 2020).

⁹³United States v. Jones, 980 F.3d 1098, 1109 (6th Cir. 2020) ("[U]ntil the Sentencing Commission updates § 1B1.13 to reflect the First Step Act, district courts have full discretion in the interim to determine whether an 'extraordinary and compelling' reason justifies compassionate release when an imprisoned person files a § 3582(c)(1)(A) motion."); United States v. Maumau, 993 F.3d 821, 832 (10th Cir. 2021) (holding "we instead conclude that district courts . . . possess the authority to determine for themselves what constitutes 'extraordinary and compelling reasons'").

⁹⁴United States v. Lopez, 998 F.3d 431, 437 (9th Cir. 2021) (citing *Brown v. Gardner*, 513 U.S. 115, 118–20 (1994)).

⁹⁵*Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006) (quoting *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005)).

⁹⁶*Smith v. City of Jackson, Miss.*, 544 U.S. 228, 233 (2005).

understanding of “extraordinary and compelling reasons.” The courts that have concluded otherwise have undermined, rather than discerned, Congress’s intention in enacting the FSA.

IV. CONCLUSION

The majority view is inconsistent with Congress’s delegation of authority in Section 994(t) and with the basic tools of statutory interpretation. In the FSA, Congress could have replaced the phrase “extraordinary and compelling reasons” with a new substantive standard, but it did not. It could have repealed Section 994(t) or revoked application note 1 to Section 1B1.13, but it did not. What Congress did in the FSA was expand the procedural mechanism in Section 3582(c)(1)(A) by which inmates may seek compassionate release. It is difficult to square that important, but limited, procedural change with the breadth of the majority view described above.

The courts that have adopted the majority view—and in particular the maximalist version of that view as set forth in *Brooker*—have largely ignored the straightforward methods of analysis described above. In so doing, they have created unwarranted sentencing disparities across the circuits,⁹⁷ disturbed the constitutional balance of authority between Congress and the judiciary,⁹⁸ and effectively eliminated Congress’s exclusive role in determining the scope of its own grants of lenity. These decisions are likely to have practical, legal, and doctrinal consequences for years to come.

⁹⁷ Compare *Brooker*, 976 F.3d at 237 (suggesting that a district court might grant “compassionate release” because a defendant’s “sentence was too long in the first place”), and *United States v. McCoy*, 981 F.3d 271, 285 (4th Cir. 2021) (holding that “the severity of a § 924(c) sentence, combined with the enormous disparity between that sentence and the sentence a defendant would receive today, can constitute an ‘extraordinary and compelling’ reason for relief under § 3582(c)(1)(A)”) with *United States v. Gunn*, 980 F.3d 1178, 1180 (7th Cir. 2020) (holding that a district court that strays so far afield from the categories set forth in Section 1B1.13 “risks an appellate holding that judicial discretion has been abused”) and *United States v. Bryant*, 996 F.3d 1243, 1253 (11th Cir.), *cert. denied*, 142 S. Ct. 583 (2021) (holding that district courts remain bound by Section 1B1.13).

⁹⁸ See, e.g., *Mistretta v. United States*, 488 US 361, 393–94 (1989) (noting that “the Commission is fully accountable to Congress”).