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## America's Extraordinary and Compelling Problem: An Assessment of the Sentence Modification Process in the Federal District Courts and the Need to Remove the Bureau of Prison's Gatekeeper Role

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# AMERICA'S EXTRAORDINARY AND COMPELLING PROBLEM: AN ASSESSMENT OF THE SENTENCE MODIFICATION PROCESS IN THE FEDERAL DISTRICT COURTS AND THE NEED TO REMOVE THE BUREAU OF PRISON'S GATEKEEPER ROLE

## I. INTRODUCTION

The Eighth Amendment provides, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>1</sup> The brevity of the Eighth Amendment leaves unanswered many questions regarding federal sentencing and has required Congress to create guidelines structuring the sentencing process in an attempt to reduce sentencing disparities.<sup>2</sup> After the sentencing process, however, federal courts relinquish their power to modify or reduce a sentence barring narrow exceptions.<sup>3</sup> Instead, the Bureau of Prisons (“BOP”) assumes the position of judge and determines when an inmate qualifies for a sentence modification or a statutory sentence reduction.<sup>4</sup>

The ability to release inmates from prison or move inmates to home confinement became a focal issue during the coronavirus (“COVID-19”) pandemic (“pandemic”), as federal prisons experienced COVID-19 outbreaks on a massive scale.<sup>5</sup> In the early months of the pandemic, the BOP sought to move individuals to home confinement in an effort to slow the spread of the virus and protect vulnerable inmates.<sup>6</sup> Despite the BOP’s

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<sup>1</sup> See U.S. CONST. amend. VIII.

<sup>2</sup> See *Federal Sentencing Guidelines*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/federal\\_sentencing\\_guidelines](https://www.law.cornell.edu/wex/federal_sentencing_guidelines) (last visited Jan. 12, 2022) (presenting brief overview of Federal Sentencing Guidelines).

<sup>3</sup> See 18 U.S.C. § 3582(c) (outlining circumstances when court may modify sentence).

<sup>4</sup> See 18 U.S.C. § 3624(c)(2) (authorizing BOP power over prerelease custody and power to grant home confinement).

<sup>5</sup> See *COVID-19 Coronavirus*, FEDERAL BUREAU OF PRISONS, <https://www.bop.gov/coronavirus/> (last visited Jan. 12, 2022) (counting positive COVID-19 cases in federal prisons). Currently, 4,377 inmates and 928 staff in federal prisons have confirmed positive COVID-19 tests. *Id.* Currently, 42,491 inmates and 8,944 staff have recovered from COVID-19. *Id.*

<sup>6</sup> See *Examining Best Practices for Incarceration and Detention During COVID-19: Hearing on Examining Best Practices For Incarceration and Detention During Covid-19 Before the H. Comm. on the Judiciary*, 116th Cong. 5 (2020) (statement of Michael D. Carvajal, Director of Bureau of Prisons) (explaining BOP COVID-19 response). The Director of Bureau of Prisons,

attempts to move vulnerable inmates to home confinement, many inmates looked to the courts for relief in the form of compassionate release after the BOP either denied their release or failed to respond to their requests.<sup>7</sup>

The pandemic did not cause the failures in the BOP's system for prisoner release, but it brought those failures to light in a devastating way.<sup>8</sup> This note addresses those shortcomings, focusing on the widespread disparity among compassionate release decisions, and argues that these failures will continue unless Congress establishes clarifications and amendments to the current statutory framework.<sup>9</sup> To achieve parity for sentence modification, (1) the home confinement and compassionate release statutes should be amended to include stricter regulations for BOP conduct;<sup>10</sup> (2) Congress must explicitly make the compassionate release statute's exhaustion requirement waivable, thereby removing the BOP's "gatekeeper" role over sentence modification;<sup>11</sup> and (3) Congress must explicitly state that extraordinary and compelling circumstances must be assessed on the facts of each compassionate release motion.<sup>12</sup>

## II. HISTORY

In the second half of the twentieth century, reformers focused on revising federal sentencing policies that gave wide discretion to sentencing

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Michael D. Carvajal, testified before the Senate that BOP staff were conducting individualized assessments to ensure inmates' appropriateness for community placement. *Id.* at 4; *see also* FEDERAL BUREAU OF PRISONS, *supra* note 5 (counting inmates moved to home confinement). Between March 26, 2020, and October 2, 2020, the BOP placed 7,799 inmates on home confinement. FEDERAL BUREAU OF PRISONS, *supra* note 5. As of November 5, 2021, the BOP had 7,615 inmates on home confinement. FEDERAL BUREAU OF PRISONS, *supra* note 5.

<sup>7</sup> See Neena Satija, 'Come on, we're human beings': Judges Question Response to Coronavirus Pandemic in Federal Prisons, THE WASHINGTON POST (May 13, 2020, 12:16 PM), [https://www.washingtonpost.com/investigations/come-on-were-human-beings-judges-question-response-to-coronavirus-pandemic-in-federal-prisons/2020/05/12/925e5d32-912a-11ea-a9c0-73b93422d691\\_story.html](https://www.washingtonpost.com/investigations/come-on-were-human-beings-judges-question-response-to-coronavirus-pandemic-in-federal-prisons/2020/05/12/925e5d32-912a-11ea-a9c0-73b93422d691_story.html) (discussing rise in compassionate release cases in U.S. District Courts). In May of 2020, thousands of federal inmates had applied for compassionate release through the courts. *Id.*

<sup>8</sup> See Joseph Neff & Keri Blakinger, *Few Federal Prisoners Released Under COVID-19 Emergency Policies*, THE MARSHALL PROJECT (Apr. 25, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/04/25/few-federal-prisoners-released-under-covid-19-emergency-policies> (describing limited compassionate release grants). Between 2018 and the initial months of the pandemic, the BOP had released only 144 people, indicating that the issue was present before the pandemic. *Id.*

<sup>9</sup> See discussion *infra* Section IV.

<sup>10</sup> See discussion *infra* Section IV(A).

<sup>11</sup> See discussion *infra* Section IV(B).

<sup>12</sup> See discussion *infra* Section IV(C).

judges.<sup>13</sup> In an attempt to ensure uniformity in criminal sentences across the federal court system, Congress passed the Sentencing Reform Act in 1984, which granted the U.S. Sentencing Commission the power to create sentencing policies for the federal courts.<sup>14</sup> Congress instructed the Sentencing Commission to fashion its policies in a way that met the objectives of federal statutes governing punishment.<sup>15</sup> Judges in the federal district courts follow statutory guidelines as well as the Sentencing Commission's guidelines to meet the policy and statutory objectives in the sentencing process.<sup>16</sup>

Once a court sentences a defendant, it maintains limited options for changing the sentence.<sup>17</sup> Generally, the power to change an inmate's sentence rests with the BOP, which has two options for sentence modification.<sup>18</sup> First, the BOP may move an inmate to home confinement after determining that the inmate has demonstrated a reduced recidivism risk and has served the requisite percentage of his sentence.<sup>19</sup> Second, the BOP may motion the court to grant compassionate release if it finds "extraordinary

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<sup>13</sup> See Kate Stith & Steve Y. Koh, Article, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225-227 (1993) (detailing origins of federal sentencing reform). Reformers' central criticism of the sentencing system focused on the disparity of sentences handed down to persons who committed the same crimes. *Id.* at 227.

<sup>14</sup> See Paul J. Hofer & Mark H. Allenbaugh, Article, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 43 (2003) (explaining Congressional delegation of power); see also 28 U.S.C. § 994 (outlining Sentencing Commission's duties).

<sup>15</sup> See 18 U.S.C. § 3553 (instructing judges to impose sentences that are sufficient but not greater than necessary); 18 U.S.C. § 3582(a) (explaining factors federal courts must consider in sentencing).

<sup>16</sup> See *Federal Sentencing Guidelines*, *supra* note 2 (presenting brief overview of Federal Sentencing Guidelines). The guidelines became effective in 1987 and "provide for 'very precise calibration of sentences, depending upon a number of factors. These factors relate both to the subjective guilt of the defendant and to the harm caused by his facts.'" *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 820 (1991)); see also *Mission*, UNITED STATES SENT'G COMM'N, <https://www.ussc.gov/about-page> (last visited Jan. 12, 2022) (listing objectives of the U.S. Sentencing Commission).

<sup>17</sup> See 18 U.S.C. § 3582(c) (outlining court's options for modifying a sentence). The court may only modify a sentence if the BOP brings a motion for the inmate's release or if, after a lapse of thirty days from the warden receiving an inmate's request, the inmate brings a motion before the court. *Id.*

<sup>18</sup> See 18 U.S.C. § 3624(c)(2) (authorizing BOP to place prisoners in home confinement); 18 U.S.C. § 3582(c) (stating BOP may bring motion for compassionate release on inmate's behalf).

<sup>19</sup> See 18 U.S.C. § 3624(c)(2) (authorizing BOP to place prisoners in home confinement). Under the statute, the BOP has the authority to place a prisoner in home confinement for ten percent of the sentence or six months, whichever is shorter. *Id.*; see also Operations Memorandum from Hugh J. Hurwitz, Acting Dir. of the Fed. Bureau of Prisons, on Home Confinement under the First Step Act (April 4, 2019), <https://www.bop.gov/policy/om/001-2019.pdf> (explaining BOP's interpretation of First Step Act's language).

and compelling reasons” justify release.<sup>20</sup> Before a sentencing court may grant the BOP’s motion for compassionate release, the judge must find that extraordinary and compelling reasons warrant a reduction in sentence and that reducing an inmate’s sentence would still accomplish the goals of the Federal Sentencing Guidelines (“FSG”).<sup>21</sup> Congress attempted to define the terms “extraordinary and compelling” by outlining specific factors for courts to consider when judging a compassionate release motion, including medical condition, age, and family circumstances.<sup>22</sup> Before a court can consider a prisoner’s motion for compassionate release, however, the BOP must either (1) file a motion with the court or (2) deny the prisoner’s request through all stages of the administrative process.<sup>23</sup> While the system itself is inefficient, the BOP’s poor handling of the compassionate release program has compounded those inefficiencies.<sup>24</sup>

The most recent change to the federal sentencing system occurred in 2018 when Congress passed the FIRST STEP Act (“FSA”), which modified sentencing guidelines as well as methods of release available to both the BOP and the courts.<sup>25</sup> Many of the changes enacted by the FSA aimed

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<sup>20</sup> See 18 U.S.C. § 3582(c)(1)(A)(ii) (explaining statutory requirements for prisoner’s eligibility for compassionate release).

<sup>21</sup> See 18 U.S.C. § 3582(c)(1)(A)(ii) (explaining statutory grant of compassionate release). A court may reduce a term of imprisonment if the judge finds the inmate’s circumstances to be extraordinary and compelling, and the judge also makes a finding regarding the factors set out in § 3553(a). *Id.*; see also 18 U.S.C. § 3553 (a)(1)-(2) (outlining factors courts must consider when imposing sentences). When imposing a sentence, courts must consider the nature of the offense as well as the defendant’s history and characteristics. 18 U.S.C. § 3553 (a)(1)-(2). Further, courts must consider the need to provide just punishment, afford adequate deterrence, protect the public, and provide the defendant with correctional treatment. 18 U.S.C. § 3553 (a)(1)-(2).

<sup>22</sup> See 18 U.S.C. app. § 1B1.13 (explaining meaning of “extraordinary and compelling”). Medical conditions that qualify as extraordinary and compelling include terminal illnesses, serious physical or medical conditions, serious functional or cognitive impairments, or a deterioration of physical or mental health due to advanced age that inhibits an inmate’s ability to provide self-care in prison. *Id.* The policy statement also noted that the inmate’s age and family circumstances could potentially create extreme and extraordinary circumstances. *Id.* Finally, the statement notes that the Director of the BOP has the power to determine that extraordinary and compelling circumstances exist for a reason independent of health, age, or family circumstances. *Id.*

<sup>23</sup> See *Hearing on Compassionate Release and the Conditions of Supervision Before the U.S. Sentencing Comm’n* (2016) (statement of Michael E. Horowitz, Inspector General, Dep’t of Justice) (explaining department’s review of BOP’s compassionate release program).

<sup>24</sup> See *id.* (explaining flaws in BOP’s compassionate release procedures). “In our 2013 review, we found the BOP’s compassionate release program had been poorly managed and implemented inconsistently resulting in, among other things, deaths of inmates waiting to have their applications considered.” *Id.* Further, the BOP did not evaluate recidivism rates for the individuals that it did release, relying instead upon the general recidivism statistics of federal offenders, which was 41%. *Id.* However, the Office of the Inspector General’s evaluation found the recidivism rate of inmates granted compassionate release to be 3.5%. *Id.*

<sup>25</sup> See Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law – and What Happens Next*, BRENNAN CENTER FOR JUSTICE (Jan. 4, 2019), <https://www.brennancenter.org/our->

to actively lower the federal prison population, demonstrating a concerted effort to reduce incarceration levels.<sup>26</sup> The FSA explicitly directed the BOP to move qualifying prisoners to home confinement for the maximum time period.<sup>27</sup> Despite the new congressional directive, the BOP did not move inmates en masse to home confinement, which may be a result of the FSA's new system for gauging recidivism.<sup>28</sup> The FSA also amended the statutory structure for bringing a compassionate release claim by allowing inmates to bring a motion to the court in the event that the BOP either refused their request or failed to respond to their request within thirty days.<sup>29</sup> This amendment indicates a congressional acknowledgement of the BOP's failures in effectuating aspects of its gatekeeper role.<sup>30</sup>

At the state level, forty-nine states have some form of early release statutes, which allow prisoners to request early release in situations of im-

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work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next (describing the efforts of prison reform groups in passing First Step Act). "The FIRST STEP Act's overwhelming passage demonstrates that the bipartisan movement to reduce incarceration remains strong." *Id.*

<sup>26</sup> See Jonathan Feniak, *The First Step Act: Criminal Justice Reform at a Bipartisan Tipping Point*, 96 DENVER L. REV. ONLINE 166, 167-68 (2019) (describing objectives of FIRST STEP Act). The Act retroactively increased the good behavior credits that prisoners earn and also increased access to pre-release custody, such as home confinement and placement in residential reentry facilities. *Id.* "These provisions could lead to the immediate release of individuals who are currently incarcerated." *Id.* at 168.

<sup>27</sup> See First Step Act of 2018, Pub. L. No. 115-391, § 602, 132 Stat. 5194 (2018) (instructing BOP to increase use of home confinement).

<sup>28</sup> See Operations Memorandum from Hugh J. Hurwitz, Acting Dir. of the Fed. Bureau of Prisons, *supra* note 19 (instructing staff on proper interpretation of FIRST STEP Act directive regarding home confinement). The memorandum instructed Bureau staff to refer eligible inmates for home confinement at the maximum amount of time permitted under statutory scheme. *Id.*; see also Ames Grawert, *What Is the First Step Act – And What's Happening With It?*, BRENNAN CTR. FOR JUST. (June 23, 2020), <https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it> (describing issues implementing aspects of FIRST STEP Act). The Department of Justice focuses its transfers on individuals who are at a low risk for recidivism as determined under a system called "PATTERN." Grawert, *supra* note 28. However, the system "appears to have been quietly revised to make it more difficult to reach a "minimum" score." Grawert, *supra* note 28.

<sup>29</sup> See First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194 (2018). ("[I]ncreasing the use and transparency of compassionate release.") The Act amended the provision in 18 U.S.C. § 3582 to allow a defendant to bring his own motion for compassionate release after he has exhausted all administrative appeals within the BOP or after thirty days from the warden's receipt of such request if there is no response. *Id.*

<sup>30</sup> See *United States v. Rodriguez*, 451 F. Supp. 3d 392, 395 (E.D. Pa. 2020) (noting BOP's failure to move inmates to home confinement). Although Congress first authorized the BOP to file compassionate release motions in 1984, between the period of 1984 and 2013, the BOP only released an average of twenty-four inmates through BOP motions to the court each year. *Id.* The BOP lacked clear standards governing compassionate release, which resulted in staff members having inconsistent understandings of which circumstances warranted compassionate release. *Id.* at 395-96.

minent death or significant illness.<sup>31</sup> The Massachusetts legislature, for instance, recently enacted a medical parole statute, which allows prisoners to request medical parole in cases of illness or permanent incapacitation.<sup>32</sup> Notably, the Massachusetts statute imposes requirements on the superintendent of the prison, including a timeframe for responding to requests as well as what the response must entail.<sup>33</sup> In this way, the Massachusetts statute differs from the federal statute, which imposes no affirmative duty on the BOP to respond to requests for home confinement or compassionate release.<sup>34</sup>

### III. FACTS

In early 2020, the novel coronavirus began spreading through the country, rapidly evolving into a pandemic.<sup>35</sup> During the first few months of the pandemic, the virus reached the federal prison system and quickly spread through facilities across the country.<sup>36</sup> As the federal government worked to ameliorate the pandemic's damaging effects on the economy and public health, Congress passed the CARES Act, which in part addressed

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<sup>31</sup> See Mary Price, *Everywhere and Nowhere Compassionate Release in the States*, FAMILIES AGAINST MANDATORY MINIMUMS 8 (June 2018), <https://famm.org/wp-content/uploads/Exec-Summary-Report.pdf> (comparing number of states with compassionate release to number of inmates granted compassionate release); CAL. PENAL CODE § 3550 (2017) (outlining medical parole procedure). The head physician of the prison shall make a determination within thirty days of receiving a request. CAL. PENAL CODE § 3550(d) (2017); MASS. GEN. LAWS ANN. ch. 127, § 119A (2018) (describing medical parole procedure).

<sup>32</sup> See MASS. GEN. LAWS ANN. ch. 127, § 119A (2018) (describing medical parole procedure); MASS. GEN. LAWS ANN. ch. 127, § 119A(b) (2018) (explaining who qualifies for medical parole).

<sup>33</sup> See MASS. GEN. LAWS ANN. ch. 127, § 119A(c)(1) (2018) (detailing superintendent's statutory duties).

<sup>34</sup> See 18 U.S.C. § 3582(c)(1)(A)(ii) (explaining statutory grant of compassionate release); see also 18 U.S.C. § 3624(c)(2) (granting home confinement power to BOP).

<sup>35</sup> See AJMC Staff, *A Timeline of COVID-19 Developments in 2020*, AJMC (January 1, 2021), <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020> (providing timeline of COVID-19 outbreak).

<sup>36</sup> See Josh Gerstein, *Judge Orders Transfer or Release for Some Inmates at Virus Wracked Ohio Federal Prison*, POLITICO (Apr. 22, 2020, 11:58 PM), <https://www.politico.com/news/2020/04/22/coronavirus-prisoners-released-ohio-louisiana-202953> (discussing COVID-19 outbreaks at FCI Elkton and FCI Oakdale); Byron Tollefson, *70% of Inmates at Waseca Prison Have Contracted COVID-19, FMC Outbreak Reaches New High*, KTTCC (Oct. 1, 2020, 11:08 AM), <https://kttc.com/2020/10/01/70-of-inmates-at-waseca-prison-have-contracted-covid-19-fmc-outbreak-reaches-new-high/> (noting 70% of prisoners at FCI Waseca contracted COVID-19); Keegan Hamilton & Keri Blakinger, *'Con Air' Is Spreading COVID-19 All Over the Federal Prison System*, THE MARSHALL PROJECT (Aug. 13, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/08/13/con-air-is-spreading-covid-19-all-over-the-federal-prison-system> (describing prison outbreaks after U.S. Marshal Service's transport of inmates without testing for coronavirus).

COVID-19 outbreaks among the federal prison population and specifically instructed the BOP to increase home confinement for qualified inmates.<sup>37</sup>

After Congress issued this directive, Attorney General William Barr distributed a memorandum to the BOP on March 26, 2020, directing staff to prioritize granting home confinement to inmates seeking transfer in connection with the pandemic, while also requiring a fourteen-day quarantine period for inmates pre-release.<sup>38</sup> Barr's first memorandum included a non-exhaustive list of factors for BOP staff to consider when reviewing requests for home confinement, including the inmate's vulnerability to COVID-19, the inmate's score under the PATTERN system for gauging recidivism, the inmate's re-entry plan, and the seriousness of the original offense.<sup>39</sup> Barr issued a subsequent memorandum on April 3, 2020, in which he instructed the BOP to immediately expand transfers of eligible inmates to home confinement from the three federal prisons with the worst outbreaks, while cautioning against releasing inmates who pose a danger to the public.<sup>40</sup>

Despite Congressional directive through the CARES Act and Attorney General Barr's instructions, the BOP demonstrated difficulty controlling outbreaks and efficiently moving inmates to home confinement.<sup>41</sup>

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<sup>37</sup> See Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 12003(b)(2), 134 Stat. 281 (2020) (outlining increased home confinement power). As part of the CARES Act, Congress gave the Attorney General the power to increase the maximum amount of time that the BOP is authorized to place an inmate in home confinement under 18 U.S.C. § 3624(c)(2). *Id.*

<sup>38</sup> See Memorandum from the Att'y Gen. to the Dir. of Bureau of Prisons on the Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic (Mar. 26, 2020), [https://www.bop.gov/resources/news/pdfs/20200405\\_covid-19\\_home\\_confinement.pdf](https://www.bop.gov/resources/news/pdfs/20200405_covid-19_home_confinement.pdf) (instructing BOP to prioritize granting home confinement due to COVID-19).

<sup>39</sup> See *id.* (outlining factors to consider when granting home confinement). Barr noted that he believed there were inmates who would be safer remaining in the prison environment, "where the population is controlled and there is ready access to doctors and medical care." *Id.*

<sup>40</sup> See Memorandum from the Att'y Gen. to the Dir. of Bureau of Prisons on Increasing Use of Home Confinement at Institutions Most Affected by COVID-19 (Apr. 3, 2020), <https://www.justice.gov/file/1266661/download> (instructing increased use of home confinement at FCIs Oakdale, Danbury, and Elkton). Barr specifically noted that BOP staff should review all at-risk inmates, not only those who were already eligible for home confinement. *Id.* Barr discussed the risk this policy posed to the public, saying:

The last thing our massively overburdened police forces need right now is the indiscriminate release of thousands of prisoners onto the streets without any verification that those prisoners will follow the laws when they are released . . . . Thus, while I am directing you to maximize the use of home confinement . . . . it is essential that you continue making the careful, individualized determinations BOP makes in the typical case.

*Id.*

<sup>41</sup> See Neff & Blakinger, *supra* note 8 (describing failure to move inmates to home confinement). In the three weeks following Barr's April 3 memorandum, the BOP moved 1,027 people

At Federal Correctional Institution (“FCI”) Oakdale, one of the prisons Attorney General Barr specifically addressed as a hotspot, eleven prisoners died of COVID-19 between late March and April 25, 2020; the facility only released thirteen inmates total.<sup>42</sup> In a report that the Department of Justice (“DOJ”) compiled regarding COVID-19 policies at FCI Lompoc in California, the DOJ specifically noted that the BOP’s use of home confinement to stop the spread of COVID-19 was extremely limited, reporting that as of May 13, 2020, over 900 inmates at Lompoc had contracted COVID-19.<sup>43</sup> During that time period, the BOP had transferred only eight inmates to home confinement from that prison.<sup>44</sup>

During the early stages of the pandemic, BOP confusion over its own home confinement policy compounded its mismanagement of the program.<sup>45</sup> The BOP frequently changed its policy regarding the requisite percentage of a sentence an inmate must serve before the BOP can consider home confinement.<sup>46</sup> This lack of clarity led BOP staff to inform prisoners, who were set to be released, that they no longer qualified.<sup>47</sup> The BOP also

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to home confinement, which is about half of one percent of the total BOP population at the start of April. *Id.*; see also Gerstein, *supra* note 36 (discussing outbreak at FCI Elkton). A district court judge in Ohio ordered the BOP to release hundreds of elderly or vulnerable inmates from FCI Elkton, noting that, “efforts to combat the virus at the Elkton prison in Lisbon, Ohio were failing.” Gerstein, *supra* note 36. The judge further stated that although the prison had the highest infection rates in the country, “with fewer than 100 of the 2,400 inmates at Elkton tested, the actual infection rate could be much higher . . .” *Id.* In contrast, the state prison nearby had conducted thousands of tests. *Id.*

<sup>42</sup> See Neff & Blakinger, *supra* note 8 (describing issues implementing Attorney General Barr’s policies). Several family members of inmates shared stories in which the BOP moved prisoners into pre-release quarantine for up to two weeks before moving them back to the general population without an explanation. *Id.*

<sup>43</sup> See *Pandemic Response Report 20-086, Remote Inspection of Federal Correctional Complex Lompoc*, DEP’T OF JUST., OFF. OF THE INSPECTOR GEN. (July 2020), <https://oig.justice.gov/sites/default/files/reports/20-086.pdf> (detailing problems with COVID-19 policy at FCC Lompoc).

<sup>44</sup> See *id.* (noting problems with COVID-19 policy at FCC Lompoc).

<sup>45</sup> See Josh Gerstein, *Feds again shift guidance on prisoner releases due to coronavirus*, POLITICO (Apr. 23, 2020, 11:57 PM), <https://www.politico.com/news/2020/04/23/coronavirus-prisons-206155> (describing confusion with Barr’s new policy regarding home confinement); Neff & Blakinger, *supra* note 8 (discussing issues with fourteen-day quarantine period); see also *United States v. Separta*, 18-cr-578, 2020 U.S. Dist. LEXIS 68935, at \*1-2 (S.D.N.Y. Apr. 19, 2020) (discussing impracticality of quarantine procedure).

<sup>46</sup> See Gerstein, *supra* note 45 (describing confusion with Barr’s changing policies regarding home confinement).

<sup>47</sup> See *id.* (describing confusion with Barr’s changing policies regarding home confinement). Initially, BOP policy required inmates to serve twenty-five percent of their sentences before being considered for home confinement; however, in April, the BOP issued new guidance indicating that inmates must serve fifty percent of their sentences before being considered. *Id.* The BOP then retracted that guidance and issued a new policy requiring inmates to serve more than twenty-five percent of their sentence and have less than eighteen months remaining in their sentence. *Id.*

sowed confusion through changing policies surrounding pre-release quarantine for inmates eligible for home confinement.<sup>48</sup> In practice, it proved difficult for prison facilities to safely quarantine prisoners who were set for home confinement due to an inability to individually isolate inmates.<sup>49</sup> Facilities housed inmates set for home confinement with other similarly-situated inmates, leading to cycles of infection, which kept inmates who qualified for release in prison.<sup>50</sup>

As the BOP struggled to move individuals to home confinement, more inmates took their requests to the courts, utilizing their newly granted right under the FSA to bring compassionate release motions without a motion from the BOP.<sup>51</sup> However, a federal circuit split formed as judges analyzed compassionate release motions in the setting of the pandemic.<sup>52</sup> Further, federal appellate courts are limited in reviewing sentencing matters for abuse of discretion, resulting in very few precedent-setting decisions to aid

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Some inmates were preparing to be released, had their release revoked during the first policy change, and then qualified again after the second policy change, but had to start their fourteen-day quarantine period from the beginning. *Id.*

<sup>48</sup> See Memorandum from the Att’y Gen. to the Dir. of Bureau of Prisons, *supra* note 38 (requiring fourteen-day quarantine period prior to release).

<sup>49</sup> See *Scparta*, 2020 U.S. Dist. LEXIS 68935, at \*1-2 (discussing impracticality of quarantine procedure).

<sup>50</sup> See *id.* (outlining impracticality of quarantine procedure). The BOP determined *Scparta* was eligible for home confinement but required a fourteen-day custodial quarantine. *Id.* at \*1. However, the judge explained the BOP’s quarantine policy, stating:

Mr. *Scparta* is housed with many other people in conditions that will inevitably permit the virus to spread. Moreover, as of April 14, the BOP determined that Mr. *Scparta*’s 14-day-clock must *start over* because one of the many people he is now housed with tested positive. Under the BOP’s policy, if any one of the individuals in Mr. *Scparta*’s unit, most of whom have *also* been approved for home confinement, tests positive, the 14-day waiting period for *all* inmates in the unit starts anew. The Government also revealed that, despite express authority from the Attorney General to do so, the BOP has not and will not consider permitting Mr. *Scparta* to self-quarantine in his residence for 14 days.

*Id.* at \*2. The judge went on to term this policy “Kafkaesque” and immediately released the defendant. *Id.*; see also *Neff & Blakinger*, *supra* note 8 (discussing judge’s decision in *Scparta*’s case).

<sup>51</sup> See First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194 (2018) (“increasing the use and transparency of compassionate release”); *Satija*, *supra* note 7 (noting rise of compassionate release cases). According to federal public defenders, over the first three months of the pandemic, thousands of inmates sought compassionate release. *Satija*, *supra* note 7.

<sup>52</sup> See *Walter Pavlo*, *Federal Judge Rulings Across Country Inconsistent on Compassionate Release*, FORBES (June 19, 2020, 2:57 PM), <https://www.forbes.com/sites/walterpavlo/2020/06/19/federal-judge-rulings-across-country-inconsistent-on-compassionate-release/#2eff55c24c38> (describing inconsistencies in decisions across circuits).

sentencing judges in making compassionate release decisions.<sup>53</sup> Within circuits themselves, judges remain split on issues pertinent to compassionate release.<sup>54</sup>

District courts disagree on the exhaustion requirement under the compassionate release statute, which mandates that an inmate must either exhaust his options for administrative appeals, or wait until the warden fails to respond to his request within thirty days before bringing a compassionate release motion.<sup>55</sup> The exhaustion requirement became the focal issue in many compassionate release cases during the pandemic, as the BOP often failed to make an initial response to many inmates' requests.<sup>56</sup> When interpreting the statute, judges first looked to whether the exhaustion requirement creates a grant of jurisdiction or whether it is a waivable claims processing rule for judicial efficiency.<sup>57</sup> Most federal district courts have found the exhaustion requirement to be a claims-processing rule, which a judge may waive if an inmate has not exhausted his administrative appeals or waited thirty days after submitting a request to the warden.<sup>58</sup> However, both the Third Circuit and the Tenth Circuit have held that the exhaustion requirement is jurisdictional, meaning the district courts cannot hear a motion unless the inmate meets the exhaustion requirement.<sup>59</sup> The Sixth Cir-

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<sup>53</sup> See *United States v. Raia*, 954 F.3d 594, 596 (3d Cir. 2020) (stating court's inability to hear defendant's motion for compassionate release); *United States v. Borden*, 564 F.3d 100, 101 (2d Cir. 2009) (holding abuse of discretion as appropriate standard of review for appeal of compassionate release motion).

<sup>54</sup> See *United States v. Haney*, 454 F. Supp. 3d 316, 321 (S.D.N.Y. 2020) (holding court has power to waive exhaustion where strict enforcement does not serve Congressional objectives). *But see* *United States v. Roberts*, 18-CR-528-5, 2020 U.S. Dist. LEXIS 62318, at \*9 (S.D.N.Y. Apr. 8, 2020) (holding court does not have power to waive exhaustion).

<sup>55</sup> See 18 U.S.C.S. § 3582(c)(1)(A) (explaining statutory grant of compassionate release to enable modified term of imprisonment).

<sup>56</sup> See *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411, 446 (D. Conn. 2020) (highlighting BOP's failure to efficiently review compassionate release requests).

<sup>57</sup> See *Bowles v. Russell*, 551 U.S. 205, 212 (2007) (noting claims processing rules may be waived while jurisdictional rules may not); *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154 (2013) (discussing principal inquiry when analyzing whether rules are jurisdictional). Unless Congress clearly states that a rule is jurisdictional, courts should presume it is non-jurisdictional. *Auburn Reg'l Med. Ctr.*, 568 U.S. at 154.

<sup>58</sup> See *United States v. Salvagno*, 5:02-CR-51, 2020 U.S. Dist. LEXIS 109879, at \*47 (N.D.N.Y. June 22, 2020) (finding exhaustion requirement non-jurisdictional). The exhaustion requirement controls the process for inmates bringing compassionate release claims, making it a non-jurisdictional claims-processing rule. *Id.*; *United States v. Haney*, 454 F. Supp. 3d 316, 320 (S.D.N.Y. 2020) (finding exhaustion requirement non-jurisdictional). The statute "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the [federal] courts." *Haney*, 454 F. Supp. 3d at 320 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)).

<sup>59</sup> See *United States v. Raia*, 954 F.3d 594, 596 (3d Cir. 2020) (noting inability to hear defendant's case). The text of the statute requires the sentencing courts to hear motions for compassionate release. *Id.*; *United States v. Davis*, 19-CR-64-F, 2020 U.S. Dist. LEXIS 85409, at \*8-9

cuit also found an inability to waive the exhaustion requirement, focusing on the administrative necessity of the BOP's role in the compassionate release process.<sup>60</sup>

Although a majority of district court judges have found the exhaustion requirement to be non-jurisdictional, these courts are split on whether to waive the exhaustion requirement in the setting of the pandemic.<sup>61</sup> District court judges that have waived the exhaustion requirement point to the unique complications a pandemic poses along with the BOP's difficulties in efficiently responding to inmate's requests for compassionate release.<sup>62</sup>

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(D. Wyo. May 13, 2020) (holding court lacks jurisdiction to hear defendant's motion); *United States v. Baca*, CR 16-1613, 2020 U.S. Dist. LEXIS 163305, at \*40 (D.N.M. Sept. 8, 2020) (recognizing during COVID-19, all Tenth Circuit district courts have held exhaustion requirement jurisdictional).

<sup>60</sup> See *United States v. Alam*, 960 F.3d 831, 834 (6th Cir. 2020) (explaining government's reasoning in maintaining exhaustion requirement). "[The government] wants to implement an orderly system for reviewing compassionate-release applications, not one that incentivizes line jumping." *Id.*

<sup>61</sup> See *United States v. Ramirez*, 459 F. Supp. 3d 333, 344 (D. Mass. 2020) (holding court has discretion to waive exhaustion requirement). The court found that the COVID-19 pandemic allowed for an exception because "the coronavirus can enter a prison and spread undetected, [so] a wait of even 28 days . . . would render futile any attempt by the BOP to 'resolve' a compassionate release request 'in the applicant's favor' because the defendant may have already been exposed to the virus." *Id.* But see *United States v. Eberhart*, 448 F. Supp. 3d 1086, 1088-90 (N.D. Cal. 2020) (finding court without authority to hear defendant's claim). The court noted that the defendant failed to demonstrate the futility in exhaustion, pointing to the BOP's outbreak control plan. *Id.*

<sup>62</sup> See *United States v. Pena*, 459 F. Supp. 3d 544, 549 (S.D.N.Y. 2020) (holding "the statute's exhaustion requirement is amenable to equitable exceptions.") Equitable exceptions to the exhaustion requirement are necessary in the setting of COVID-19 to ensure that inmates "obtain timely judicial review before the virus takes its toll." *Id.* The court pointed to the text and legislative history of the First Step Act when concluding that the statute's purpose is to ensure the expeditious review of applications, and that this purpose is best served through equitable exceptions to the exhaustion requirement. *Id.*; see also *United States v. Haney*, 454 F. Supp. 3d 316, 321 (S.D.N.Y. 2020) (holding court has power to waive exhaustion requirement). The court points to the hybrid requirement, which allows an inmate to either exhaust or wait thirty days for a response, as evidence that Congress foresaw situations where the BOP could not respond in thirty days and "was determined not to let such exigencies interfere with the right of a defendant to be heard in court on his motion for compassionate release . . ." *Haney*, 454 F. Supp. 3d at 321. The court also addressed the argument that the exhaustion requirement benefits judicial efficiency and found that, in the setting of a pandemic, it has the opposite effect. *Haney*, 454 F. Supp. 3d at 321. Because prisoners are frustrated with the pace of the BOP's response to the high number of requests received, they are bringing petitions to the court "en masse." *Haney*, 454 F. Supp. 3d at 321. As a result, courts must determine each motion twice: first, to hold that the exhaustion requirement is not satisfied; and second, to decide the motion on its merits once the thirty-day period has elapsed and the inmate has brought the motion forward a second time. *Haney*, 454 F. Supp. 3d at 321-322; see also Letter from John W. Lungstrum & James C. Duff, Jud. Conf. of the U.S., to the Hon. Nita Lowey, et al., Chairwoman, H. Comm. on Appropriations (Apr. 28, 2020), [https://www.uscourts.gov/sites/default/files/judiciary\\_covid-19\\_supplemental\\_request\\_to\\_house\\_and\\_senate\\_judiciary\\_and\\_approps\\_committees.4.28.2020\\_0.pdf](https://www.uscourts.gov/sites/default/files/judiciary_covid-19_supplemental_request_to_house_and_senate_judiciary_and_approps_committees.4.28.2020_0.pdf) (requesting Congress temporarily amend compassionate release statute).

Other district court judges have held that they do not have the power to waive the exhaustion requirement, finding that legislative intent and the BOP's attempts to curb outbreaks prevent defendants from seeking relief until they have exhausted their administrative remedies or waited thirty days without a response from the warden.<sup>63</sup> Because so few appellate courts have decided whether courts have the power to waive exhaustion, judges within the same district have decided differently regarding the issue.<sup>64</sup>

When district court judges decide compassionate release motions on the merits, there are discrepancies in their decisions regarding what health conditions qualify as extraordinary and compelling.<sup>65</sup> Some judges closely adhere to the specific medical conditions listed in the sentencing commission's policy statement accompanying the compassionate release statute, which requires that an inmate's medical condition be serious and advanced with an end-of-life trajectory.<sup>66</sup> Other judges utilize the sentenc-

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<sup>63</sup> See *United States v. Roberts*, No. 18-CR-528-5, 2020 U.S. Dist. LEXIS 62318, at \*7 (S.D.N.Y. Apr. 8, 2020) (holding exhaustion not waivable). The court states that the legislative history indicates "that Congress recognized the importance of expediting applications for compassionate release and still chose to require a thirty-day waiting period." *Id.*; see also *Eberhart*, 448 F. Supp. 3d at 1088-89 (finding defendant failed to demonstrate futility of administrative remedies). The court specifically pointed to the jail's implementation of an outbreak control plan and the lack of COVID-19 cases at the institution. *Eberhart*, 448 F. Supp. 3d at 1089; *United States v. Feiling*, 453 F. Supp. 3d 832, 837 (E.D. Va. 2020) (holding even if exhaustion could be waived for futility, defendant failed to demonstrate futility). The court found that the presence of COVID-19 in a facility combined with an inmate's particular susceptibility to it is not enough to prove futility. *Feiling*, 453 F. Supp. 3d at 838-39. Further, the court pointed to the BOP's efforts to create a "safe and healthy prison environment" as evidence that the BOP would prioritize the defendant's request for home confinement. *Feiling*, 453 F. Supp. 3d at 839; *United States v. Isidaehomen*, No. 3:16-CR-0240-B-4, 2020 U.S. Dist. LEXIS 179408, at \*3-4 (N.D. Tex. Sept. 30, 2020) (holding defendant did not meet exhaustion requirement). The defendant's request to the warden was titled "Petition for Home Confinement Release" and mentioned compassionate release twice. *Id.* at \*4. However, because she asked for home confinement, the court characterized the request as one for home confinement and, as a result, found that she had not exhausted her administrative appeals for compassionate release. *Isidaehomen*, 2020 U.S. Dist. LEXIS 179408, at \*4-5; *United States v. Rodriguez*, No. 15-198, 2020 U.S. Dist. LEXIS 162923, at \*3-4 (E.D. La. Sept. 5, 2020) (holding defendant failed to satisfy exhaustion requirement). The defendant filed his motion with the court six days after sending a request to the warden; although thirty days passed since the initial request, the court found that because the defendant filed the motion after only six days, he failed to meet the exhaustion requirement. *Rodriguez*, 2020 U.S. Dist. LEXIS 162923, at \*3-4.

<sup>64</sup> See *Haney*, 454 F. Supp. 3d at 321 (holding court has power to waive exhaustion). *But see Roberts*, 2020 U.S. Dist. LEXIS 62318, at \*7 (holding court does not have power to waive exhaustion).

<sup>65</sup> See *Pavlo*, *supra* note 52 (describing inconsistencies in decisions regarding compassionate release).

<sup>66</sup> See 18 U.S.C. app. § 1B1.13, Application Notes (defining extraordinary and compelling medical conditions); see also *United States v. Clark*, 451 F. Supp. 3d 651, 656 (M.D. La. 2020) (finding defendant failed to prove extraordinary and compelling circumstances). The defendant

ing commission's last listed category, a catch-all category that allows the BOP or a judge to find a defendant's medical condition sufficient to satisfy the extraordinary and compelling requirement if there is another alternative extraordinary and compelling reason either separate from the explicitly listed medical conditions or in combination with those conditions.<sup>67</sup>

Judges who find extraordinary and compelling circumstances when an inmate has a non-life-threatening illness that may become life-threatening in conjunction with COVID-19 are then split on which underlying conditions qualify as risk factors.<sup>68</sup> For example, the Centers for Disease Control and Prevention ("CDC") lists hypertension as an underlying condition that might increase the risk of death should the individual contract COVID-19; however, district court judges are not in agreement about whether hypertension, in conjunction with the risk of COVID-19, rises to the level of extraordinary and compelling.<sup>69</sup> Courts, some within the same

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was sixty-seven years old, with high blood pressure, high cholesterol, and sleep apnea. *Clark*, 451 F. Supp. at 652. The court found that the defendant did not meet any of the statutory criteria, because he was not terminally ill, nor suffering from a serious medical condition. *Clark*, 451 F. Supp. at 656; *United States v. Mondragon*, No. 4:18-CR-132, 2020 U.S. Dist. LEXIS 120273, at \*10-13 (E.D. Tex. July 8, 2020) (finding no extraordinary and compelling reasons in defendant's case). Although the defendant had hypertension, gout, arthritis, diabetes, and hypothyroidism, the court found that "[n]one of these medical conditions is terminal or substantially diminishes his ability to provide self-care." *Mondragon*, 2020 U.S. Dist. LEXIS 120273, at \*11-12.

<sup>67</sup> See 18 U.S.C. app. § 1B1.13, Application Notes (defining extraordinary and compelling medical conditions); *United States v. Rodriguez*, 451 F. Supp. 3d 392, 395 (E.D. Pa. 2020) (concluding court may assess whether extraordinary and compelling circumstances exist under § 1B1.13). The court found that the defendant's underlying health conditions constituted extraordinary and compelling circumstances in the context of the pandemic. *Rodriguez*, 451 F. Supp. 3d at 395; see also *United States v. McIntosh*, No. 11-20085-01-KHV, 2020 U.S. Dist. LEXIS 176446, at \*16 (D. Kan. Sept. 25, 2020) (noting court has authority to "consider whether defendant's medical condition—combined with the risk of contracting COVID-19 . . . constitute 'other' extraordinary and compelling reasons for a reduced sentence.")

<sup>68</sup> See Pavlo, *supra* note 52 (describing inconsistencies regarding findings of extraordinary and compelling circumstances).

<sup>69</sup> See *Coronavirus Disease 2019 (COVID-19), People with Certain Medical Conditions*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (Oct. 14 2021) (listing hypertension as risk factor for COVID-19); see also *United States v. McLin*, No. 1:17-CR-110-LG-RHW, 2020 U.S. Dist. LEXIS 118319, at \*7 (S.D. Miss. July 7, 2020) (noting lack of clarity in CDC guidance regarding hypertension); *McIntosh*, 2020 U.S. Dist. LEXIS 176446, at \*17 (holding hypertension does not compel finding of extraordinary and compelling). Defendant was 39 years old and housed at USP Thompson, which was experiencing a COVID-19 outbreak. *McIntosh*, 2020 U.S. Dist. LEXIS 176446, at \*2-3; *Mondragon*, 2020 U.S. Dist. LEXIS 120273, at \*12-13 (noting defendant's circumstances do not rise to the level of extraordinary and compelling). The defendant's medical conditions included hypertension and type 2 diabetes. *Mondragon*, 2020 U.S. Dist. LEXIS 120273, at \*11. But see *United States v. Cardena*, 461 F. Supp. 3d 798, 803 (N.D. Ill. 2020) (noting both of defendant's hypertension and diabetes are underlying risk factors per CDC); *United States v. Pena*, 459 F. Supp. 3d 544, 550 (S.D.N.Y. 2020) (stating

circuit, are similarly split over whether asthma qualifies as an underlying risk factor that could warrant a finding of extraordinary and compelling based on the risk of COVID-19.<sup>70</sup>

Even when judges do find that an inmate has an underlying condition that places the inmate at an increased risk for serious illness, many courts will not grant compassionate release on this basis alone.<sup>71</sup> District courts are further split on whether an inmate must prove that there is an outbreak at his or her prison to meet the standard of extraordinary and compelling.<sup>72</sup> Some district courts follow the reasoning of the Third Circuit in *United States v. Raia* and require that a defendant show a particularized risk of contracting COVID-19 by proving that there is an outbreak in his prison facility.<sup>73</sup> Other district courts have noted that the lack of testing in

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“[t]his Court has repeatedly recognized that COVID-19 presents a heightened risk for individuals with hypertension . . . .”)

<sup>70</sup> See *Coronavirus Disease 2019 (COVID-19), People with Certain Medical Conditions*, *supra* note 69 (listing asthma as risk factor for COVID-19); see also *United States v. Echevarria*, No. 3:17-cr-44 (MPS), 2020 U.S. Dist. LEXIS 77894, at \*8-9 (D. Conn. May 4, 2020) (granting compassionate release based on defendant’s medical condition of bronchial asthma). *But see United States v. Rodriguez*, 454 F. Supp. 3d 224, 228 (S.D.N.Y. 2020) (finding defendant did not meet his burden of showing extraordinary and compelling circumstances). Although the defendant’s medical records confirmed a lifelong diagnosis of asthma, the court found that he failed to show “that he falls into the narrow band of inmates who are ‘suffering from a serious physical or medical condition,’ ‘that substantially diminishes the ability of the Defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.’” *Rodriguez*, 454 F. Supp. 3d at 228 (quoting U.S.C. §1B1.13, Application Note 1(A)). The court further found that the defendant did not indicate to the court how his asthma has “proved a problem lately.” *Rodriguez*, 454 F. Supp. 3d at 228.

<sup>71</sup> See *McLin*, 2020 U.S. Dist. LEXIS 118319, at \*7 (finding preexisting conditions alone not enough to establish extraordinary and compelling). Despite holding that “preexisting conditions are not in themselves sufficient to establish extraordinary and compelling reasons justifying a reduction in sentence,” the court found that the defendant’s medical vulnerability in conjunction with the outbreak at his federal prison weighed in favor of his release. *Id.* at \*8.

<sup>72</sup> See *United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020) (finding “the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release . . . .”) The court pointed to the BOP’s extensive efforts to contain the virus when explaining its decision not to grant compassionate release. *Id.* *But see United States v. Feucht*, 462 F. Supp. 3d 1339, 1342-43 (S.D. Fla. 2020) (finding absence of COVID-19 cases not dispositive). The court expressed its belief that zero confirmed cases in a prison does not mean that there are no COVID-19 cases, and noted the lack of universal testing in federal prisons. *Feucht*, 462 F. Supp. 3d at 1342. Further, the court recognized that, based on the virus’s ability to spread rapidly, a lack of confirmed cases does not mean inmates are safe from the virus. *Feucht*, 462 F. Supp. 3d at 1342.

<sup>73</sup> See *Raia*, 954 F.3d at 597 (finding existence of COVID-19 in society not enough to prove extraordinary and compelling); see also *United States v. Mondragon*, No. 4:18-CR-132(5), 2020 U.S. Dist. LEXIS 120273, at \*14 (E.D. Tex. July 8, 2020) (finding defendant failed to prove existence of extraordinary and compelling circumstances). Although the defendant was suffering from hypertension and Type 2 diabetes, the court noted that no inmates or staff had tested positive at his facility. *Mondragon*, 2020 U.S. Dist. LEXIS 120273 at \*11, \*14; *United States v. Feiling*, 453 F. Supp. 3d 832, 841 (E.D. Va. 2020) (finding defendant failed to establish “a particular-

federal prisons, combined with the rapid spread of the virus, make it unjust to require proof of positive cases in a facility to prove extraordinary and compelling circumstances.<sup>74</sup> Finally, some district court judges have held that it is not enough to prove the existence of a COVID-19 outbreak in the defendant's prison facility; rather, if there is an outbreak in his facility, a defendant must then prove that the BOP is not equipped to manage the outbreak.<sup>75</sup>

Because of these discrepancies, judges in two different circuits looked at the same prison, FCI Loretto, and came to opposite conclusions regarding whether each defendant proved the conditions of the prison demonstrated a particularized risk of contracting COVID-19.<sup>76</sup> Similarly,

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ized risk of contracting the disease.”) The court found that the defendant established a particularized susceptibility to COVID-19 based on his comorbidities, including respiratory and heart conditions. *Feiling*, 453 F. Supp. 3d at 841. However, because the BOP had not confirmed a case of COVID-19 at his facility, the court found defendant's request was premised on the “mere possibility that COVID-19 will spread to his facility.” *Feiling*, 453 F. Supp. 3d at 841.

<sup>74</sup> See *Feucht*, 462 F. Supp. 3d at 1342 (finding the absence of COVID-19 cases not dispositive); *United States v. Amarrah*, 458 F. Supp. 3d 611, 618 (E.D. Mich. 2020) (noting “[z]ero confirmed COVID-19 cases is not the same thing as zero COVID-19 cases.”) The court further stated,

[f]or these reasons, unless and until FCI Loretto implements a universal testing regimen, the Court gives no weight to the zero ‘confirmed’ COVID-19 cases statistic – particularly because BOP is housing detainees together, because the United States could not give the Court any information regarding current testing practices, and because basic disinfecting tools such as soap and hand sanitizer are not universally provided to the population.

*Amarrah*, 458 F. Supp. 3d at 618; see also Sadie Gurman, *More Than 70% of Inmates Tested in Federal Prisons Have Coronavirus*, THE WALL STREET JOURNAL (Apr. 30, 2020, 9:07 AM), <https://www.wsj.com/articles/more-than-70-of-inmates-tested-in-federal-prisons-have-coronavirus-11588252023> (noting “[m]ore than two thirds of the small number of federal prisoners who have been tested for the new coronavirus had positive results . . . .”)

<sup>75</sup> See *United States v. Isidaehomen*, No. 3:16-CR-0240-B-4, 2020 U.S. Dist. LEXIS 179408, at \*6 (N.D. Tex. Sept. 30, 2020) (finding COVID-19's “generalized effect” on defendant's facility does not establish specific extraordinary and compelling circumstances). Although defendant's facility at the time of her motion had nine active COVID-19 cases with 529 recovered cases, and six deaths, the court did not find these statistics compelling in making a finding of extraordinary and compelling. *Id.* at \*1-2, \*6; see also *United States v. McIntosh*, No. 11-20085-01-KHV, 2020 U.S. Dist. LEXIS 176446, at \*17 (D. Kan. Sept. 25, 2020) (noting that despite an outbreak, only four inmates tested positive and had not recovered). Although, at the time of defendant's motion, fifty-eight inmates and fifty-five staff had tested positive, defendant failed to show that he faced a heightened risk of exposure to COVID-19 at USP Thompson compared to home confinement or community placement. *McIntosh*, 2020 U.S. Dist. LEXIS 176446, at \*3, \*17.

<sup>76</sup> See *Amarrah*, 458 F. Supp. 3d at 617 (finding absence of COVID-19 cases not dispositive in determining extraordinary and compelling circumstances). The court gave no weight to the argument that there were no confirmed cases at FCI Loretto because the BOP was housing inmates together and not providing universal testing or access to hygienic products. *Id.* at 618. *But see Feiling*, 453 F. Supp. 3d at 841 (finding defendant failed to “demonstrate a particularized risk of contracting the disease.”) The defendant based his request on the possibility that COVID-19

judges have reached different conclusions regarding whether the conditions at FCI Fort Dix constitute an outbreak that would create a need for an equitable exception to the exhaustion requirement.<sup>77</sup>

When deciding compassionate release motions, judges often look at a defendant's plan for release and re-entry to ensure that granting the motion will not put the public at risk for future harm.<sup>78</sup> However, in the setting of COVID-19, judges must consider not only the potential that an inmate will recidivate but also the potential that the inmate will spread the virus to the greater community.<sup>79</sup> This has created another split among judges as to whether a defendant's release option that involves residing with family members is a safe option.<sup>80</sup> Judges tend to look favorably on inmate requests that demonstrate that the inmate has the means and support to create a lower risk environment outside of prison.<sup>81</sup>

Finally, in deciding a motion for compassionate release, judges must consider the factors laid out in 18 U.S.C. § 3553(a), which outlines

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would enter his facility in the future as the BOP had not yet confirmed a case of COVID-19 at FCI Loretto. *Feiling*, 453 F. Supp. 3d at 841. The court found this insufficient to justify compassionate release because it did not demonstrate that the defendant had a particularized risk of contracting COVID-19. *Feiling*, 453 F. Supp. 3d at 841.

<sup>77</sup> See *United States v. Garcia*, 460 F. Supp. 3d 403, 409 (S.D.N.Y. 2020) (noting lack of outbreak at FCI Fort Dix). The court found that "Fort Dix is not a facility that has seen a massive outbreak of COVID-19. With 2,936 inmates, it has only 40 documented cases as of May 4." *Id.* But see *United States v. Pena*, 459 F. Supp. 3d 544, 549 (S.D.N.Y. 2020) (finding exhaustion requirement futile based on outbreak at FCI Fort Dix). The judge noted that FCI Fort Dix "is the most heavily populated BOP facility and has had 43 confirmed cases of COVID-19." *Id.* The judge found that requiring the defendant to wait an additional three weeks to meet the exhaustion requirement "could be the difference between life and death." *Id.*

<sup>78</sup> See *United States v. Cardena*, 461 F. Supp. 3d 798, 803 (N.D. Ill. 2020) (explaining that "[t]he court begins with the need to protect the public.") When considering the ramifications of Cardena's release, the court pointed to his lack of a criminal record and the minor role he played in the offense giving rise to his conviction. *Id.* The court also noted that his mother agreed to let him quarantine in a separate portion of her home, and that he had a promise of employment. *Id.* These factors led the court to conclude that Cardena's re-entry plan militated in favor of release. *Id.*

<sup>79</sup> See *Garcia*, 460 F. Supp. 3d at 410 (finding defendant's post-release behavior likely would not mitigate risks of COVID-19). The court noted that releasing the defendant to his home in Newark, New Jersey, where "compliance with social distancing and mask requirements would be strictly voluntary," would not necessarily reduce his risk of contracting COVID-19 or spreading it to others. *Id.*

<sup>80</sup> See *Feiling*, 453 F. Supp. 3d at 841 (finding defendant's release would create safety risk for his family). The court noted that the defendant's wife was also in a high-risk demographic due to her age and comorbidities, and releasing him would compound her health risks. *Id.*; cf. *United States v. Scott*, No. 19-cr-10144-ADB-1, 2020 U.S. Dist. LEXIS 143316, at \*9 (D. Mass. Aug. 11, 2020) (finding release to mother's home appropriate).

<sup>81</sup> See *United States v. Edwards*, No. 3:13-cr-00012, 2020 U.S. Dist. LEXIS 127869, at \*33-34 (M.D. Tenn. June 2, 2020) (outlining reasons defendant will fare better with regard to COVID-19 outside BOP custody); *Cardena*, 461 F. Supp. 3d at 804 (finding defendant had good reentry plan).

specific criteria for judges imposing sentences.<sup>82</sup> The three most relevant factors under § 3553 are: (1) the need to provide the defendant with services, including medical care; (2) the need for a sentence that serves as a deterrent; and (3) the need to ensure public safety.<sup>83</sup> In the setting of COVID-19, judges look to the final provision of § 3553(a)(2), which directs courts to consider “the need for the sentence imposed to provide the defendant with necessary educational or vocational training, medical care, or other correctional treatment in the most effective manner.”<sup>84</sup> Judges consider the care a facility is able to provide for an inmate and require an inmate to demonstrate that he will receive better medical care outside of the facility.<sup>85</sup>

Another important factor is the deterrent factor that sentences confer on individuals as well as the general community.<sup>86</sup> However, judges are not in agreement regarding the percentage of a sentence that an inmate must serve to provide the requisite deterrent factor, leading to confusion, further compounded by BOP policies.<sup>87</sup> Some judges appear more willing to reduce sentences in the context of COVID-19, noting that the risk of death from COVID-19 creates a different type of incarceration than the one

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<sup>82</sup> See 18 U.S.C. § 3582(c)(1)(A) (outlining court’s options for modifying a sentence); see also 18 U.S.C. § 3553(a) (providing factors for judges to consider when imposing sentences).

<sup>83</sup> See 18 U.S.C. § 3553(a)(2) (outlining sentencing factors).

<sup>84</sup> 18 U.S.C. § 3553(a)(2)(D) (outlining need for sentences).

<sup>85</sup> See *United States v. Garcia*, 460 F. Supp. 3d 403, 410 (S.D.N.Y. 2020) (finding defendant failed to prove he would be safer at home). The court found that the defendant’s history indicated that he would not take care of himself if released, pointing to his repeated failures to adhere to medical advice while at liberty. *Id.* The court also stated that it was not convinced the defendant would be safer outside of FCI Fort Dix as he was “arguably receiving the most attentive and comprehensive health care that he ha[d] received in a long time . . .” *Id.* But see *Edwards*, 2020 U.S. Dist. LEXIS 127869, at \*33-35 (finding defendant demonstrated he would fare better at home than in prison). The court pointed to the defendant’s access to personal protective equipment, health insurance, and proximity to hospitals. *Edwards*, 2020 U.S. Dist. LEXIS 127869, at \*34-35. The court explained that the defendant’s access to resources

distinguishes [him] from many other inmates seeking release, who appear to lack plans and resources to enable them to cope with an infection as well (or better) upon release as they would in the custody of BOP, which does have resources (strained and limited though they may be) to confer upon infected inmates.

*Edwards*, 2020 U.S. Dist. LEXIS 127869, at \*35.

<sup>86</sup> See 18 U.S.C. § 3553(a)(2)(B) (outlining need for sentences to deter criminal conduct).

<sup>87</sup> See *Neff & Blakinger*, *supra* note 8 (discussing confusion over sentence reduction). The authors reference one individual who drove to pick up her husband from prison only to discover that he would not be released because he had not yet served fifty percent of his sentence. *Id.* A judge ordered the prison to release him, but prison officials refused, claiming that the judge’s order was unclear. *Id.*

the judge initially handed down to the defendant.<sup>88</sup> Others, however, have held that the § 3553(a) factors are more important than the prison conditions and the inmate's medical condition.<sup>89</sup> District court judges have different standards for what constitutes an appropriate reduction in sentence when extraordinary and compelling circumstances apply.<sup>90</sup> When considering whether sentence reduction is appropriate, courts also consider the public safety implications that arise from releasing inmates, mostly focusing on an inmate's likelihood to reoffend.<sup>91</sup>

#### IV. ANALYSIS

##### A. Congress should amend 18 U.S.C. § 3624(c) to require accountability from the BOP in considering home confinement requests

The BOP is unable to carry its statutory burden under the FSA and, more recently, the CARES Act to release at-risk prisoners to home con-

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<sup>88</sup> See *United States v. Amarras*, 458 F. Supp. 3d 611, 618 (E.D. Mich. 2020) (finding extraordinary and compelling circumstances). Although the defendant had only served thirty-five percent of his sentence, the court stated, "the Court sentenced Defendant to 60 months in prison; it did not sentence him to death or to incarceration that carries a significant risk of death." *Id.*

<sup>89</sup> See *United States v. Younger*, No. 16-40012-02-DDC, 2020 U.S. Dist. LEXIS 109555, at \*19 (D. Kan. June 23, 2020) (finding reduced sentence would not provide adequate deterrence). Although the defendant had served two-thirds of his sentence at FCI Elkton, where nine inmates had died from COVID-19 at the time of his motion, the court found that reducing his sentence by one-third would not provide the necessary deterrent factor. *Id.* at \*2, \*19.

<sup>90</sup> See *United States v. McLin*, No. 1:17-CR-110-LG-RHW, 2020 U.S. Dist. LEXIS 118319, at \*10 (S.D. Miss. July 7, 2020) (citing *United States v. Schwab*, No. 13-CR-237, 2020 U.S. Dist. LEXIS 110504, at \*1 (E.D. La. June 24, 2020)) (finding sentence reduction not appropriate considering gravity of offense). The court found that because the defendant had only served a little over a quarter of his sentence, a reduction in sentence would not meet the objectives of deterrence. *Id.* at \*9-10; see also *United States v. Osborne*, No. 4:05-CR-00109-BSM-12, 2020 U.S. Dist. LEXIS 104943, at \*4 (E.D. Ark. June 16, 2020) (noting defendant's case does not merit release). The defendant had served over ninety-two percent of his sentence and "his home confinement eligibility, halfway house placement, and release dates [were] all months away." *But see Edwards*, 2020 U.S. Dist. LEXIS 127869, at \*26-27 (reducing defendant's sentence from seventy-two months to twenty-two months). The court clarified that the sentence reduction, effectively cutting the defendant's sentence by two thirds, was "not huge." *Edwards*, 2020 U.S. Dist. LEXIS 127869, at \*27.

<sup>91</sup> See *Edwards*, 2020 U.S. Dist. LEXIS 127869, at \*23-24 (explaining why public safety is not at risk with defendant's release). The court notes "[i]t is almost as if Defendant left no stone unturned in his crimes . . . violence was not one of them – a fact that decreases the risk attributable to his potential release." *Id.*; see also *United States v. Cardena*, 461 F. Supp. 3d 798, 804 (N.D. Ill. 2020) (finding BOP's transfer of defendant to pre-release facility suggests appropriateness of release). *But see McLin*, 2020 U.S. Dist. LEXIS 118319, at \*9 (focusing on defendant's lengthy criminal history of non-violent and violent offenses).

finement in an efficient way.<sup>92</sup> The legislative history of § 3624(c)(2) indicates Congressional frustration with the BOP's failure to utilize the home confinement authority.<sup>93</sup> Despite these statutory directives, however, the BOP's approach to home confinement did not change in a substantial way.<sup>94</sup> When it became clear that the pandemic had infiltrated the federal prison system, Attorney General Barr appeared to understand the gravity and issued two memoranda encouraging the BOP to move vulnerable inmates out of prison.<sup>95</sup> Unfortunately, Attorney General Barr could only encourage the BOP to increase home confinement, because under 18 U.S.C. § 3624(c)(2), the BOP wields sole control over the ability to move prisoners to home confinement.<sup>96</sup>

The new guidance from Congress under the CARES Act failed to deliver the relief many prisoners and their family members demanded.<sup>97</sup> Despite the explicit directives imbedded in the CARES Act and subsequent urgent instruction from Attorney General Barr, the BOP did not move individuals to home confinement at a speed that matched the urgency of the situation.<sup>98</sup> In noting the BOP's failure to move prisoners to home confinement, the chief federal public defender in New York City stated, “[t]hey don’t want to let people out. It’s not in their DNA.”<sup>99</sup>

Beyond making it difficult for prisoners to reach the requisite PATTERN score to achieve home confinement, the BOP sowed confusion

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<sup>92</sup> See Neff & Blakinger, *supra* note 8 (discussing marginal reduction in prison population following CARES Act).

<sup>93</sup> See First Step Act of 2018, Pub. L. No. 115-391, § 602, 132 Stat. 5194 (2018) (instructing BOP to increase use of home confinement); see also Coronavirus Aid, Relief, and Economic Security Act, title II, sec. 12003(b)(2), Pub. L. No. 116-136, 134 Stat. 281 (2020) (outlining increased home confinement power).

<sup>94</sup> See Grawert, *supra* note 28 (discussing issues implementing First Step Act). Due to the DOJ's use of the PATTERN system to determine eligibility for home confinement, it is difficult for inmates to achieve the requisite minimum score. *Id.*; see also Neff & Blakinger, *supra* note 8 (describing BOP's failure to move inmates to home confinement under CARES Act).

<sup>95</sup> See Memorandum from the Att’y Gen. to the Dir. of Bureau of Prisons, *supra* note 38 (instructing BOP to prioritize granting home confinement due to COVID-19); see also Memorandum from the Att’y Gen. to the Dir. of Bureau of Prisons, *supra* note 40 (instructing increased use of home confinement at FCIs Oakdale, Danbury, and Elkton).

<sup>96</sup> See 18 U.S.C. § 3624(c)(2) (granting home confinement power to BOP).

<sup>97</sup> See Neff & Blakinger, *supra* note 8 (noting marginal reductions in federal prison populations after Congressional instruction).

<sup>98</sup> See *id.* (describing BOP's failure to efficiently move inmates to home confinement); see also Satija, *supra* note 7 (discussing BOP's slow response to home confinement requests). Judge Michael P. Shea responded to FCI Danbury's rate of home confinement review by stating that the slow trickle of releases (159 inmates had been reviewed as of May 5 and only twenty-one were granted home confinement) did not match the urgent tone that Attorney General Barr demonstrated in his memo. *Id.*

<sup>99</sup> See Neff & Blakinger, *supra* note 8 (discussing BOP's failures in carrying out policies).

regarding its release eligibility policy as it relates to percentages of sentences served.<sup>100</sup> This confusion created real consequences, as its policy changes resulted in the revocation of release for inmates already in prerelease quarantine.<sup>101</sup> While federal policies should be streamlined to ensure fair results across the federal system, the ever-changing policies that emerged from the Barr administration left even federal prosecutors unable to articulate the United States' position.<sup>102</sup>

By failing to move inmates to home confinement during the pandemic, the BOP pushed the responsibility of protecting vulnerable inmates into the hands of the judicial system.<sup>103</sup> Statutorily, the courts only have the power to grant compassionate release and have no power to grant home confinement.<sup>104</sup> Because courts lack the ability to move inmates to home confinement, they have less ability to balance the competing interests of protecting inmates while also protecting the general public and upholding justice.<sup>105</sup> While the BOP's changing metrics created a breakdown in moving inmates to home confinement, judges released individuals who do not meet BOP criteria under the PATTERN system or have not served the requisite percentage of their sentences.<sup>106</sup>

The BOP had an opportunity to move at-risk inmates away from centralized COVID-19 outbreaks while also ensuring they served their sentences without putting the public at risk.<sup>107</sup> Instead, judges faced the impossible decision of granting compassionate release, effectively cutting an inmate's sentence to time served, or ordering an inmate to stay in prison, which could be equated to a death sentence in some instances.<sup>108</sup> Since the

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<sup>100</sup> See Gerstein, *supra* note 45 (describing confusion with Barr's changing policies regarding home confinement).

<sup>101</sup> See *id.* (observing effects of policy confusion on inmates).

<sup>102</sup> See *id.* (describing incident where federal prosecutor could not explain government's policy to federal judge). A federal prosecutor in Manhattan was unable to respond effectively to an order from the court requiring her to detail the federal government's standards for compassionate release because of uncertainties regarding the policies in effect. *Id.*

<sup>103</sup> See Satija, *supra* note 7 (discussing rise of compassionate release cases in federal court).

<sup>104</sup> See 18 U.S.C. § 3624(c)(2) (granting home confinement power to BOP). See 18 U.S.C. § 3582(c) (granting court compassionate release power).

<sup>105</sup> See Gerstein, *supra* note 36 (noting judicial concerns regarding releasing prisoners en masse).

<sup>106</sup> See *United States v. Edwards*, No. 3:13-cr-00012, 2020 U.S. Dist. LEXIS 127869, at \*26-27 (M.D. Tenn. June 2, 2020) (reducing inmate's sentence from seventy-two to twenty-one months); see also *United States v. Amarrah*, 458 F. Supp. 3d 611, 618 (E.D. Mich. 2020) (releasing inmate with sixty-five percent of his sentence left).

<sup>107</sup> See Memorandum from the Att'y Gen. to the Dir. of Bureau of Prisons, *supra* note 38 (instructing BOP to prioritize granting home confinement due to COVID-19).

<sup>108</sup> See Satija, *supra* note 7 (discussing rise in federal judges deciding compassionate release cases); see also Gerstein *supra* note 36 (describing Judge Gwin's order to release inmates at FCI

pandemic began, many district court judges have demonstrated that they are more comfortable shortening sentences than requiring individuals to risk their lives remaining in prison.<sup>109</sup>

Congress should amend the home confinement statute to place greater accountability requirements on the BOP, ensuring the BOP processes home confinement petitions in a timely manner.<sup>110</sup> If the BOP responded to home confinement requests and moved individuals to home confinement efficiently, courts would not have to make the difficult decision to negate an individual's sentence.<sup>111</sup> One way to foster greater accountability is to create a statutory time frame for responding to petitions, which Congress could model after state statutes governing medical parole.<sup>112</sup> The federal home confinement statute merely authorizes the BOP to move individuals to home confinement for a specific period of time.<sup>113</sup> In contrast, medical parole statutes in states like Massachusetts and California authorize state agencies to move individuals to the medical parole program while also conferring upon those agencies an affirmative duty to respond to home confinement requests within specified time periods.<sup>114</sup>

In Massachusetts, the medical parole statute requires the superintendent of the correctional facility to respond to a medical parole request within twenty-one days.<sup>115</sup> It further requires the superintendent to make a recommendation to the commissioner that includes a medical parole plan, a physician's diagnosis, and a risk assessment.<sup>116</sup> Creating requirements in the language of the statute allows the court and the legislature to hold prison officials accountable for not responding efficiently to requests.<sup>117</sup> Con-

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Elkton). Judge Gwin could not order home confinement himself, so he ordered the BOP to determine which inmates were eligible for release from FCI Elkton. Gerstein *supra* note 36.

<sup>109</sup> See *Edwards*, 2020 U.S. Dist. LEXIS 127869, at \*26-27 (M.D. Tenn. June 2, 2020) (reducing inmate's sentence by two thirds); see also *Amarrah*, 458 F. Supp. 3d at 618 (releasing inmate with sixty-five percent of his sentence left).

<sup>110</sup> See 18 U.S.C. § 3624(c)(2) (authorizing BOP to place prisoners in home confinement). The current statute imposes no affirmative duty on the BOP to respond to requests efficiently. *Id.*

<sup>111</sup> See Satija, *supra* note 7 (discussing rise in federal judges deciding compassionate release cases).

<sup>112</sup> See MASS. GEN. LAWS ANN. ch. 127, § 119A (2018) (outlining medical parole procedure); see also CAL. PENAL CODE § 3550 (outlining medical parole procedure).

<sup>113</sup> See 18 U.S.C. § 3624(c)(2) (authorizing BOP to place prisoners in home confinement).

<sup>114</sup> See MASS. GEN. LAWS ANN. ch. 127, § 119A(c) (2018) (requiring response from superintendent of prison within twenty-one days); CAL. PENAL CODE § 3550(d) (requiring response from head physician of institution within thirty days).

<sup>115</sup> See MASS. GEN. LAWS ANN. ch. 127, § 119A(c) (2018) (requiring response from superintendent of prison within twenty-one days).

<sup>116</sup> See *id.* (outlining superintendent's statutory duties).

<sup>117</sup> See *Buckman v. Comm'r of Correction*, 138 N.E.3d 996, 1011 (Mass. 2020) (holding superintendent of prison bears burden of responding to prisoner's request). The court held that the superintendent is responsible for "preparing or procuring '(i) a medical parole plan; (ii) a written

gress did not impute any similar duties to the BOP in granting the agency sole power over the home confinement system, leaving the federal courts powerless to demand more from the agency.<sup>118</sup>

*B. Congress should amend 18 U.S.C. § 3582(c) to permanently remove the thirty-day waiting period*

Although the First Step Act gave inmates more power to bring their cases forward, the exhaustion requirement remains as a barrier for inmates seeking release.<sup>119</sup> Because of the BOP's failure to make even an initial response to a majority of compassionate release requests, the thirty-day waiting period is often wasted time during which the court cannot act to help vulnerable inmates.<sup>120</sup> The administrative exhaustion process is only feasible if the wardens at federal prisons participate in the process.<sup>121</sup> During the pandemic, numerous inmates reported wardens verbally refusing their requests or refusing even to accept their requests, both of which prevent the exhaustion process from beginning.<sup>122</sup> For example, the warden of one facility in California issued an official memo informing inmates that he

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diagnosis by a physician . . . ; and (iii) an assessment of the risk for violence that the prisoner poses to society.” *Id.*

<sup>118</sup> See 18 U.S.C. § 3624(c)(2) (authorizing BOP to place prisoners in home confinement). The current statute imposes no affirmative duty on the BOP to respond to requests efficiently. *Id.*; see also *United States v. Rodriguez*, 451 F. Supp. 3d 392, 395 (E.D. Pa. 2020) (noting BOP's failure to move inmates to home confinement).

<sup>119</sup> See First Step Act of 2018, Pub. L. No. 115-391, § 603(b)(1), 132 Stat. 5194 (2018) (outlining compassionate release process).

<sup>120</sup> See Satija, *supra* note 7 (discussing judicial concern regarding thirty-day waiting period). As of May 2020, 241 inmates at FCI Danbury had applied for compassionate release since the beginning of the pandemic and none had been approved. *Id.* Judge Michael Shea said of the waiting period with this number in mind, “the numbers you’re reporting suggest . . . there’s no point in waiting the 30 days. The warden might as well tell people, look, we’re not going to be granting it.” *Id.* In his opinion he wrote, “[t]he 30-day period under the statute is simply dead time during which there is no prospect the BOP will come to the defendant’s aid.” *Id.*

<sup>121</sup> See 18 U.S.C. § 3582(c) (granting court compassionate release power after BOP's initial decision).

<sup>122</sup> See *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411, 428-29 (D. Conn. May 12, 2020) (noting BOP rarely filed compassionate release motions). Over a more than six-week period, the warden at FCI Danbury failed to make even an initial response to 44% of compassionate release requests. *Id.* at 437; see also *United States v. Rodriguez*, 451 F. Supp. 3d 392, 395 (E.D. Pa. Apr. 1, 2020) (noting BOP's failure to move court for compassionate release). The BOP has a long history of failing to utilize its power to approve compassionate release requests, resulting in terminally ill inmates dying in prison waiting for the BOP to respond to their requests. *Rodriguez*, 451 F. Supp. 3d at 395; see also Neff & Blakinger, *supra* note 8 (describing BOP's struggle implementing new policy directives from Attorney General Barr).

would not be addressing any further requests.<sup>123</sup> When the BOP consistently fails to allow the administrative process to begin and end, it is unjust to require inmates to exhaust administrative remedies.<sup>124</sup>

Courts often point to the BOP's remedial actions as proof of effective administration, which courts believe places the BOP in the best position to make determinations about home confinement and compassionate release.<sup>125</sup> In one of the few appellate decisions on the issue, the Sixth Circuit concluded that thirty days is not an unreasonable or indefinite period of time for an inmate to wait before bringing a motion before the court.<sup>126</sup> However, the BOP has not handled the virus in an effective way, with massive outbreaks occurring in federal prisons across the country and inmate requests for relief left unanswered.<sup>127</sup> Further, while the thirty-day period may not be an unreasonable timeframe under normal circumstances, in the setting of a pandemic, each day a prisoner spends incarcerated adds to the cumulative risk the individual faces.<sup>128</sup> With an understanding of the BOP's poor handling of compassionate release requests, specifically during the COVID-19 pandemic, the court's role in granting compassionate release when the BOP wrongly denies, or is incapable of responding to, a request should be acknowledged.<sup>129</sup>

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<sup>123</sup> See Letter from John W. Lungstrum & James C. Duff *supra* note 62 (describing BOP's lack of cooperation in reviewing compassionate release requests).

<sup>124</sup> See *id.* (describing BOP obstruction in resolving compassionate release requests).

<sup>125</sup> See *United States v. Feiling*, 453 F. Supp. 3d 832, 839 (E.D. Va. 2020) (praising BOP's efforts in containing COVID and evaluating prisoner release requests).

<sup>126</sup> See *United States v. Alam*, 960 F.3d 831, 834 (6th Cir. 2020) (explaining government's reasoning in maintaining exhaustion requirement). The court determined that the government had a good reason for objecting to the defendant's failure to exhaust: "[i]t wants to implement an orderly system for reviewing compassionate-release applications, not one that incentivizes line jumping." *Id.*

<sup>127</sup> See Gerstein, *supra* note 36 (discussing outbreak at FCI Elkton); see also Tollefson *supra* note 36 (noting 70% of prisoners at FCI Waseka contracted COVID-19); Letter from John W. Lungstrum & James C. Duff, *supra* note 62 (describing instances of blatant BOP obstruction); *United States v. Amarrah*, 458 F. Supp. 3d 611, 617 (E.D. Mich. 2020) (excoriating government's argument regarding line-cutting). The government argued that allowing judges to waive the exhaustion requirement would incentivize inmates to attempt to jump ahead of fellow inmates in requesting compassionate release from the court instead of the BOP. *Amarrah*, 458 F. Supp. 3d at 617. The court states bluntly that this argument offends the court, noting that a defendant does not cut in line or interfere with the administrative process by exercising his statutory right to relief. *Amarrah*, 458 F. Supp. 3d at 617.

<sup>128</sup> See *United States v. Cardena*, 461 F. Supp. 3d 798, 802 (N.D. Ill. 2020) (waiving exhaustion requirement). The court points to the reality that due to the pandemic, each day a prisoner spends in prison, his risk increases. *Id.*

<sup>129</sup> See *Amarrah*, 458 F. Supp. 3d at 617 (noting importance of court's ability in waiving exhaustion). The court notes that Congress designed the compassionate release statute in anticipation of courts taking responsibility in situations where the BOP is unable to manage high levels of requests for release. *Id.*; see also Letter from John W. Lungstrum & James C. Duff, *supra* note

If Congress gave judges the power to waive the exhaustion requirement, inmates would have an equitable remedy in situations where BOP employees deliberately slow down the process.<sup>130</sup> There are multiple reports of federal prison wardens either refusing to accept requests for compassionate release or verbally denying all requests and telling inmates not to file any applications for relief.<sup>131</sup> When there is such a blatant obstruction of the compassionate release process, it is important for judges to have the option to waive the exhaustion requirement in the interest of justice.<sup>132</sup>

It is crucial that Congress amend the compassionate release statute to give judges the power to waive the thirty-day exhaustion requirement to ensure efficient management of their dockets in states of emergency.<sup>133</sup> Judge Lungstrum, in his official capacity as the Chair of the Committee on the Budget of the Judicial Conference of the United States, raised this issue in a letter to Congress, requesting that Congress waive the exhaustion requirement.<sup>134</sup> The letter raised concerns over the ability of district courts to review requests from vulnerable inmates, as the judges believed there had

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62 (requesting statutory amendment granting courts greater power in compassionate release decisions).

<sup>130</sup> See Letter from John W. Lungstrum & James C. Duff *supra* note 62 (describing instances of blatant BOP obstruction).

<sup>131</sup> See *United States v. Hansen*, 4:13-CR-40053-01-KES, 2020 U.S. Dist. LEXIS 173093, at \*4-5 (S.D.S.D. September 22, 2020) (claiming exhaustion of administrative remedies). The defendant claimed that the warden at his facility “verbally told all inmates that he was denying all requests for compassionate release.” *Id.*; see also Letter from John W. Lungstrum & James C. Duff *supra* note 62 (describing instances of blatant BOP obstruction). The Warden at Taft Correctional Institution distributed a memo informing inmates that the office would not be reviewing any more administrative requests. Letter from John W. Lungstrum & James C. Duff *supra* note 62.

<sup>132</sup> See Letter from John W. Lungstrum & James C. Duff *supra* note 62 (describing instances of blatant BOP obstruction). As Judge Lungstrum argues, it is crucial in a pandemic for judges to have the power to waive the exhaustion requirement. *Id.*

<sup>133</sup> See Satija, *supra* note 7 (quoting letter from federal judges requesting Congress change compassionate release statute). Federal judges noted that the thirty-day waiting period has resulted in an inability for district courts to review petitions in a timely manner to protect vulnerable inmates from future harm. *Id.*

<sup>134</sup> See Letter from John W. Lungstrum & James C. Duff, *supra* note 62 (requesting amendment to compassionate release statute). Judge Lungstrum requested Congress insert the following language into the compassionate release statute:

[O]r, effective during the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to COVID-19 and end 30 days after the national emergency terminates, upon motion by the defendant submitted to the court upon a showing that administrative exhaustion would be futile or that the 30-day lapse would cause serious harm to the defendant’s health . . .

*Id.*

been significant delays in the BOP's response to these requests.<sup>135</sup> The compassionate release system simply does not work during a pandemic when the circumstance that inmates claim as a reason for release is a virus that moves rapidly through dense populations and thirty days could be the difference between life and death.<sup>136</sup>

Further, the pandemic has demonstrated that it is essential that courts have the power to waive the exhaustion requirement in the interest of judicial efficiency.<sup>137</sup> Inmates flooded the BOP with requests for home confinement and compassionate release, and the agency was unable to respond to all of the requests.<sup>138</sup> The courts' inability to waive the thirty-day waiting period hampers judicial efficiency because the court must deny the motion only to re-hear the same motion when the thirty days has elapsed.<sup>139</sup> This issue is clearly demonstrated in cases where by the time the judge hears the motion, thirty days or more have elapsed since the inmate filed the motion, with no response from the BOP.<sup>140</sup> When courts dismiss these cases, they do so out of a strict adherence to the language of the statute.<sup>141</sup> However, when interests of justice require the courts to move swiftly, dismissing these cases harms judicial efficiency, as the cases will be relitigated immediately in their same form.<sup>142</sup> In these instances, equitable excep-

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<sup>135</sup> See *id.* (justifying request for statutory amendment).

<sup>136</sup> See Satija, *supra* note 7 (quoting federal prosecutor's statement). In one hearing, a federal prosecutor argued that a judge was bound to honor the thirty-day waiting period but acknowledged that the system itself was not designed for the current circumstances. *Id.*

<sup>137</sup> See *United States v. Ramirez*, 459 F. Supp. 3d 333, 344 (D. Mass. 2020) (noting futility of exhaustion requirement in pandemic setting); see also *United States v. Haney*, 454 F. Supp. 3d 316, 321 (S.D.N.Y. 2020) (discussing judicial efficiency issues regarding compassionate release statute). If courts cannot waive the thirty-day period they must dismiss the case and rehear it after the requisite amount of time, instead of deciding the merits of the case when it is in front of them the first time. *Haney*, 454 F. Supp. 3d at 321-22.

<sup>138</sup> See *Haney*, 454 F. Supp. 3d at 321 (discussing increase in compassionate release cases due to BOP's inaction); see also Satija, *supra* note 7 (noting rise of compassionate release cases).

<sup>139</sup> See *Haney*, 454 F. Supp. 3d at 321-22 (discussing interest of judicial efficiency in waiving exhaustion requirement).

<sup>140</sup> See *United States v. Rodriguez*, No. 15-198, 2020 U.S. Dist. LEXIS 162923, at \*3-4 (E.D. La. September 5, 2020) (refusing to waive exhaustion requirement). Although thirty days had elapsed by the time the court heard the motion, the judge still dismissed the case because the defendant had not waited thirty days before filing. *Id.*

<sup>141</sup> See *id.* (explaining reasoning for not waiving exhaustion requirement).

<sup>142</sup> See *United States v. Pena*, 459 F. Supp. 3d 544, 549 (S.D.N.Y. 2020) (holding "the statute's exhaustion requirement is amenable to equitable exceptions.") Similar to the defendant in *Rodriguez*, the defendant in *Pena* did not wait thirty days before filing his motion with the court. *Id.* at 548. However, Judge Nathan found that without equitable exceptions to the exhaustion requirement, the pandemic may make it impossible for inmates to obtain judicial review in time. *Id.* at 549.

tions to the warrant requirement are vital to ensure vulnerable prisoners receive judicial review before the virus catches up with them.<sup>143</sup>

Although the pandemic has brought the issue to the forefront of judicial dialogue, and the letter the federal judges wrote to Congress only requests a temporary amendment, the underlying problems will remain after the pandemic is over.<sup>144</sup> The amendment the judiciary proposed to the compassionate release statute should be a permanent addition because the BOP has proven itself incapable of participating in the administrative process.<sup>145</sup> COVID-19 may be highlighting the BOP's ineptitude, but the pandemic is not responsible for the problem created by the First Step Act.<sup>146</sup>

Finally, the lack of clarity from Congress regarding the statutory interpretation of the exhaustion requirement creates sentence modification disparities, the exact situation the Federal Sentencing Guidelines sought to eliminate.<sup>147</sup> Moreover, because sentence modification is at the discretion of the sentencing court, there are few appellate decisions guiding district courts on whether they can waive the exhaustion requirement.<sup>148</sup> This manifests in the splits that have arisen not only between federal circuits but also *within* federal districts.<sup>149</sup> For example, within the Southern District of New York, prisoners find themselves in different situations based on which judge hears their petition.<sup>150</sup>

In two cases decided within five days of each other, judges in the Southern District of New York made contradicting statements on the en-

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<sup>143</sup> See *id.* (explaining importance of equitable exceptions for exhaustion requirement).

<sup>144</sup> See Neff & Blakinger, *supra* note 8 (describing limited compassionate release grants since First Step Act). Despite passing the First Step Act in 2018, at the start of the COVID-19 pandemic the BOP had only released 144 people to date. *Id.*

<sup>145</sup> See Letter from John W. Lungstrum & James C. Duff, *supra* note 62 (requesting temporary amendment to compassionate release statute).

<sup>146</sup> See Neff & Blakinger, *supra* note 8 (indicating lack of compassionate release grants since First Step Act).

<sup>147</sup> See *Federal Sentencing Guidelines*, *supra* note 2 (presenting brief overview of Federal Sentencing Guidelines). The Federal Sentencing Guidelines, while non-binding, provide a uniform sentencing policy based on various factors relating to guilt and harm. *Id.*; see also Pavlo, *supra* note 52 (discussing tensions between judges and BOP in decisions regarding compassionate release).

<sup>148</sup> See Pavlo, *supra* note 52 (highlighting problems faced by district courts regarding compassionate release). While there is dispute regarding whether district court judges should defer to BOP findings, it is clear that district court judges can make that decision independently. *Id.*

<sup>149</sup> See *United States v. Haney*, 454 F. Supp. 3d 316, 321 (S.D.N.Y. 2020) (finding exhaustion requirement waivable). *But see* *United States v. Roberts*, 18-CR-528-5, 2020 U.S. Dist. LEXIS 62318, at \*7 (S.D.N.Y. Apr. 8, 2020) (holding exhaustion requirement not waivable).

<sup>150</sup> See *Haney*, 454 F. Supp. 3d at 321 (holding court has power to waive exhaustion); *cf.* *Roberts*, 2020 U.S. Dist. LEXIS 62318, at \*7 (holding exhaustion requirement not waivable).

forceability of the waiting period.<sup>151</sup> In *United States v. Haney*, Judge Rakoff determined that “Congress cannot have intended the 30-day waiting period . . . to rigidly apply in the highly unusual situation in which the nation finds itself today.”<sup>152</sup> In contrast, in *United States v. Roberts*, Judge Furman refused to waive the exhaustion period, instead concluding that the correct interpretation of the statute’s legislative history is that Congress recognized the importance of expediting applications and *still* chose to require a waiting period.<sup>153</sup> This type of split undermines the mission that the drafters of the Federal Sentencing Guidelines set out to achieve: parity in sentencing.<sup>154</sup> Although the Federal Sentencing Guidelines focus on the sentences individuals receive, the same logic should apply with regard to the sentence-modification stage of the process.<sup>155</sup>

Another way to ameliorate the disparity in sentence modification would be to look again at state medical parole statutes and the reporting requirements they impose upon prison authorities.<sup>156</sup> The Massachusetts medical parole statute requires the commissioner of correction and the secretary of the executive office of public safety and security to file yearly reports with the state legislature detailing the number of individuals who applied for medical parole, as well as the number of individuals granted parole.<sup>157</sup> The statute also requires a report of how many prisoners the prison authorities denied medical parole, as well as the reasons for those denials.<sup>158</sup> Requiring these reports by statute would incentivize the BOP to consider compassionate release requests and either deny the inmate’s request or motion the court in a more timely manner.<sup>159</sup>

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<sup>151</sup> See *Haney*, 454 F. Supp. 3d at 321 (holding court has power to waive exhaustion); cf. *Roberts*, 2020 U.S. Dist. LEXIS 62318 at \*7 (holding exhaustion requirement not waivable).

<sup>152</sup> *Haney*, 454 F. Supp. 3d at 321.

<sup>153</sup> *Roberts*, 2020 U.S. Dist. LEXIS 62318 at \*7 (holding exhaustion requirement not waivable).

<sup>154</sup> See *Federal Sentencing Guidelines*, *supra* note 2 (discussing impact of Federal Sentencing Guidelines on defendants). The Federal Sentencing Guidelines, while non-binding, provide a uniform sentencing policy based on various factors relating to guilt and harm. *Id.*

<sup>155</sup> See UNITED STATES SENT’G, COMM’N, *supra* note 16 (listing objectives of U.S. Sentencing Commission).

<sup>156</sup> See MASS. GEN. LAWS ANN. ch. 127, § 119A(i) (2018) (outlining reporting requirement). The statute requires annual reports to the legislature accounting for inmates who requested medical parole and delineating how many of those inmates actually received parole. *Id.* The statute further requires the prison officials’ reason for denying medical parole. *Id.*

<sup>157</sup> See *id.* (outlining reporting requirement).

<sup>158</sup> See *id.* (outlining reporting requirement).

<sup>159</sup> See *Buckman v. Comm’r of Corr.*, 138 N.E.3d 996, 1008 (Mass. 2020) (explaining community participation in medical parole decisions). The court focused its opinion on the prisoner’s ability to request assistance from parole staff and noted that it was more efficient for the superintendent to prepare the parole plan than help the prisoner do so. *Id.*

C. *Courts need clarity and guidance from Congress on specific statutory interpretation to ensure equitable results across the federal system.*

The multitude of federal district court cases concerning compassionate release during 2020 revealed the inconsistencies of district court judges' interpretations of extraordinary and compelling circumstances warranting release.<sup>160</sup> The Application Note for the statute may provide appropriate guidance under normal circumstances, but it falls short during a public health crisis.<sup>161</sup> The Application Note explaining the definition of "extraordinary and compelling" within the compassionate release statute is not malleable to the current situation, wherein a seemingly controllable illness could prove deadly if an inmate contracts COVID-19.<sup>162</sup> A clarified Application Note would help bring the results of compassionate release motions within the objectives of the Federal Sentencing Commission.<sup>163</sup>

1. The Federal Sentencing Commission should clarify the standard for extraordinary and compelling circumstances in a global pandemic.

When judges rely on the Application Note to the compassionate release statute in determining whether an inmate's circumstances are extraordinary and compelling, they typically look to the inmate's illness and ask whether that illness diminishes their ability to provide self-care in prison.<sup>164</sup> The pandemic complicated this analysis, as a latent condition that may be well controlled could contribute to very severe illness or death when com-

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<sup>160</sup> See Pavlo, *supra* note 52 (describing inconsistencies in decisions regarding compassionate release).

<sup>161</sup> See 18 U.S.C. app. § 1B1.13 (defining extraordinary and compelling medical conditions); *United States v. Mondragon*, No. 18-CR-132(5), 2020 U.S. Dist. LEXIS 120273, at \*10-11 (E.D. Tex. July 8, 2020) (finding no extraordinary and compelling reasons in defendant's case despite medical conditions); *cf.* *United States v. Rodriguez*, 451 F. Supp. 3d 392, 395 (E.D. Pa. 2020) (holding defendant's medical condition and pandemic constitute extraordinary and compelling reasons).

<sup>162</sup> See 18 U.S.C. app. § 1B1.13 (defining extraordinary and compelling medical conditions). The Application Note defines extraordinary and compelling medical conditions as: terminal illnesses, serious medical conditions or cognitive impairments, and deterioration from the aging process affecting the inmate's ability to care for himself in prison. *Id.*

<sup>163</sup> See *Federal Sentencing Guidelines*, *supra* note 2 (noting purpose of Federal Sentencing Guidelines).

<sup>164</sup> See *United States v. Rodriguez*, 454 F. Supp. 3d 224, 228-29 (S.D.N.Y. 2020) (finding defendant did not meet burden of proving extraordinary and compelling circumstances). The court found that the defendant did not show that his asthma condition "substantially diminish[ed]" his ability to provide self-care in prison. *Id.*

bined with COVID-19.<sup>165</sup> The Federal Sentencing Commission should clarify that, in the setting of a pandemic, an underlying condition that does not diminish an inmate's ability to provide self-care, but may contribute to a significantly higher risk of death should the inmate be exposed to the virus, constitutes an extraordinary and compelling circumstance.<sup>166</sup>

Courts agree that, in the context of the pandemic, an inmate's health condition is a key factor in determining whether that inmate's circumstances are extraordinary and compelling as to justify compassionate release.<sup>167</sup> However, when courts require an active outbreak in a prison before they will consider compassionate release, they overlook the manner in which the virus spreads in dense populations, as well as the BOP's failures in testing inmates.<sup>168</sup> As Judge Levy stated in *United States v. Amarrah*, "Zero confirmed COVID-19 cases is not the same thing as zero COVID-19 cases."<sup>169</sup> At FCI Elkton, one of the facilities severely impacted by COVID-19, only 100 out of the 2,400 inmates had been tested for the virus at the height of the outbreak.<sup>170</sup> Because of the lack of testing in federal prisons, it would be wise for Congress to clarify that courts should consider the pandemic as a threat regardless of whether there is an active outbreak within the prison.<sup>171</sup>

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<sup>165</sup> See *United States v. Pena*, 459 F. Supp. 3d 544, 550 (S.D.N.Y. 2020) (noting shifting standards for compassionate release during pandemic and stating, "[t]he court's analysis is different in current circumstances"); see also *United States v. Echevarria*, No. 17-cr-44, 2020 U.S. Dist. LEXIS 77894, at \*5 (D. Conn. May 4, 2020) (discussing defendant's health conditions). The court in *Echevarria* notes that other Second Circuit courts have held that preexisting respiratory conditions, combined with the outbreaks of COVID-19 in prison, represent extraordinary and compelling reasons for release. *Echevarria*, 2020 U.S. Dist. LEXIS 77894, at \*5.

<sup>166</sup> See *Pena*, 459 F. Supp. 3d at 550 (noting shifting standards for compassionate release during pandemic).

<sup>167</sup> See *id.* (explaining intricacies of compassionate release during pandemic); *United States v. McIntosh*, No. 11-20085-01-KHV, 2020 U.S. Dist. LEXIS 176446, at \*16 (D. Kan. Sept. 25, 2020) (noting court's authority to consider COVID-19 in conjunction with medical conditions).

<sup>168</sup> See *United States v. Amarrah*, 458 F. Supp. 3d 611, 618 (E.D. Mich. 2020) (noting complexities of analyzing COVID-19 positivity rates); see also *Pandemic Response Report 20-086, Remote Inspection of Federal Correctional Complex Lompoc*, *supra* note 43 (describing problems with COVID-19 policy at FCC Lompoc). One of the largest issues the facility experienced in its efforts to mitigate transmission was a preexisting shortage of medical staff, which impacted the facility's ability to test and screen inmates for the virus. *Pandemic Response Report 20-086, Remote Inspection of Federal Correctional Complex Lompoc*, *supra* note 43.

<sup>169</sup> *Amarrah*, 458 F. Supp. 3d at 618.

<sup>170</sup> See Gerstein, *supra* note 36 (noting lack of testing at federal prisons).

<sup>171</sup> See *Amarrah*, 458 F. Supp. 3d at 618 (noting issues with testing at federal prisons). Judge Levy stated that she would not be giving any weight to COVID-19 infection statistics until FCI Loretto implements a universal testing regimen. *Id.*; see also *Pandemic Response Report 20-086, Remote Inspection of Federal Correctional Complex Lompoc*, *supra* note 43 (describing testing issues at FCC Lompoc); Gurman, *supra* note 74 (noting great potential for secret virus spread given lack of testing).

This clarification would help ensure fairness in decisions where courts require an inmate to prove that there is an outbreak at his facility and that the BOP cannot manage the outbreak.<sup>172</sup> The clarification would also work toward ensuring parity across jurisdictions with regard to requests arising from the same FCI facility.<sup>173</sup> For example, a judge in the Eastern District of Virginia and a judge in the Eastern District of Michigan came to the opposite conclusions regarding the conditions at FCI Loretto.<sup>174</sup> In *United States v. Feiling*, the court found that the defendant had multiple medical conditions that establish a particularized susceptibility to COVID-19 complications, but ultimately denied his motion because he failed to show a particularized risk of contracting the disease as there were no confirmed cases at FCI Loretto.<sup>175</sup> Subsequently, in *United States v. Amarrah*, the court noted that although there were no confirmed cases at FCI Loretto, there was no evidence that the facility was conducting widespread COVID-19 testing, so the existence of COVID-19 infections could not be ruled out.<sup>176</sup> Ensuring that courts view the pandemic as a particularized threat for inmates irrespective of the specific numbers coming out of each facility would remove from judges the responsibility of determining what number of infections qualifies as an outbreak.<sup>177</sup>

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<sup>172</sup> See *United States v. Mondragon*, No. 18-CR-132(5), 2020 U.S. Dist. LEXIS 120273, at \*13 (E.D. Tex. July 8, 2020) (finding no extraordinary and compelling reasons in defendant's case). The court specifically found that the defendant failed to prove that if there was an outbreak at his facility, the BOP would be unable to manage that outbreak. *Id.*

<sup>173</sup> See *Amarrah*, 458 F. Supp. 3d at 618 (noting inability to know how many positive cases facility may have). *But see* *United States v. Feiling*, 453 F. Supp. 3d 832, 841 (E.D. Va. 2020) (finding defendant failed in showing particularized risk of contracting COVID-19 at FCI Loretto). The court found that because there were no confirmed cases at FCI Loretto, defendant's motion relied solely on the possibility that the disease may spread to his facility. *Feiling*, 453 F. Supp. 3d at 841.

<sup>174</sup> See *Amarrah*, 458 F. Supp. 3d at 618 (finding defendant proved particularized risk of contracting COVID-19 at FCI Loretto). *But see* *Feiling*, 453 F. Supp. 3d at 841 (finding defendant failed in showing particularized risk of contracting COVID-19 at FCI Loretto).

<sup>175</sup> See *Feiling*, 453 F. Supp. 3d at 841 (finding defendant failed to show particularized risk of contracting COVID-19 at FCI Loretto).

<sup>176</sup> See *Amarrah*, 458 F. Supp. 3d at 618 (pointing out deficiencies in BOP testing procedures).

<sup>177</sup> See *United States v. Garcia*, 460 F. Supp. 3d 403, 409 (S.D.N.Y. 2020) (noting lack of outbreak at FCI Fort Dix). The court found that "Fort Dix is not a facility that has seen a massive outbreak of COVID-19. With 2,936 inmates, it has only 40 documented cases as of May 4." *Id.*; *cf.* *United States v. Pena*, 459 F. Supp. 3d 544, 549 (S.D.N.Y. 2020) (finding exhaustion requirement futile based on outbreak at Fort Dix).

## V. CONCLUSION

The pandemic laid bare the BOP's inability to manage its role as judge and jury for both home confinement and compassionate release decisions. Despite numerous statutory changes, the BOP has failed to carry its burden of moving appropriate inmates to home confinement. Congress must amend the home confinement statute to place affirmative duties on the BOP, including time frames for responding to inmate requests. When the BOP fails to respond to home confinement or compassionate release requests, inmates flood the court systems with disorganized pleadings, leaving judges unsure of whether they can hear the motions. For the sake of judicial efficiency and to compensate for the BOP's inability to respond in a timely manner, Congress must remove the thirty-day waiting period from the compassionate release statute. Finally, to ensure parity in sentence modification, Congress must clarify that the extraordinary and compelling circumstances standard is malleable in light of current affairs.

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