No. 18-6996

IN THE

United States Court of Appeals for the Fourth Circuit

STEVEN DAVID AVERY,
Appellant,

v.

JUSTIN ANDREWS,
Appellee.

On Appeal from the United States District Court for
The Eastern District of North Carolina

OPENING BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over the petition for writ of habeas corpus seeking review of unlawful Bureau of Prisons action under 28 U.S.C. §§ 1331 and 2241. The district court entered its judgment dismissing the habeas corpus petition on August 6, 2018. J.A. 59. The petitioner filed a timely notice of appeal on August 9, 2018. J.A. 60. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 2253.

STATEMENT OF ISSUES

After receiving a 151-month prison sentence, appellant Steven Avery was diagnosed with terminal cancer and determined to have a life expectancy of less than 18 months. In 18 U.S.C. § 3582(c)(1)(A)(i), Congress provided that, upon motion of the Bureau of Prisons (BOP), sentencing courts have authority to reduce a defendant's term of imprisonment if, after considering the factors set forth in 18 U.S.C. § 3553(a), the sentencing court determines that extraordinary and compelling reasons warrant the sentence reduction. The BOP recognized that Mr. Avery's terminal diagnosis represents an extraordinary and compelling circumstance but refused to file a sentence reduction motion on his behalf. This appeal presents two questions related to the BOP's statutory authority under § 3582(c)(1)(A)(i):

I. Whether the district court had subject matter jurisdiction to review the BOP's decision not to file a motion for compassionate release because (A) the statutory structure provides meaningful standards for review under the "extraordinary and compelling reasons" definition and so does not commit the decision to unreviewable agency discretion, and (B) Mr. Avery raised a challenge to the validity of the BOP's program statement, a legal question reviewable by the courts.

II. Whether the BOP's refusal to file a compassionate release motion on Mr. Avery's behalf was unlawful because the BOP's program statement authorized it to consider factors related to public safety, while the statutory structure of § 3582(c) reserves such factors for consideration by the sentencing court under 18 U.S.C. § 3553(a) and restricts the BOP's consideration to factors that bear on the existence of extraordinary and compelling reasons.

STATEMENT OF THE CASE

Procedural History

On February 12, 2018, while serving a federal prison sentence at the Federal Correctional Institution in Butner, North Carolina, Steven Avery filed a petition for writ of habeas corpus under 28 U.S.C. § 2241. J.A. 4-29. The petition challenged the BOP's refusal to move for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i). On March 14, 2018, the Warden responded and sought dismissal of the petition for habeas corpus, arguing that the district court lacked jurisdiction to review the agency's decision. J.A. 30-39. On August 6, 2018, the district court issued an opinion and order granting the motion to dismiss without a hearing on the matter. J.A. 54-58. The Court entered a formal judgment dismissing the action on the same day. J.A. 59.

Factual Background

On February 4, 2013, the United States District Court for the District of Oregon sentenced Steven Avery to 151 months' incarceration upon his plea of guilty to two counts of unarmed bank robbery (Case No. 3:11-cr-00274). J.A. 4. Several years later, prison doctors diagnosed Mr. Avery with prostate cancer, and he began radiation treatment. J.A. 4. In 2017, Mr. Avery learned that he has "highly aggressive" adenocarcinoma of the prostate State T2aN1MO Stage IV. J.A. 4. Since

then, the cancer has spread, Mr. Avery's health has steadily declined, and medical personnel have advised that his condition is terminal. J.A. 4.

Upon receiving the terminal diagnosis, Mr. Avery prepared a release plan involving residence with his sister at her home in Sacramento, California, where she would care for him in his last days. J.A. 4, 7. With help from prison personnel, Mr. Avery asked the BOP to move for reduction in sentence. J.A. 7. His request was submitted to the Warden, and the Warden recommended its approval. J.A. 31. The Warden's recommendation was forwarded to the BOP's Office of General Counsel for final review. J.A. 31.

The BOP General Counsel denied the request. J.A. 20. The BOP recognized that Mr. Avery has a terminal cancer diagnosis and a life expectancy of less than eighteen months, which fulfills the definition of a "terminal medical condition" under BOP Program Statement 5050.49, section 3(a):

> Mr. Avery, age 67, has been diagnosed with stage IV adenocarcinoma of the prostate. He also suffers from hypertension, diabetes, and hepatitis C. Although he has received chemotherapy and radiation, his prostate cancer is aggressive and castrate resistant. Accordingly, his condition is considered terminal with a life expectancy of less than l8 months. He remains housed on an outpatient unit where he is fully ambulatory and independent with his activities of daily living (ADLs).

J.A. 20. Despite this finding, the BOP refused to file a motion for sentence reduction under its authority in 18 U.S.C. § 3582(c)(1)(A)(i). The BOP expressly based this

decision on factors related to public safety listed in section 7 of Program Statement 5050.49 and purported to deny the sentence reduction on the merits:

> In light of the nature and circumstances of Mr. Avery's offense, his criminal history, his repeated violations while on supervision, and his disciplinary history, his release at this time would minimize the severity of his offense and pose a danger to the community. Moreover, he remains fully ambulatory and independent with his ADLs and thus retains the ability to reoffend. Therefore, *although Mr. Avery meets the criteria for a [reduction in sentence] under section 3(a), his [reduction in sentence] request is denied*.

J.A. 21 (emphasis added). Mr. Avery had no pathway for administrative review of the BOP General Counsel's denial. J.A. 33 (citing 28 C.F.R. § 571.63(d)) (denial by the General Counsel is a "final administrative decision" that an inmate may not appeal through the Administrative Remedy Procedure).

With the assistance of counsel, Mr. Avery filed a Petition for Writ of Habeas Corpus and Other Equitable Relief Pursuant to 28 U.S.C. §§ 1331 and 2241 in the District Court for the Eastern District of North Carolina.. J.A. 4, 6. Mr. Avery asserted that the BOP had overstepped its statutory authority under § 3582(c)(1)(A)(i) by denying the request outright, based on factors reserved for consideration by the sentencing court upon review of a reduction motion, such as protecting public safety and reflecting the severity of the offense. J.A. 9. Mr. Avery asserted that the BOP's role under the statute is limited to determining whether the prisoner qualifies as having "extraordinary and compelling reasons," as informed by

policy statements promulgated by the Sentencing Commission, and that only the sentencing judge in the district where the sentence was imposed may consider the § 3553(a) factors and make a decision on the merits, once a reduction motion for an eligible prisoner has been filed. J.A. 9, 14. Mr. Avery argued that § 3582(c)(1)(A)(i) would risk violating the separation of powers if the courts construed it to confer on the executive branch the judicial role of determining the length of a prisoner's sentence following a change in the prisoner's circumstances. J.A. 9, 14.

The BOP opposed relief, arguing that "the BOP's decision whether to make a motion for a sentence reduction pursuant to § 3582(c)(1)(A)(i) is not subject to judicial review." J.A. 31. The BOP asserted that it properly may consider not only the facts related to whether a prisoner's circumstances present "extraordinary and compelling reasons" for a sentence reduction, but also whether release would "minimize the severity of [the prisoner's] offense" or "pose a danger to the community." J.A. 37-38. The BOP contended that its decision not to move for a sentence reduction based on these factors is conferred to agency discretion as a matter of law and is judicially unreviewable. J.A. 38.

Without holding a hearing on the matter or permitting oral argument, the district court granted the BOP's motion to dismiss the habeas corpus petition. J.A. 53-58. Citing non-precedential authority, and conducting no independent statutory

or constitutional analysis, the district court held that it lacked subject matter jurisdiction to review the BOP's decision. J.A. 56-57. The district court also stated that, even if the BOP's decision were reviewable, the decision was not an abuse of discretion because "§ 3582(c)(1)(A) provides the BOP discretion to reduce a term of imprisonment if 'extraordinary and compelling reasons warrant such a reduction,'" and, according to the court, the BOP validly exercised that supposed statutory discretion after considering pertinent factors. J.A. 57.

Standard of Review

This Court reviews de novo the district court's dismissal of a petition for habeas corpus relief. *Fontanez v. O'Brien*, 807 F.3d 84, 86 (4th Cir. 2015); *Bostick v. Stevenson*, 589 F.3d 160, 163 (4th Cir. 2009). The Court also reviews de novo a district court's determination of subject matter jurisdiction. *Angelex Ltd. v. United States*, 723 F.3d 500 (4th Cir. 2013). This Court reviews questions of statutory interpretation de novo. *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 191 (4th Cir. 2011). This Court reviews a district court's review of agency action de novo "from the same position as that of the district court." *Fishermen's Dock Co-op., Inc. v. Brown*, 75 F.3d 164, 168 (4th Cir. 1996).

SUMMARY OF ARGUMENT

The sentence reduction authority in 18 U.S.C. § 3582(c)(1)(A)(i), often called "compassionate release," is a safety valve that permits courts to revisit an otherwise final sentence when "extraordinary and compelling reasons" for a sentence reduction arise. The statutory structure divides authority between the sentencing court and the BOP. It confers on the sentencing court the judicial role of determining whether the prisoner's circumstances warrant a sentence reduction, considering the prisoner's extraordinary and compelling circumstances and assessing the sentencing factors that courts traditionally consider under 18 U.S.C. § 3553(a). The statute limits the BOP's role to filing a motion for potentially qualifying prisoners whose circumstances are extraordinary and compelling. Congress in 28 U.S.C. § 994(t) delegated to the Sentencing Commission the authority to define "extraordinary and compelling reasons."

The BOP program statement for implementation of its compassionate release authority sets out criteria that agency personnel should consider in assessing whether a prisoner's circumstances are extraordinary and compelling. BOP Program Statement 5050.49, at 3-10 (8/12/13 rev.). The program statement then goes on to state the agency should also consider a host of other factors, largely duplicative of the factors in § 3553(a), to determine whether a grant of a sentence reduction would

"pose a danger to the safety of any other person or the community" or "minimize the severity of the offense." BOP Program Statement 5050.49(7), at 10.

The district court erred in finding that it lacked subject matter jurisdiction to review the BOP's decision whether to move for sentence reduction under § 3582(c)(1)(A)(i). There is a strong presumption in favor of judicial review of agency action that can be rebutted only in the rare circumstance when a statute's language or structure provides no meaningful standards for a reviewing court to apply. The BOP did not carry its heavy burden to establish that § 3582(c)(1)(A)(i) falls within one of the very narrow category of agency actions exempted from judicial review. The statutory structure provides meaningful review standards under the framework of "extraordinary and compelling reasons," as that phase is defined by the Sentencing Commission.

Construing the statute as requiring the BOP to file a compassionate release motion when it identifies a prisoner whose circumstances are "extraordinary and compelling," leaving to the sentencing judge the ultimate decision whether and when to grant that motion, comports with the statute's structure, history and purpose. It ensures that the ultimate sentencing authority rests with the courts, and it assigns to the BOP the executive function of identifying prisoners who have qualifying circumstances. Determining sentence length is not the type of function over which

the executive BOP agency would be expected to exercise unreviewable discretion based on any institutional expertise.

Even if the BOP's decision whether extraordinary and compelling reasons warrant a sentence reduction motion in a particular case were exempt from review, Mr. Avery raised a legal challenge to the validity of the BOP's program statement. Whether an agency's rule violates a statutory or constitutional requirement is a legal question that is never exempted from judicial review. Here, the executive agency purported to rule on the merits of whether sentence reduction should be granted, conceding the existence of "extraordinary or compelling" circumstances. In doing so, the agency violated the statutory language as well as the constitutionally based separation of powers. To the same extent, the district court's conclusion that, if it had authority to review, it would defer to the BOP's exercise of discretion, was also in error because the statute does not confer discretion for the merits decision on the BOP, and the statute, consistently with the constitutionally-based separation of powers, explicitly confers on the sentencing court the ultimate decision on the merits.

ARGUMENT

I. The Bureau Of Prisons' Refusal To File A Motion For Compassionate Release Does Not Fall Within The Narrow Category Of Agency Decisions Exempted From Judicial Review.

The district court erred in concluding that the BOP has unreviewable discretion over whether to seek compassionate release. The court erred because the statutory structure, including its text, context, and history, provide meaningful standards for review based on the existence of "extraordinary and compelling reasons."

A. The Supreme Court Has Articulated A Strong Presumption Of Judicial Review That Is Rebutted Only In The Very Narrow Category Of Cases Where A Statute Cannot Be Construed To Provide Any Meaningful Standards For Review.

"Congress rarely intends to prevent courts from enforcing its directives to federal agencies." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). The Supreme Court "applies a 'strong presumption' favoring judicial review of administrative action." *Id.* (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986)). A party rebuts that presumption only "when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct." *Id.* at 1651. The judicial review provisions of the Administrative Procedure Act (APA) give way only when: "(1) statutes preclude

judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a).

The presumption in favor of judicial review exists to provide a needed check on agency overreaching:

> Absent such review, the Commission's compliance with the law would rest in the Commission's hands alone. We need not doubt the EEOC's trustworthiness, or its fidelity to law, to shy away from that result. We need only know—and know that Congress knows—that legal lapses and violations occur, and especially so when they have no consequence.

Mach Mining, 135 S. Ct. at 1652-63. Thus, an agency "bears a 'heavy burden'" to show "that Congress wanted an agency to police its own conduct." *Id.* at 1651 (quoting *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)).

As this Court has elaborated, the narrow exception to the presumption of judicial review arises "'in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Angelex*, 723 F.3d at 506 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)). "[T]he mere fact that a statute contains discretionary language does not make agency action unreviewable." *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 719 (9th Cir. 2011); *see also Quinteros-Mendoza v. Holder*, 556 F.3d 159, 161 (4th Cir. 2009) (holding that the Board of Immigration Appeals's "broad discretion

to enact appropriate administrative regulations . . . does not shield the BIA's implementation and execution of those regulations from judicial review").

Judicial review is foreclosed if the "agency action of which plaintiff complains fails to raise a legal issue which can be reviewed by the court by reference to statutory standards and legislative intent." *Inova Alexandria Hosp. v. Shalala*, 244 F.3d 342, 346 (4th Cir. 2001) (citation and quotation marks omitted). In deciding whether meaningful standards for review exist, courts should consider "the particular language and overall structure of the statute in question," *Speed Mining, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 528 F.3d 310, 317 (4th Cir. 2008), "the nature of the administrative action," *id.*, and rules promulgated by the agency, *Inova Alexandria Hosp.*, 244 F.3d at 346. "Agency actions are more likely to be committed to agency discretion when they involve factual disputes, particularly those of a politically sensitive nature," *id.* at 347, or when the decision is within the agency's peculiar expertise, leaving the agency "better equipped than the courts" to balance the relevant factors, *Speed Mining*, 528 F.3d at 318 (citing *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985)) (holding that the discretionary decision about which operator to cite for a Mine Act violation is unreviewable in part because the decision rests on a "complicated balancing of a number of factors which are peculiarly within" the agency's expertise).

The Supreme Court's opinion in *Mach Mining* is illustrative. In *Mach Mining*, the Supreme Court rejected a claim that the Equal Employment Opportunity Commission's efforts to conduct informal conciliation proceedings before suing for unlawful employment practices were not subject to judicial review. 135 S. Ct. at 1651-52. The Court explained that Congress's conferral of broad discretion cannot, alone, rebut the presumption of judicial review: "Yes, the statute provides the EEOC with wide latitude over the conciliation process, and that feature becomes significant when we turn to defining the proper scope of judicial review. But no, Congress has not left *everything* to the Commission." *Mach Mining,* 135 S. Ct. at 1652 (emphasis in original) (citations omitted).

B. The BOP Did Not Carry Its Heavy Burden To Establish That Its Decision Whether To Move For Compassionate Release Is Committed To Agency Discretion By Law And Entirely Exempted From Judicial Review.

The district court concluded that that the BOP's decision whether to file a motion for compassionate release is "judicially unreviewable." J.A. 56-57. But the district court failed to engage in any relevant legal analysis under the *Mach Mining* "heavy burden" standard to determine congressional intent. Applying that analysis, the decision is reviewable. Considering the text, context, and history of § 3582(c)(1)(A), the statutory structure shows that the "extraordinary and compelling reason" standard governs the BOP's decision.

Section 3582(c)(1)(A) provides:

> (A) [T]he court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment . . . after considering the factors set forth in [18 U.S.C. §] 3553(a) to the extent that they are applicable, if it finds that--
>
> (i) extraordinary and compelling reasons warrant such a reduction; or
>
> (ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g)[.]

Congress did not leave "extraordinary and compelling reasons" undefined; it assigned to the Sentencing Commission authority to establish criteria for identifying prisoners with extraordinary and compelling reasons for a sentence reduction:

> The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

28 U.S.C. § 994(t). In 2006, the Sentencing Commission fulfilled its delegated authority with the promulgation of U.S.S.G. § 1B1.13, which listed a prisoner's terminal illness among the examples of "extraordinary and compelling reasons" warranting a reduction in the term of imprisonment.

On its face, § 3582(c)(1)(A) contains no indication that Congress intended to preclude judicial review of the BOP's decision to move for sentence reduction. In other contexts, Congress has spoken expressly when it intends to preclude review of BOP decisions. In 18 U.S.C. § 3625, for example, Congress expressly barred judicial review of any substantive "'determination, decision, or order' made pursuant to 18 U.S.C. §§ 3621-3624." *Reeb v. Thomas*, 636 F.3d 1224, 1227 (9th Cir. 2011). Congress's silence on the matter in relation to compassionate release decisions strongly supports the presumption that Congress did not intend to bar judicial review here. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

The statutory structure provides meaningful criteria for review because it contemplates that the BOP will identify and file motions on behalf of individuals who have "extraordinary and compelling reasons" for a sentence reduction. The statute expressly divides authority between the judiciary and the executive branch. It provides that "the court" has the authority to reduce the term of imprisonment after considering the factors outlined in 18 U.S.C. § 3553(a). The § 3553(a) factors include the nature and circumstances of the offense; the history and characteristics

of the defendant; and the purposes of sentencing including the need for just punishment, to protect the public against further crimes of the defendant, and to provide correctional and medical care in the most effective manner. In 18 U.S.C. § 3582(c)(1)(A), Congress required the court, not the BOP, to consider these factors and then to decide whether (and when) release on a reduced sentence is "warrant[ed]."

The only statutory authority conferred on the BOP is the authority to file a motion for sentence reduction. Although the statute does not expressly state that the BOP's decision should be based on the existence of extraordinary and compelling reasons, that is the most natural reading of the statute. *See Kennedy*, 657 F.3d at 191 (holding that statutory construction must consider the statute "as a whole," rather than any particular phrase in isolation). If that were not the case—if the BOP could choose to file a motion or refuse to file a motion for any reason whatsoever—then the statute would be arbitrary and meaningless. It would confer authority on the courts to reduce the sentence of certain prisoners, without specifying any mechanism for ensuring that courts have an opportunity to exercise that authority.

The legislative history of § 3582(c) supports the primacy of the judicial role in determining whether a sentence should be reduced, and, in turn, relegating the BOP's function to determining the existence of qualifying circumstances. Congress

viewed § 3582(c) as a mechanism to fill the "substantial void in the sentencing system" left by the repeal of discretionary judicial review under old Rule 35(b). Comprehensive Crime Control Act of 1983, Hearing on S. 829 before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary, 98th Cong., at 491 (1983). "The Sentencing Reform Act . . . provides . . . *for court determination*, subject to consideration of Sentencing Commission standards, of the question whether there is justification for reducing a term of imprisonment in situations such as those described." *Id.* at 56 (emphasis added). Congress intended the statute to vest discretion for sentence reductions in the courts, not the BOP, as a check on unnecessary harshness:

> The value of the forms of "safety valves" contained in this subsection lies in the fact that they assure the availability of specific review and reduction of a term of imprisonment for "extraordinary and compelling reasons" and to respond to changes in the guidelines. The approach taken *keeps the sentencing power in the judiciary where it belongs*, yet permits later review of sentences in particularly compelling situations.

Sen. Comm. on Judiciary, S. Rep. 98-225, 98th Cong., 1st Sess., at 121 (1983), 1984 U.S.C.C.A.N. 3182, 3304 (emphasis added).

This history reinforces the plain meaning of the statute – especially the explicit reference to the sentencing court's discretionary authority under § 3553(a) – that the power to reduce the sentence is a judicial power and that the BOP's role is only

ministerial (that is, to bring cases that meet the threshold qualification to the sentencing judge's attention for judicial fact-finding and a ruling on the merits).

Construing the statute to limit the BOP authority based on the "extraordinary and compelling reasons" criteria set forth by the Commission makes sense. The executive carries out the task of determining which prisoners have qualifying criteria, permitting the sentencing judge to exercise the sentencing function of deciding which eligible prisoners' sentences should be reduced. *See* Comments on Docket No. BOP 1168, 28 CFR part 571, Compassionate Release, at 4 (Feb. 3, 2014) ("[T]he structure and legislative history of the sentence reduction authority, 18 U.S.C. § 3582(c)(1)(A), leave little doubt that Congress intended that the Bureau's role be limited to identifying prisoners with extraordinary and compelling circumstances and of bringing their cases to the courts.").

Nor is the determination of whether a prisoner's sentence should be reduced the type of decision over which the BOP can claim particular expertise. To the contrary, in a related context, the Supreme Court recognized that sentencing is traditionally within the exclusive province of the judiciary and should "not be left to employees of the same Department of Justice that conducts the prosecution." *Setser v. United States*, 566 U.S. 231, 242 (2012). Although the BOP has unique access to information about the inmates in its custody, that expertise supports confining the

agency's discretion to the determination of whether "extraordinary and compelling reasons" exist, a decision easily susceptible to judicial review. On the other hand, federal district court judges have both the long experience and the independence appropriate to applying the § 3553(a) factors to individual defendants. *See Setser*, 566 U.S. at 240 (in the concurrency context, it "is much more natural for a judge to apply the § 3553(a) factors," "[b]ut the Bureau is not charged with applying § 3553(a).").

In 2016, while amending the commentary in § 1B1.13 to provide a more expansive definition of "extraordinary and compelling reasons," the Sentencing Commission opined that the BOP should leave to the expertise of the sentencing judge the final decision on the merits of a motion once the BOP identified "extraordinary and compelling reasons":

> The Commission encourages the Director of the Bureau of Prisons to file such a motion if the defendant meets any of the circumstances set forth in Application Note 1. The court is in a unique position to determine whether the circumstances warrant a reduction (and, if so, the amount of reduction), after considering the factors set forth [in] 18 U.S.C. § 3553(a) and the criteria set forth in this policy statement, such as the defendant's medical condition, the defendant's family circumstances, and whether the defendant is a danger to the safety of any other person or to the community.

U.S.S.G. § 1B1.13, comment. 4. The BOP's executive role, as contrasted with the judiciary's well-recognized expertise in matters of sentencing, leaves it unlikely that

Congress intended the BOP to be the sole decisionmaker regarding sentence reduction authority.

C. The District Court's Subject Matter Jurisdiction Analysis Was Flawed Because It Relied On Precedent Interpreting A Parole Statute That Was Superseded By § 3582(c)(1)(A) And The Sentencing Reform Act.

In combination, § 3582(c)(1)(A) and § 994(t) provide meaningful standards for review of BOP compassionate release decisions, as supplemented by the standards in the BOP's own program statement. *See Pinnacle Armor*, 648 F.3d at 719 ("established agency policies" can provide meaningful standards for judicial review). But the district court here never purported to analyze independently whether the BOP met its "heavy burden" to rebut the presumption of judicial review. Instead, the court simply adopted the conclusions from two non-precedential circuit decisions. J.A. 57 (citing *Crowe v. United States*, 430 F. App'x 484 (6th Cir. 2011), and *Fields v. Warden Allenwood USP*, 684 F. App'x 121 (3d Cir. 2017)).[1] This Court should not do the same. Unpublished opinions should be followed only based on the persuasiveness of their reasoning. None of the cases that the district court cited

[1] The district court cited a third case, *United States v. Wood*, No. 2:18-cv-73, 2018 WL 793608 (E.D. Va. Feb. 8, 2018)), that involved a motion for sentence reduction under 18 U.S.C. § 3582(c)(2) based on retroactive amendments to the Guidelines. The opinion is not relevant to the reviewability of BOP decisions under § 3582(c)(1)(A).

recognized the presumption of judicial review or followed the *Mach Mining* standard.

Additionally, each of the cases that the district court cited, in turn, relied on precedent that interpreted 18 U.S.C. § 4205(g), a sentence reduction provision under the Parole Act that was superseded by § 3582(c)(1)(A) and the Sentence Reform Act. *See, e.g.*, *Crowe*, 430 F. App'x at 485 (citing *Fernandez v. United States*, 941 F.2d 1488, 1493 (11th Cir. 1991) (interpreting § 4205(g)), *Simmons v. Christensen*, 894 F.2d 1041, 1043 (9th Cir. 1990) (same), and *Turner v. U.S. Parole Comm'n*, 810 F.2d 612, 614-16 (7th Cir. 1987) (same)). The Sentencing Reform Act abolished the Parole Commission prospectively, replacing it with judicial determinate sentences guided by the Sentencing Commission. *Mistretta v. United States*, 488 U.S. 361, 367 (1989). "[W]hen Congress amends statutes, our decisions that rely on the older versions of the statutes must be reevaluated in light of the amended statute." *United States v. McNeil*, 362 F.3d 570, 574 (9th Cir. 2004). When case law interpreting a statute is "clearly irreconcilable with the text and history of subsequent legislation," this Court should not follow the prior decisions. *United States v. Pepe*, 895 F.3d 679, 686 (9th Cir. 2018).

The text and context of § 4205(g) contrast with § 3582(c)(1)(A) in every way relevant to reviewability. First, § 4205(g) "devotes only a single clause" to the

sentence reduction authority, including no criteria for consideration. *Turner*, 810 F.2d at 615. Unlike the two specific clauses set forth in § 3582(c)(1)(A)(i) and (ii), § 4205(g) states simply: "At any time upon motion of the Bureau of Prisons, the court may reduce any minimum term to the time the defendant has served." 18 U.S.C. § 4205(g). As the Seventh Circuit noted in *Turner*, "[t]his clause is entirely bereft of any standards a court could apply in reviewing the Bureau's decision." 810 F.2d at 615. "Thus there is no language committing the Bureau to make a section 4205(g) motion in any particular circumstances—and no guidelines a court could apply rationally as a basis for review." *Id.* at 617. In contrast, Congress explicitly delegated to the Sentencing Commission in § 994(t) the authority to define what constitutes "extraordinary and compelling reasons" for purposes of § 3582(c)(1)(A)(i).

Moreover, the BOP's role has shifted since the decision in *Turner*. The Court in *Turner* explained that, under the parole regime, "two complex and interlocking systems . . . exert control over the time a convicted federal offender is actually incarcerated": (1) sentencing, controlled by the federal courts, and (2) parole, controlled by the Parole Commission. *Id.* at 616. The *Turner* court characterized the BOP as serving an advisory role to the Parole Commission "in matters regarding the length of incarceration," *Turner*, 810 F.2d at 615 (citing 18 U.S.C. §§ 4205(d),

4207(1)), and stated that, under § 4205(g), the BOP serves a similar role by "bring[ing] the matter to the court's attention." *Id.* at 615-16.

By contrast, Congress enacted § 3582 to do away with the "complex and interlocking systems" of parole and to return sentencing discretion from the executive branch back to the judiciary. *See* S. Rep. 98-225, at 56, 1984 U.S.C.C.A.N. 3182, 3239. Eliminating executive parole power over sentence lengths was a principal objective of the Sentencing Reform Act of which § 3582(c) is a part. *Setser*, 566 U.S. at 243 n.5. In *Setser*, the Court confirmed that the BOP no longer plays even an advisory role in matters involving the length of a defendant's sentence. *Id.* at 242. The Court found it "implausible" that Congress would have intended the effectiveness of its sentencing statutes to "depend[] upon the 'discretion' of the Bureau." *Setser*, 566 U.S. at 238 n.3.

The district court's evisceration of judicial review under § 3582(c)(1)(A) presents just the danger that the Supreme Court identified in *Mach Mining*. 135 S. Ct. at 1652-53. Without judicial review, the BOP's critical decisions on compassionate release would rest in the BOP's hands alone. The BOP would have authority to grant or deny compassionate release for any reason, no matter how unfair or unfounded, or for no reason at all. And even presuming the BOP's best

efforts, "legal lapses and violations [will] occur, and especially so when they have no consequence." *Id.*

Because the statutory structure provides meaningful standards to review the BOP's decision whether to file a sentence reduction motion under § 3582(c)(1)(A), the agency failed to meet the "heavy burden" necessary to rebut the presumption of judicial review. This Court should reverse the district court and hold that § 3582(c)(1)(A) requires judicial review of the BOP's decision whether to move for compassionate release.

D. Mr. Avery's Challenge To The Statutory And Constitutional Validity Of The BOP's Program Statement Presents A Legal Question Subject To Judicial Review.

Even if the BOP's individual decisions under § 3582(c)(1)(A) were committed to agency discretion and thus shielded from judicial review, Mr. Avery's challenge to the validity of the BOP's program statement that authorizes it to consider factors duplicative of § 3553(a) is a legal question appropriate for this Court's review. *See Elecs. of N. Carolina, Inc. v. S.E. Power Admin.*, 774 F.2d 1262, 1267 (4th Cir. 1985) (holding that agency action committed to agency discretion by law "is not completely shielded from judicial review" because courts may review "an agency decision that violates a statutory or constitutional command").

The court recognized a similar distinction in *Reeb*, 636 F.3d at 1224. The petitioner in *Reeb* claimed that the BOP wrongfully discharged him from its residential drug abuse program (RDAP). *Id.* at 1226. Congress exempts individual RDAP decisions from judicial review under 18 U.S.C. § 3625. Because challenged the individual decision in his case, the Ninth Circuit concluded that the district court lacked jurisdiction to adjudicate the case. But the court explicitly recognized that "judicial review remains available for allegations that BOP action is contrary to established federal law, violates the United States Constitution, or exceeds its statutory authority[.]" *Id.* at 1228.

In a later case, the court recognized that it had authority to review the BOP's decision to deny early release eligibility upon completion of RDAP to a prisoner based on its conclusion that the BOP's program statement unreasonably included a prior conviction for unlawful restraint as a "crime of violence." *Abbott v. Fed. Bureau of Prisons*, 771 F.3d 512, 514 (9th Cir. 2014). Rejecting the BOP's challenge to the court's jurisdiction, the court held, "Abbott makes a categorical challenge to the BOP's interpretation of its own regulation, which is not foreclosed from review." *Id.*; *see also Rodriguez v. Copenhaver*, 823 F.3d 1238, 1242 (9th Cir. 2016) (holding that the district court had "jurisdiction to decide whether the Bureau of Prisons acted

contrary to established federal law, violated the Constitution, or exceeded its statutory authority").

Just as in *Abbott*, Mr. Avery is categorically challenging the BOP's authority to make sentence reduction decisions reserved for the courts based on factors relevant to the exercise of discretion under § 3553(a), rather than simply confining its decision to the existence of extraordinary and compelling reasons. That challenge presents a legal question appropriate for judicial review.

II. The District Court Erred In Deferring To An Invalid Bureau Of Prisons Policy Statement That Usurps The Judicial Function Of Assessing 18 U.S.C. § 3553(a) Factors And Determining The Defendant's Sentence.

As an alternative basis for denying relief, the district court stated that it would "not disturb the BOP's decision" if it had authority to review that decision. But the district court erred in its construction of the BOP's statutory authority, and it inappropriately deferred to a program statement that conflicts with the agency's statutory and constitutional authority. The district court's approach would create substantial separation of powers problems because it confers ultimate sentencing authority on the executive branch when that authority is the sole province of the judicial branch under the Sentencing Reform Act.

A. The District Court Misconstrued The Statute.

As a matter of statutory construction, the court erred in concluding that the statute "provides the BOP discretion to reduce a term of imprisonment if 'extraordinary and compelling reasons warrant such a reduction.'" J.A. 57. Section 3582(c)(1)(A) expressly reserves that discretion to the court in the district of sentencing. § 3582(c)(1)(A) (providing that "*the court* . . . may reduce the term of imprisonment . . . if *it* finds that . . . extraordinary and compelling reasons warrant" such action) (emphasis added). The only statutory authority conferred on the BOP is the authority to move for sentence reduction. Thus, the statutory text and structure divides authority between the BOP and confers on the sentencing court the authority to decide whether a sentence should be reduced. *See Nken v. Holder*, 556 U.S. 418, 426 (2009) (holding that statutory interpretation turns on "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole") (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). The district court misinterpreted the statute.

B. The District Court Improperly Deferred To An Invalid Agency Interpretive Rule That Applied § 3553(a) Factors Reserved Under The Statute For Consideration By The Sentencing Courts.

The BOP's refusal to move for compassionate release was rendered in accordance with section 7 of Program Statement 5050.49, which states that the

agency may consider factors such as public safety in deciding whether to file a sentence reduction motion for compassionate release. The district court inappropriately deferred to the BOP's decision under that program statement. Under the correct construction of the statute, the BOP may not consider § 3553(a) factors related to the merits of granting a sentence reduction motion because those factors are reserved under the statutory scheme for consideration by the courts; the BOP must base its decision must solely on the existence of extraordinary and compelling reasons, as defined by the Sentencing Commission.

An agency's interpretive rules, such as those in BOP Program Statement 5050.49, lack the force of law and "do not warrant *Chevron*-style deference." *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000). Instead, interpretive rules are "'entitled to respect' . . . only to the extent that those interpretations have the "power to persuade.'" *Id.* (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

This Court and the Supreme Court have repeatedly confirmed that BOP program statements are internal agency guidelines that warrant little judicial deference under the *Skidmore* framework. *Reno v. Koray*, 515 U.S. 50, 60-61 (1995) (affirming policy defining "official detention"); *Cunningham v. Scibana*, 259 F.3d 303, 309 (4th Cir. 2001) (affirming policy defining "crime of violence"); *Hogge v. Wilson*, 648 F. App'x 327, 332 (4th Cir. 2016) (rejecting good conduct time credit

policy). In conducting *Skidmore* review in each of those cases, the courts first determined whether the challenged BOP policy flows from a statutory construction that "packs sufficient power to persuade us." *Cunningham*, 259 F.3d at 307 (concluding that the BOP's classification of the prisoner's offense as a "crime of violence" "is supported by sound reasoning"); *see also Koray*, 515 U.S. at 61 (concluding that the BOP's definition of "official detention" follows the "most natural and reasonable reading of the statute"); *Hogge*, 648 F. App'x at 330 (holding that the BOP program statement for calculating good conduct time credit conflicts with the statute).

The Court's unpublished opinion in *Hogge* shows that the analysis should be conducted without deference to the agency's construction of the statute, even when the policy concerns an area of agency expertise, which is not the case here. In *Hogge*, a panel of this Court reviewed and rejected the BOP's method of calculating good conduct time credit on concurrent sentences under the *Skidmore* standard. 648 F. App'x at 330-32. The Court held that the BOP's program statement "conflicts with the [good conduct time] statute" by cancelling out good conduct time credit earned during the concurrent portion of the defendant's sentence and by vesting the time "up front" rather than upon release. *Id*. The Court held that, contrary to the statutory purpose, "the BOP's method of calculation grants Hogge an illusory benefit for his

good behavior during the concurrent portion of his sentence, as it has no effect on the length of time he will spend in prison." *Id.* at 332. Because the BOP's program statement conflicted with the statute, the Court found "[t]he BOP's method of calculation . . . insufficiently persuasive under *Skidmore*," *id.* at 330, and it remanded the case for the district court to grant Mr. Hogge's habeas petition.

Similarly, the Supreme Court's decision in *Gonzales v. Oregon* provides another example of the correct framework for analyzing an agency's interpretive rules, which requires a thorough and non-deferential consideration of the full statutory framework. 546 U.S. 243 (2006). At issue in *Gonzales* was an interpretive rule issued by the Attorney General stating that prescribing controlled substances to assist suicide, as permitted by Oregon law, violates the federal Controlled Substances Act. The Supreme Court first determined that *Skidmore*'s power-to-persuade standard provided the correct framework for review because the interpretive rule was not a formally-promulgated regulation. *Gonzales*, 546 U.S. at 268. The Court then construed the statute as not permitting the Attorney General to "declar[e] illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law." *Id.* at 258. In making this determination, the Court reviewed "the statute's text and design," and "the understanding of the CSA as a statute combating recreational drug abuse." *Id.* at 269-272. The Court refused

to scrutinize a single provision "without the illumination of the rest of the statute." *Id.* at 274.

The role of the Attorney General in the statutory scheme bolstered this conclusion: the "Attorney General is an unlikely recipient of such broad authority, given the Secretary [of Health and Human Service]'s primacy in shaping medical policy under the CSA, and the statute's otherwise careful allocation of decisionmaking powers." *Id.* at 274. The Court thus deemed the Attorney General's interpretive rule invalid as in conflict with the statute. *Id.* at 274-75.

Here, as in *Gonzales*, the Court should first thoroughly review § 3582(c)(2)(A) to determine if the power that the BOP has arrogated to itself is "inconsistent with the design of the statute in . . . fundamental respects." 546 U.S. at 265. The Court's analysis must consider the statute's text and structure and consider whether § 3582(c)(1)(A)(i) establishes Congress's intent for the BOP to decide the merits about whether a defendant's sentence should be reduced, particularly given the expertise of the courts to make those determinations and the BOP's status as an executive agency. *See Gonzales*, 546 U.S. at 269 ("The deference here is tempered by the Attorney General's lack of expertise in this area[.]"); *see also Bd. of Governors of Univ. of N. Carolina v. U.S. Dep't of Labor*, 917 F.2d 812, 816 (4th Cir. 1990) ("The policies of legislative delegation and agency competence that

militate in favor of the doctrine of administrative deference give way when the question before an agency no longer involves issues on which the agency's expertise gives it a special competence.") (internal citations omitted)).

The BOP's program statement requiring it to exercise sentencing authority by considering sentencing factors in 18 U.S.C. § 3553(a)—such as the nature of the offense, the history and characteristics of the defendant, the need for the sentence to reflect the seriousness of the offense, and the protection of the public—conflicts with the statutory structure and risks violating the constitutional separation of powers requirement.

Congress enacted the compassionate release statute as part of the Sentencing Reform Act of 1984, legislation aimed, in significant part, at relocating the power of deciding the lengths of sentences from the executive branch to the judiciary. *Mistretta*, 488 U.S. at 367. The statutory text creates a clear division of authority: it assigns to the BOP the role of presenting the sentencing judge with a motion for prisoners, and it assigns to the sentencing court the authority to determine whether a sentence should be reduced "after considering the factors set forth in section 3553(a) to the extent that they are applicable[.]" The relevant § 3553(a) factors that the statute requires the sentencing court to consider include "the nature and circumstances of the offense, "the history and characteristics of the defendant," and "the need for the

sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense, [and] to protect the public from further crimes." 18 U.S.C. § 3553(a)(1) and (2). Further establishing this division of authority, Congress delegated to the Sentencing Commission the duty to define "extraordinary and compelling reasons." 28 U.S.C. § 994(t).

The Supreme Court in *Setser* and the Sentencing Commission in its 2016 amendments both recognized that it is the judiciary, not the BOP, that has the expertise (and the constitutional prerogative) to determine the length of a defendant's sentence after weighing the factors in § 3553(a). In the Reasons for Amendment that accompanied the Commission's 2016 amendments to U.S.S.G. § 1B1.13, the Sentencing Commission reiterated its concern that sentencing courts are best positioned to determine whether a sentence reduction is appropriate:

> The Commission heard testimony and received public comment concerning the inefficiencies that exist within the Bureau of Prisons' administrative review of compassionate release applications, which can delay or deny release, even in cases where the applicant appears to meet the criteria for eligibility. While only the Director of the Bureau of Prisons has the statutory authority to file a motion for compassionate release, the Commission finds that "the court is in a unique position to assess whether the circumstances exist, and whether a reduction is warranted (and, if so, the amount of reduction)."

U.S.S.G. Supplement to Appendix C, Amendment 799, at 136 (effective Nov. 1, 2016).[2]

Program Statement 5050.49 fails to respect the statute's division of authority between the courts and the executive (here, the BOP) because it allows the BOP to decline to bring a sentence reduction motion based on factors that substantially overlap with the sentencing court's § 3553(a) assessment:

> For all [reduction in sentence] requests, the following factors should be considered:
>
> ■ Nature and circumstances of the inmate's offense.
> ■ Criminal history.
> ■ Comments from victims.
> ■ Unresolved detainers.
> ■ Supervised release violations.
> ■ Institutional adjustment.
> ■ Disciplinary infractions.
> ■ Personal history derived from the [presentence report].
> ■ Length of sentence and amount of time served. This factor is considered with respect to proximity to release date or Residential Reentry Center (RRC) or home confinement date.
> ■ Inmate's current age.
> ■ Inmate's age at the time of offense and sentencing.

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[2] The Commission's concern about "inefficiencies" in the BOP's administration of its compassionate program joined a growing chorus of criticism. *See generally* Department of Justice, Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program*, at 11 (April 2013) ("The BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered."); Human Rights Watch & FAMM, *The Answer Is No: Too Little Compassionate Release in US Federal Prisons* (Nov. 2012).

> ■ Inmate's release plans (employment, medical, financial).
> ■ Whether release would minimize the severity of the offense.
>
> When reviewing [reduction in sentence] requests, these factors are neither exclusive nor weighted. These factors should be considered to assess whether the [reduction in sentence] request presents *particularly* extraordinary and compelling circumstances.
>
> Overall, for each [reduction in sentence] request, *the BOP should consider whether the inmate's release would pose a danger to the safety of any other person or the community*.

Program Statement 5050.49(7), at 10 (emphasis added). It makes scant sense to construe the statute so that an executive agency is authorized to decide in the first instance whether a sentence reduction motion should be granted. Instead, the statutory purpose is best served by relegating the BOP's discretion solely to considering whether the inmate's circumstances meet the criteria for extraordinary and compelling reasons, as defined by the Commission, and then leaving the sentence reduction issue to be decided on the merits by the sentencing court.[3]

If Congress's intent to preclude the BOP from considering § 3553(a) factors like public safety were not apparent enough from the face of § 3582(c)(1)(A)(i), then the second prong of the same statute, § 3582(c)(1)(A)(ii), would make that intent crystal clear. Unlike subparagraph (i), subparagraph (ii) expressly authorizes and

[3] Further, the BOP program statement provides no standard for determining when extraordinary and compelling circumstances are "particularly extraordinary and compelling."

directs the BOP to consider public safety in deciding whether to take a prisoner's case back to the sentencing court for reduction of sentence. Specifically subsection (ii) of the statute provides sentence reduction authority when:

> (ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, *and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community*, as provided under section 3142(g)[.]

(Emphasis added.) Congress added subparagraph (ii) to § 3582(c)(1)(A) in 1994, and the previous material in that section was re-designated as (A)(i). *See* Pub. L. 103-3226, Title VII ("Mandatory Life Imprisonment for Persons Convicted of Certain Felonies"). The express text of this provision evidences Congress's intent that the BOP make a determination about public safety and that the matter not be presented to the court for consideration until that determination has been made, in relation to decisions governed by that subparagraph. That Congress did *not* include a similar provision in subparagraph (i) is strong evidence that Congress did not intend the BOP to play the same role, particularly given that subsection (i) instead requires consideration of § 3553(a) factors *by the court*. *See Dean v. United States*, 137 S. Ct. 1170, 1177 (2017) ("We have said that '[d]rawing meaning from silence is particularly inappropriate' where 'Congress has shown that it knows how to direct

sentencing practices in express terms.'") (quoting *Kimbrough v. United States*, 552 U.S. 85, 103 (2007)).

Any remaining doubt about the correct interpretation of § 3582(c)(1)(A) should be informed by the constitutionally protected separation of powers and the directive to construe statutes to avoid serious constitutional problems. *See Clark v. Martinez*, 543 U.S. 371, 380-82 (2005) (describing the canon of constitutional avoidance). The BOP's usurpation of the decision whether a motion should be granted violates *Setser*'s statutory and separation of powers principles that confer upon the sentencing judge the ultimate decision of the amount of time a defendant should spend in prison.

In *Setser*, the Supreme Court relied on the separation of powers in distinguishing between the judicial authority to declare whether a sentence is concurrent or consecutive and the executive authority over the execution of the sentence. The Supreme Court explicitly rejected the BOP's designation authority under 18 U.S.C. § 3621(b) as a source of power to decide whether a silent judgment should run consecutively to a later sentence. In rejecting the government's claim that § 3621(b) gave the BOP the power to resolve the concurrent-consecutive question, *Setser* found that the plain language of § 3584(a)—which like § 3582(c)(1)(A)(i) incorporates § 3553(a)—meant the statutory decision was judicial, not executive:

"When § 3584(a) specifically addresses decisions about concurrent and consecutive sentences, and makes no mention of the Bureau's role in the process, the implication is that no such role exists." 566 U.S. at 239. Repeatedly, *Setser* made clear that sentencing courts, and not the BOP, are the arbiters of decisions, which, like compassionate release, determine the actual time in custody:

- "Congress contemplated that only district courts [as opposed to the BOP] would have the authority to make the concurrent-vs.-consecutive decision . . . ." *Id.* at 237.

- "§ 3621(b) . . . *is* a conferral of authority on the Bureau of Prisons, but does not confer authority to choose between concurrent and consecutive sentences." *Id.* at 238 (emphasis in original).

- "[T]he Bureau is not charged with applying [the sentencing factors of] § 3553(a). . . . It is much more natural for a judge to apply the § 3553(a) factors in making all concurrent-vs.-consecutive decisions, than it is for some such decisions to be made by a judge . . . and others by the Bureau of Prisons . . . ." *Id.* at 240-41.

- "[S]entencing [should] not be left to employees of the same Department of Justice that conducts the prosecution." *Id.* at 242.

- "Yet-to-be-imposed sentences are not within the system . . . and we are simply left with the question whether judges or the Bureau of Prisons is responsible for them. For the reasons we have given, we think it is judges." *Id.* at 242 n.5.

In evaluating whether the BOP exceeded its statutory and constitutional authority, the Supreme Court's guidance on the separation of powers in a closely analogous

context strongly supports reversal and remand to the district of sentencing to apply the § 3553(a) factors and decide the ultimate question whether the sentence reduction should be granted.

The BOP exceeded its authority here by refusing to file a compassionate release motion for Mr. Avery despite the terminal cancer diagnosis, which establishes the existence of extraordinary and compelling circumstances. The denial was based on factors specifically referenced in § 3553(a), which Congress has reserved for consideration by the sentencing judge, not the BOP. The Program Statement purporting to permit consideration of such factors should be held invalid, and the BOP's statutory role should be limited to the determination of whether "extraordinary and compelling reasons" exist.

The uniquely judicial nature of the decision that the BOP has arrogated to itself is best understood by considering the effect of Mr. Avery's terminal diagnosis on the § 3553(a) sentencing factors that the sentencing court would consider if presented at the initial sentencing. There is no indication that the sentencing court intended Mr. Avery's conviction to result in a life sentence. The sentence reasonably contemplated that Mr. Avery would return to the community, resume his family relationships, and live the remainder of his life in freedom. The onset of Mr. Avery's

terminal illness upends those expectations and requires a reevaluation—by the sentencing court—of the factors set forth in 18 U.S.C. § 3553(a).

Conclusion

For all these reasons, this Court should reverse the denial of habeas corpus relief and remand the case to the sentencing court in the District of Oregon on an expedited basis for consideration of whether a sentence reduction under § 3582(c)(1)(A)(i) should be granted or for such other appropriate relief as law and justice require under 28 U.S.C. §§ 2106 and 2243.

REQUEST FOR ORAL ARGUMENT

The decision of this case may be assisted by oral arguments based on the complexity of the statutory background, the competing statutory and constitutional functions of the judiciary and the executive in the compassionate release context,

and the history of BOP conduct unconstrained by effective judicial review. Mr. Avery requests such argument.

Respectfully submitted this 14th day of September, 2018.

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CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains no more than 13,000 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(f), and

2. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman.

/s/ Elizabeth G. Daily
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CERTIFICATE OF MIXED SERVICE

I certify that today, September 14, 2018, I electronically filed this by CM/ECF, which will send notice to all counsel of record.

I also certify that today, September 14, 2018, I have mailed this by First-Class Mail, postage prepaid to

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