Note

A Prisoner's Dilemma: Why COVID-19 Must Serve as a Catalyst to Address Compassionate Release Limitations in Federal Prison

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INTRODUCTION

The introduction of COVID-19 into prisons was catastrophic. The University of Minnesota's Center for Infectious Disease Research and Policy warned that between April and June of 2020, coronavirus cases in U.S. state and federal prisons were 5.5 times higher than that of the general population, and death rates were three times higher.[1] In June 2020, the *New York Times* reported that five of the largest coronavirus clusters in the United States occurred not in meatpacking plants or in nursing homes, as popularly believed, but in correctional facilities throughout the country.[2] During one week in October 2020 alone, sixty correctional facilities indicated new

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1. Mary Van Beusekom, *U.S. Prison Inmates Among Those Hit Hard with COVID-19*, CTR. FOR INFECTIOUS DISEASE RSCH. & POL'Y (July 9, 2020), https://www.cidrap.umn.edu/news-perspective/2020/07/us-prison-inmates-among-those-hit-hard-covid-19 [https://perma.cc/KD3K-R8FH].

2. Timothy Williams, Libby Seline & Rebecca Griesbach, *Coronavirus Cases Rise Sharply in Prisons Even as They Plateau Nationwide*, N.Y. TIMES (June 16, 2020), https://www.nytimes.com/2020/06/16/us/coronavirus-inmates-prisons-jails.html [https://perma.cc/JC8P-Q8AX] (noting that the number of prisoners infected doubled during the month of June 2020).

outbreaks.[3] By June 2021, fifteen months after the first known COVID-19 prisoner death, the number of prisoners who died from the coronavirus had risen to more than 2,700 and the number of cases had risen to nearly 400,000.[4]

In response to COVID-19's rapid spread throughout correctional facilities, many federal inmates sought compassionate release.[5]

3. Kelly Davis, *Coronavirus in Jails and Prisons*, APPEAL (Oct. 26, 2020), https://theappeal.org/coronavirus-in-jails-and-prisons-70 [https://perma.cc/L2K3-TMGB].

4. *See A State-by-State Look at Coronavirus in Prisons*, MARSHALL PROJECT (June 1, 2021), https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons [https://perma.cc/PGY5-NP4D] (noting that at least 2,715 prisoners had died of causes related to the coronavirus through June 2021 and that 398,627 cases had been reported in correctional facilities among prisoners). Notably, these statistics may be higher than actually reported. *See* Maura Turcotte, Rachel Sherman, Rebecca Griesbach & Ann Hinga Klein, *The Real Toll from Prison Covid Cases May Be Higher than Reported*, N.Y. TIMES (July 7, 2021), https://www.nytimes.com/2021/07/07/us/inmates-incarcerated-covid-deaths.html [https://perma.cc/K3MD-2JHC] ("Some deaths were not counted as part of prison virus tallies because hospitalized inmates were officially released from custody before they died.").

What makes these statistics all the more concerning is the sobering reality that a prison's current ability to effectively respond to a health crisis like COVID-19 is minimal. Testing and care for inmates and correctional facility workers has been inconsistent. *See* Williams et al., *supra* note 2 ("In interviews, prison and jail officials acknowledged that their approach has largely been based on trial and error, and that an effective, consistent response for U.S. correctional facilities remains elusive."). The Director of the Bureau of Prisons (BOP), Michael Carvajal, has largely stayed silent since the pandemic began, preferring instead to write and issue directives that address COVID-19's spread within facilities. *See, e.g.*, Walter Pavlo, *AG William Barr's Memo to Bureau of Prisons: 'Time Is of the Essence*', FORBES (Apr. 4, 2020), https://www.forbes.com/sites/walterpavlo/2020/04/04/ag-william-barrs-new-memo-to-bureau-of-prisons-time-is-of-the-essence [https://perma.cc/7ZCR-8EV4]. Although correctional health experts urged administrators of prisons to create plans for the virus, many simply leaned on existing plans for other infectious disease outbreaks, failing to adjust for new issues stemming from the coronavirus. *See* Martin Kaste, *Prisons and Jails Worry About Becoming Coronavirus 'Incubators,'* NPR (Mar. 13, 2020), https://www.npr.org/2020/03/13/815002735/prisons-and-jails-worry-about-becoming-coronavirus-incubators [https://perma.cc/X8XD-PUKR]. And furthermore, vulnerable, elderly inmate populations with significant comorbidities seeking release have been met with uneven responses by administrative officials and the judiciary. *See infra* Part I.C, Part II.B.

5. Joseph Neff & Keri Blankinger, *Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent Were Denied*, MARSHALL PROJECT (Oct. 7, 2020), https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied [https://perma.cc/UH27-3RND] (indicating that between March and May 2020 alone, over 10,500 prisoners had submitted compassionate release applications); *see also* COMPASSIONATE RELEASE DATA REP.: CALENDAR YEARS 2020 TO 2021, U.S. SENT'G COMM'N (Sept. 2021) [hereinafter, COMPASSIONATE RELEASE REPORT],

Compassionate release has long been available as a remedy to combat prison overcrowding and to give vulnerable and elderly prison populations an ability to return home under, among other things, "extraordinary and compelling" circumstances.[6] In submitting these petitions, prisoners largely argued that their comorbidities, paired with the coronavirus, represented an "extraordinary and compelling" circumstance necessitating compassionate release.[7] The inundation of these compassionate release requests following the spread of COVID-19 in prisons, and courts' varied responses, highlight the fatalistic limitations to the compassionate release statute as currently written—particularly related to its exhaustion of administrative remedy requirement.

Following congressional passage of the First Step Act in late 2018,[8] which notably expanded previous compassionate release requirements—by allowing inmates in federal prison to petition federal courts directly for compassionate release[9]—compassionate

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https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210928-Compassionate-Release.pdf [https://perma.cc/S2EX-79XD] ("With the advent of the COVID-19 pandemic, the courts received thousands of compassionate release motions, most filed by offenders.").

6. 18 U.S.C. § 3582(c)(1)(A)(i); *see infra* Part I.B (discussing compassionate release as a legislative solution); *see also* Jalila Jefferson-Bullock, *Are You (Still) My Great and Worthy Opponent?: Compassionate Release of Terminally Ill Offenders*, 83 UMKC L. REV. 521, 521 (2015) ("Compassionate release is rooted in the notion that changed circumstances post-conviction may render a criminal sentence inhumane, excessive, unjust, and, therefore, unwarranted. Compassionate release provides for the early release of prisoners for 'extraordinary and compelling' reasons, which may include terminal illness, debilitating medical condition, age, and unique family caregiving duties." (quoting 18 U.S.C. § 3582(c)(1)(A)(i))).

7. *See, e.g.*, United States v. Jemal, No. 15-570, 2020 WL 1701706, slip op. at *1 (E.D. Pa. Apr. 8, 2020) (describing petitioner's argument that the introduction of COVID-19 into his facility, and his existing diagnosis of Chronic Obstructive Pulmonary Disease, constitutes "extraordinary and compelling circumstances" (quoting 18 U.S.C. § 3582(c)(1)(A)(i))); United States v. Jackson, No. 5:02-cr-30020, 2020 WL 2735724, at *1 (W.D. Va. May 26, 2020) (reporting petitioner's argument that his "various medical issues," including asthma, type two diabetes, and obesity, "constitute 'extraordinary and compelling' reasons warranting sentence reduction" (quoting 18 U.S.C. § 3582(c)(1)(A)(i))).

8. *See infra* notes 66–74 and accompanying text; First Step Act of 2018, Pub. L. No. 115-391, § 603, 132 Stat. 5194 (2018).

9. Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 106 (2019) ("Section 603 of the First Step Act changed the process . . . so that, instead of depending upon the BOP Director . . . a court can now resentence 'upon motion of the defendant.'" (quoting First Step Act of 2018, Pub. L. No. 115-391, § 603, 132 Stat. 5194 (2018) (codified as amended in scattered sections of 18, 21, 34, and 42

release requests typically follow an orderly process.[10] Inmates who request compassionate release must first petition the Bureau of Prisons (BOP) for a sentence reduction.[11] Then, if the BOP either (1) fails to respond within thirty days, or (2) denies the petition by issuing a final administrative decision, the petitioner may file a motion with the court to consider compassionate release.[12] Upon the petitioner's motion, the court either grants or denies their petition.[13]

Outside a pandemic, the potential thirty-day lapse between petitioning the BOP and petitioning the court is, perhaps, not wholly significant.[14] However, the spread of COVID-19 demonstrated its limitations. Consider a compassionate release petition from April 2020, one month after COVID-19 exploded in the United States: a seventy-three-year-old BOP inmate with Parkinson's, asthma, high blood pressure, high cholesterol, and diabetes, convicted of possession with intent to distribute cocaine, petitions the BOP for compassionate release due to "extraordinary and compelling reasons."[15] With coronavirus infection rates in prison at 5.5 times that of the general population,[16] that thirty-day wait for this individual could be deadly.[17]

As compassionate release requests burgeoned during the first few months of the coronavirus pandemic, federal courts split as to

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U.S.C.))); *see* 18 U.S.C. § 3582(c) (giving the BOP power to motion a court to modify a prison sentence); *infra* Part I.B (discussing the First Step Act in detail).

10. 28 C.F.R. §§ 571.60–.63 (2020) (detailing procedures for implementing 18 U.S.C. 3582(c)(1)(A) and 4205(g)).

11. 28 C.F.R. § 571.61 (2020).

12. *See* 18 U.S.C. § 3582(c).

13. *Id.*

14. *Cf.* Hopwood, *supra* note 9, at 109–10 (noting that an "extraordinary and compelling" circumstance reason for compassionate release sentence reduction may also include non-life-threatening situations, such as when a person's prison sentence falls under a statute that has since been amended by Congress as too punitive (quoting 18 U.S.C. § 3582(c)(1)(A)(i))).

15. United States v. Ben-Yhwh, 453 F.Supp.3d 1324, 1328 (D. Haw. 2020).

16. Beusekom, *supra* note 1 (reporting infection rates between April and June of 2020, when this case was litigated).

17. *See, e.g.*, *Ben-Yhwh*, 453 F. Supp. 3d at 1329 ("[C]ontracting COVID-19 would likely result in catastrophic health consequences, including [petitioner's] death."); *see also Federal Prison Officials Granted Only 36 of 31,000 Compassionate Release Requests During Pandemic*, EQUAL JUST. INITIATIVE (June 6, 2021), https://eji.org/news/federal-prison-officials-granted-only-36-of-31000-compassionate-release-requests-during-pandemic [https://perma.cc/BTP8-G279] (noting that as of June 2021, thirty-five inmates died while waiting for compassionate release decisions following BOP petitions).

whether courts, under the First Step Act, could waive exhaustion requirements during a time of crisis.[18] That is to say, does the federal inmate who petitions the BOP for compassionate release necessarily have to wait for a BOP denial or non-response over thirty days before petitioning the court? Some courts attempted to sidestep the exhaustion of administrative remedy requirement by reading the court's ability to waive the exhaustion requirement into the statute.[19] Other courts, however, indicated that the exhaustion of administrative remedy requirement for compassionate release was mandatory and thus, un-waivable.[20]

This split among federal district courts and the courts' considerations into whether they may waive the exhaustion of administrative remedy requirement during a national emergency provides an interesting and noteworthy case study to the limitations posed by the compassionate release statute, as written. While the present waivability issue has somewhat resolved itself—most prisoners who petitioned for compassionate release due to the coronavirus have applied, and the thirty-day window has passed—the issue remains for future national health emergencies. With many scholars noting the rise of pandemic prevalence[21] and with

18. *See generally infra* Part II (discussing the court split as to whether a waiver can be granted).

19. *See generally infra* Part II. In the case noted above regarding the seventy-three-year-old petitioner with numerous comorbidities, the court held that the exhaustion of administrative remedy requirement was, in fact, waivable. *Ben-Yhwh*, 453 F. Supp. 3d at 1329–31 ("Ben-Yhwh meets all three [waiver] exceptions. In addition to being 73 years old, he has serious medical conditions which include Parkinson's Disease, asthma, and diabetes . . . . Thus waiver of the exhaustion requirement is justified.").

20. *See, e.g.*, United States v. DeMaria, 17-CR-569, 2020 WL 1888910, slip op. at *1 (S.D.N.Y. Apr. 16, 2020) ("The tool Demaria seeks to invoke—the compassionate release provision . . . —is particularly inflexible in its allowance for when the Court may step in . . . accordingly, the Court must DENY Demaria's application without prejudice . . . ."); United States v. Britton, 473 F. Supp. 3d 14, 21 (D.N.H. 2020) ("Defendant must meet the statutory exhaustion requirement in one of the two ways spelled out in the statute . . . the statutory text admits no other possible 'exceptions' and leaves no room for judicial discretion . . . ."). *See generally infra* Part II.

21. *See* Michael Penn, *Statistics Say Large Pandemics Are More Likely Than We Thought*, DUKE GLOB. HEALTH INST. (Aug. 23, 2021), https://globalhealth.duke.edu/news/statistics-say-large-pandemics-are-more-likely-we-thought [https://perma.cc/U6FQ-PJAU] ("[T]he probability of a pandemic with similar impact to COVID-19 is about 2% in any year, meaning that someone born in the year 2000 would have about a 38% chance of experiencing one by now. And that probability is only growing which . . . highlights the need to adjust perceptions of pandemic risks and expectations for preparedness."); Eleni Smeitham & Amanda Glassman, *The Next*

continued concerns about coronavirus variants,[22] it is imperative that we learn from the past and address these limitations now before another new health emergency arises.[23]

This Note examines the limitations of the exhaustion of administrative remedy requirement, using the federal district court split following the coronavirus as a case study. Part I of this Note will explore the public health emergency affecting prisons, the use of compassionate release as an enacted legislative solution to counter this emergency, and efforts by federal inmates to use compassionate release as a means to mitigate the effects of the COVID-19 pandemic. Part II will analyze whether the exhaustion of administrative remedies for compassionate release applications is subject to a judicially created equitable exception waiving this requirement, using the court split following COVID-19's development as a test case. It will assess the consistency of each side's holding with the Act's plain language, congressional intent, and precedential case law. Lastly, Part III will propose that, given the Act's clear ambiguity toward judicially created equitable exceptions, and the Supreme Court's unlikely ability to shed light on the issue given the thirty-day requirement in question, Congress should clarify the compassionate release statute to ensure that all circuits may use judicial discretion to waive the exhaustion requirement in future emergencies. Policymakers will be able to utilize this Note to review ambiguities within the First Step Act to consider ways in which legislators must clarify its language to better serve its purpose when responding to future public health crises.

Pandemic Could Come Soon and Be Deadlier, CTR. FOR GLOB. DEV. (Aug. 25, 2021), https://www.cgdev.org/blog/the-next-pandemic-could-come-soon-and-be-deadlier [https://perma.cc/AGE3-GFQX].

22. *What You Need to Know About Variants*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 1, 2021), https://www.cdc.gov/coronavirus/2019-ncov/variants/about-variants.html [https://perma.cc/3BMX-4FVM] (noting increased transmission among the Delta and Omicron variants); *cf.* Emily Widra, *Data Update: As the Delta Variant Ravages the Country, Correctional Systems Are Dropping the Ball (Again)*, PRISON POL'Y INITIATIVE (Oct. 21, 2021), https://www.prisonpolicy.org/blog/2021/10/21/october2021_population [https://perma.cc/468Z-BH4T] (studying the virus's relationship with prison populations, particularly related to the Delta variant's impact).

23. *See* Emily Anthenes, *Omicron Is a Dress Rehearsal for the Next Pandemic*, N.Y. TIMES (Dec. 18, 2021), https://www.nytimes.com/2021/12/14/health/coronavirus-omicron-next-pandemic.html [https://perma.cc/SM8Y-8K4L] ("Omicron's emergence is an opportunity to take stock of both the gains we have made and the ways in which we are still falling short. It is also a call to action: Whatever progress we have made is not enough.").

I. TRACING THE HISTORY OF OVERCROWDING IN PRISONS AND THE USE OF COMPASSIONATE RELEASE

Public health experts and legal scholars have long warned about the negative impact of overcrowding within the United States' prison system. This Part provides foundational knowledge about problems that face inmates and prison administrators outside of COVID-19. It traces both prison overcrowding, as well as the history, development, and use of compassionate release within prisons. It then orients the reader to the interplay of these foundational issues with disease development in prisons, as seen with the coronavirus. Lastly, it briefly presents the current court split related to the exhaustion of administrative remedy waiver that Part II will further assess.

A. PRISON CONDITIONS AND WHY THEY ARE NOT CONDUCIVE TO MITIGATING DISEASE SPREAD

Prisons have long been known as "incubators" for infectious disease.[24] Overcrowding,[25] poor treatment programs, and inadequate screening all contribute to prison disease proliferation.[26] A brief exploration of these conditions within America's prison system will illuminate why it is difficult to toll the spread of a communicable disease, like the coronavirus, once it is introduced into a prison, an aspect that correctional healthcare experts warned

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24. Claire Fortin, *A Breeding Ground for Communicable Disease: What to Do About Public Health Hazards in New York Prisons*, 29 BUFF. PUB. INT. L.J. 153, 162–65 (2010) (showing that the cumulative number of correctional inmates with HIV/AIDS went from 325 in 1985 to 4,588 in 1995); *id.* at 164–65 (noting that twenty to forty percent of prison inmates were infected with Hepatitis C in 2005); John E. Dannenberg, *Prisons as Incubators and Spreaders of Disease and Illness*, HUM. RTS. DEF. CTR. (Aug. 15, 2007), https://www.prisonlegalnews.org/news/2007/aug/15/prisons-as-incubators-and-spreaders-of-disease-and-illness [https://perma.cc/4PFL-HDCT] ("Prisons and jails have been the incubators of disease for centuries.").

25. Fortin, *supra* note 24, at 157 ("The overcrowded conditions, inadequate screening and substandard treatment programs contribute to the spread of communicable diseases in prison."); *see also* Lauren Salins & Shepard Simpson, *Efforts to Fix a Broken System:* Brown v. Plata *and the Prison Overcrowding Epidemic*, 44 LOY. U. CHI. L.J. 1153, 1157 (2013) (noting that the U.S. prison population grew over 700 percent from 1970 to 2007).

26. Fortin, *supra* note 24, at 157; *see also* Salins & Simpson, *supra* note 25, at 1161 ("Overcrowding can lead to double-celling inmates, random housing assignments without proper assessments, deterioration of facilities, poor staff retention, and unsanitary conditions.").

about when COVID-19 first began to spread.[27]

Prison overcrowding refers to instances where the design capacity of a prison has exceeded its maximum occupancy.[28] Common causes of prison overcrowding include the increase in crime rate,[29] the "getting-tough-on-crime policy" stemming from the early 1970s,[30] the United States' population demographic,[31] mass incarceration,[32] and the facilities' failure to proportionally increase accommodation capacity.[33] Consequences of overcrowding are more than benign: overcrowding causes delayed medical services, unsanitary kitchen conditions, fire hazards, increased rates of violence, increased mental health problems, and the creation of new health problems.[34]

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27. *See* Davis, *supra* note 3 ("[C]orrectional health care experts warned that all the worst aspects of the U.S. criminal justice system . . . would leave detention facilities, and their surrounding communities, vulnerable to outbreaks."). Even with the introduction of vaccines, this difficulty in tolling the coronavirus has only increased given the new variants' high infection rates. *See* Carl Zimmer & Andrew Jacobs, *Omicron: What We Know*, N.Y. TIMES (Jan. 3, 2022), https://www.nytimes.com/article/omicron-coronavirus-variant.html [https://perma.cc/YBK5-QLB3] (noting that although the illness from the Omicron variant is less severe, the variant's infection rate is two to three times that of the Delta variant).

28. *See* Nadine Curran, *Blue Hairs in the Bighouse: The Rise in the Elderly Inmate Population, Its Effect on the Overcrowding Dilemma and Solutions to Correct It*, 26 NEW ENG. J. CRIM. & CIV. CONFINEMENT 225, 228 (2000).

29. *Id.* at 230 ("Although the increase in crime rate is not the sole cause of prison overcrowding, its rise has been a contributing factor.").

30. *Id.* at 230–31 (noting that the getting-tough-on-crime policy has led to an increase in life-without-parole sentencing, ensuring that many prisoners will grow old and die in prison, further crowding prisons); *see also* Bryant S. Green, *As the Pendulum Swings: The Reformation of Compassionate Release to Accommodate Changing Perceptions of Corrections*, 46 U. TOL. L. REV. 123, 124 (2014) ("[T]ough-on-crime legislation, including mandatory minimum sentences and [the] war on drugs, have paved the way for an unsustainable, ever-expanding prison system.").

31. Curran, *supra* note 28, at 230–32 (showing a higher population of individuals who are a "high-crime-committing" age, causing an increase in crime rates, resulting in a higher prison population).

32. *See generally* Jonathan Simon, *The New Overcrowding*, 48 CONN. L. REV. 1191 (2016) (linking the overcrowding of prison to mass incarceration and suggesting that this new era of overcrowding is far more severe than the past).

33. *See, e.g.*, Pamela M. Rosenblatt, *The Dilemma of Overcrowding in the Nation's Prisons: What Are the Constitutional Conditions and What Can Be Done?*, 8 N.Y. L. SCH. J. HUM. RTS. 489, 490 (1991) ("[T]he costs of new prison facilities are phenomenal, and as a result, the rate of construction of new penal institutions lags far behind the rate of admittance of new inmates.").

34. *See* Simon, *supra* note 32 (noting that mass incarceration has created a new "hyper-chronic" overcrowding that often leads to a routine lack of mental health and medical care); Rosenblatt, *supra* note 33, at 494 (citing McKay, *Prison Overcrowding:*

Overcrowding within the prison system has led to increased concerns related to the spread of communicable diseases. Infectious diseases, like Hepatitis C, HIV/AIDS, and tuberculosis, have each made their way through prisons, leaving devastation in their wake.[35] Long before individuals called the coronavirus a public health crisis tied to prisons,[36] Hepatitis C and HIV/AIDS were also named prison-related public health crises.[37] Unlike Hepatitis C and HIV, which are largely spread by the sharing of contaminated needles,[38] airborne illnesses like tuberculosis and the coronavirus are more gravely influenced by prison overcrowding given a prison's poor ventilation and the inability to social distance.[39]

The impact of prison overcrowding and the spread of communicable disease is only exacerbated by the rise of an elderly inmate population.[40] Even outside an all-encompassing pandemic,

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The Threat of the 1980's, *in* PRISONERS AND THE LAW § 6, 11 (I. Robbins ed., 1985)) ("[L]ong-term crowding causes and accelerates the spread of communicable disease and promotes heart attacks and high blood pressure.").

35. *See generally* Fortin, *supra* note 24 (discussing the history of communicable diseases in U.S. prisons). *See also* Scott Burris, *Prisons, Law and Public Health: The Case for a Coordinated Response to Epidemic Disease Behind Bars,* 47 U. MIAMI L. REV. 291, 294 (1992) ("The prevalence of each of these diseases is disproportionately large among the disadvantaged, who also make up a large proportion of the nation's prison population.").

36. *See, e.g.*, Katherine Zuk, *Jails and COVID-19: An Overlooked Public Health Crisis in Philadelphia*, HARV. L.: BILL OF HEALTH (Sept. 21, 2020), https://blog.petrieflom.law.harvard.edu/2020/09/21/covid19-jails-prisons-philadelphia [https://perma.cc/H23L-MCP6] (recognizing the disproportionate burden the pandemic placed on prisons early on).

37. *See, e.g.*, Andrew Brunsden, *Hepatitis C in Prisons: Evolving Toward Decency Through Adequate Medical Care and Public Health Information*, 54 UCLA L. REV. 465, 465 (2006) ("Heptatis C . . . in prisons is a public health crisis tied to current drug policy's emphasis on the mass incarceration of drug users."); Robert Katz, *Hepatitis C Litigation: Healing Inmates as a Public Health Strategy*, 29 ANNALS HEALTH L. & LIFE SCI. 127, 127 (2020) ("Hepatitis C virus . . . is the most lethal infectious disease in the United States."); Kathleen Knepper, *Responsibility of Correctional Officials in Responding to the Incidence of the HIV Virus in Jails and Prisons*, 21 NEW ENG. J. CRIM. & CIV. CONFINEMENT 45, 45 (1995) ("The human immunodeficiency virus (HIV) is unquestionably the health care epidemic of the century.").

38. Alan Elsner, *Supermax Prison: A Growing Human Rights Issue*, CHAMPION, Aug. 2004, at 40.

39. *See* Burris, *supra* note 35, at 301 ("[T]here is no question that overcrowded, poorly ventilated prisons foster [tuberculosis] transmission.").

40. Jalila Jefferson-Bullock, *The Creation of a Crisis*, 32 FED. SENT'G REP. 257, 257 (2020) (noting that elderly inmates comprise nineteen percent of the present prison population); *see* Salins & Simpson, *supra* note 25, at 240–44 (demonstrating that a rise of the elderly population is due to an increase of elderly individuals in general, an

the population increase of elderly inmates continues to raise concerns related to healthcare costs and inadequate facilities.[41] Prison systems are not equipped with the tools to provide adequate facilities, housing, medical services, and prison personnel required to care for more vulnerable adults.[42] Further, as people who are elderly tend to have more medical needs,[43] the cost of meeting the medical needs of these elderly inmates is substantial to the American taxpayer.[44]

To address prison overcrowding, disease spread, and an increased elderly population, scholars have long advocated for releasing elderly inmates.[45] More recently, politicians on both sides of the aisle have pushed for a decrease in prison population.[46] As the

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increase in the amount of elders who commit crimes, and the three strike "tough-on-crime" legislation); Off. of the Inspector Gen., U.S. Dep't of Just., *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, 32 FED. SENT'G REP. 294, 294 (2020) (showing that between 2009 and 2013, the number of inmates older than fifty increased by twenty-five percent; in contrast, the number of inmates twenty-nine and younger decreased sixteen percent in the same time period).

41. *See* Curran, *supra* note 28, at 244–48; *cf.* Amy Vanheuverzwyn, *The Law and Economics of Prison Health Care: Legal Standards and Financial Burdens*, 13 U PA. J.L. & SOC. CHANGE 119 (2009) (demonstrating that the increase of elderly prisoners has created a high cost for health care systems).

42. Curran, *supra* note 28, 244–49.

43. *See* Jason S. Ornduff, *Releasing the Elderly Inmate: A Solution to Prison Overcrowding*, 4 ELDER L.J. 173, 174–75 (1996) (noting that elderly prisoners' use of prison medical facilities causes society to pay significantly more for their medical care).

44. *See id.* at 185 (noting that in 1990, the annual cost of maintaining an average prisoner was $18,600 while the cost of a terminally ill prisoner costs $67,000); Curran, *supra* note 28, at 247 n.209 (stating that in 1998, the NCIA reported that the amount being spent on younger inmates was $27,000 while the amount spent on the elderly was $69,000 per year). Beyond the medical costs required to take care of elderly inmates, prison overcrowding in general has imposed a tremendous economic burden on the government. *See* Green, *supra* note 30, at 123 ("In 2010, incarceration at the federal, state, and local levels imposed an economic burden of approximately $80 billion. For the 2013 fiscal year, the Department of Justice requested a $6.8 billion budget for Federal Bureau of Prisons, or 26% of the entire budget for the Department of Justice.").

45. *See, e.g.*, Ornduff, *supra* note 43, at 173 (noting that inmates "both suffer from and further burden overcrowded living conditions in prisons" and proposing that the releasing elderly inmates would address this issue).

46. *See* Jalila Jefferson-Bullock, *Quelling the Silver Tsunami: Compassionate Release of Elderly Offenders*, 79 OHIO ST. L.J. 937, 938 (2018) ("Following a brief hiatus and an expectedly unwelcoming recent federal response, sentencing reform is again reemerging as a major initiative."); *see also* Kelly Cohen, *Criminal Justice Reform Poised to Take Off in 2018*, WASH. EXAM'R (Dec. 30, 2017), https://www.washingtonexaminer.com/criminal-justice-reform-poised-to-take-off-in-2018

coronavirus made all of these factors worse, the interest in releasing vulnerable inmates in the United States has only grown.[47] Perhaps thankfully, the development and expansion of compassionate release, particularly in 2018, came at an opportune time for prison systems to utilize its function during a pandemic.[48]

B. COMPASSIONATE RELEASE AS AN ENACTED LEGISLATIVE SOLUTION

The concept of compassionate release as an enacted legislative solution has a long history within the United States, although the term and structure have not always been the same.[49] "Back-end" sentencing decisions began in 1910 in the form of parole release.[50] In these cases, courts did not fix a set sentence for each defendant; rather, parole boards reviewed cases after a period of time to determine potential release based on rehabilitation.[51]

In 1976, Congress enacted the first form of a federal compassionate release statute under the Parole Commission and Reorganization Act.[52] The statute laid out a three-stage process for compassionate release consideration:[53] (1) the BOP filed a motion on behalf of the inmate to the sentencing court "only in particularly meritorious or unusual circumstances,"[54] (2) upon reviewing the motion, the sentencing court could move the date an inmate becomes eligible for parole forward to make the inmate eligible for immediate

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[https://perma.cc/5WCP-7YVN] ("[This bipartisan effort] calls for lower-risk inmates to be put in less-restrictive conditions to reduce prisons costs and allow for more resources to be shifted to law enforcement."); Bill Keller, *Prison Revolt: A Former Law-and-Order Conservative Takes a Lead on Criminal-Justice Reform*, NEW YORKER (June 29, 2015), https://www.newyorker.com/magazine/2015/06/29/prison-revolt [https://perma.cc/3XW5-W97F] ("These days, it is hard to ignore a rising conservative clamor to rehabilitate the criminal-justice system. Conservatives are as quick as liberals to note that the United States, a country with less than five per cent of the world's population, houses nearly twenty-five per cent of the world's prisoners.").

47. *See infra* Part I.C.

48. *See infra* Part I.C (detailing how the pandemic offered an opportunity to test the First Step Act and compassionate release).

49. *See generally* Hopwood, *supra* note 9 (chronicling the history of legislative solutions to sentence reductions).

50. *Id.* at 77.

51. *Id.*

52. *See* Green, *supra* note 30, at 126; Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219 (1976).

53. Green, *supra* note 30, at 126–27; 18 U.S.C. § 4205(g) (1976).

54. Green, *supra* note 30, at 127; 28 C.F.R. § 572.40 (1983); 18 U.S.C. § 4205(g).

review by the Parole Commission,[55] and (3) upon eligibility for review by the Parole Commission, the Commission could consider an inmate's release.[56] Notably, this initial compassionate release statute required inmates to pass three different authorities: the BOP, the sentencing court, and the Parole Commission.[57] Any of these entities had the power to reject the initial request.[58]

Congress enacted the modern form of compassionate release in 1984 through its elimination of parole and the establishment of 18 U.S.C. § 3582(c)(1)(A) as part of the Comprehensive Crime Control Act of 1984.[59] The creation of this compassionate release statute gave courts the ability to reduce a defendant's sentence given "extraordinary and compelling reasons."[60] Most notably, the

55. 18 U.S.C. § 4205(a), (g); *see also id.* § 4203(b)(1); Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219 (codified as amended at 18 U.S.C. §§ 4201–4218).

56. Parole Commission and Reorganization Act; *see* Green, *supra* note 30, at 128 ("The Commission would make a determination as to whether the recently-made-eligible inmate should be released after considering the inmate's compliance with institution rules, the nature of the offense, the history and characteristics of the offender, the public message the inmate's release would send, and the likelihood that the inmate would recidivate.").

57. Green, *supra* note 30, at 128 (detailing this third step).

58. *Id.*

59. 18 U.S.C. § 3582(c)(1)(a) (1984); *see also* Hopwood, *supra* note 9, at 77.

60. *See* 18 U.S.C. § 3582(c)(1)(a) (1984); Nina J. Ginsberg, *From the President: Compassionate Release: The Nuts and Bolts*, CHAMPION 5 (Jan./Feb. 2020), https://www.nacdl.org/Article/JanFeb2020-FromthePresidentCompassionateReleaseThe [https://perma.cc/JE4J-PUE6] (noting three examples given by the United States Sentencing Committee to determine "extraordinary and compelling circumstances": (1) a medical condition, such as a serious illness with an "end of life trajectory"; (2) "a prisoner is 65 years old, experiencing a serious deterioration in physical or mental health, and has served at least 10 years or 75% of his term of imprisonment (whichever is less)"; and (3) the death or incapacitation of the caretaker of the inmate's minor child). The applicable policy statements referenced in § 3282(c)(1) refer to comments within the United States Sentencing Guidelines which define extraordinary and compelling reasons: the defendant's medical condition, age, family circumstances, or other circumstances. 18 U.S.C. § 1B1.13(1)(A)–(D). The "other circumstances" category is known as the "catch-all category." An increasing number of courts have found that this reasoning incorporates a "vast variety of circumstances that may constitute extraordinary and compelling" reasons. *See, e.g.*, United States v. Rodriguez, 424 F. Supp. 3d 674, 681–82 (N.D. Cal. 2019).

While it goes beyond the scope of this Note, it is helpful to note the additional limitations of the compassionate release statute given the "extraordinary and compelling" circumstances definition. The definition has led to a "patchwork" of compassionate release solutions, even among courts throughout the country. *See* Casey Tolan, *Compassionate Release Became a Life-or-Death Lottery for Thousands of Federal Inmates During the Pandemic*, CNN (Sept. 30, 2021), https://www.cnn

previous three-step process transitioned to a two-step process: while the BOP still initiated the process by filing a request with the sentencing court, the sentencing court secured the authority to reduce an inmate's sentence in and of itself.[61]

Under this 1984 Act, the legislature instituted the BOP as the main "gatekeeper" when making the determination to reduce sentences.[62] That is, an inmate could not petition the court for compassionate release without the BOP first filing a request.[63] For more than thirty years, the legislature assigned this narrow gatekeeping function to the BOP.[64] The BOP used the Act sparingly;[65] however, the First Step Act's enactment in 2018 expanded its potential use.

Pertinently, the First Step Act removed the BOP from the gatekeeping function.[66] The amended Act allowed defendants to file motions for compassionate release in federal court once (1) the BOP

.com/2021/09/30/us/covid-prison-inmates-compassionate-release-invs/index.html [https://perma.cc/3FGJ-YQWA] (comparing federal courts in the Eastern District of Kentucky, which granted about six percent of compassionate release petitions during the first year of the pandemic, with federal courts in Massachusetts and Oregon, which granted between fifty and sixty percent of compassionate release motions during the same period).

61. *Compare* 18 U.S.C. § 3582(c)(1)(A)(i) (1984), *with* 18 U.S.C. § 4205(g) (1980).

62. Hopwood, *supra* note 9, at 77.

63. *Id.*

64. *Id.*

65. *See* Alan Ellis & EJ Hurst II, *Federal BOP Puts a Little Compassion in Its Newest Release Program*, CRIM. JUST. 41, 41 (2014) (highlighting the Inspector General's description of compassionate release's four fundamental failures); Ginsberg, *supra* note 60 (citing Patti Saris, *The First Step Act Is a Major Step for Sentencing Reform,* LAW360: PERSPECTIVES (Apr. 28, 2019), https://www.law360.com/articles/1153056/the-first-step-act-is-a-major-step-for-sentencing-reform [https://perma.cc/X7CC-EFHS]) (noting that between 2013 and 2017, the BOP only approved 312 out of 5,400 requests for compassionate release); William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 868 (2009) (stating that from 2006 to 2011, only twenty-four inmates on average were granted compassionate release); *Public Hearing on Compassionate Release and Conditions of Supervision: Hearing Before the U.S. Sent'g Comm'n* (2016) (statement of Michael Horowitz, Inspector General, Dep't of Just.); Casey N. Ferri, *A Stuck Safety Valve: The Inadequacy of Compassionate Release for Elderly Inmates*, 42 STETSON L. REV. 197, 198 (2013) (noting that the compassionate release program had only a 0.01% release rate within the entire prison population); *see also* Jefferson-Bullock, *supra* note 6, at 523 (2015).

66. *See* Molly Gill, *Threading the Needle: The FIRST STEP Act, Sentencing Reform, and the Future of Criminal Justice Reform Advocacy*, 31 FED. SENT'G REP. 107, 108 (2018).

denied the inmate's requests for compassionate release, and subsequently rejected any appeal made by the inmate (thereby exhausting the inmate's administrative remedies),[67] or (2) the BOP failed to respond to the defendant's request within thirty days.[68]

This change in the First Step Act substantially reflects the 2017 Model Penal Code (MPC) for sentencing that had been approved one year earlier and assigns a more expansive, discretionary role to the judiciary.[69] While the MPC instilled the opportunity for a second look at compassionate release, similar to the earlier § 3582 statute, it recommended against having prison administrators as the sole gatekeeper to this "second look" function.[70] The MPC reflects the foundation upon which the statute's amendment is based: primarily it "is rooted in the belief that government should be especially cautious in the use of their powers when imposing penalties that deprive offenders of their liberty for a substantial portion of their adult lives."[71] Notably, a co-sponsor of the bill, Senator Ben Cardin, noted that the expansion under the new act "expedites compassionate release applications."[72]

Up until recently, the First Step Act failed to gain traction. Indeed, immediately following its enactment, courts failed to realize its full potential, approving only a handful of compassionate release requests each year.[73] Much of the failure stemmed from the BOP's continued preservation of sentencing guidelines following the Act's enactment, keeping in place many of the same standards previously required for elderly offenders.[74] Still, many individuals noted its

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67. *See, e.g.*, Sarah French Russell, *Second Looks at Sentences Under the First Step Act*, 32 FED. SENT'G REP. 76, 76 (2019).

68. *See* First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194 (2018) (amending 18 U.S.C. § 3582(c)(1)(a)); Ginsberg, *supra* note 60, at 5.

69. *See* MODEL PENAL CODE § 11.02 (AM. L. INST.).

70. Russell, *supra* note 67.

71. *Id.* at 77 (quoting MODEL PENAL CODE: SENTENCING § 305.6, cmt. at 570 (Proposed Final Draft)).

72. 164 CONG. REC. S7314 (daily ed. Dec. 15, 2018) (statement of Sen. Cardin).

73. *See* Jalila Jefferson-Bullock, *Consensus, Compassion, and Compromise? The First Step Act and Aging Out of Crime*, 32 FED. SENT'G REP. 71 (2019) (noting that only fifty-one compassionate release requests were approved in 2019, following the Act's passage, compared to thirty-four requests approved in 2018); Johnny Thach, *Not Far Enough: The Rising Elderly Prison Population and Criminal Justice and Prison Reform Following the First Step Act of 2018*, 26 CARDOZO J. EQUAL RTS. & SOC. JUST. 631, 678–80 (2020).

74. *See* Jefferson-Bullock, *supra* note 73, at 72 ("Nothing in the guiding policies has changed. These are the exact same limiting guidelines that the BOP has relied

importance and potential future impact at the time of its enactment. Specifically, scholars stressed that "prisoners are no longer restricted by the BOP's cabined view of what constitutes an 'extraordinary and compelling' reason."[75] Others ventured to guess what that standard could mean for prisoners, speculating that an inmate who is no longer viewed as dangerous or a prisoner whose penalty provision has since been lowered by Congress could potentially seek release under the amended compassionate release statute.[76] In short, the amendment gave federal judges the opportunity and judicial discretion to take a second look at sentencing in a way that had previously been stunted under the BOP's gatekeeping function.[77] The amended Act represented a shift in legislative thought toward understanding the significance of rehabilitation, sentence reduction, and second chances.[78]

C. COVID-19 DRAMATICALLY INCREASES COMPASSIONATE RELEASE REQUESTS, CREATING AN OPPORTUNITY TO TEST THE FIRST STEP ACT

The introduction of the coronavirus to the U.S. prison system drastically exacerbated the overcrowding problems within prisons and created new circumstances in which to assess compassionate release procedures under the First Step Act during a state of emergency. Following a brief examination of the government's response to COVID-19 within prisons, this Section explores how prisoners' use of the compassionate release statute exploded during the first three months of the pandemic.

The government responded to the devastation created by the coronavirus pandemic in various ways. Federal legislation granted the Department of Justice broad discharge powers, and the Attorney

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upon since the enactment of the . . . 2013 program 'revisions.' As before, elderly offenders receive no cognizable relief from federal compassionate release policies."); *see also* John F. Ferraro, *Compelling Compassion: Navigating Federal Compassionate Release After the First Step Act*, 62 B.C. L. REV. 2463, 2484–85 (2021) ("Despite [the First Step Act's] change in procedure, the Act does not purport to change the substantive criteria used to assess individual motions for compassionate release. Courts are still required to assess inmates moving for release against the sentencing factors outlined in § 3553(a), as they had prior to the [Act].").

75. Todd Bussert, *What the FIRST STEP Act Means for Federal Prisoners*, CHAMPION, May 2019, at 28, 32.

76. Hopwood, *supra* note 9, at 89.

77. *Id.* at 109–10.

78. *See generally* Russell, *supra* note 67, at 81 ("Through considering First Step Act motions, judges will see individuals who have truly transformed in prison, and learn what brought about this rehabilitation and when the change occurred.").

General directed the BOP to use home confinement for prisoners with significant comorbidities.[79] The Federal CARES Act expanded the BOP Director's ability to transfer inmates to home confinement earlier than previously held.[80] The Attorney General stepped in, urging the Director of BOP, Michael Carvajal, to take effective and preventative steps, emphasizing that "time is of the essence."[81] Courts executed measures to expedite bond hearings for particularly vulnerable inmates.[82]

Despite all three branches of the government coming together in an effort to mitigate the damage caused by the coronavirus in prison, it was not enough. Within the first eight months of the pandemic, more than 173,000 inmates nationally were diagnosed with COVID-19, and more than 1,300 correctional staff and inmates died due to the infection.[83] What's more, infection rates in prisons greatly

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79. *Id.* at 87. It is important to note that home confinement is notably different than compassionate release. The BOP still considers federal prisoners transferred to home confinement as being in custody and the transfer allows prisoners to complete their sentence at home. Neff & Blakinger, *supra* note 5. The BOP, alone, decides home confinement applicability and the decision is not subject to judicial review. *Id.*; *see also Understanding the Difference Between Home Confinement, Compassionate Release, and Clemency in the Federal Prison System*, FAMM, https://famm.org/wp-content/uploads/Understanding-the-Difference.pdf [https://perma.cc/3AZB-V6GQ] (differentiating compassionate release and home confinement procedures in the context of the coronavirus).

80. *See* Adam Sheppard, *The Pandemic's Effect on Criminal Law*, CBA REC. 33 (2020), https://www.thesheppardlawfirm.com/wp-content/uploads/sites/1401222/2020/09/PandemicsEffectOnCriminalLaw.pdf [https://perma.cc/6ECP-FB9L]; David Shortell, *Trump Administration to Federal Prisons: Increase Home Confinement for Inmates to Slow Coronavirus Spread*, CNN (Mar. 26, 2020), https://www.cnn.com/2020/03/26/politics/trump-administration-federal-prisons-coronavirus/index.html [https://perma.cc/JJW5-W8XA].

81. Pavlo, *supra* note 4.

82. *Id.* at 33 (noting some district courts have also "regularly delayed surrender dates (post-sentencing)" as well).

83. *See* Eric Westervelt, *Pandemic's Deadly Toll Behind Bars Spurs Calls for Change in U.S. Jails and Prisons*, NPR (Nov. 12, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/11/12/934363254/pandemics-deadly-toll-behind-bars-spurs-calls-for-change-in-u-s-jails-and-prison [https://perma.cc/NWU7-K9ZA] (citing *UCLA Law Covid-19 Behind Bars Data Project*, UCLA L., https://law.ucla.edu/academics/centers/criminal-justice-program/ucla-covid-19-behind-bars-data-project [https://perma.cc/LX9P-ZUQM]); Cid Standifer & Frances Stead Sellers, *Prisons and Jails Have Become a 'Public Health Threat' During the Pandemic, Advocates Say*, WASH. POST (Nov. 11, 2020), https://www.washingtonpost.com/national/coronavirus-outbreaks-prisons/2020/11/11/b8c3a90c-d8d6-11ea-930e-d88518c57dcc_story.html [https://perma.cc/9XGJ-S48N].

exceeded those outside incarceration facilities.[84]

Prisoners in federal correctional facilities turned to compassionate release under the First Step Act. During the first few months of the coronavirus, inmates filed compassionate release applications at an increasing rate.[85] The National Association of Criminal Defense Lawyers launched an effort to recruit and train attorneys to file compassionate release motions for elderly and ill federal inmates.[86] Senators Dick Durbin and Chuck Grassley, in a bipartisan effort introduced the COVID-19 Safer Detention Bill, urging the need for clearer compassionate release guidelines.[87]

While Congress may not have contemplated the impending significance of the First Step Act in a pandemic-driven emergency, COVID-19 pushed the statute forward and forced courts to confront its limitations.[88] With an overwhelming influx of compassionate release petitions to the BOP—paired with the potentially deadly environment confronting petitioners in prison—many inmates forewent the exhaustion of administrative remedy requirement noted in the First Step Act and petitioned the court without waiting for either BOP's denial of their request for compassionate release or

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84. Van Beusekom, *supra* note 1; *see also* Lee Kovarsky, *Pandemics, Risks, and Remedies*, 106 VA. L. REV. ONLINE 71 n.2 (2020) (noting that COVID-19 infection rates for inmates in New York's Department of Corrections was 8.72% compared to New York's general population infection rate of 1.90%). These prison mortality and incidence rates have continued to remain higher than those in communities outside of prison. *See* Neal Marquez, Julie A. Ward, Kalind Parish, Brendan Saloner & Sharon Dolovich, *COVID-19 Incidence and Mortality in Federal and State Prisons Compared with the U.S. Population, April 5, 2020, to April 3, 2021*, 326 JAMA 1865, 1867 (2021) ("While COVID-19 incidence and mortality rates peaked in late 2020 and early 2021 and have since declined, the cumulative toll of COVID-19 has been several times greater among the prison population than the overall US population.").

85. *See* Ariane de Vogue, *Covid-19 Cases Concerning Prisoners' Rights Hit the Supreme Court*, CNN, (MAY 21, 2020) https://www.cnn.com/2020/05/21/politics/covid-19-supreme-court-prisoners-rights/index.html [https://perma.cc/2PRW-9EE9] ("[T]he ACLU alone has filed seven lawsuits and dozens more have been filed by its affiliates across the country."); *cf. COVID-19 Roundup: Court Closures and Procedural Changes*, 2020 WL 1223450 (Oct. 21, 2020) (noting that at least seven states appointed the Federal Public Defender's Office to represent inmates for compassionate release petitions under First Step Act).

86. *See* Elizabeth A. Blackwood, *Compassionate Release*, CHAMPION, April 2020, at 51.

87. *Bill Summary: The COVID-19 Safer Detention Act*, FAMM, https://famm.org/wp-content/uploads/COVID-19-Humane-Detention-Act-Summary.pdf [https://perma.cc/KNY9-6S9K] (urging legislation that clarifies the compassionate release process).

88. *See infra* Part II.

the thirty-day lapse.[89] In response to these petitions, some courts found the exhaustion of remedy requirement waivable in the face of a national emergency, while others did not.[90] As Part II makes clear, both sides of the waiver issue present compelling arguments that leave the exhaustion requirement's waivability ambiguous, at best.[91] Part II's examination of the split, considering precedential case law, legislative history, statutory structure, and plain language, demonstrates this ambiguity and underscores the need for Congress to clarify the statute's exhaustion of remedy requirement during times of future emergency.[92]

II. COURT SPLIT: THE STATE OF THE FIRST STEP ACT'S EXHAUSTION OF ADMINISTRATIVE REMEDY REQUIREMENT IN THE FACE OF COVID-19

As a "flood of compassionate release motions" prompted by the pandemic overwhelmed the BOP,[93] the judiciary's interpretation of the First Step Act and its exhaustion of administrative remedy requirement widely varied.[94] Courts within not only the same circuit,[95] but within the same federal district court,[96] issued differing interpretations: on one side, arguing that the exhaustion of administrative remedy requirement under the First Step Act may be waived—bypassing the thirty-day requirement or BOP response—

89. *See infra* Part II.

90. *See infra* Part II.

91. *See infra* Part II.

92. *See infra* Part II.

93. United States v. McIndoo, 1:15-CR-00142, 2020 WL 2201970, at *5 (W.D.N.Y. May 6, 2020); *see also* United States v. Atwi, 455 F. Supp. 3d 426, 429 (E.D. Mich. 2020) ("Congress likely did not contemplate that a once-in-a-lifetime pandemic would lead hundreds of federal prisoners to seek compassionate release all within a four-week window.").

94. *See infra* Part II.B.

95. *Compare* United States v. Vence-Small, No. 3:18-cr-00031, 2020 WL 1921590 (D. Conn. Apr. 20, 2020) (a Second Circuit district court finding that the exhaustion requirement is not subject to a judicial exception), *with* United States v. Russo, 454 F. Supp. 3d 270 (S.D.N.Y. 2020) (a Second Circuit district court finding the opposite).

96. *Compare, e.g.*, United States v. Haney, 454 F. Supp. 3d 316 (S.D.N.Y. 2020) (finding, in a federal court within the Southern District of New York, that the exhaustion requirement is waivable), *and* United States v. Scparta, 18-cr-578 (AJN), 2020 WL 1910481 (S.D.N.Y. Apr. 20, 2020) (finding the same), *with* United States v. Demaria, 17-CR-569 (ER), 2020 WL 1888910, slip op. at *4 (S.D.N.Y. Apr. 16, 2020) (finding the opposite).

and on the other side, arguing it may not. While some courts carved out a judicial exception to the administrative remedy requirement,[97] others warned that these types of "judge-made exceptions" "rewrite explicit, unambiguous statutory language" in a manner that is contrary to the court's power.[98] Federal courts issued dozens of opinions.[99] What's more, given the impracticality of a higher-level court granting certiorari review within the thirty-day timeline,[100] and that the present coronavirus issue has largely resolved itself,[101] the vast majority of opinions have stayed—and will likely continue to stay—in federal district court. The split on the waivability of the exhaustion requirement for compassionate release is ripe for analysis.

This Part briefly touches on the concept of exhaustion of administrative remedy requirements generally and how the First Step Act's language differs from previously explored exhaustion requirements. Subsequently, the Part studies common arguments discussed on each side of the split. The analysis follows a court characterization of the issue by addressing (1) whether the exhaustion requirement is a claims-processing rule or a jurisdictional rule, and (2) whether the exhaustion requirement can be waived. By considering these issues, this Part argues that while the rule is likely claims-processing, there is genuine ambiguity as to whether the courts should consider the exhaustion requirement waivable under the First Step Act. Given this uncertainty, it is paramount that Congress amend the statute to allow for waiver during future national health emergencies.

A. THE EXHAUSTION OF ADMINISTRATIVE REMEDY REQUIREMENT: AN OVERVIEW

The exhaustion of administrative remedy requirement, put simply, requires litigants to pursue specific administrative remedies

97. *See, e.g.*, *Russo*, 454 F. Supp. 3d at 270.

98. *See, e.g.*, *McIndoo*, 1:15-CR-00142, 2020 WL 2201970, at *6–7.

99. *See* Fern L. Kletter, *COVID-19 Related Litigation: Effect of Pandemic on Release from Federal Custody*, 54 A.L.R. FED. 3D Art. 1 (2020).

100. *See infra* notes 214–215 and accompanying text; *cf.*, *e.g.*, United States v. Alam, 960 F.3d 831, 836 (6th Cir. 2020) (discussing the procedural posture of the Sixth Circuit addressing the exhaustion issue).

101. As noted, the majority of inmates requesting compassionate release due to COVID-19 have petitioned for release, and the thirty-day exhaustion requirement has passed. *See supra* text accompanying notes 19–20, 93–98.

prior to seeking judicial review.[102] For example, under Title VII,[103] an employee that initiates a discrimination claim against their employer must initially file their claim of discrimination with the EEOC, and receive a right-to-sue letter, prior to filing a complaint with the court.[104] An employee that files their claim with the EEOC and receives that letter thereby *exhausts* their administrative remedies, allowing for judicial review of their claim. As noted, under the First Step Act, an inmate that requests compassionate release must first petition the BOP and wait until either (1) the BOP issues a final administrative decision on the matter (thus, exhausting their administrative remedies),[105] or (2) the passage of thirty days since the warden's receipt of their request, whichever is earlier, before petitioning the court.[106]

The exhaustion requirement generally stems from several distinct, yet overlapping, doctrines.[107] Traditionally, courts recognize that exhaustion requirements serve a dual purpose: to protect administrative agency authority and to promote judicial efficiency.[108] Courts have previously discussed the waivability of the exhaustion requirement in several statutory contexts. The Supreme Court has found some exhaustion of remedy requirements waivable,[109] while finding others not.[110] When determining the waivability of these requirements, the Supreme Court cautions federal courts to "balance

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102. KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., FEDERAL ADMINISTRATIVE LAW 943–1049 (3d ed. 2020).

103. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

104. *Filing a Charge of Discrimination with the EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/filing-charge-discrimination [https://perma.cc/8VQL-2MHC] ("All of the laws enforced by EEOC, except for the Equal Pay Act, require you to file a Charge of Discrimination with [the EEOC] before you can file a job discrimination lawsuit against your employer.").

105. *See* 28 C.F.R. §§ 571.62–.63 (describing the required compassionate release petitioning procedure prior to judicial review).

106. 18 U.S.C. § 3582(c)(1)(A) ("[T]he court . . . after the defendant has *fully exhausted* all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf *or* the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility . . . ." (emphasis added)).

107. HICKMAN & PIERCE, *supra* note 102, at 943 (noting that judicial review timing doctrines include finality, ripeness, and exhaustion).

108. McCarthy v. Madigan, 503 U.S. 140–41 (1992).

109. *See generally id.* (finding that an inmate raising a *Bivens* claim need not exhaust his administrative remedies).

110. *See, e.g.*, Ross v. Blake, 578 U.S. 632, 648 (2016) (finding the exhaustion requirement under the Prison Litigation Reform Act mandatory and unable to be waived).

the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion."[111]

The primary issues that make the First Step Act's exhaustion of administrative remedy requirements somewhat ambiguous are threefold: (1) there is some disagreement among courts whether the exhaustion requirement functions as a claims-processing rule or jurisdictional rule;[112] (2) the previously articulated exceptions to the administrative remedy requirements are based on cases with judicially created, common-law exhaustion requirements; here, the exhaustion requirement is statutorily created—it is written into the statute's language;[113] and (3) the exhaustion requirement in the First Step Act appears to be non-traditional based on its legislative history and congressional intent.[114] The subtleties of each of these arguments, as will be addressed, underscore the ambiguity highlighted by the courts' split.

B. ANALYZING WHETHER THE FIRST STEP ACT'S EXHAUSTION REQUIREMENT IS WAIVABLE: A COURT SPLIT

Although the federal district courts' opinions vary in structure and length, the primary issues discussed within each opinion are fairly consistent among courts. A court first considers whether the exhaustion of administrative remedy requirement in § 3582(c)(1)(a) is a claims-processing or jurisdictional rule.[115] If a court identifies the exhaustion requirement as claims-processing, the court then determines if the requirement is mandatory or not[116] and whether the court may waive it when a petitioner has failed to comply with its requirements.[117] If the court finds that the requirement is waivable, the court finally considers the petition on its merit—that is, whether

111. *McCarthy*, 503 U.S. at 146. Considerations of the petitioner's interests include determining whether waiting for an administrative remedy would unduly prejudice the petitioner or fail to provide them with an adequate remedy. *Id.* at 147–48. In contrast, an agency's institutional interests include (1) its desire for an internal resolution, and (2) its interest in institutional autonomy in matters related to agency expertise. *Id.* at 155.

112. *See infra* Part II.B.1.

113. *See infra* Part II.B.2.

114. *See infra* Part II.B.2.

115. *See infra* Part II.B.1.

116. *See infra* Part II.B.2.

117. For a structured analysis of these considerations, see generally United States v. Alam, 960 F.3d 831 (6th Cir. 2020).

the petitioner meets the extraordinary-and-compelling-circumstance argument.[118] The court's analysis follows.

1. Considering Whether the Exhaustion Requirement Is Jurisdictional or Claims-Processing

In essence, a rule is "jurisdictional" if it refers to "a court's adjudicatory authority."[119] That is to say, it controls the court's ability to hear the case (either via subject-matter or personal jurisdiction capacity).[120] If a court finds that a rule is jurisdictional, it does not have adjudicatory capacity under any circumstances, unless the petitioner meets the rule's requirements (such as through the exhaustion of their administrative remedies).[121] In contrast, a rule is considered claims-processing if it merely "seek[s] to promote the orderly progress of litigation by requiring that parties take certain procedural steps at certain specified times."[122] Under a claims-processing requirement, an individual's failure to follow the rule does not negatively impact the court's *jurisdiction*[123]—although it may still be considered un-waivable by the court. Given this difference, the distinction between a jurisdictional and claims-processing rule is a significant one. If a rule is jurisdictional, the court

118. *See, e.g.*, United States v. Haney, 454 F. Supp. 3d 316, 322–24 (S.D.N.Y. 2020) (determining "[w]hether extraordinary and compelling circumstances require [petitioner]'s release" after concluding that the court has the ability to waive the First Step Act's exhaustion requirement).

119. Kontrick v. Ryan, 540 U.S. 443, 455 (2004).

120. Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 435 (2011) ("[A] rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction." (citing Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 161–62 (2010))).

121. *Cf.* Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 154 (2013) (stating that if the court designated the governing statute at issue in the case, 42 U.S.C. § 1395*oo*(a)(3), jurisdictional, "under no circumstance" could a good cause extension or equitable tolling apply). For more insight into this distinction, and the inconsistencies of its application, see United States v. Taylor, 778 F.3d 667, 669–70 (7th Cir. 2015).

122. *Henderson*, 562 U.S. at 435.

123. Fort Bend Cnty. v. Davis, 139 S. Ct. 1843, 1849 (2019) ("A claims-processing rule may be 'mandatory' in the sense that a court must enforce the rule if a party 'properly raise[s]' it . . . . But an objection based on a mandatory claims-processing rule may be forfeited 'if the party asserting the rule waits too long to raise the point.'" (citing Eberhart v. United States, 546 U.S. 12, 19 (2005)); (quoting *Kontrick*, 540 U.S. at 456); *see also Taylor*, 778 F.3d at 670 ("[T]he Supreme Court has taken new care to distinguish between truly (i.e., non-waivable) jurisdictional rules and ordinary claims-processing rules that may be mandatory and even strict, but which a court need not raise on its own.").

need not continue with any sort of analysis unless the rule is met, since it does not have jurisdiction to review the case until the petitioner complies with the requirement.[124] If a rule is claims-processing, however, the court still has jurisdiction and may proceed to consider whether the rule is waivable.[125]

When courts determine whether a rule is claim-processing or jurisdictional, they most often consider the statute's plain language: a rule is nonjurisdictional unless Congress "'clearly state[d]' that the rule is jurisdictional"[126] and unless the rule "speak[s] to a court's authority."[127] The Court considers both the context, language, and historical treatment of the statute in determining whether Congress clearly stated that a rule is jurisdictional.[128]

In one case, for example, the Court determined whether the

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124. *See Sebelius*, 568 U.S. at 145, 154; *see also* United States v. Haney, 454 F. Supp. 3d 316, 319 (S.D.N.Y. 2020) ("[T]he failure to satisfy a jurisdictional requirement would require the Court to dismiss the motion for lack of subject matter jurisdiction, even if the parties themselves consented to the Court hearing the motion.").

125. *See Fort Bend*, 139 S. Ct. at 1849; *see also* United States v. Connell, 18-cr-00281-RS-1, 2020 WL 2315858 at *4–5 (N.D. Cal. May 8, 2020) ("Claims processing rules can be mandatory, in that they must be enforced—sometimes subject to exceptions—when properly raised, but they are not jurisdictional bars." (citing *Fort Bend*, 139 S. Ct. at 1849 (2019))).

It is worth noting, however, while many courts that consider the First Step Act's exhaustion requirement spend several paragraphs analyzing the claims-processing requirement, others wholly fail to mention it. *Compare Haney*, 454 F. Supp. 3d 316, 319–20 (spending ample time analyzing the claims-processing argument), *with* United States v. Sanchez, No. 18-CR-00140-VLB-11, 2020 WL 1933815 at *3–4 (D. Conn. Apr. 22, 2020), *and* United States v. Colvin, 451 F. Supp. 3d 237, 239–41(D. Conn. 2020) (failing to address the issue at all).

126. *Sebelius*, 568 U.S. at 153 ("[A]bsent such a clear statement, [the Court] ha[s] cautioned, 'courts should treat the restriction as nonjurisdictional in character.'" (quoting Arbaugh v. Y & H Corp., 546 U.S. 500, 515–16 (2006))); *see also Arbaugh*, 546 U.S. at 515–16 ("If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue . . . . But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.").

127. EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 512 (2014) (noting that a rule is mandatory yet not "jurisdictional" when "it does not speak to a court's authority, but only to a party's procedural obligations").

128. *See, e.g.*, Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 166 (2010) ("[T]he jurisdictional analysis must focus on the 'legal character' of the requirement . . . which we discern[] by looking to the condition's text, context, and relevant historical treatment.").

numerosity requirement for a Title VII sex-discrimination claim,[129] where petitioners can only bring these claims against employers with" fifteen or more employees,"[130] was a jurisdictional or claims-processing rule.[131] The Court held that because Title VII's statutory text does not "clearly state[]" that the threshold requirement is jurisdictional,[132] and because the requirement did not fall under the jurisdiction of Title VII, it was nonjurisdictional.[133]

In another case, the Court again found that the Copyright Act's registration requirement, which preconditions the filing of a copyright-infringement claim,[134] was nonjurisdictional based on the statute's plain language[135] and provision location.[136] Indeed, the Court often treats threshold requirements as nonjurisdictional.[137] Perhaps most notably to the case at hand, the Supreme Court recently held that the exhaustion of administrative remedy requirement for a Title VII claim, requiring that petitioners raise the claim with the EEOC prior to judicial review, was nonjurisdictional.[138]

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129. 42 U.S.C. § 2000e–2(a)(1).

130. *Id.* § 2000e(b).

131. *See Arbaugh*, 546 U.S. at 516.

132. *Id.* at 515–16.

133. *Id.* at 516 ("But when Congress does not rank a statutory limitation on coverage jurisdictional, courts should treat the restriction as nonjurisdictional in character. Applying that readily administrable bright line to this case, we hold that the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue.").

134. 17 U.S.C. § 411(a) ("Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title.").

135. Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 165 (2010) ("Nor does any other factor suggest that 17 U.S.C. § 411(a)'s registration requirement can be read to 'speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'" (quoting *Arbaugh*, 546 U.S. at 515) (internal quotation marks omitted)).

136. *Reed*, 559 U.S. at 164 ("Moreover, § 411(a)'s registration requirement . . . is located in a provision 'separate' from those granting federal courts subject-matter jurisdiction over those respective claims.").

137. *Reed*, 559 U.S. at 166 (referring to Jones v. Bock, 549 U.S. 199, 211 (2007) and Woodford v. Ngo, 548 U.S. 81, 93 (2006)) ("We similarly have treated as nonjurisdictional other types of threshold requirements that claimants must complete, or exhaust, before filing a lawsuit.").

138. Fort Bend Cnty. v. Davis, 139 S. Ct. 1843, 1850 (2019) ("Title VII's charge-filing requirement is not of jurisdictional cast."). The Court supported the requirement's nonjurisdictional nature by emphasizing that it was not located within

By directly considering whether Congress clearly stated a requirement is jurisdictional under the First Step Act, the exhaustion requirement is quite likely claims-processing—that is to say, nonjurisdictional. The relevant statute does not reference the term "jurisdictional" at all.[139] Further, the provision is within chapters that manage imprisonment and sentencing[140] and is completely outside the jurisdictional section of the United States Criminal Code.[141] Thus, there is no indication by Congress that the requirement was meant to have jurisdictional elements, as required for jurisdictional rules.[142] Indeed, many courts that analyze this distinction for First Step Act purposes come to this same conclusion.[143]

Title VII's jurisdictional provisions and highlighting that the exhaustion requirement merely speaks to the petitioner's "procedural obligations." *Id.* at 1850–51.

139. 18 U.S.C. § 3582(c)(1)(A) ("[T]he court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment . . . .").

140. 18 U.S.C. Pt. II, Ch. 227, Subch. D (demonstrating that the compassionate release exhaustion requirement is located in the Chapter entitled "Sentences" and Subchapter entitled "Imprisonment"); *see id.* § 3582(c) (noting only that "[t]he court may not modify a term of imprisonment once it has been imposed except" in the case of listed exceptions).

141. United States v. Taylor, 778 F.3d 667, 671 (7th Cir. 2015) ("[Section] 3582 is not part of a jurisdictional portion of the criminal code but part of the chapter dealing generally with sentences of imprisonment.").

142. *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 515–16 (2006).

143. *See, e.g.*, *Taylor*, 778 F.3d at 671 ("[Section] 3582[(c)] is not part of a jurisdictional portion of the [United States] criminal code but part of the chapter dealing generally with sentences of imprisonment."). Federal district courts note that a plain reading of § 3582(c) demonstrates Congress' failure to mention any "jurisdictional elements," United States v. Russo, 454 F. Supp. 3d 270, 274 (S.D.N.Y. 2020), "jurisdictional language," United States v. Guzman Soto, No. 1:18-cr-10086, 2020 WL 1905323, at *3 (D. Mass. Apr. 17, 2020), or "sweeping and direct language that would indicate a jurisdictional bar," United States v. Ramirez, 459 F. Supp. 3d 333, *342 (D. Mass. 2020) (citing Casanova v. Dubois, 289 F.3d 142, 146 (1st Cir. 2002)), which illustrates its nonjurisdictional nature. *See also* United States v. Haney, 454 F. Supp. 3d 316, 320 (S.D.N.Y. 2020) ("The exhaustion requirement in § 3582(c)(1)(A) merely controls who . . . may move for compassionate release and when such a motion may be made. It simply delineates the process for a party to obtain judicial review, not referring the adjudicatory capacity of the courts."); United States v. Flenory, 458 F. Supp. 3d 602, 607 (E.D. Mich. 2020) ("There is no indication that the exhaustion requirement in section 3582 was ever meant as a condition on the Court's authority to adjudicate a compassionate release motion. It is a claim-processing rule.").

Beyond the plain language argument, the First Step Act's exhaustion

Notwithstanding the exhaustion requirement's appearance as clearly claims-processing, some courts have classified the provision as jurisdictional.[144] These courts often rely on circuit court opinions that previously found § 3582(c)(2) to be jurisdictional in nature.[145] These courts often fail to address, however, the difference between the First Step Act's exhaustion requirement for compassionate release under § 3582(c)(1) and the requirements for sentence reductions under § 3582(c)(2).[146] While § 3582(c)(1) has an "either-or" exhaustion requirement that allows for an alternative,[147] the court's interpretation of § 3582(c)(2) reviews a requirement that is an explicit restriction.[148] As the Court notes, "a requirement we would otherwise classify as non-jurisdictional . . . does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions."[149]

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requirement allows for a sort of exception to the rule—that is, the petitioner must *either* exhaust their administrative remedies *or* wait thirty days. 18 U.S.C. § 3582(c)(1)(A). This type of language is most analogous to the Supreme Court's analysis of the Copyright Act's registration requirement, which it found to be nonjurisdictional. *See* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 166 (2010). As it noted, an exception to a jurisdictional element would be considered "at least unusual." *Id.* at 165 ("[Section] 411(c) permits courts to adjudicate infringement actions over certain kinds of unregistered works . . . . It would be at least unusual to ascribe jurisdictional significance to a condition subject to these sorts of exceptions.").

144. *See, e.g.*, United States v. Johnson, 451 F. Supp. 3d 436, 440 (D. Md. 2020); United States v. Otero, No. 17.cr 897-JAH, 2020 WL 1912215, at *3 (S.D. Cal. Apr. 20, 2020); United States v. Heath, No. CR-13-102-SLP, 2020 WL 1957916, at *2 (W.D. Okla. Apr. 23, 2020).

145. *See, e.g.*, *Johnson*, 451 F. Supp. 3d, at 441–42 (citing United States v. Garcia, 606 F.3d 209, 212 n.5 (5th Cir. 2010); United States v. Spears, 824 F.3d 908, 917 (9th Cir. 2016); United States v. McGaughy, 670 F.3d 1149 (10th Cir. 2012) (to support the court's claims that § 3582(c)(1)(A) is jurisdictional in nature).

146. *Compare Spears*, 824 F.3d at 912–16, *and* United States v. Spaulding, 802 F.3d 1110, 1124 (10th Cir. 2015), *and Garcia*, 606 F.3d at 212 n.5 (analyzing the jurisdictional nature ranging from a court's inability to allow a defendant to withdraw a plea deal following sentencing to a court's lack of authority to lower a defendant's guideline range), *with Johnson*, 451 F. Supp. 3d at 441 (determining whether the administrative exhaustion requirement under § 3582(c)(1) is a jurisdictional or claims-processing requirement).

147. 18 U.S.C. § 3582(c)(1)(A) (noting that the defendant must *either* exhaust their administrative rights *or* wait thirty days from their initial petition to the warden before petitioning the court); *see supra* note 143.

148. 18 U.S.C. § 3582(c)(2) ("[T]he court may reduce the term of imprisonment . . . *if* such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." (emphasis added)).

149. Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 155 (2013) (noting that

The claims-processing and jurisdictional distinction that courts wrestle with when considering the First Step Act's exhaustion requirement may seem straightforward.[150] In short, however, the distinction underscores some of the statute's ambiguity and highlights yet another obstacle that petitioners must overcome when petitioning the court for compassionate release prior to exhausting their administrative remedies.[151] Necessarily, Congress must amend the compassionate release statute to clarify the courts' ambiguous role under the compassionate release statute during times of crisis.

The following Subsection builds upon the claims-processing and jurisdictional distinction. Namely, if the exhaustion requirement is a claims-processing rule, can a court waive the requirement during a time of crisis? While courts most often find that the rule is claims-processing, the question regarding judicial waiver is significantly

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although a section of a statute's jurisdictional nature may be persuasive, it is certainly not dispositive); *see also* Gonzalez v. Thaler, 565 U.S. 134, 147 (2012) ("Mere proximity will not turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle.").

150. Although courts ordinarily depend on the above arguments, several others have put forth additional creative positions, both to support the exhaustion requirement as a claims-processing rule, and as a jurisdictional rule. For example, courts that find that the exhaustion requirement is a claims-processing rule note that the government has previously taken such a position. *See, e.g.*, United States v. Malone, No. 13-231-01, 2020 WL 1984261, at *1 (D.C. Cir. Apr. 27, 2020) (citing United States v. Powell, No. 94-cr-0316 (D.D.C. 2020)); *see also* United States v. Connell, No. 18-CR-00281-RS-1, 2020 WL 2315888, at *3 (N.D. Cal. May 8, 2020) ("Although the defendant has not exhausted her administrative remedies pursuant to 18 U.S.C. § 3582(c)(1)(A) . . . the Government has concluded that it is appropriate to waive the exhaustion requirement." (citing Government Brief, United States v. Jasper, No. 18-cr-00390, ECF No. 440 (S.D.N.Y. Apr. 4, 2020))) (ruling that the failure to exhaust does not deprive the courts of jurisdiction). In contrast, at least one court that found the exhaustion requirement to be jurisdictional referenced an Eighth Circuit court decision that found the correction of an illegal sentence to be jurisdictional in nature. *See* United States v. Smith, 460 F. Supp. 3d 783, 790–92 (E.D. Ark. 2020) (relying on United States v. Auman, 8 F.3d 1268 (8th Cir. 1993)).

151. For example, multiple courts that ultimately found the exhaustion requirement un-waivable conceded that the rule was claims-processing, rather than jurisdictional. *See, e.g.*, United States v. McIndoo, 1:15-CR-00142, 2020 WL 2201970, at *6 (W.D.N.Y. May 6, 2020); United States v. Britton, 473 F. Supp. 3d 14, 19 (D.N.H. 2020). Others wholly failed to address it. *See, e.g.*, United States v. Demaria, 17-Cr-569 (ER), 2020 WL 1888910, at *4 (S.D.N.Y. Apr. 16, 2020). Still others referenced the issue but chose not to decide either way given the petition's failure on exception grounds. *See, e.g.*, United States v. Lugo, 2:19-cr-00056-JAW, 2020 WL 1821010, slip op. at *3 (D. Me. Apr. 10, 2020).

murkier and creates a split among federal district courts.[152] The reasoning for the split is assessed below.

2. Considering Whether the Exhaustion Requirement Is Subject to a Judicial Exception

When considering whether a seemingly mandated exhaustion requirement is absolute, the Supreme Court's decision in *McCarthy v. Madigan* is most significant.[153] In relevant part, *McCarthy* sets out three explicit exceptions to an exhaustion requirement: (1) when its requirement would subject the claimant to "undue prejudice,"[154] (2) when its requirement would be "inadequate 'because of some doubt as to whether the agency was empowered to grant effective relief,'"[155] and (3) when it would be "futile," based on agency bias or a previous agency determination.[156] Under *McCarthy*, for example, the Court found that an inmate seeking money damages under an Eighth Amendment claim did not need to exhaust his administrative remedies because, in part, the administrative remedy lacked the ability to grant monetary damages, the only relief requested by the petitioner.[157]

When courts apply this rule directly to the First Step Act's exhaustion requirement, it arguably allows for a judicial waiver of the requirement during a national health emergency: a statute that requires petitioners to wait an extra thirty days in prison before petitioning the courts—during the peak of COVID-19—is unduly prejudicial.[158] What makes the application of these exceptions to the present case unclear, however, is the nature of the exhaustion requirement. Under *McCarthy*, the requirement is judicially

152. *Compare* Kletter, *supra* note 99, § 118 (listing court opinions that held judicial waiver was not applicable to the First Step Act's exhaustion requirement), *with* Kletter, *supra* note 99, § 119 (listing court opinions that held judicial waiver was applicable to the First Step Act's exhaustion requirement).

153. *See generally* McCarthy v. Madigan, 503 U.S. 140 (1992) (expounding on the ability to waive the exhaustion requirement).

154. *Id.* at 146–47.

155. *Id.* at 147 (citing Gibson v. Berryhill, 411 U.S. 564, 575 n.14 (1973)).

156. *Id.* at 148.

157. *Id.* at 154–56.

158. *See, e.g.*, Coleman v. United States, 465 F. Supp. 3d 543, 546 (E.D. Va. 2020) ("Due to the administrative challenges presented by the COVID-19 pandemic and the extreme unlikelihood of action from the BOP within 30 days, the Court finds that compliance with the exhaustion requirement on COVID-19-related petitions for compassionate release is unduly prejudicial as a general matter.").

imposed.[159] In contrast, under the First Step Act, it is spelled out in the statute.[160] While it is "well-settled" that courts may utilize exceptions to judicially created exhaustion requirements under *McCarthy*, the mandatory nature of statute-created exhaustion requirements is unclear.[161] To determine *McCarthy*'s applicability to a statutorily created exhaustion requirement, it is necessary to consider the statute's plain language, congressional intent—determined by considering the First Step Act's legislative history and statutory structure—and other similar case law precedent. The resulting conclusion, however, is murky.

a. Applying McCarthy v. Madigan *to the First Step Act: Considering the Statute's Plain Language*

First, it is unclear whether the statute's plain language, seemingly mandating the exhaustion of administrative remedies, is enough to determine whether judicial waiver applies. On one hand, as *McCarthy* notes, "[w]here Congress specifically mandates, exhaustion is required."[162] In a similar manner, the Supreme Court decision, *Ross v. Blake,* indicates that "[w]hen it comes to statutory exhaustion provisions, courts have a role in creating exceptions *only if* Congress wants them to."[163] The First Step Act's plain language,[164] without reviewing congressional intent or legislative history, seems to indicate that an exhaustion requirement must be met, even if it is a "glaring roadblock foreclosing compassionate release."[165]

This discussion by both *McCarthy* and *Ross*, however, may not be wholly conclusive. First, arguably, *McCarthy*'s discussion is mere dicta.[166] A Second Circuit opinion interpreting *McCarthy* appears to support this understanding.[167] Second, the quote from *Ross* allows

159. *McCarthy*, 503 U.S. at 149 ("[W]e note that the general grievance procedure was neither enacted nor mandated by Congress.").

160. *See* 18 U.S.C. § 3582(c)(1)(A).

161. *See infra* Part II.B.2.a–b.

162. *McCarthy*, 503 U.S. at 143 (1992) ("Where Congress specifically mandates, exhaustion is required . . . . But where Congress has not clearly required exhaustion, sound judicial discretion governs.").

163. Ross v. Blake, 136 S. Ct. 1850, 1853 (2016) (emphasis added).

164. *See* 18 U.S.C. § 3582(c)(1)(A).

165. United States v. Raia, 954 F.3d 594, 597 (3d Cir. 2020).

166. *McCarthy* only considers a judicially created exception—not a statutorily created one. *See generally* 503 U.S. 140.

167. *See* Washington v. Barr, 925 F.3d 109, 118 (2d Cir. 2019) ("Even where exhaustion is seemingly mandated by statute or decisional law, the requirement is

for congressional intent interpretation. As will be discussed, interpreting the First Step Act through a congressional intent lens does not create a strict, bright-line rule against judicial waivers of statutorily created exhaustion requirements.[168] And finally, the Court has "reserved whether mandatory claim-processing rules may be subject to equitable exceptions."[169] As discussed above, the exhaustion requirement under the compassionate release statute is most likely a claims-processing rule.[170] Does that mean that the requirement *is* subject to waiver?

Given the ambiguity of statute-created exhaustion requirements, it is important to further analyze congressional intent to determine whether exhaustion is mandatory.[171] Importantly, *McCarthy* recognizes that legislative intent is "paramount" when determining the required nature of the exhaustion rule.[172] The analysis of congressional intent, however, further highlights the ambiguity surrounding a judicial waiver under the First Step Act.

b. Applying McCarthy v. Madigan *to the First Step Act: Considering Congressional Intent Beyond the Statute's Plain Language*

Notwithstanding the seemingly mandatory nature of the statute's exhaustion requirement, Congress arguably did not intend its mandatory nature for two reasons: namely, (1) the non-

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not absolute."). *But see, e.g.*, United States v. Britton, 473 F. Supp. 3d 14, 24 (D.N.H. 2020) (indicating that given its dissimilar nature, *Washington v. Barr*'s "not absolute" statement is "mere dicta").

168. *See infra* Part II.B.2.b.

169. Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13, 18 n.3 (2017). Further, the Supreme Court has addressed analogous statutes with seemingly mandated language which were held to be subject to equitable exceptions. *See, e.g.*, Holland v. Florida, 560 U.S. 631, 645–46 (2010) (addressing the requirement in the Antiterrorism and Effective Death Penalty Act); Menominee Indian Tribe of Wis. v. United States, 136 S. Ct. 750, 756 (2016) (finding that nonjurisdictional statutes could be equitably tolled). Responding courts have rebutted that reliance, however, noting that statutes of limitations addressed in *Holland* carry a very different meaning than this type of exhaustion requirement. *See Britton*, 473 F. Supp. at 23.

170. *See supra* Part II.B.1.

171. *McCarthy*, 503 U.S. at 144 ("Of 'paramount importance' to any exhaustion inquiry is congressional intent." (quoting Patsy v. Board of Regents of Florida, 457 U.S. 496, 501 (1982))).

172. *Id.*; *see also, e.g.*, United States v. Haney, 454 F. Supp. 3d 316, 320 (S.D.N.Y. 2020) ("The Court is sensitive to the fact that the here-relevant exhaustion requirement is imposed by statute, rather than by case law. In such situations, Congressional intent is 'paramount' to any determination of whether exhaustion is mandatory." (quoting *Patsy*, 457 U.S. at 501) (internal quotation marks omitted)).

traditional nature of the compassionate release exhaustion requirement and (2) the legislature's clear intent that the exhaustion requirement promote judicial efficiency appears to indicate otherwise.

First, the compassionate release exhaustion requirement is non-traditional.[173] As succinctly stated by a federal district court in the Second Circuit[174] and cited by other courts finding the same determination[175] the statute does not require "full litigation" of a claim with the BOP, but instead requires that the defendant *either* "fully exhaust[] all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf" *or* wait thirty days from their request, "*whichever is earlier*."[176] This language articulates an alternative to a traditional, full exhaustion of administrative remedy requirement. Rather than require petitioners to exhaust administrative remedies with the BOP prior to petitioning the courts, the statute gives the petitioner an alternative option to simply wait thirty days.

Arguably, Congress intended the First Step Act exhaustion requirement to move beyond the "scope of traditional" exhaustion mandates. As previously noted, the Supreme Court has held that "traditional" exhaustion mandates generally "serve[] the twin purposes of protecting administrative agency authority and promoting judicial efficiency."[177] Here, however, *McCarthy*'s twin exhaustion purposes appear to fall flat in the face of the compassionate release statute.[178] First, given the "either-or" requirement of the statute (to either fully exhaust *or* to wait thirty days), the purpose in protecting administrative authority is greatly diminished.[179] Rather, the thirty-day requirement,[180] as well as the

173. *See, e.g.*, *Haney*, 454 F. Supp. 3d at *321("Importantly, § 3582(c)(1)(A) does not contain an exhaustion requirement in the traditional sense. That is, the statute does not necessarily require the moving defendant to fully litigate his claim before the agency . . . before bringing his petition to court.").

174. *Id.*

175. *See, e.g.*, United States v. Ramirez, 459 F. Supp. 3d 333, 343 (D. Mass. 2020).

176. *Id.*; 18 U.S.C. § 3582(c)(1)(A) (2018) (emphasis added).

177. *McCarthy*, 503 U.S. at 140.

178. *Cf.* United States v. Russo, 454 F. Supp. 3d 270, 277 (S.D.N.Y. 2020) ("[Section 3582(c)] does not reflect unqualified commitment to administrative exhaustion and it does reflect acknowledgment that the judiciary has an independent interest in, and responsibility for, the criminal judgments it is charged with imposing. It has features of an administrative exhaustion requirement and of a timeliness statute.").

179. *See, e.g.*, *Haney*, 454 F. Supp. 3d at 321 ("But the hybrid requirement in this

legislature's understanding of the overwhelming demand faced by the BOP,[181] indicates that the exhaustion requirement "unquestionably reflects" a different purpose: the "congressional intent for the defendant to have the right to a meaningful and prompt judicial determination."[182] In sum, the "either-or" alternative "suggests that Congress understood that some requests for relief may be too urgent to wait for the BOP's process"[183] and was intended as an "accelerant to judicial review" rather than as a protection of administrative agency authority.[184]

Moreover, COVID-19 has greatly diminished the second purpose: promoting judicial efficiency. The pandemic and the influx of petitions greatly increased the court's docket.[185] Rather than slowing down petitions directly filed with the court, COVID-19 compassionate release filings have overburdened the BOP, drastically lengthening the BOP's response time.[186] In turn, petitioners filed compassionate release requests "en masse irrespective of the 30-day rule."[187] The situation ultimately forced federal district courts to consider each motion twice: first, to determine whether the exhaustion requirement is satisfied; and second, a few weeks later, to determine the merits of the case.[188]

The legislative history and statutory structure of the compassionate release statute further support courts who claim that the administrative requirement indeed reflects a congressional

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statute . . . substantially reduces the importance of [protecting agency authority], as it allows a defendant to come to court before the agency has rendered a final decision.").

180. *Id.* (indicating the thirty-day requirement is "far shorter" than typical exhaustion rules).

181. United States v. Jemal, No. 15-570, 2020 WL 1701706, slip op. at *3 (E.D. Pa. Apr. 8, 2020) ("[COVID-19] has resulted in an overwhelming tide of compassionate release requests that are straining, if not overwhelming, the BOP's resources, making it difficult to act with the speed that necessity commands.").

182. *Haney*, 454 F. Supp. 3d at 321.

183. United States v. Guzman Soto, No 1:18-cr-10086, 2020 WL 1905323, at *5 (D. Mass. Apr. 17, 2020).

184. United States v. Russo, 454 F. Supp. 3d 270, 277 (S.D.N.Y. 2020) ("In essence, the 30-day rule was meant as an accelerant to judicial review. The Court is charged with interpreting congressional intent and it would pervert congressional intent to treat it as a substantial obstacle to effective judicial review.").

185. *See Haney*, 454 F. Supp. 3d at 321.

186. *Id.* ("Because of the pandemic, prisoners have inundated the BOP with requests for release.").

187. *Id.*

188. *Id.* at 321–22.

desire for prompt judicial determination. First, as noted previously, the First Step Act generally expands compassionate release by removing the BOP Director as a "gatekeeper."[189] Given the BOP's previous role as an impediment to the compassionate release process,[190] this general expansion indicates that Congress intended the First Step Act to provide petitioners with "meaningful and prompt" determination.[191] The heading of § 3582, "Increasing the Use and Transparency of Compassionate Release,"[192] as well as the statute's legislative history,[193] further supports this claim.

Indeed, several courts have argued that both the congressional intent to accelerate compassionate release petitions, as well as the frustration of Congress' original intent behind exhaustion requirements generally, allow courts the discretion to waive these requirements under *McCarthy*.[194] On the other hand, it is notable that Congress failed to clarify or change the First Step Act legislation when they passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act on March 27, 2020 in response to providing relief by those impacted by the pandemic.[195] This lack of clarification perhaps indicates that Congress did not intend judicial waiver of exhaustion requirements under the compassionate release statute.[196] These considerations taken together, and their failure to support conclusive results, highlight the uncertainty courts face when

189. *Compare* 18 U.S.C. § 3582(c)(1)(a) (1984), *with* 18 U.S.C. § 3582(c)(1)(a) (2018).

190. *See supra* notes 62–64 and accompanying text.

191. *Haney*, 454 F. Supp. 3d at 321.

192. *See* Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998) (showing that a title or heading of a statute can resolve doubt regarding the statute's meaning); *see also* First Step Act of 2018, Pub. L. No. 115-391, § 603, 132 Stat. 5239 (2018) (stating the statute's purpose was to "[i]ncreas[e] the use and transparency of compassionate release").

193. A co-sponsor of the bill, Senator Cardin, noted that it "expedites compassionate release applications." 164 Cong. Rec. S7314 (daily ed. Dec. 5, 2018) (statement of Sen. Cardin).

194. *See supra* notes 154–157 and accompanying text (noting the *McCarthy* exceptions: undue prejudice, incapable of granting adequate relief, and futility). See *Haney*, 454 F. Supp. 3d 316 and United States v. Russo, 454 F. Supp. 3d 270 (S.D.N.Y. 2020) for cases that thoroughly consider this idea.

195. *See* Pub. L. 116-136, 134 Stat. 281.

196. *See* United States v. McIndoo, 1:15-CR-00142, 2020 WL 2201970, at *8 (W.D.N.Y. May 6, 2020) ("In other words, 'Congress recognized the danger that COVID-19 poses to inmates and determined that the problem required a centralized response by a specialized agency in the executive branch, not piecemeal consideration by courts.'" (internal citation removed)).

considering waiver-of-exhaustion requirements under the First Step Act.

c. Applying McCarthy v. Madigan *to the First Step Act: Considering* Ross v. Blake

Beyond considerations of plain language and congressional intent, some courts have found that *Ross v. Blake* offers perhaps the most relevant Supreme Court case when considering the First Step Act's exhaustion requirement.[197] Under *Ross*, the Supreme Court found that the exhaustion requirement under the Prison Litigation Reform Act (PLRA) was mandatory and unable to be waived, even in "special circumstances."[198] Its applicability to the First Step Act, however, is questionably relevant given four key differences between the PLRA and the First Step Act.

First, the language of the exhaustion requirement within the PLRA reflects the more traditional exhaustion requirement discussed above.[199] Rather than including an "either-or" requirement, petitioners that bring an action under § 1983 must fully exhaust their administrative remedies.[200] Effectively, the exhaustion requirement under the PLRA does not indicate a congressional desire to accelerate review.

Second, the procedural purpose under the PLRA was to allow the BOP agency to correct any previous mistakes, avoid liability, and solve the situation administratively.[201] In contrast, rather than allow the BOP to correct a previous mistake or incident, the hybrid exhaustion requirement in § 3582(c) simply determines whether the defendant will receive the support of the BOP when bringing the motion to court.[202]

Third, and perhaps most importantly, the legislative nature of the exhaustion requirement under the PLRA and the compassionate release statute differs. While the PLRA's requirement reflected an

197. *See* Ross v. Blake, 578 U.S. 632, 642 (2016).

198. *Id.*

199. *See* 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 of this title . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.").

200. *See id.*

201. *See* Woodford v. Ngo, 548 U.S. 81, 89 (2006).

202. *See, e.g.*, United States v. Guzman Soto, No 1:18-cr-10086, 2020 WL 1905323, at *5 (D. Mass. Apr. 17, 2020).

intentional strengthening of agency exhaustion,[203] the First Step Act expanded the compassionate release statute to increase both its use and transparency.[204] The inclusion of an exhaustion requirement was actually an *expansion* of petitioner rights and *diminishment* of agency power, rather than an impediment to inmates seeking sentence reduction.[205]

Lastly, as scholars have pointed out, *Ross v. Blake* actually "illustrates the Court's desire to provide parties and lower courts with some means of reducing the often onerous exhaustion requirements that Congress sometimes imposes."[206] While it is true that *Ross v. Blake* does not allow a "special circumstances" exception to a statute-created exhaustion requirement under the PLRA, it notes that an administrative remedy can be considered "unavailable" when (1) "it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates";[207] (2) the remedy is "so opaque that it becomes, practically speaking, incapable of use";[208] or (3) "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation."[209] These exceptions appear to somewhat track the exceptions in *McCarthy*.[210]

d. In Conclusion, It Is Unclear Whether the Exhaustion Requirement Is Subject to a Judicial Exception

Because each argument finds support within the plain language of the compassionate release statute, its legislative history, and precedent, it is difficult to dismiss any of them unilaterally. Each side leads to inconclusive results: while the Supreme Court in *McCarthy* offers a substantive example of exhaustion waiver applicability for

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203. *Ross*, 578 U.S. at 641 ("In enacting the PLRA, Congress thus substituted an 'invigorated' exhaustion provision . . . 'differing markedly from its predecessor.'" (internal citation omitted)).

204. *See supra* notes 66–68 and accompanying text.

205. *See supra* notes 189–193 and accompanying text.

206. HICKMAN & PIERCE, *supra* note 102, at 1069.

207. *Ross*, 578 U.S. at 643.

208. *Id.*

209. *Id.* at 644; *see also* HICKMAN & PIERCE, *supra* note 102, at 1069.

210. *See* McCarthy v. Madigan, 503 U.S. 140, 146–48 (1992). With that being said, the court's interpretation for potential exceptions may not be wholly applicable to the First Step Act's statutory text. *See Ross*, 578 U.S. at 642 (considering whether the exhaustion requirement is "available" given the PLRA's textual inclusion of the word); 18 U.S.C. § 3582(c)(1)(a) (containing no use of the word "available").

judicially created requirements, a *statutorily created* exhaustion requirement, as explored here, does not neatly fit into the case; while the Supreme Court finds a statutorily created exhaustion requirement mandatory under *Ross*, the requirement in *Ross* reflects traditional exhaustion purposes not seen under the compassionate release statute.

Beyond these technical arguments, the backdrop of a pandemic adds an additional wrinkle to the analysis. Often, although not always, courts that ultimately found the exhaustion requirement waivable spent significant time exploring the dire circumstances of the petitioners themselves.[211] In contrast, courts that indicated their inability to waive an exhaustion requirement often expressed optimism for the BOP's ability to quickly move through petitions,[212] not addressing COVID-19's reality.

The fact remains that the compassionate release statute and its exhaustion of remedy requirement, although recently amended to expand for its potential usage among inmates, remains ambiguous

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211. *See, e.g.*, United States v. Haney, 454 F. Supp. 3d 316, 322 (S.D.N.Y. 2020) ("[T]he Court concludes that Congressional intent not only permits judicial waiver of the 30-day exhaustion period, but also, in the current *extreme circumstances,* actually favors such waiver, allowing courts to deal with the emergency before it is potentially too late."(emphasis added)); United States v. Jemal, No. 15-570, 2020 WL 1701706, slip op. at *3 (E.D. Pa. Apr. 8, 2020) ("It is highly unlikely that, in drafting § 3582(c)(1)(A)(i), Congress anticipated a fast-moving pandemic of this magnitude that threatens large segments of the prison population and has resulted in an overwhelming tide of compassionate release requests that are straining, if not overwhelming, the BOP's resources, making it difficult to act with speed that necessity commands."); Coleman v. United States, 465 F. Supp. 3d 543, 547 (E.D. Va. 2020) ("Despite Congress' intent to increase compassionate release, BOP's chronic mismanagement of its compassionate release discretion has persisted in the midst of the COVID-19 pandemic.").

212. *See, e.g.*, United States v. DeMaria, 17-CR-569, 2020 WL 1888910, at *4 (S.D.N.Y. Apr. 16, 2020) ("'Realistically, the best . . . way to mitigate the damage and reduce the death toll of inmates from COVID-19 is to decrease the jail and prison population by releasing as many people as possible' . . . . The Court urges the Bureau to quickly take those steps necessary to protect those under its care." (internal citation omitted)); United States v. Raia, 954 F.3d 594, 597 (3d Cir. 2020) ("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, especially considering BOP's statutory role . . . given BOP's shared desire for a safe and healthy prison environment, we conclude that strict compliance . . . . takes on added—and critical—importance."). *But see* United States v. Britton, 473 F. Supp. 3d 14, 25 (D.N.H. 2020) ("[T]he COVID-19 pandemic is unprecedented and poses a special risk to individuals who are currently incarcerated, especially those who are particularly vulnerable due to serious, chronic health issues or age. In short, inmates' lives are on the line. But the court's hands are tied by the compassionate release statute.").

and unworkable in times of crisis. It is imperative that Congress act now to address the statute's limitations and to propose a workable solution that addresses the exhaustion requirement's limitations in the face of a national health emergency.

III. RESOLVING THE ISSUE: CONGRESS MUST ADDRESS THE FIRST STEP ACT'S AMBIGUITY AND GIVE COURTS THE ABILITY TO ACT SWIFTLY IN CASES OF NATIONAL EMERGENCY

The issues explored in Part II not only demonstrate the ambiguous nature of the exhaustion requirement within the First Step Act but exemplify how its ambiguity can lead to deleterious and potentially fatal results in the face of the coronavirus pandemic. This Part explores why Congress, and not the court system, is in the best position to address this ambiguity. In closing, the Note argues that Congress should amend the First Step Act's exhaustion requirement to clarify its non-mandatory nature in cases of national emergency.

A. THE LEGISLATURE, NOT THE COURT, MUST ADDRESS THE COMPASSIONATE RELEASE STATUTE'S LIMITATIONS

Congress, not the courts, is currently in the best position to respond to the current split for several reasons. These reasons will be addressed in turn.

First, the compassionate relief's exhaustion requirement time period is short.[213] For practicality purposes, the thirty-day length of the exhaustion requirement mirrors the length of time in which each of the following must be completed: (1) a compassionate release request made by the petitioner to the prison warden; (2) an emergency relief request made to the district court; (3) the district court's denial of that request; (4) an appeal by the petitioner to a higher court for a decision on the exhaustion requirement issue; and (5) an issuance of an opinion by that higher federal court.[214] The mere two cases that have made their way to a federal circuit court reflect the reality that a challenge, primarily based on waiving a short period of time, makes it procedurally difficult to make its way to a court of appeals or the Supreme Court.[215] Notably, because few circuit courts have been able to set precedent, the issue will likely be

213. *See* 18 U.S.C. § 3582(c).

214. *See, e.g.*, United States v. Alam, 960 F.3d 831, 832 (6th Cir. 2020) (discussing the procedural posture of the Sixth Circuit addressing the exhaustion issue).

215. *See id.*; *Raia*, 954 F.3d at 596.

resolved inconsistently by most federal district courts.

Second, even if each circuit court had the time necessary to make a proper examination of the statute, the exhaustion requirement cannot be adequately addressed based on precedent. As discussed by numerous courts, the exhaustion requirement within the statute is highly untraditional.[216] It has both aspects of a timeliness statute, and of an administrative exhaustion rule,[217] a factor that is exceedingly unusual.[218] The courts' application of multiple different case precedents, and the overall court split, merely exemplifies the statute's ambiguity and the courts' inability to come to a lasting and meaningful conclusion.[219] Contradicting decisions issued by courts alone will not be a sustainable solution in future times of crisis.

Lastly, many courts themselves, have recognized their limitations in interpreting the statute. As the Third Circuit held, the statute's exhaustion requirement "presents a glaring roadblock foreclosing compassionate release at this point."[220] Several courts that determined an inability to waive the exhaustion requirement recognized the dire circumstances but fully embraced their limitation to act.[221] Other courts, faced with the limitation of their interpretation, urged Congress to amend the law in the face of COVID-19.[222] Given the courts' inability to effectively speak to the exhaustion requirement, it is clear that action addressing this statute's ambiguity must lie with the legislature, and not the courts.

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216. *See supra* notes 173–193 and accompanying text.

217. United States v. Russo, 454 F. Supp. 3d 270, 277 (S.D.N.Y. 2020) ("Section 3582(c) is a distinctive federal statute, unlike those in the cases cited by the Government. It does not reflect unqualified commitment to administrative exhaustion . . . . It has features of an administrative exhaustion requirement and of a timeliness statute.").

218. *Id.* ("[S]uch a provision is extremely unusual (if not unprecedented) as an element of an administrative exhaustion provision.").

219. *See supra* Part II.B.

220. *See Raia*, 954 F.3d at 597.

221. *See* United States v. McIndoo, 1:15-CR-00142, 2020 WL 2201970, at *7 (W.D.N.Y. May 6 2020) ("[W]hen faced with an unambiguous statute, a court is 'not at liberty to engraft onto the statute an exception Congress chose not to create.'" (citing Honig v. Doe, 484 U.S. 305, 306 (1988)) (internal citation omitted))).

222. United States v. Britton, 473 F. Supp. 3d 14, 25 (D.N.H. 2020) ("'Congress may of course amend the law at any time' . . . to remove or amend the exhaustion requirement. Until then, the court is constrained by the law as enacted by Congress." (citing Barton v. Barr, 140 S. Ct. 1442, 1454 (2020) (internal citation omitted)).

B. ADDRESSING THE SOBERING REALITY OF THE FIRST STEP ACT'S LIMITATIONS

The reality is, by the end of 2020, twenty percent of state and federal prisoners tested positive for COVID-19.[223] In some states, the percentage of prisoners who contracted the coronavirus hovered above fifty percent.[224] More than 2,700 prisoners died within the first fifteen months of the pandemic, and new cases within prisons continue to increase.[225]

Given the administrative challenges of the BOP and the deluge of petitions brought about by the coronavirus, the Bureau was not in a position to act as swiftly as it should have in the face of a national emergency.[226] Beyond that, even when inmates received a timely response to their compassionate release requests during the initial months of the coronavirus, prison wardens rejected more than

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223. Beth Schwartzapfel & Katie Park, *1 in 5 Prisoners in the U.S. Has Had COVID-19, 1,700 Have Died*, ABC NEWS (Dec. 18, 2020), https://abcnews.go.com/Health/wireStory/prisoners-us-covid-19-1700-died-74797059 [https://perma.cc/C27E-4NUY].

224. Marc Sallinger, *Report: For Every 1,000 People Incarcerated in Colorado Prisons, 557 Have Contracted COVID-19*, 9NEWS (Jan. 31, 2021), https://www.9news.com/article/news/health/coronavirus/for-every-1000-people-incarcerated-in-colorado-prisons-557-have-contracted-covid-19/73-b1434ce3-1581-4814-a876-68eb2725b2d4 [https://perma.cc/CZ4X-VUU5] (finding 55.7% of inmates within Colorado prisons had contracted the coronavirus by February 2021); *see also* Schwartzapfel & Park, *supra* note 223 ("Half of the prisoners in Kansas have been infected with COVID-19—eight times the rate of cases among the state's overall population.").

225. *See A State-By-State Look at Coronavirus in Prisons*, *supra* note 4. The availability of vaccines has perhaps helped these numbers, but it is likely not enough. *Compare* Becky Sullivan, *All Federal Inmates to Be Offered Vaccine by Mid-May, BOP Director Says*, NPR (Apr. 16, 2021), https://www.npr.org/2021/04/16/988237102/all-federal-inmates-to-be-offered-vaccine-by-mid-may-bop-director-says [https://perma.cc/BV8D-CU95] ("All federal prison inmates will have the opportunity to receive a vaccine by mid-May, according to the director of the Federal Bureau of Prisons, Michael Carvajal . . . . About 66% of federal inmates have accepted invitations to receive the vaccine."), *with* Benjamin A. Barsky, Eric Reinhart, Paul Farmer & Salmaan Keshavjee, *Vaccination Plus Decarceration—Stopping Covid-19 in Jails and Prisons*, NEW ENG. J. MED. 1583, 1585 (2021) ("Vaccination of incarcerated people is important for changing [the spread of COVID-19], but it is not enough."), *and* Walter Pavlo, *Even After Vaccine, Federal Prisons Still have COVID-19 Concerns*, FORBES (May 31, 2021), https://www.forbes.com/sites/walterpavlo/2021/05/31/even-after-vaccine-federal-prisons-still-have-covid-19-concerns [https://perma.cc/G7H5-UHT9] ("[T]here will continue to be low vaccination rates in prison because the BOP currently lacks to [sic] authority to mandate vaccination for both staff and inmates.").

226. *See supra* note 181 and accompanying text.

ninety-eight percent of the petitions they received.[227] These numbers did not improve as COVID-19 spread.[228] With courts, over the Bureau's objections, granting more than ninety-nine percent of the total releases approved,[229] it is clear that inmates require a judicial review of compassionate release requests as soon as possible in states of emergency. Therefore, the legislature must either amend § 3582(c) to allow for judicial waiver of administrative exhaustion requirements under the statute,[230] or include an avenue for direct judicial consideration under the compassionate release statute during pandemics or other similar national emergencies.[231] As the likelihood of future pandemics increases[232] and COVID-19's more communicable variants continue to circulate,[233] the urgency for Congress to clarify the exhaustion provision only grows.

CONCLUSION

It is necessary that Congress address the compassionate release limitations that have been illuminated by COVID-19, to allow courts the discretion to waive exhaustion requirements in the face of a

227. Neff & Blakinger, *supra* note 5 (noting that from March through May 2020, the prison wardens approved only 156 of the 9,436 compassionate release petitions that received a response).

228. *See* Keri Blakinger & Joseph Neff, *31,000 Prisoners Sought Compassionate Release During COVID-19. The Bureau of Prisons Approved 36.*, MARSHALL PROJECT (June 11, 2021), https://www.themarshallproject.org/2021/06/11/31-000-prisoners-sought-compassionate-release-during-covid-19-the-bureau-of-prisons-approved-36 [https://perma.cc/HF5W-2ERD] ("As the pandemic worsened inside federal prisons, officials granted fewer releases."); *see also* COMPASSIONATE RELEASE REPORT, *supra* note 5 (showing that for the percentage of compassionate release grants declined from January 2020 to June 2021).

229. *See* EQUAL JUST. INITIATIVE, *supra* note 17 ("Of the 3,221 people who have been granted compassionate release since the pandemic started, 99% were granted by federal judges over BOP's objections.").

230. An amendment mirroring the exception language in *McCarthy* could perhaps read: "Except when the exhaustion of administrative remedies is unduly prejudicial to petitioner, grants inadequate relief, or is futile . . . ." For reference, see McCarthy v. Madigan, 503 U.S. 140 (1992).

231. There is a current bill introduced to Congress by Senator Brian Schatz that comports with this type of language. *See* Emergency Grants of Release and Compassion Effectively Act of 2021, S. 2095, 117th Cong. § 3(a) (2021) ("Authority.—For purposes of a motion filed under section 3582(c)(1) of title 18, United States Code, during any period for which a public health emergency is in effect, the requirement to exhaust all administrative rights or the 30-day waiting period described in section 3582(c)(1) of title 18, United States Code, shall not apply.").

232. *See supra* note 21 and accompanying text.

233. *See supra* note 22 and accompanying text.

pandemic. Although Congress likely did not foresee a pandemic or the disastrous effect left in its wake when drafting the First Step Act,[234] now equipped with the knowledge of its limitations, it is essential that Congress act to prevent these same limitations in future national emergencies. As eloquently stated by a federal district court in the Second Circuit, "[c]ongressional intent not only permits judicial waiver of the 30-day exhaustion period, but also, in the current extreme circumstances, actually favors such waiver, allowing courts to deal with the emergency before it is potentially too late."[235] It is time that Congress addresses the question head on to specify that *all* federal courts may waive the exhaustion requirement for compassionate release in the face of a global pandemic.

234. *See, e.g.*, United States v. Smith, 454 F. Supp. 3d 310, 314 (S.D.N.Y. 2020) ("No one anticipated today's circumstances, where each day that goes by threatens incarcerated defendants with greater peril." (citing Order at 5, United States v. Russo, 454 F. Supp. 3d 270 (S.D.N.Y. 2020) (No. 16-CR-441))).

235. United States v. Haney, 454 F. Supp. 3d 316, 322 (S.D.N.Y. 2020).