Case No. 20-4056

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellant,

v.

KEPA MAUMAU,

Defendant/Appellee.

On Appeal from the United States District Court
For the District of Utah, Central Division
The Honorable Tena Campbell, District Judge
District Court Case No. 2:08-CR-00758

REPLY BRIEF FOR THE UNITED STATES OF AMERICA

JOHN W. HUBER
United States Attorney
District of Utah

RYAN D. TENNEY
Assistant United States Attorney
111 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Telephone (801) 524-5682
Ryan.Tenney@usdoj.gov
Attorneys for Plaintiff/Appellant

ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff/Appellant, vs. KEPA MAUMAU, Defendant/Appellee.	No. 20-4056 REPLY BRIEF FOR THE UNITED STATES

This appeal now boils down to essentially two questions:

1. For purposes of the compassionate release statute, can a district court define for itself what legally qualifies as an "extraordinary and compelling reason"?

2. Does a district court's belief that a mandatory sentence is too long legally qualify as an "extraordinary and compelling reason"?

Even with the arguments made by Maumau in his responsive brief, the answer to both questions is no.

ARGUMENT

I. A district court does not have the authority to define what legally qualifies as an "extraordinary and compelling reason."

A. Two statutes give this authority to the Sentencing Commission.

An inmate does not have a "constitutional or inherent right" "to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). Statutes that allow for "early release, be it mandatory or otherwise" are thus acts "of legislative grace." *Julian v. Harris*, 482 F.2d 405, 407 (10th Cir. 1973); *see also Dillon v. United States*, 560 U.S. 817, 828 (2010) (describing the release provisions of 18 U.S.C. § 3582(c)(2) as "a congressional act of lenity").

Because Congress created the compassionate release statute, Congress can decide how it operates. Congress can also decide who is empowered to define its terms. As discussed in the government's opening brief, Congress gave this particular authority to the Sentencing Commission in two statutes. The first is the most direct: 28 U.S.C. § 994(t), which states that the Commission's "policy statement[]" "shall describe what should be considered extraordinary and compelling

reasons for sentence reduction, including the criteria to be applied and a list of specific examples." The second is 18 U.S.C. § 3582(c)(1)(A), which corroborates this by requiring a court to "find[ ]" that any reduction is "consistent with" the Commission's policy statement. Maumau nevertheless claims that "the text of § 3582(c)(1)(A)" "reinforce[s] that the court, and the court alone, has the ultimate authority to determine whether extraordinary and compelling reasons warrant a sentence reduction." *Maumau Br.* 17.

It's true that a district court has authority to make the ultimate determination of whether extraordinary and compelling reasons exist in a particular case. But as with any other determination, a court must do so under the correct legal standard. Maumau points to nothing in § 3582 (or any other statute) that gives courts the authority to define what qualifies as an extraordinary and compelling reason. By contrast, § 994(t) and § 3582(c)(1)(A) empower the Commission to define this.

In the absence of any statutory language giving courts this authority, Maumau nevertheless asks this Court to allow district courts to treat the Commission's policy statement as a non-exclusive list. In

Maumau's view, a court should be able to rely on any reason that is not excluded by the policy statement. *Maumau Br.* 12, 15-16.

The "'short answer is that Congress did not write the statute that way.'" *Garcia v. United States*, 469 U.S. 70, 79 (1984) (citation omitted). Section 994(t) doesn't say that the Commission has power to "determine what should (-not-) be considered an extraordinary and compelling reason." Rather, that statute is written as an affirmative grant of authority, stating that the Commission "shall describe what *should be* considered extraordinary and compelling reasons." *Id.* (emphasis added). As used, the imperative phrase "should be" functions as a directive.

The policy statement expresses a similar understanding about the Commission's role. That statement declares at the outset that "extraordinary and compelling reasons exist under any of the circumstances set forth" in Note 1. USSG § 1B1.13, Note 1. As written, the statement makes no allowance for a court to expand on the Commission's definition.

If it were true that a court can base a compassionate release ruling on any reason that it thinks should qualify, so long as that

reason is not excluded by the policy statement, then § 994(t), § 3582(c)(1)(A), and the policy statement would all have been written differently. Moreover, this would be a massive revision to how this scheme operates, shifting definitional control over the scope of this statute from the Commission (which is the clear import of § 994(t)) to the courts (even though no statute says that this is where it belongs).

If Congress had indeed intended for courts (rather than the Commission) to be the ones who ultimately decide what kind of reason can legally qualify, one "would expect the text" of the statutes "to say so." *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1947 (2016) (citation omitted). "Congress 'does not, one might say, hide elephants in mouseholes.'" *Id.* (citation omitted).

As written, however, the statute delegates this authority to the Commission, and the Commission's policy statement likewise reflects its understanding that it is the body that defines the parameters of compassionate release. Maumau's proposed rule would upend this Congressionally-enacted scheme. As a matter of textual interpretation, this Court should reject it.

B. The compassionate release statute's legislative history does not support Maumau's argument.

To the extent that there is any ambiguity, the government has pointed to legislative history showing that Congress intended for the Commission's policy statement to determine what kind of reason qualifies. *U.S. Br.* 23-29.

Maumau disputes this, claiming that the legislative history instead shows that Congress "inten[ded] to grant federal sentencing courts discretion" in this area. *Maumau Br.* 12. In support, Maumau points to a statement in the Senate Report that says compassionate release will be available to reduce an "'unusually long sentence.'" *Id.* at 9-10, 13, 28, 33 (citing S. Rep. No. 98-225 at 55-56). But this statement does not go as far as Maumau suggests.

The paragraph containing this statement begins with this:

> The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the Sentencing Guidelines for the offense of which the defender (sic) was convicted have been later amended to provide a shorter term of imprisonment.

S. Rep. No. 98-225 at 55-56. Two sentences later, that paragraph ends with a directive that a court's "determination" of "whether there is justification for reducing a term of imprisonment in situations such as those described" will be "subject to consideration of Sentencing Commission standards." *Id.* at 56.

Two things stand out. First, in the initial sentence of this paragraph, the Senate did not say that a reduction can be based on the "length of a term of imprisonment." Rather, the Senate said that a reduction will be "justified by changed circumstances." *Id.* at 55. Then, in the sentence that Maumau relies on, the Senate similarly said that when there is an "unusually long sentence," the defendant's "severe illness" or "other extraordinary and compelling circumstances justify a reduction." *Id.* Thus, what the Senate said was that it's the illness or "other" circumstance that justifies the reduction, not the "unusual length" itself. By arguing otherwise, Maumau has inverted the meaning of the very passage he's relying on.

Second, at the close of this paragraph, the Senate reiterated that a compassionate release determination will be "subject to consideration of Sentencing Commission standards." *Id.* at 56. As discussed on pages

26-28 of the government's opening brief, this directly refutes Maumau's claim that the Senate intended for courts to have discretion to define for themselves what qualifies. Instead, the Senate emphasized even here that a court's determination of whether extraordinary and compelling reasons exists in a given case will be governed by what the Commission has said that phrase actually means.

C. The Sentencing Commission's policy statement does not give definitional authority to courts.

Turning from the statute, Maumau claims that the policy statement itself "unambiguously confers" "authority on judges" to "legislate[] the bases for sentence reductions." *Maumau Br.* at 25 n.8.

But Maumau points to no language from the policy statement that says this. The closest that Maumau comes is in a passing reference to USSG § 1B1.13, Note 4. *Maumau Br.* 19. But Maumau only includes Note 4's language in a parenthetical to a citation, *id.*, and he never develops any further argument about it. If this is the basis for this argument, it is inadequately briefed and should not be considered.

Regardless, Note 4 does not create this authority. There, the Commission "encourage[d]" the Bureau of Prisons (BOP) to file a motion "if the defendant meets any of the circumstances set forth in

Application Note 1," recognizing that a "court is in a unique position to determine whether the circumstances warrant a reduction" "after considering the factors set forth in 18 U.S.C. § 3553(a) and the criteria set forth in this policy statement." USSG § 1B1.13, Note 4.

Thus, at its outset, Note 4 reiterates that the "circumstances set forth in Application Note 1" of the policy statement (as opposed to the court's views) are what determine eligibility for compassionate release. And while this note also recognizes that courts are in a "unique position," it doesn't say that courts are in a unique position to determine the scope of this statute. Rather, it says that they are in "unique position" to determine whether a defendant should be released in light of the § 3553(a) factors and the policy statement's criteria.

But this appeal isn't about the ultimate determination of whether Maumau should be released. Rather, it's about whether he's even eligible for release under this statute, and that initial question turns on how to define the statute's operative term. On that question, Note 4 doesn't say that a court can move outside the bounds of the policy statement. If anything, that note reinforces that the policy statement is controlling.

D. The First Step Act did not give courts this authority.

Maumau next asks this Court to give courts this authority under the First Step Act. Maumau claims that (1) this is necessary to accomplish the First Step Act's purposes, and (2) that the First Step Act gave courts the power that is currently set forth in Note 1(D) to the policy statement.

1. It is not necessary to give district courts new definitional power in order to accomplish the First Step Act's purposes.

The First Step Act made two key changes to the compassionate release statute: (1) it added the language now found in § 3582(c)(1)(A) that gives defendants the right to file a motion directly with a court if BOP does not; and (2) it added the language now found in § 3582(d) that imposes notification obligations on BOP. First Step Act of 2018, § 603(b), Pub. L. 115-391, 132 Stat. 5194. As noted, Maumau first argues that courts must have new definitional power in order to fulfill the First Step Act's purpose. *Maumau Br.* 21. In support, Maumau points out that the title of the sub-provision that changed the compassionate release statute was "'Increasing the Use and

Transparency of Compassionate Release.'" *Id.* at 4-5, 20-24 (citing 132 Stat. 5194, 5239).

A statute's title is a "tool[] available for the resolution of a doubt about the meaning of [the] statute," but it "cannot substitute for the operative text of the statute." *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008). Again, nothing in the text of the First Step Act actually created the authority that Maumau seeks, and the current language of the compassionate release statute does not give it to courts either.

But Maumau's argument also fails because the First Step Act's purpose has already been accomplished without giving courts any new authority.

Maumau points to a 2013 report by the Department of Justice's Inspector General that reviewed the compassionate release program. *Maumau Br.* 5.[1] In that report, the Inspector General detailed a number of ways in which federal inmates and prison staff were

[1] This report is available at: https://oig.justice.gov/reports/2013/e1306.pdf (last accessed August 20, 2020) (hereinafter *the OIG Report*).

previously uninformed about how compassionate release works and its substantive standards. *See generally OIG Report* at 11-22.

The First Step Act partially rectified this by adding the provisions now found in 18 U.S.C. § 3582(d). Among others, those provisions require BOP to (i) affirmatively notify inmates of their rights to request compassionate release and (ii) provide employee assistance to inmates as they prepare and submit their requests. 18 U.S.C. § 3582(d)(2)(A)(i)-(iv). With these requirements alone, the First Step Act has already "increased the use of compassionate release," because these changes make it easier for inmates to learn of their rights and file requests.

The First Step Act also did so by now allowing defendants to file motions directly with courts. Again, before the First Step Act, a defendant could not file a motion with a court; only BOP could.

But the Inspector General found that BOP had not approved "a single non-medical request" for compassionate release from 2007 through 2013. *OIG Report* at ii, 8. In addition, it found that while BOP approved an average of 24 medical-based requests per year, BOP personnel were being given inconsistent guidance about what kinds of medical conditions qualified. *Id.* at 1, 13. As a result, the report

concluded that "*eligible* candidates for release" were not "being considered." *Id.* at 11 (emphasis added).

By now allowing inmates to obtain court review on their own, the First Step Act addressed this very problem. By doing so, this also "increased the use of compassionate release," even without making any other change to the substantive standard.

The post-First Step Act cases already reflect that. Here are just some of the cases in which district courts granted compassionate release on defendant-filed motions, where the grants were based on facts that qualify under the criteria already set forth in the Commission's policy statement:

- *United States v. Johns*, 2019 WL 2646663, at *3 (D. Ariz. 2019) (unpublished) (serious medical condition);
- *United States v. Johnson*, 2020 WL 1434367, at *3 (W.D. Ark. 2020) (unpublished) (terminal illness);
- *United States v. Mondaca*, 2020 WL 1029024, at *2-3 (S.D. Cal. 2020) (unpublished) (age and medical conditions);
- *United States v. Gasich*, 2019 WL 4261614, at *1 (N.D. Ind. 2019) (unpublished) ("rapidly progressive breast cancer");
- *United States v. McGraw*, 2019 WL 2059488, at *1-6 (S.D. Ind. 2019) (unpublished) (serious medical condition);

- *United States v. Schmitt*, 2020 WL 96904, at *1, 4 (N.D. Iowa 2020) (unpublished) (terminal illness);

- *United States v. Davis*, 2020 WL 1083158, at *2 (D. Md. 2020) (unpublished) (age and "serious deterioration of his physical health");

- *United States v. Beck*, 425 F. Supp. 3d 573, 577, 580-81 (M.D.N.C. 2019) (terminal breast cancer);

- *United States v. Ebbers*, 432 F. Supp. 3d 421, 431-33 (S.D.N.Y. 2020) (age and medical condition);

- *United States v. Spears*, 2019 WL 5190877, at *3-4 (D. Or. 2019) (unpublished) (age and "serious, possibly terminal, health problems");

- *United States v. Winckler*, 2020 WL 1666652, at *2-3 (W.D. Pa. 2020) (unpublished) (terminal cancer);

- *United States v. York*, 2019 WL 3241166, at *5-6 (E.D. Tenn. 2019) (unpublished) ("chronic systolic heart failure");

- *United States v. Cantu-Rivera*, 2019 WL 2578272, at *2 n.1 (S.D. Tex. 2019) (unpublished) (age);

- *United States v. Cantu*, 423 F. Supp. 3d 345, 348 n.2, 349 (S.D. Tex. 2019) (age).

Again, before the First Step Act, these defendants could not have gotten into court without BOP approval. But because of the First Step Act, these defendants got into court and then obtained early release,

and they did so for reasons that already qualify under the Commission's policy statement.

These cases show that "[p]ermitting a defendant to move for compassionate release of itself increases the use of compassionate release, because it ensures that a greater volume of such motions (not just those BOP agrees are meritorious) will be presented to the courts." *United States v. Lynn*, 2019 WL 3805349, at *3 (S.D. Ala. 2019) (unpublished). Thus, while "Congress did intend to increase the number of compassionate releases," "Congress chose to effectuate this goal, in part, by allowing defendants to bring claims on their own accord—not by expanding the definition of 'extraordinary and compelling reasons' nor changing the fact that the Commission is to define the term." *United States v. Baye*, 2020 WL 2857500, at *9 (D. Nev. 2020) (unpublished).

It is therefore unnecessary to give courts any new definitional power to accomplish the First Step Act's purpose. Maumau's legislative-purpose claim should be rejected.

2. The First Step Act did not give courts power to assume the authority that is currently given to BOP in Note 1(D) of the policy statement.

In the policy statement, Notes 1(A)-(C) allow for release based on medical conditions, age, and family circumstances. Under Note 1(D), a defendant can also be released if it is "determined by the Director of the Bureau of Prisons" that extraordinary and compelling reasons exist. USSG § 1B1.13, Note (1)(D).

Maumau claims that, after the First Step Act, there are three reasons why courts should have power to use the Note 1(D) authority themselves.

First, as a textual matter, Maumau claims that a court can exercise the Note 1(D) authority because there "is no mention or suggestion in the policy statement itself that the BOP's determination of what constitutes extraordinary and compelling reasons warranting relief matters at all." *Maumau Br.* 15.

But on its face, Note 1(D) requires a "determin[ation] by the Director of the Bureau of Prisons" that "there exists in the defendant's case an extraordinary and compelling reason." USSG § 1B1.13, Note

1(D). This is more than a mere "mention or suggestion" that "BOP's determination" "matters."

Given this language, Maumau's assertion only makes sense if he is claiming that there is a meaningful difference between the "policy statement" and Note 1(D) itself. If this is his argument, he's incorrect. Note 1(D) is located in the commentary to a Guideline. By rule, Guideline commentary "is to be treated as the legal equivalent of a policy statement." USSG § 1B1.7. This Court has thus recognized that Guideline commentary is binding in a variety of cases. *See, e.g., United States v. Hargrove*, 911 F.3d 1306, 1328 (10th Cir. 2019); *United States v. Martinez*, 602 F.3d 1166, 1173-74 (10th Cir. 2010); *United States v. Nacchio*, 573 F.3d 1062, 1066-67 (10th Cir. 2009). This Court should reject Maumau's suggestion to the contrary.

Second, Maumau claims that the language in Note 1(D) requiring a determination "by the Director of the Bureau of Prisons" became "vestigial" and "obsolete" when the First Step Act allowed defendants to directly file compassionate release motions with the courts. *Maumau Br.* 17-18, 21. Maumau accordingly asks this Court to "read" this "introductory phrase" "out of the commentary." *Maumau Br.* 19. Then,

having asked this Court to create a power vacuum inside of Note 1(D), Maumau asks this Court to allow district courts to fill it.

There is no power vacuum to fill. Federal courts "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Here, Congress did not change Note 1(D) as part of the First Step Act, and the Commission has likewise left the Note 1(D) introductory language intact. On the plain and express language of that provision, the Note 1(D) power belongs exclusively to the Director of BOP, not to the courts.[2]

Because of this, Maumau's Note 1(D) argument only works if this Court does indeed "read" this phrase "out of the commentary." But notably, Maumau is not arguing that Congress *couldn't* delegate

---

[2] Maumau notes that the Commission no longer has a quorum and can no longer amend the Guidelines. *Maumau Br.* 20. True, but the Commission only lost its quorum in "the second quarter of fiscal year 2019." *See* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report-and-Sourcebook.pdf at *2 (last accessed August 20, 2020).

This was 6 years after the OIG Report that detailed BOP's lack of use of this power. Even before then, the Commission still did not amend Note 1(D) to remove BOP's control over it.

definitional authority to the Commission, nor is he arguing that the Commission *couldn't* give the backstop power to BOP under Note 1(D). Rather, he's arguing that, as a matter of statutory interpretation, the First Step Act itself essentially repealed Note 1(D)'s introductory language. *Maumau Br.* 17-21; *cf. United States v. Marrufo*, 661 F.3d 1204, 1207 (10th Cir. 2011) (Guidelines are interpreted "'according to accepted rules of statutory construction'").

Because neither Congress nor the Commission have actually removed this language, however, this is an implied repeal argument. But an implied repeal argument "faces a stout uphill climb." *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). This Court must start with the "'strong presumption' that repeals by implication are 'disfavored.'" *Id.* (alterations and citation omitted). To overcome this strong presumption, Maumau "bears the heavy burden of showing 'a clearly expressed congressional intention' that such a result should follow." *Id.* (citation omitted). This "intention must be 'clear and manifest.'" *Id.* (citation omitted).

There's no clear and manifest intention here. Again, Maumau's argument is based on BOP's (alleged) "disuse and mismanagement of

the compassionate release motions." *Maumau Br.* 20. But although the Inspector General issued its report in 2013 showing how infrequently BOP was using its authority, Congress and the Commission both left the Note 1(D) limitation untouched in subsequent years. Indeed, even when Congress made changes in the 2018 First Step Act to "increase the use" of compassionate release, Congress still did not transfer BOP's Note 1(D) authority to the courts.

Maumau points out that the Commission has recently recognized the need to update language in the policy statement that is "related to the identity of the movant." *Maumau Br.* 20. But this was reflective of the change Congress that did make to the statute that allowed a defendant to directly file such a motion. This stands in contrast to what Maumau is proposing, which is a transfer of the Note 1(D) power in order to reflect an alleged change that Congress never actually made. On that front, Maumau points to nothing showing an express intent by Congress (or the Commission) for this to occur.

Maumau clearly believes that BOP should use its authority more frequently. But that's a policy argument, not a legal one. "Courts are not authorized to rewrite a statute because they might deem its effects

susceptible of improvement." *Badaracco v. Comm'r*, 464 U.S. 386, 398 (1984). So too with this Guideline.

Third, Maumau argues that enforcing Note 1(D) as written would "put the BOP right back in charge" of compassionate release motions. *Maumau Br.* 21. According to Maumau, the government is claiming that a "district court lacks authority" to even "grant" a compassionate release motion "without BOP approval," a result that he describes as "odd" and "strain[ed]" and "convoluted" and "absurd." *Id.* at 25 n.8.

Maumau is vehemently opposing an argument that the government is not making. The government is not arguing that BOP approval is required before a court can grant any compassionate release motion. Rather, the government is only arguing that BOP approval is required before a court can grant a motion that is predicated on Note 1(D). There's nothing odd about this, because this is what the text of that note still says.

To be clear: this does not mean that BOP approval is required for any other kind of compassionate release motion. Again, the policy statement allows defendants to also obtain relief based on medical conditions, advanced age, or family circumstances. USSG § 1B1.13,

Notes 1(A)-(C). If a defendant properly bypasses BOP and files a motion with a court on one of those grounds, BOP's approval would not be required. As illustrated by the above cases, this is already happening.

As for Note 1(D) itself, however, the text reserves this authority for the Director of BOP. Although Congress and the Commission were aware of BOP's hesitancy to use it, Congress and the Commission still left that limitation intact. Maumau points to nothing that allows this Court to transfer that authority by judicial fiat to the district courts.

II. A district court's disagreement with a mandatory sentence's length is not an "extraordinary and compelling reason" for compassionate release.

Given all this, the remaining question is whether a court's disagreement with the length of a mandatory sentence qualifies as an extraordinary and compelling reason under the policy statement.

A. The district court's ruling below was based on its disagreement with the mandatory sentence's length.

As an initial matter, Maumau claims that the government has "mischaracterize[d] the record" by claiming that the district court's ruling was "based on [its] disagreement with the length of [the]

mandatory sentence." *Maumau Br.* 9. According to Maumau, the court "expressed no disagreement with a mandatory sentence," and the ruling was actually "based on a number of factors, none of which was disagreement with the length of a mandatory sentence." *Id.* at 9, 32. In support, Maumau cites to a passage in which the court said that its determination was based on Maumau's "age, the length of sentence imposed, and the fact that he would not receive the same sentence if the crime occurred today." *Id.* at 31.

Maumau's mistaken—the court did express its "disagreement with a mandatory sentence." *Maumau Br.* 32. As Maumau notes in his brief, the court expressed hostility to the length of the sentence and its mandatory nature at the 2011 sentencing, as well as in an unsolicited letter that it sent to the U.S. Attorney in April 2019 (just 6 months before Maumau filed this motion). *Id.* at 3-4.

Moreover, the ruling itself says that it was based on the court's disagreement with both the mandatory nature of the sentence and its length. In the very passage that Maumau relies on, the court said that "the length of sentence imposed" was one of the factors it was relying on. *Id.* at 31. And while the court also referred to Maumau's age and

"the fact that he would not receive the same sentence if the crime occurred today," those were essentially the court's explanations of why it thought that the sentence was too long and should not be mandatorily enforced.

Elsewhere in the ruling, the court also said that its ruling was based on these grounds. In the section of the ruling that addressed the extraordinary and compelling reasons determination, the court noted that it had "repeatedly expressed [its] concern regarding the length" of the sentence, affirmed its belief that the "mandatory sentence" was "unjust[ ]," and concluded that a court can grant compassionate release if a sentence is "unusually" or "exceedingly long." *Aplt. App'x* 187-91.

Thus, contrary to Maumau's claim, the ruling was based on the court's conclusion that the mandatory sentence was too long and should not be mandatorily imposed. These rationales are directly at issue.

B. A court's disagreement with the length of a mandatory sentence is not an "extraordinary and compelling reason."

The question, then, is whether this qualifies as a proper basis for compassionate release.

Maumau cites to a number of district court cases holding that it does. *Maumau Br.* 22-23. But the landscape on this question is fluid, and it is not actually clear that a "majority of district courts" have embraced Maumau's expansive view of this statute. *Id.* at 22. Indeed, a large number of district courts have rejected arguments like Maumau's.[3]

---

[3] *See, e.g.*, *Lynn*, 2019 WL 3805349, at *1 ("[t]he Commission's policy statement thus establishes the boundaries of what may and may not be judicially determined to be extraordinary and compelling reasons for a sentence reduction"); *United States v. McCloud*, 2020 WL 2843220, at *2 (S.D. Ga. 2020) (unpublished) (holding that arguments like Maumau's "rest upon a faulty premise that the First Step Act somehow rendered the Sentencing Commission's policy statement an inappropriate expression of policy," which "contravenes express Congressional intent that the Sentencing Commission, not the judiciary, determine what constitutes an appropriate use of the 'compassionate release' provision"); *United States v. Brown*, 2020 WL 3511584, at *5 (E.D. Tenn. 2020) (unpublished) ("when some courts construe the First Step Act's modification to § 3582(c)(1)(A) as transferring the Sentencing Commission's definitional authority to the judiciary, they do so in contravention of the plain text of related statutory provisions that Congress chose not to modify"); *see also United States v. Strain*, 2020 WL 1977114, at *4 (D. Alaska 2020) (unpublished); *United States v. Shields*, 2019 WL 2359231, at *3-4 (N.D. Cal. 2019) (unpublished); *United States v. Nasirun*, 2020 WL 686030, at *2 (M.D. Fla. 2020) (unpublished); *United States v. Willingham*, 2019 WL 6733028, at *2 (S.D. Ga. 2019) (unpublished); *United States v. Lum*, 2020 WL 3472908, at *4 (D. Haw. 2020) (unpublished); *United States v. Garcia*, 2020 WL 2039227, at *5 (C.D. Ill. 2020) (unpublished); *United*

But this is a question of statutory interpretation, so this Court is not ultimately bound by a head-counting exercise amongst the mostly unpublished decisions of the district courts. Instead, this Court's interpretation is controlled by the governing statutes themselves.

On this, Maumau calls it "nonsense" to assert that "a judge cannot base a sentence reduction under § 3582(c)(1)(A)" on "her disagreement with the length of a mandatory sentence." *Maumau Br.* 33.

It's not "nonsense." Rather, it's the scheme that Congress created. Again, § 994(t) empowers the Commission to "describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples," and § 3582(c)(1)(A) likewise requires a court to find that any reduction is "consistent with" the Commission's policy statement.

The Commission's policy statement gives four categories of reasons that qualify. Under Notes 1(A)-(C), this includes serious illness, advanced age, or certain specifically-defined "family

---

States v. Washington, 2019 WL 6220984, at *2 (E.D. Ky. 2019) (unpublished); *United States v. Willis*, 382 F. Supp. 3d 1185, 1187 (D.N.M. 2019); *Baye*, 2020 WL 2857500, at *9; *United States v. Ballenger*, 2020 WL 3488157, at *4 (W.D. Wash. 2020) (unpublished).

circumstances." USSG § 1B1.13, Notes 1(A)-(C). Under Note 1(D), this also includes a determination by the Director of BOP that extraordinary and compelling reasons exist in that case. *Id.*, Note 1(D).

The Commission has not included a court's disagreement with the mandatory length of the sentence itself as an extraordinary and compelling reason. Because of this, the ruling below was not authorized under this controlling definition.

This is also true if this Court accepts Maumau's invitation to view the district court's ruling more broadly—i.e., to view its references to Maumau's "age" and the recent statutory amendments as being analytically distinct rationales.

First, age. Unlike the court's concerns about the sentence's length, its reference to Maumau's "age" is at least comparable in kind to a reason that is set forth in the policy statement—the "age of the defendant" reason set forth in Note 1(B). But the similarity stops there. That note doesn't say that a court can grant compassionate release based on *any* age. Everyone has some age, so if that were so, the note would be meaningless. Rather, what the note says is that a defendant can be released early if he is "at least 65 years old," has experienced a

"serious deterioration in physical or mental health because of the aging process," and has served at least 10 years or 75 percent of his sentence. USSG § 1B1.13, Note 1(B). In this sense, the note only allows release based on a defendant's *advanced* age.

Maumau is currently 32 years old. *Aplt. App'x* at 271. Allowing a court to modify a sentence of a 32-year-old under a provision that allows release based on advanced age would subvert that provision entirely. As a matter of interpretation, this cannot be correct.

Second, the statutory amendment. A subsequent statutory amendment is at least a "changed circumstance," but it's still not similar to the kinds of changed circumstances that are included in the policy statement. Again, those all involve factual developments in the defendant's personal life—specifically, to his health, or his age, or his family. By contrast, a statutory amendment is a legal development, not a factual one, and it's one that isn't even about this defendant.

Moreover, unlike the kinds of life changes contemplated in Notes 1(A)-(C), a defendant already has the ability to request relief when a statutory amendment occurs. When Congress amends a statute, courts routinely examine whether the amendment was retroactively

applicable; if it is, courts then give its benefit to the defendant. A statutory amendment is thus fundamentally dissimilar from changes to the defendant's life involving age or illness or family, because in those circumstances, the defendant would not have the ability to obtain judicial relief from his sentence on those grounds without this statutory allowance.

In short, the reasons relied on by the court below are not consistent with the reasons for compassionate release included in the policy statement. This reduction was therefore not authorized.

C. The compassionate release statute cannot be used to "check" prosecutors' charging decisions.

Finally, Maumau asks this Court to allow the compassionate release statute to be used as a "judicial check on exercises of prosecutorial discretion" over charging decisions. *Maumau Br.* 1; *accord id.* at 26-27.

But "courts aren't free to rewrite clear statutes under the banner of [their] own policy concerns." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1815 (2019). Courts also cannot "'rewrite [a] statute'" to make it say what the court "'think[s] Congress really intended.'" *Little Sisters of*

the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2381 (2020) (citation omitted).

Nothing in the statute or the policy statement says that compassionate release is a vehicle for the judiciary to check prosecutors' charging decisions. On statutory interpretation grounds alone, this argument fails.

This is also so because it would violate the separation of powers to interpret the statute this way. Charging decisions are a "core executive constitutional function," *United States v. Armstrong*, 517 U.S. 456, 465 (1996), and "'the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.'" *Greenlaw v. United States*, 554 U.S. 237, 246 (2008) (citation omitted). Charging decisions are left to prosecutors, "the representatives of the executive branch of government, who 'are not mere servants of the judiciary,'" and the separation of powers "mandates" that the "judiciary remain independent of executive affairs and vice versa." *United States v. Robertson*, 45 F.3d 1423, 1437 (10th Cir. 1995) (citation omitted).

For these reasons, prosecutorial charging decisions are "particularly ill-suited to judicial review" and "not readily susceptible to

the kind of analysis the courts are competent to undertake." *Wayte v. United States*, 470 U.S. 598, 607 (1985). Because of this, so long as the government has not acted unconstitutionally by basing the decision on an impermissible ground such as race or religion, *id.* at 608, "the government can charge and take to trial any offense for which it has probable cause and thinks it can prove beyond a reasonable doubt." *United States v. Bradshaw*, 580 F.3d 1129, 1135 (10th Cir. 2009).

Here, Maumau insinuates in passing that the prosecutors' decisions were racially motivated. *Maumau Br.* 26-27. But although he could have raised a selective prosecution claim in his direct appeal, he didn't. And in this case, he has not even pleaded the correct standard for a selective prosecution claim, let alone proven it. *See Wayte,* 470 U.S. at 608 (detailing the standard and burden of proof for such a claim).

As for Maumau's criminal culpability, the government had far more than probable cause. The jury convicted Maumau on all counts, this Court affirmed those convictions, the district court denied Maumau's 2255 petition, and this Court recently affirmed the denial of Maumau's 2255 petition. *See Toki v. United States,* 2020 WL 4590536

(10th Cir. Aug. 11, 2020) (unpublished). Maumau thus stands validly convicted.

Maumau nevertheless insists that it was unfair for prosecutors to have charged him with so many offenses. But courts are "not permitted" to "'abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment' or 'to impose on law enforcement officials their personal and private notions of fairness.'" *United States v. Begay*, 602 F.3d 1150, 1155 (10th Cir. 2010) (alterations and citations omitted).

Again, the only question on appeal is whether, as a matter of statutory interpretation, the compassionate release statute allows relief on this basis. Given the Executive Branch's "'exclusive authority and absolute discretion to decide whether to prosecute a case,'" it "seems unlikely" that Congress "meant that discretion to be shared with more than 200 appellate judges.'" *Greenlaw*, 554 U.S. at 246 n.4.

For both statutory interpretation and constitutional reasons, this argument must be rejected.

* * * * *

A final note is in order. Maumau chides the government for "trotting out the all-too-familiar trope of the slippery slope." *Maumau Br.* 1. But after assuring this Court that there are limits to a district court's alleged authority, *id.* at 26, Maumau never actually says what those limits are. Instead, he asks this Court to come up with them itself, suggesting that "[o]ver time, this Court will no doubt provide further guidance by affirming reductions that fall within the ambit of discretion afforded by the law and policy statement and reversing those that amount to abuses of that discretion." *Id.*

If this Court accepts Maumau's expansive view of this statute, this will no doubt be required. Given what's at stake in federal sentencing, many defendants will see "extraordinary and compelling reasons" in their cases, and they will now be free to challenge their otherwise-final sentences using new rationales. It will be up to the courts to decide what reasons can legally qualify, except courts will do so without any bounded criteria.

This is not what Congress intended. Again, the 1984 legislative overhaul was designed to promote consistency within federal sentencing. It was no accident that Congress tasked the Commission

with defining what qualifies as an "extraordinary and compelling reason." Not only does the Commission have expertise in sentencing, but it also has a national mandate. By leaving this definitional question up to the Commission, Congress thus ensured that compassionate release requests nationwide would be evaluated using the same substantive criteria.

If this question is now unmoored from the Commission's definition, the result will be inconsistency on a judge-to-judge basis. Also, the courts will now have to assume the role that the Commission once played in defining the scope of this statute, only they will do so seriatim, rather than systemically.

This Court need not and should not open this door. As an act of congressional grace and lenity, Congress created a limited compassionate release system that is expressly tied to the Sentencing Commission's standards. Because the ruling below was based on rationales that are not set forth in (or consistent with) the rationales set forth in the Commission's policy statement, that ruling was not statutorily authorized.

CONCLUSION

For the foregoing reasons, the ruling below should be reversed.

RESPECTFULLY SUBMITTED on August 20, 2020.

JOHN W. HUBER
United States Attorney

/s/ Ryan D. Tenney
RYAN D. TENNEY
Assistant United States Attorney
Utah Bar No. 9866
111 South Main Street, Suite 1800
Salt Lake City, Utah 84111
(801) 524-5682
Ryan.Tenney@usdoj.gov

CERTIFICATE OF COMPLIANCE

This brief was prepared in a proportionally spaced typeface and contains 6491 words. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Ryan D. Tenney

RYAN D. TENNEY
Assistant United States Attorney
Utah Bar No. 9866
111 South Main Street, Suite 1800
Salt Lake City, Utah 84111
(801) 524-5682
Ryan.Tenney@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the United States Attorney's Office, and that an electronic copy via the ECF system of the foregoing REPLY BRIEF FOR THE UNITED STATES was served to all parties named below on August 20, 2020:

John Gleeson
Farhana Choudhury
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
jgleeson@debevoise.com
fchoudhury@debevoise.com
Ph: (212) 909-6000

Patrick E. Johnson
COHNE KINGHORN, P.C.
111 E. Broadway, 11th Floor
Salt Lake City, Utah 84111
pjohnson@ck.law
Ph: (801) 363-4300

Attorneys for Defendant/Appellee

/s/ Libby Oberg
LIBBY OBERG
Legal Administrative Specialist
111 S. Main Street, Suite 1800
Salt Lake City, Utah 84111
(801) 524-5682

CERTIFICATION OF DIGITAL SUBMISSIONS

I HEREBY CERTIFY that I am an employee of the United States Attorney's Office, and that

(1) All required privacy redactions have been made and, with the exception of any redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the clerk; and

(2) The ECF submission has been scanned for viruses with the most recent version of "McAfee," version number 5.6.1.308, last updated August 20, 2020 and according to the program, are free of viruses.

/s/ Libby Oberg

LIBBY OBERG
Legal Administrative Specialist
111 S. Main Street, Suite 1800
Salt Lake City, Utah 84111
(801) 524-5682