No. 17-3997

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In The
United States Court of Appeals
For The Second Circuit

ALEXANDER SALVAGNO,

***Petitioner – Appellant*,**

v.

DIRECTOR, FEDERAL BUREAU OF PRISONS,

***Respondent – Appellee*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR AMICI CURIAE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW, FAMM, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS and WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, IN SUPPORT OF APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Fed. R. App. P. 26.1 and 29(c) the amici state:

Amica curiae FAMM, like its associated FAMM Foundation, is a nonprofit (nonstock, non-membership) corporation organized under the laws of the District of Columbia as Families Against Mandatory Minimums and Families Against Mandatory Minimums Foundation. Neither has any parent corporation, and no publicly held corporation owns ten percent or more of its stock.

Amici curiae National Association of Criminal Defense Lawyers ("NACDL") and Washington Lawyers' Committee for Civil Rights and Urban Affairs are also nonprofit, nonstock corporations organized under the laws of the District of Columbia. Neither has any parent corporation, and no publicly held corporation owns ten percent or more of its stock. Amicus Center on the Administration of Criminal Law is not incorporated.

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IDENTITY AND INTEREST OF AMICI[1]

FAMM is a nonpartisan, national advocacy organization that promotes fair and effective criminal justice reforms to make our communities safe. Founded in 1991 as Families Against Mandatory Minimums, FAMM promotes change by raising the voices of families and individuals who are directly affected by counterproductive sentencing and prison policies. FAMM has developed a team of attorneys, advocates, and researchers with extensive expertise in crafting and promoting state and federal legislative and sentencing guideline reforms. FAMM also advances our members' interests before the executive branch by, for example, fostering improvements to the executive clemency process. FAMM routinely participates in precedent-setting cases in the U.S. courts of appeals and Supreme Court through the filing of amicus curiae briefs.

FAMM has long fought to improve the federal Bureau of Prisons' compassionate release program. We do so because we hear routinely from our members who are incarcerated in BOP facilities – and their loved ones – about

[1] Pursuant to Fed.R.App.P. 29(a)(4)(D), *amici* represent to this Court that counsel for both parties have consented to the filing of this brief. Pursuant to LAR 29.1(b) and Rule 29(a)(4)(E), *amici* further state that no party's counsel authored this brief, either in whole or in part, nor did any party or party's counsel contribute any money to either amicus that was intended or used to fund preparing or submitting the brief. Rather, only *amica* FAMM and its counsel (and no other person or entity) contributed any money that was used or intended to be used to fund preparing or submitting this brief.

significant delays in processing requests and inexplicable denials of requests, even those from dying prisoners. FAMM first urged the U.S. Sentencing Commission in 2001 to develop – and more recently, in 2016, to refine – USSG § 1B1.13, because as of 2001 the Commission had not acted to comply with 28 U.S.C. § 994(a). That provision, enacted in 1984, requires a Policy Statement to provide guidance to courts considering compassionate release motions from the Director of BOP. See also *id.* § 994(t). FAMM has worked to raise public awareness of the subject through public media and reporting, including an in-depth study co-authored with Human Rights Watch in 2012, "The Answer Is No: Too Little Compassionate Release in U.S. Federal Prisons."[2]

FAMM helped spearhead support for comprehensive legislative reform contained in the GRACE Act (S. 2471, 115th Cong.), which would provide prisoners a clear right to appeal a denied or neglected compassionate release request after exhausting administrative remedies. A similar provision is included in the First Step Act, versions of which have passed both the House (H.R. 5682, 115th Cong.) and the Senate (S. 3649, 115th Cong.), awaiting (as of this filing) reconciliation and the President's signature.

FAMM supports petitioner Salvagno because we believe the Bureau of Prisons exceeded the statutory authority under 18 U.S.C. § 3582(c)(1)(A)(i) when it denied his request – and the similar requests of many of our own members – by relying on factors committed by statute to the sentencing court

[2] Available at https://www.hrw.org/sites/default/files/reports/us1112ForUploadSm.pdf .

(in light of the cross-reference to 18 U.S.C. § 3553(a)), such as protecting public safety and reflecting the severity of the offense.

The Center on the Administration of Criminal Law (the "Center"), based at New York University School of Law, is dedicated to defining and promoting good government practices in the criminal justice system through academic research, litigation, and public policy advocacy.[3] The Center regularly participates as amicus curiae in cases raising substantial legal issues regarding interpretation of the Constitution, statutes, regulations, or policies. The Center supports challenges to practices that raise fundamental questions of defendants' rights or that the Center believes constitute a misuse of government resources in view of law-enforcement priorities. The Center also defends criminal justice practices where discretionary decisions align with applicable law and standards , and are consistent with law-enforcement priorities.

The Center has a substantial interest in this case because post-sentencing reduction decisions play an important role in the administration of criminal law. Permitting district courts to review the federal Bureau of Prisons' denial of a compassionate release request that was made consistent with Sentencing Guidelines and the BOP's own internal policies is consistent with the federal sentencing scheme, which entrusts sentencing reduction determinations to district court judges, as well as the Sentencing Commission's intent to ease the

[3] No part of this brief purports to represent the views, if any, of New York University School of Law or New York University.

burden of applying for compassionate release, and will improve the functioning of the criminal justice system.

The National Association of Criminal Defense Lawyers ("NACDL"), founded in 1958, is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct and to advance the professionalism of the defense bar. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice according to law. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide assistance to courts in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The Washington Lawyers' Committee for Civil Rights & Urban Affairs (WLC) was founded in 1968 to provide *pro bono* legal services to address issues of discrimination and entrenched poverty. Since then, it has successfully handled thousands of civil rights cases on behalf of individuals and groups, including prisoners.

Because of the District of Columbia's status as a federal district, all individuals convicted of felonies in the District since 1998 have been imprisoned in federal Bureau of Prisons (BOP) facilities. Over 4,500 convicted D.C. offenders currently reside in more than ninety BOP institutions across the country. The WLC engages in extensive individual advocacy and class-action litigation on behalf of individuals in BOP custody, whether sentenced under D.C. or federal law. The WLC is one of the only legal organizations that advocates regarding systemic issues in BOP facilities nationwide.

ARGUMENT FOR AMICI CURIAE

The nature and duration of a federal criminal sentence are determined through a complex interaction of all three branches of government. Congress must define offenses and their attendant potential punishments, subject only to constitutional limitations. *United States v. Evans*, 333 U.S. 483 (1948); *United States v. Britton*, 108 U.S. 199, 206 (1883); *United States v. Hudson & Goodwin*, 7 Cranch (11 U.S.) 32 (1812). An Article III judge presides over a trial or guilty plea proceeding that determines guilt; the verdict or finding of guilt in turn delimits the available punishments for that defendant. *Alleyne v. United States*, 570 U.S. 99 (2013). A judge then exercises discretion, within defined statutory boundaries, to impose the sentence. *Booker v. United States*, 543 U.S. 220 (2005). When a sentence of imprisonment is part of the judgment, the Bureau of Prisons ("BOP"), an Executive Branch agency in the Department of Justice, executes that judgment, including by calculating the date when the sentence of imprisonment ends, 18 U.S.C. §§ 3585, 3624. But the Bureau exercises no "sentencing authority." *Setser v. United States*, 566 U.S. 231, 239 (2012). The circumstances under which – and the extent to which – a sentence, once imposed, may be modified, are established either by statute or by the Federal Rules of Criminal, Appellate and 2255 Procedure. As held in *Setser*, any role BOP is to play in modifying a sentence must be clearly set forth in a statute, will be narrowly construed, and may not be exceeded.

This case involves a part of the 1984 Sentencing Reform Act, 18 U.S.C. § 3582(c)(1)(A)(i), which governs reductions of sentence for "extraordinary and compelling reasons." As explained in detail in the following discussion, under that statute the judge may not act unless a motion for such relief is filed by the Director of BOP. When acting upon the motion, the court is to determine whether reduction is "warranted," after considering, in the light of current circumstances, the guidance provided by the Sentencing Commission in a policy statement promulgated pursuant to 28 U.S.C. § 994(t), and the many criteria for just sentencing articulated in 18 U.S.C. § 3553(a). As currently practiced, the BOP's interpretation and implementation of §3582(c) are wrong as a matter of law, because the agency arrogates authority to itself that the statute assigns to the Commission and the sentencing judge, and thus abuses its limited position as gatekeeper.[4]

In this case – and in many others like it of which the undersigned Amici are aware – the BOP exercised power that the governing statute assigns to the Judiciary. It thereby deprived the appellant of liberty without due process of law and violated his right to fair consideration under the governing statute. This Court should reverse the order of the court below and hold that the writ of

[4] We use the term "gatekeeper" here in the same sense that it is used by this Court in exercising its screening function under 28 U.S.C. § 2244(b)(3)(A) with respect to "second or successive" petitions under § 2254 or § 2255. In such proceedings this Court determines whether the petition may be filed in the district court under the statutory criteria, but does not prejudge the merits of any claim advanced in the petition. See *Chambers v. United States*, 106 F.3d 472 (2d Cir. 1997).

habeas corpus under 28 U.S.C. § 2241 is available to remedy this grave and potentially tragic violation of law.

A. The Governing Statute, Properly Construed, Does Not Authorize BOP to Refuse to File a Sentence Reduction Motion for Reasons that Congress Expressly Assigned to a Court for Consideration.

Prior to the Sentencing Reform Act of 1984 going into effect in November 1987, the sentencing court enjoyed unlimited discretion, at any time within 120 days of the sentence being imposed, to reconsider and reduce a federal criminal sentence. Fed.R.Crim.P. 35(b) (pre-1987 version).[5] Most sentences were parolable, with parole eligibility arising in the majority of cases after service of one third of the full term. 18 U.S.C. § 4205(a) (1982 ed., repealed). The decision on parole was made by an independent executive agency, the United States Parole Commission.

Most important for present purposes, the Bureau of Prisons was authorized, in cases subject to pre-1987 law, to move the sentencing judge to reduce the "minimum term." *Id.* § 4205(g) (1982 ed., repealed).[6] This advanced the potential release date for a prisoner who was otherwise not yet eligible for parole. Release *vel non* was then up to the Parole Commission. Section 4205(g)

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[5] If the defendant took a direct appeal, the court could exercise this authority within 120 days after the conviction became final (potentially several years later). See *United States v. Baraldini*, 803 F.2d 776 (2d Cir. 1986) (per curiam).

[6] This provision read: "At any time upon motion of the Bureau of Prisons, the court may reduce any minimum term to the time the defendant has served. The court shall have jurisdiction to act upon the application at any time and no hearing shall be required."

contained no substantive criteria to guide BOP's decision of when or for whom to file, leaving those decisions in the sole discretion of BOP. Similarly, the statute afforded no substantive guidance to the judge receiving such a motion. BOP's regulations authorized motions to advance parole eligibility in "particularly meritorious or unusual circumstances which could not reasonably have been foreseen by the court at the time of sentencing ... for example, if there is an extraordinary change in an inmate's personal or family situation or if an inmate becomes severely ill." 28 C.F.R. § 572.40(a).[7]

The current sentencing system, as revamped in 1984, is very different. One of the principal features of the Sentencing Reform Act was "truth in sentencing." See *Mistretta v. United States*, 488 U.S. 361, 367 (1989). Congress abolished parole for offenses committed on or after November 1, 1987. Henceforth, prison sentences would be determinate, and subject to a lesser rate of reduction for good conduct than had formerly applied. *Compare* 18 U.S.C. § 3624(b) with *id.* §§ 4161–4166 (1982 ed., repealed). Only the sentencing court itself could modify the sentence once imposed, and only in a scant handful of stated circumstances.

The Sentencing Reform Act replaced the sentence modification function previously served by § 4205(g) with the twin provisions of 18 U.S.C. § 3582(c)(1)(A) and 28 U.S.C. § 994(t). The former articulates a substantive

[7] The BOP's insertion of the emphatic adverb "particularly" into the statutory standard appears to reflect its restrictive and unlawful attitude toward the process.

standard on which an otherwise-final sentence may be reduced ("extraordinary and compelling reasons") and assigns particular responsibilities for assessing eligibility to three official actors: the Sentencing Commission, the BOP, and the sentencing court. The new statutory scheme directs the Commission to establish policy defining when a prisoner's circumstances should be deemed to present an "extraordinary and compelling reason" potentially justifying reduction of the sentence; authorizes the BOP to determine when someone appears to meet one or more of the Commission-established criteria and to bring that case to the attention of the sentencing court by motion; and then empowers the sentencing court to grant the motion after considering certain factors.

The role assigned by § 3582(c)(1)(A) to the Sentencing Commission is clarified in another part of the Sentencing Reform Act, 28 U.S.C. § 994(a), which directs the Commission to "promulgate and distribute to all courts of the United States ... (2) general policy statements regarding ... any ... aspect of sentencing or sentence implementation ..., including the appropriate use of ... (C) the sentence modification provisions set forth in section[] ... 3582(c) of title 18 ...." The Act elaborates on this duty by providing more specifically that the Commission "shall" issue a "policy statement" describing:

> what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

28 U.S.C. § 994(t).

Section 3582(c) states that a federal sentencing court "may not modify a term of imprisonment once it has been imposed," except as provided in that subsection. One of the few authorized exceptions is found in the subsection at issue here. That clause provides:

> (1) in any case—
>
> (A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—
>
> (i) extraordinary and compelling reasons warrant such a reduction; ….
>
> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; * * *

18 U.S.C. § 3582(c)(1)(A)(i).[8] The statute clearly states that it is the sentencing court, not BOP, that is to determine, as a matter of *fact* ("it finds") whether (a) "extraordinary and compelling reasons" exist in a particular case that "warrant" a sentence reduction, and (b) that such reduction is consistent with guidance to be issued by the Sentencing Commission. In each individual case, in making

[8] The other allowable sentence reduction provisions apply to a defendant sentenced to life as a "three strikes" offender who has served 30 years, is at least 70 years old, and BOP determines is "not a danger" to others, § 3582(c)(1)(A)(ii); someone who has rendered valuable assistance to the government, whose sentence has been reversed and remanded on appeal, or has been vacated under § 2255, *id.*(c)(1)(B); or one who is the beneficiary of a retroactive Guidelines reduction by the Sentencing Commission, *id.*(c)(2).

this determination the court must first reconsider the § 3553(a) factors, previously examined at the time of sentencing, as they may apply in the present circumstances.

Section 3582(c)(1)(A) does not expressly state the basis upon which the BOP Director is to decide whether to file a motion authorizing sentence reduction. Read as a whole, however, the statutory scheme is best understood as directing BOP to determine only whether "extraordinary and compelling reasons" may exist in a particular case, based on the general criteria and categories defined by the Commission in its policy statement issued under § 994(t). The sentencing court is then to decide (guided by § 3553(a) and the Commission's policy statement) whether the case at hand does present "extraordinary and compelling" reasons and, if so, whether the circumstances "warrant" a sentence reduction.

This reading of the statute, assigning complementary but not redundant roles to different institutional actors according to the professional competence and constitutional role of each, comports with the legislative history, found in the 1983 Senate Judiciary Committee Report on the Sentencing Reform Act. The Senate Report refers to § 3582(c) as providing a set of "safety valves" for the otherwise more determinate sentencing system created by the Act. It describes subsection (c)(1)(A) as applying in "the unusual case in which the defendant's circumstances are so changed, such as by terminal illness, that it

would be inequitable to continue the confinement of the prisoner." S.Rep. 98-225, 98th Cong., 1st Sess., at 121 (Sept. 14, 1983).

Making clear that offense severity is not a disqualifying factor, the Senate Report states that this provision applies "regardless of the length of sentence." *Id*. The "value of the forms of 'safety valves' contained in" the bill, the Committee explained, was that "they assure the availability" of relief in appropriate cases while "keep[ing] the sentencing power in the judiciary where it belongs" and "permit[ting] later review of sentences in particularly compelling situations." *Id*.

In 2007, twenty years after the Sentencing Reform Act went into effect, the Sentencing Commission belatedly issued a policy statement on compassionate release, as required by § 3582(c)(1)(A) and § 994(a).[9] Thus, by the time appellant Salvagno's case came up for consideration by BOP, the Commission, as directed by statute, had authoritatively defined "extraordinary and compelling reasons" in USSG § 1B1.13 (p.s.). As applicable to appellant's

[9] The Commission issued an initial version of USSG § 1B1.13 (p.s.) effective November 1, 2006. *See* USSG appx. C, amend. 683. That enactment did not define "extraordinary and compelling reasons" or provide examples, as required by the statute. Instead (expressly as a "first step" to be further developed), it deferred entirely to BOP. *Id.*, appl. note 1(A). That initial and invalid version was replaced a year later with a list of four criteria similar to those which exist today, but without elaboration or further guidance. USSG appx. C, amend. 698 (Nov. 1, 2007). For better or worse, during the first two decades of the statute's existence, the BOP was thus left to define "extraordinary and compelling reasons" for itself, without the expert policy guidance that Congress intended the Commission to provide. The validity and reviewability of BOP action on requests for sentence reduction during the period from 1987 to 2007 are not at issue here.

case, the Commission's current policy statement provides that a reduction would be "consistent" with the Commission's views (as required by the statute) if any of several types of circumstances exist, *see* USSG § 1B1.13, Appl. Note 1(A)-(C) (2016 rev.).[10] Among the Commission-defined categories potentially warranting sentence modification is "death ... of the caregiver of the defendant's minor child or minor children," *id*. Note 1(C)(i),[11] as in appellant Salvagno's case.

As the facts and history of the present case show, however, BOP, relying on its internal Program Statement 5050.49 (Aug. 12, 2013),[12] is improperly attempting to exercise authority it does not possess, when it refuses to file a

[10] The Commission also invites BOP to present cases to the courts for other reasons it may regard as extraordinary and compelling. *Id.*, Appl. Note 1(D).

[11] The "Family Circumstances" criterion, *inter alia*, was clarified and broadened in the most recent amendment to the Commission's policy statement. *See* USSG, appx. C, amend. 799 (Nov. 1, 2016), at 1388 (2016 ed.).

[12] Available at https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf. In two years since the promulgation of the current § 1B1.13 policy statement, BOP has failed to amend its own 2013 Program Statement on the subject, to which it continues to adhere, thus ignoring the Commission's expert guidance. This is so even though (as explained at length in appellant's brief, with which your Amici agree) the Program Statement – which is not even a formal regulation appearing as part of 28 C.F.R. § 571.60–571.64 – has no legal force. Moreover, the Program Statement, like the BOP regulation itself, *id*. § 570.61(a), is inconsistent with the statute by elevating the governing standard to one of "particularly" extraordinary and compelling circumstances. The court below truncated its quotation of the regulation and thus omitted the regulation's unwarranted limitation. *See* Appx. A.147. (In addition, the BOP continues to insist that the change in circumstances "could not reasonably have been foreseen by the court at the time of sentencing," even though the Sentencing Commission rejected this criterion in its 2016 promulgation. Amend. 799, *supra* note 11, at 1389.)

motion for reasons that the statute clearly assigns for decision to a federal judge. BOP determined that appellant Salvagno had indeed suffered a tragic and unanticipated change in family circumstances that threatens the present welfare and long-term psychological development of his three minor children. Nevertheless, it declined to bring a motion to the sentencing court because of its own assessment of the nature and circumstances of Mr. Salvagno's criminal conduct. Appx. A.88. But the statute commits consideration of factors relating to retribution and just punishment not to BOP, but rather to the sentencing court, which consults the Commission's policy statement and reconsiders the factors set out in § 3553(a) in light of present circumstances. The Bureau's policy and practice, by contrast, prevent the judiciary from exercising the sentencing power, placing that authority instead where it does not belong. See *Setser*, 566 U.S. at 235–37.

Notably, the other subparagraph of § 3582(c)(1)(A) specifically directs BOP to determine that the defendant is "not a danger to the safety of any other person or the community" as a prerequisite to seeking modification of a life sentence imposed under 18 U.S.C. § 3559(c) ("three strikes"). *See* § 3582(c)(1)-(A)(ii). While both of the subsections of § 3582(c)(1)(A) have the same general statutory purpose to authorize ameliorative reductions in sentence, the subparagraph at issue in the present case lacks the particular directive for BOP to consider issues other than those set forth in the Sentencing Commission's policy statement, including those relating to the defendant's crime of conviction, which are peculiarly within the province of the sentencing court.

The principle of *expressio unius* requires the conclusion that Congress meant to confine BOP's authority to keep cases from the courts on public safety grounds to 3559(c) cases, and did not want BOP to withhold (c)(1)(A)(i) cases – as here – from the courts on this or similar grounds related to the defendant's criminal conduct. See *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991); *Jaen v. Sessions*, 899 F.3d 182, 189 (2d Cir. 2017). Such differences in wording between statutory provisions addressing similar concerns are given controlling weight over general statutory purpose when interpreting the statute lacking the specific provision, particularly in criminal cases. See *Lagos v. United States*, 584 U.S. —, 138 S.Ct. 1684, 1689–90 (2018) (construing restitution statute); *Dean v. United States*, 581 U.S. —, 137 S.Ct. 1170, 1177 (2017) (construing mandatory consecutive sentencing law). Of course, the BOP may be well situated to advise the court about an inmate's disciplinary history, but neither public safety considerations nor sufficiency of punishment may lawfully be made a basis for declining to bring a case to court at all.

The district court in this case engaged in no independent analysis of the applicable statutes before dismissing appellant's habeas corpus petition, Appx. A.145, but merely cited non-precedential opinions that do not grapple with the full structure, language, history and meaning of the governing provision. Appx. A.150–53. All of the cited opinions, moreover, arose prior to the promulgation of the current and pertinent 2016 version of the Sentencing Commission's policy statement, and nearly all the cases were litigated *pro se*. Because conformity with the policy statement is a critical part of the legality of any

action under § 3582(c)(1)(A), moreover, case law arising from prisoner requests for compassionate release made prior to November 2007, when there was no such policy statement (*see* note 9 *ante*), is entirely inapt.

Section 3582(c)(1)(A) does not state that the judge should base his or her decision "on the recommendation" of BOP, but rather authorizes the court to act "upon [the BOP Director's] motion." Unlike a sentence reduction motion premised on cooperation (*see* 18 U.S.C. § 3553(e); Fed.R.Crim.P. 35(b)), the court's decision does not depend on finding facts that are within the peculiar purview or expertise of the government or of prison officials.[13] Interpreting the statute as conferring any more authority on BOP than to exercise a preliminary screening function when it acts as gatekeeper under § 3582(c)(1)(A) (after finding facts that indicate eligibility consistent with the Sentencing Commission's policy statement), would be inconsistent with all other provisions of the Sentencing Reform Act that address BOP's role in the sentencing process. The Act as a whole (in keeping with the traditional office of penal authorities, as well as with our general understanding of the Article III "judicial power" as it applies to sentencing; see generally *Setser, supra*) does not invite prison

[13] For the same reasons, although the issue is not necessarily presented here, a U.S. Attorney's Office could not lawfully decline to file a motion under § 3582(c)-(1)(A) that was recommended to it by BOP, or advise BOP against recommending a filing, if in good faith government attorneys perceive that "extraordinary and compelling reasons" as defined by the Sentencing Commission appear to exist in the case. The USAO could, however, properly express in the motion its view as to whether relief was "warranted," including addressing the question whether a danger to other persons or to the community exists. *See* USSG § 1B1.13(2) (p.s.).

managers to exercise discretionary authority based upon highly individualized judgments about when the men and women committed to their custody should be released. In particular, the Act does not authorize the BOP to refuse to file a motion, as in appellant's case, based on its own view of the seriousness of a prisoner's offense and thus of sufficient punishment, in direct conflict with the legislative history of § 3582(c) and the traditionally separate roles of the judiciary and the executive.

It follows that the Commission was correct, in explaining its 2016 amendment of the applicable policy statement, "to encourage the [BOP] Director … to exercise his or her authority to file a motion" under this provision whenever the Commission's stated criteria are satisfied. The court, the Commission recognized, not the BOP, "is in a unique position to assess whether the circumstances exist, and whether a reduction is warranted …." USSG appx. C, amend. 799 ("Reason for Amendment"), at 1389 (2016 rev.), *explaining* § 1B1.13, Appl. Note 4 (p.s.).

This Court should hold that the U.S. Sentencing Commission's advisory interpretation of § 3582(c), as articulated in the policy statement and its commentary, is legally correct, and indeed compelled by the statutory language and structure. The "text, … our tradition of judicial sentencing, and … the accompanying desideratum that sentencing not be left to employees of the same Department of Justice that conducts the prosecution" all lead to the conclusion that BOP cannot set up a roadblock to prevent the sentencing judge from

responding when changed circumstances "produce[] unfairness to the defendant." *Setser*, 566 U.S. at 242–43 (discussing § 3582(c)). Section 3582(c), by design, "provides a mechanism for relief" that BOP is not authorized to thwart. *Id.*

It follows that the BOP action challenged by appellant Salvagno – refusing to file a motion that would authorize his sentencing judge to consider whether to reduce his sentence on account of his tragically changed family circumstances – was contrary to the governing statute. The district court erred in ruling otherwise, and in refusing to grant him prompt relief on that basis.

B. BOP Has Routinely Refused to Recommend the Filing of Sentence Reduction Motions for Plainly Qualified Candidates, With Results That Are Not Only Unlawful but Also Tragic.

Amici FAMM, WLC, CACL and the members of NACDL hear routinely from federal prisoners and their loved ones about efforts to secure compassionate release. Their stories of lengthy delays and adverse decisions by BOP are often compelling. Most disturbing, however, are the accounts of adverse decisions that mirror the denial in appellant Salvagno's case: BOP candidly acknowledges that the prisoner meets one or more of the criteria outlined in BOP Program Statement 5050.49 (which corresponds generally but not entirely to USSG § 1B1.13 (p.s.) and is not published as a formal regulation), but it nonetheless rejects the request to file a motion in court for other, non-statutory reasons that are properly within the purview of the sentencing judge. In

hundreds of cases over the years, family members have struggled to understand how a loved one near death, who can barely move, is considered a risk to public safety; how a prison administrator's inexpert misreading of a Pre-Sentence Investigation Report can prevent a judge from responding to the changed needs of a prisoner's minor children; or how the release of an elderly prisoner who has served a significant amount of her sentence will minimize the seriousness of her crime. They rightly wonder why a prison official rather than a federal judge gets the final word on such questions.

Amici present a few of their stories here to illustrate that appellant Salvagno's experience is not unique. Rather, it is illustrative of a pervasive and systemic problem of executive usurpation of judicial authority. The amici therefore urge this Court to issue a reasoned and precedential opinion putting an end to BOP's longstanding and unlawful arrogation of judicial discretion, particularly where its impact is so cruel and inhumane.

Gregory Schultz was convicted of multiple counts of securities and mail fraud and money laundering. He was sentenced on April 4, 2006, to 262 months in prison and ordered to pay restitution to his victims. Mr. Shultz was 69 years old when he was recommended more than a decade later for compassionate release by the warden at Butner Federal Medical Center. According to the Bureau of Prisons, he suffered from numerous medical conditions which had worsened dramatically during his incarceration. They included multiple sclerosis, blindness in one eye, a neurocognitive disorder that had altered his

personality, a neurogenic bowel and bladder, chronic kidney disease, and hypertension. Peripheral vascular disease had led to the amputation of his right leg above the knee while incarcerated, so that Mr. Schultz had to rely on a wheelchair. He could use a walker, but only with assistance. He could feed himself, but could do little else. He could not bathe, dress, or attend to personal hygiene without help.

In February 2018, officials at BOP headquarters found that Mr. Schultz met the agency's criteria for compassionate release due to his debilitated medical condition. Despite his having served ten years for a nonviolent offense, BOP's general counsel nonetheless refused to allow Mr. Schultz's sentencing judge to even consider a reduction in sentence, asserting that releasing Mr. Schultz would "minimize the seriousness of his offense."[14] In support of that assessment, the general counsel explained that Mr. Schultz had lied, accused federal prosecutors of wrongdoing, testified falsely, obstructed the criminal proceedings, and defrauded a number of victims of approximately $17 million.

Mr. Shultz, who had not (and could not have) been sentenced to life imprisonment, died in BOP custody on July 18, 2018, of prostate cancer. He was 69 years old and had served more than ten years for his nonviolent offenses. His family found the denial letter among his personal belongings provided to them following their loved one's death.

[14] Memorandum from Ken Hyle to J.C. Holland at 1-2 (Feb. 28, 2018) (on file at FAMM). Additional documents relating to Mr. Schultz are on file at FAMM.

Robert Gutierrez was convicted in 2006 of possession with intent to distribute methamphetamine. His sentence was enhanced to 360 months because he was deemed a career offender due to prior felony drug convictions. President Barack Obama commuted Mr. Gutierrez's sentence on October 27, 2016, reducing it to 210 months. As a result, his release date is March 3, 2020.[15]

Mr. Gutierrez is 78 years old. He has no history of violence, no infractions in prison, and a release plan that includes living with his sister in her home and supporting himself with social security and Medicare.

On January 28, 2018, Mr. Gutierrez applied for compassionate release based on his age and the fact that he had as of that day served 75 percent of his sentence. *See* USSG § 1B1.13, appl. note 1(B) ("Age of the Defendant"). More than seven months later, the BOP's general counsel denied his application.[16] The denial acknowledged that Mr. Gutierrez fully met the criteria for compassionate release. The general counsel explained, however, that "[a]s the President has already reduced his sentence, an additional reduction for a non-medical reason is unwarranted. Accordingly, his RIS request is denied."

Nothing in the Sentencing Commission guidance, or even, for that matter, in the BOP's own dubious criteria, exempts individuals who have received a commutation from eligibility for being considered for compassionate

[15] Documents relating to Mr. Gutierrez's conviction, commutation, and compassionate release application are on file at FAMM.

[16] Memorandum from Ken Hyle to C.R. Goetz (Aug. 20, 2018) (on file at FAMM).

release by the judges who sentenced them because of a prison official's subjective view of how much time a defendant deserves to serve.

Connie Farris is serving a sentence of 144 months imposed in April 2011 for multiple counts of mail fraud. The sentence was based on the amount of loss, number of victims, and her role in the offense. It was Ms. Farris's first offense.

In October 2016, the warden at FCI Dublin recommended Ms. Farris for compassionate release so that she could care for her husband, whose muscular dystrophy had rendered him incapacitated and who was left without any family to assist him.[17] The BOP considers a prisoner eligible for compassionate release in the event his or her spouse becomes completely disabled and the prisoner is the only available caregiver. Program Statement 5050.49, ¶¶ 5–6, at 5–9 (2013); *see also* USSG § 1B1.13, appl. note 1(C)(ii) ("Family Circumstances").

The BOP general counsel sought opinions from the agency's medical and correctional programs directors. The medical director found that Mr. Farris, the inmate's spouse, met the BOP's definition of incapacitation.[18] The correctional programs director recommended Ms. Farris' release, explaining that Ms. Farris and her husband had been married for 49 years and had no children, that she

[17] Memorandum from Charles C. Iwuagwu to Connie Farris (Oct. 28, 2016) (on file with FAMM).

[18] Memorandum from Ken Hyle to Charleston C. Iwuagwu (July 14, 2017) (Ken Hyle memorandum) (on file with FAMM).

had no criminal history prior to her offense, and had maintained a perfect record while incarcerated.[19]

Six months later, the general counsel rejected the recommendations. The denial affirmed that Ms. Farris and her husband met the established criteria, but denied the opportunity to be considered by the court for release based on the nature and circumstances surrounding her offense. BOP found that Ms. Farris had "defrauded hundreds of investors of over $32 million over three years"[20] and concluded, as if this determination was for BOP to make, that "[r]elease at this time would minimize the severity of Mrs. Farris's offense."[21]

These three cases are emblematic of the many on file in the offices of *amici*. Only an authoritative court decision properly construing 18 U.S.C. § 3582(c)(1)(A)(i) and affirming the habeas corpus power of federal courts to require that BOP act in accordance with law can end this humanitarian crisis which has persisted for 30 years in defiance of a Congressional mandate for reform.[22]

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[19] Memorandum from Angela P. Dunbar to Kathleen M. Kenney (Jan. 17, 2017) (on file with FAMM).

[20] The general counsel misstates the sentencing court's loss finding, which was $1.9 million, according to official records in the possession of FAMM.

[21] Ken Hyle memorandum, note 17 supra.

[22] *See* Human Rights Watch & Families Against Mandatory Minimums, "The Answer is No: Too Little Compassionate Release in U.S. Federal Prisons," at 16–27, 34–39 (Nov. 2012), available at https://www.hrw.org/sites/default/files/reports/us1112ForUploadSm.pdf ; Mary Price, *A Case for Compassion*, 21 Fed.Sent.Rptr. 170 (2009).

C. District Courts Have Jurisdiction and Authority to Require BOP to Comply With the Statutory Scheme and File Sentence Reduction Motions for Qualified Candidates, So That Sentencing Judges Can Decide Whether, When and to What Extent a Sentence Should Be Reduced for "Extraordinary and Compelling Reasons."

The district court dismissed appellant Salvagno's petition for habeas corpus under 28 U.S.C. § 2241 on the basis that § 3582(c) confers unreviewable discretion on BOP to file a motion with the district court, or not. Appx. A.154–55 (statute "prohibits judicial review," "precludes judicial review"). Yet nothing in the statutory language reflects a congressional intent to divest the district court of its broad, historic habeas corpus jurisdiction. *Cf. Boumedienne v. Bush*, 553 U.S. 723 (2008) (Detainee Treatment Act not an adequate substitute for § 2241 habeas protection); *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001) (IIRIRA of 1996 analyzed and shown not to divest § 2241 jurisdiction); *Felker v. Turpin*, 518 U.S. 651, 665 (1996) (AEDPA provision stripping certiorari jurisdiction does not abrogate Supreme Court's power to issue original writ under § 2241); see *Sharkey v. Quarantillo*, 541 F.3d 75, 84 (2d Cir. 2008) ("We begin with the strong presumption that Congress intends judicial review of administrative action.") (quoting Supreme Court case law).

The federal habeas corpus statute authorizes any federal court to hear the complaint of a federal prisoner who alleges he or she is "in custody in violation of the Constitution *or laws* or treaties of the United States." 28 U.S.C. § 2241(c)(3) (emphasis added). This Court has long recognized that a federal district court, sitting in the location where the petitioner is confined, has juris-

diction under this clause to review actions of BOP affecting the question of when the prisoner will be released and the right to procedural due process. See, *e.g.*, *Lugo v. Hudson*, 785 F.3d 852, 853 (2d Cir. 2015) (per curiam); *Lopez v. Terrell*, 654 F.3d 176, 180 & n.2 (2d Cir. 2011); *Levine v. Apker*, 455 F.3d 71, 78 (2d Cir. 2006); *Adams v. United States*, 372 F.3d 132, 135 (2d Cir. 2004) ("In a § 2241 petition a prisoner may seek relief from such things as, for example, the administration of his parole, computation of his sentence ..., disciplinary actions taken against him, the type of detention, and prison conditions in the facility where he is incarcerated."); *Jiminian v. Nash*, 245 F.3d 144, 146 (2d Cir. 2001); *Carmona v. U.S. Bureau of Prisons*, 243 F.3d 629, 632 (2d Cir. 2001); *cf. Billiteri v. U.S. Board of Parole*, 541 F.2d 938, 947–48 (2d Cir. 1976) (§ 2241 habeas corpus jurisdiction proper to review lawfulness of discretionary decision whether to grant parole, but must be brought in district of confinement, not in sentencing court).

The district court's conclusion that a BOP decision at the threshold stage under § 3582(c) is immune from judicial review under § 2241 when challenged, not on the merits, but as procedurally or substantively out of compliance with the governing statute, is contrary to law. It is therefore due to be reversed.

Moreover, although not pled,[23] the district court had another basis to exercise jurisdiction in this matter: an action in the nature of mandamus under

[23] The assertion on appeal of new or different grounds for subject matter jurisdiction is proper and an exception to the usual rule against raising issues on appeal not advanced below. See *Doe v. Civiletti*, 635 F.2d 88, 93 n.10 (2d Cir. 1980).

28 U.S.C. § 1361 to compel a federal agency or official to perform a nondiscretionary duty or to exercise statutory discretion under lawful criteria only. See *Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979) (recognizing § 1361 jurisdiction over BOP to review conditions of federal pretrial confinement); *Billiteri*, 541 F.2d at 946–47; *Kahane v. Carlson*, 527 F.2d 492, 493–94 (2d Cir. 1975).

The district court did not lack jurisdiction or other authority to act in this case. Because BOP acted in violation of the governing statute, appellant Salvagno was entitled to judicial relief under 28 U.S.C. §§ 1361 and 2241(c)(3) releasing him from unlawful custody (or granting other appropriate relief under 28 U.S.C. § 2243(¶8)) unless BOP promptly agrees to file a compassionate release motion in his case.

CONCLUSION

For the foregoing reasons, complementing those advanced by the appellant, amici CACL, FAMM, NACDL and WLC urge this Court to issue a precedential opinion instructing the Bureau of Prisons to comply with 18 U.S.C. § 3582(c)(1)(A) and file motions for sentence reduction in this case and whenever it finds that the statutory criteria, as elaborated by the Sentencing Commission in its Policy Statement, are facially satisfied, so that a just and humane decision can be made in each individual case by the sentencing court, as intended by Congress.

Respectfully submitted,[†]

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CERTIFICATE OF TYPE-VOLUME COMPLIANCE

This brief was prepared in a 14-point Times New Roman, proportional typeface. Pursuant to Fed.R.App.P. 29(a)(4)(G) and 32(g), I certify, based on the word-counting function of my word processing system (Word 2003), that this brief complies with the type-volume limitations of Rule 29(a)(5) and LAR 29.1(c), in that the brief contains 5882 words, including footnotes but excluding portions of the brief that are not to be counted, which is less than half the allowable length of a party's principal brief.

s/Peter Goldberger
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CERTIFICATE OF SERVICE

I certify that on December 19, 2018, I caused a copy of the foregoing Brief of Amici Curiae to be served on *(a)* counsel for the government (appellee), Sandra Slack Glover, Esq., Chief of Appeals, and John W. Larson, Esq., Assistant U.S. Attorney, District of Connecticut, and *(b)* counsel for the appellant, Georgia J. Hinde, Esq., all by automated CM/ECF delivery upon the electronic filing of the document.

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