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ARTICLE

Compassionate Release, the Sentencing Commission, and the Major Questions Doctrine

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Abstract. The United States Sentencing Commission has fundamentally reshaped the back end of the federal sentencing system. For the first time in the Commission's history, it has expressly authorized judges to consider—in very specific circumstances—nonretroactive changes to the law as "extraordinary and compelling reasons" for granting a sentence-reduction motion. Such sentence-reduction motions are the primary avenue for federal prisoners to obtain relief from disproportionate mandatory minimum sentences that could not be imposed today. To an observer unfamiliar with the history and law of federal compassionate release, the Commission's amended sentence-reduction guidance (U.S.S.G. § 1B1.13) might appear to violate the increasingly important major questions doctrine. After all, the Commission has never before enumerated with such specificity that judges may consider certain changes to the law when evaluating a sentence-reduction motion. And when Congress most recently amended the sentence-reduction law (18 U.S.C. § 3582(c)(1)(A)) as part of the First Step Act of 2018, it made only procedural revisions but left the scope of the Commission's authority untouched. This Article will debunk the recent suggestion by many that the Commission's updated compassionate release policy statement violates the major questions doctrine. After describing the status quo lay-of-the-law, this Article will proceed through the text and statutory history of the sentence-reduction statutes to show why § 1B1.13's changes-in-the-law provision is unlike the actions invalidated in the Court's recent major questions cases, such as West Virginia v. EPA *and* Biden v. Nebraska*. Though the amended policy statement has been the source of recent political controversy, this Article will show that the policy statement actually reflects a narrowing of the Commission's historical authority. It will conclude by confronting the nascent split among the Court's conservatives on*

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the status of the major questions doctrine's clear-statement rule, contending that under either view, the Commission's actions had clear congressional authorization.

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Introduction

In 2005, Sergio Santamaria was convicted of a nonviolent drug offense. He should have faced a mandatory minimum of only ten years. But the government filed a notice pursuant to 21 U.S.C. § 851 that it intended to seek a sentencing enhancement based on two prior felony drug offenses Santamaria committed as a young man. Both convictions were minor; Santamaria was sentenced to five months for possession of marijuana and ninety days for possession of cocaine base. Because of the § 851 notice, however, the judge had no choice but to impose a mandatory life sentence.[1] The judge later lamented that Santamaria's "life sentence for a non-violent drug trafficking offense 'would be laughable if only there w[as not a] real p[erson] on the receiving end,'"[2] especially given that his "prior convictions were incredibly minor."[3]

More than a decade later, Congress drastically changed the law. The First Step Act of 2018 limited the prior offenses that could serve as predicates for a life enhancement.[4] Under the change in the law, neither of Santamaria's prior drug offenses could have authorized an enhanced sentence,[5] and he would have faced only a ten-year mandatory minimum. But the First Step Act did not make these amendments retroactive,[6] and Santamaria continued to serve an "objectively inhumane" sentence.[7]

So, Santamaria turned to a provision of the law that had long been a dead letter—compassionate release. Since 1984, the law has allowed for sentence-reduction motions in cases presenting "extraordinary and compelling"[8] circumstances, but historically, such motions were rarely filed, let alone granted.[9] And when those motions were filed and granted, the "extraordinary and compelling" reasons for sentence reductions were almost always medical in nature, such as terminal illnesses.[10]

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1 United States v. Santamaria, 516 F. Supp. 3d 832, 833–34 (S.D. Iowa 2021).

2 *Id.* at 836 (alterations in original) (quoting United States v. Holloway, 68 F. Supp. 3d 310, 312 (E.D.N.Y. 2014)).

3 *Id.*

4 *See* First Step Act of 2018, Pub. L. No. 115-391, sec. 401, §§ 102, 401(b)(1), 132 Stat. 5194, 5220.

5 *Santamaria*, 516 F. Supp. 3d at 836.

6 First Step Act of 2018 § 401(c).

7 *Santamaria*, 516 F. Supp. 3d at 836.

8 18 U.S.C. § 3582(c)(1)(A)(i).

9 *See, e.g.*, Stephen R. Sady & Lynn Deffebach, *Second Look Resentencing Under 18 U.S.C. § 3582(c) as an Example of Bureau of Prisons Policies That Result in Overincarceration*, 21 FED. SENT'G REP. 167, 167 (2009) ("[W]ith almost 200,000 federal prisoners, the [Bureau of Prisons ("BOP")] approved an average of only 21.3 motions each year between 2000 and 2008 and, in about 24 percent of the motions that were approved by the BOP, the prisoner died before the motion was ruled on . . . .")

10 *See* Erica Zunkel & Jaden M. Lessnick, *Putting the "Compassion" in Compassionate Release: The Need for a Policy Statement Codifying Judicial Discretion*, 35 FED. SENT'G REP. 164, 165 (2023).

But in April 2023, the United States Sentencing Commission—the body tasked with describing the circumstances that should be considered "extraordinary and compelling reasons for sentence reduction"[11]—clarified that some nonretroactive changes in the law may be considered as the basis for compassionate release, assuming the satisfaction of certain criteria.[12] The Commission's updated policy statement on this issue represents a sea change in the compassionate release landscape. Never before has the Commission expressly authorized courts to consider nonretroactive changes in the law as extraordinary and compelling reasons justifying a sentence reduction. For the hundreds of federal prisoners serving comparably draconian sentences to Santamaria's,[13] the Commission's updated guidance opens the door to obtaining relief.

The Commission's revised compassionate release policy statement has already become the battleground of an ideological proxy war. Deep disagreements have emerged in this area about issues ranging from the policy wisdom of an expanded post-sentencing review mechanism to statutory interpretation and deference issues.[14] Courts, too, have split sharply as to whether the proper interpretation of the compassionate release statute permits judges to consider changes in the law as extraordinary and compelling.[15]

Perhaps the most consequential controversy is whether the Commission's enumeration of certain changes in the law as extraordinary and compelling circumstances violates the ever-evolving major questions doctrine. Under the major questions doctrine, "[w]hen an agency claims to have found a previously 'unheralded power,' its assertion generally warrants a 'measure of skepticism.'"[16] Until 2023, the Commission had never previously listed certain changes in the law as extraordinary and compelling. Moreover, the Court generally presumes that Congress intends to retain for itself the authority to make decisions of vast political significance.[17] Beyond being controversial, the Commission's decision

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11 28 U.S.C. § 994(t).

12 U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(6) (U.S. SENT'G COMM'N 2023).

13 *See* C.J. Ciaramella, *This 'Three Strikes' Law Sends People to Die in Federal Prison for Drug Crimes*, REASON (Nov. 27, 2018, 10:00 AM), https://perma.cc/8QY8-MWWT.

14 *See, e.g.*, Hon. Carlton W. Reeves, Chair, U.S. Sent'g Comm'n, Opening Remarks at the United States Sentencing Commission Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines 6–8 (Feb. 23, 2023) (transcript available at https://perma.cc/DS9T-GWMV); Hon. Randolph D. Moss, Chair, Comm. on Crim. L. of the Jud. Conf. of the U.S., Remarks at the United States Sentencing Commission Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines 129–30 (Feb. 23, 2023) (transcript available at https://perma.cc/DS9T-GWMV).

15 *See* United States v. McCall, 56 F.4th 1048, 1065 (6th Cir. 2022) (en banc) (cataloging the circuit split).

16 West Virginia v. EPA, 142 S. Ct. 2587, 2623 (2022) (Gorsuch, J., concurring) (quoting Util. Air Regul. Grp. v. EPA 573 U.S. 302, 324 (2014)).

17 *See id.* at 716.

ostensibly allows for the retroactive application of changes in the law that Congress expressly chose not to make retroactive.[18]

Despite the Commission's purportedly radical transformation of compassionate release, this Article shows why the Commission's amended guidance does not violate the major questions doctrine. Part I explicates the past and present trajectory of the compassionate release landscape. Part II traces the origins of the major questions doctrine and lays out the doctrine's recent developments. Part III makes clear why the Commission's updated compassionate release policy statement does not run afoul of the major questions doctrine. Finally, Part IV illuminates why, even if the major questions doctrine *did* apply, the Commission's actions have clear congressional authorization.

I. An Introduction to Federal Compassionate Release

"Compassionate release" is something of a misnomer. The statutory basis for compassionate release—18 U.S.C. § 3582(c)(1)(A)—"in fact speaks of sentence reductions."[19] Although district courts can reduce a person's term of incarceration to time served, they may also "reduce but not eliminate a defendant's prison sentence, or end the term of imprisonment but impose a significant term of probation or supervised release in its place."[20]

Section 3582(c)(1)(A) generally imposes three requirements before a court may reduce a term of imprisonment. First, the movant must demonstrate that "extraordinary and compelling reasons warrant such a reduction."[21] Second, a sentence reduction must be "consistent with applicable policy statements issued by the Sentencing Commission."[22] And third, a reduction must be consistent with the relevant 18 U.S.C. § 3553(a) factors, which instruct judges to consider "the nature and circumstance of the offense," "the history and characteristics of the defendant," "the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," and so on.[23]

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18 *See* United States v. Thacker, 4 F.4th 569, 574 (7th Cir. 2021) (holding that allowing changes in the law to serve as extraordinary and compelling circumstances would circumvent the imposition of "a lawful sentence whose term Congress enacted, and the President signed, into law").

19 United States v. Brooker, 976 F.3d 228, 237 (2d Cir. 2020) (Calabresi, J., writing for the court).

20 *Id.*

21 18 U.S.C. § 3582(c)(1)(A)(i).

22 *Id.* § 3582(c)(1)(A)(ii).

23 *Id.* § 3553(a)(1)–(7).

When Congress enacted this sentence-reduction mechanism as part of the Sentencing Reform Act of 1984[24] ("SRA"), it allowed only the Bureau of Prisons ("BOP") to file compassionate release motions with a court.[25] A court could modify a term of imprisonment only upon motion of the BOP. At the same time, the SRA created the Sentencing Commission.[26]

Congress tasked the Sentencing Commission with, among other responsibilities, promulgating policy statements that "describe what should be considered extraordinary and compelling reasons for sentence reduction."[27] Congress modestly limited that authority, however, by stating that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason."[28] Beyond that limitation, Congress included no other express limitations on the Commission's authority to enumerate certain circumstances as extraordinary and compelling reasons for a reduction in sentence.[29]

The Sentencing Commission first issued a compassionate release policy statement—U.S. Sentencing Guideline § 1B1.13—in 2006.[30] That policy statement did not define the phrase "extraordinary and compelling." Rather, it stated only that "[a] determination made by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such."[31] The Commission revised § 1B1.13 one year later.[32] It enumerated three extraordinary and compelling circumstances: (1) terminal illness; (2) a significant decline in the movant's physical or mental well-being that would undermine his ability to practice self-care within prison; and (3) the death or incapacitation of the primary caregiver of the movant's minor children.[33] Crucially, the Sentencing Commission also included a catch-all category, which allowed for a sentence reduction if, "[a]s determined by the Director of Bureau of Prisons, there exist[ed] in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in [the prior subsections]."[34] The BOP, therefore, had broad discretion to identify unenumerated extraordinary and compelling reasons for a sentence reduction. The Commission

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24 Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. § 3551).

25 Zunkel & Lessnick, *supra* note 10, at 165.

26 *See* Sentencing Reform Act § 217(a).

27 28 U.S.C. § 994(t).

28 *Id.*

29 *See id.* § 994.

30 *See* United States v. Brooker, 976 F.3d 228, 232 (2d Cir. 2020).

31 U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1(A) (U.S. SENT'G COMM'N 2006).

32 Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28558, 28558 (May 21, 2007).

33 *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1(A)(i)–(iii) (U.S. SENT'G COMM'N 2007).

34 *Id.* § 1B1.13 cmt. n.1(A)(iv).

occasionally updated § 1B1.13 in the following years "to cover events relating to the traditional categories of the imprisoned person's health, age, or family circumstances," but it consistently "maintained, nearly word-for-word, the catch-all provision allowing for other unidentified extraordinary and compelling reasons."[35]

Despite the Commission's grant of broad discretion to the BOP, the BOP-managed compassionate release program was disastrous. "The BOP almost *never* sought release," even for candidates who were likely eligible for a sentence reduction.[36] In the four-year period preceding the First Step Act of 2018, the "BOP approved only *six percent* of applications for compassionate release."[37] Although the Commission's policy statement gave the BOP wide latitude to seek sentence reductions for nonmedical reasons, a report by the Office of the Inspector General found that, between 2006 and 2011, the BOP did not approve a single nonmedical application for compassionate release.[38] Even after the report recommended expanding the use of nonmedical compassionate release, the BOP approved just two percent of nonmedical compassionate release applications.[39]

By 2018, Congress had enough of the BOP's failure to exercise its compassionate release discretion.[40] The First Step Act removed the BOP from its role as the gatekeeper of compassionate release and allowed incarcerated individuals to file sentence-reduction motions directly with the courts.[41] Congress termed the § 3582(c)(1)(A) amendments "Increasing the Use and Transparency of Compassionate Release."[42]

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35 *Brooker*, 976 F.3d at 232–33.

36 Erica Zunkel, Assoc. Dir., Fed. Crim. Just. Clinic, U. Chi. L. Sch., Written Statement Prepared for the United States Sentencing Commission Public Hearing on Proposed Amendments to Compassionate Release 5 (2023) [hereinafter Zunkel Written Statement], https://perma.cc/CYY9-T8V8.

37 *Id.*

38 *See* OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., I-2013-006, THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM 72–73 & tbl.3 (2013) [hereinafter BOP COMPASSIONATE RELEASE PROGRAM]; Christie Thompson, *Old, Sick and Dying in Shackles*, MARSHALL PROJECT (Mar. 7, 2018, 5:00 AM), https://perma.cc/7VZW-DP68 ("While nonmedical releases were permitted, an inspector general report found in 2013, not a single one was approved over a six-year period.").

39 Thompson, *supra* note 38 ("Of those inmates who have applied for nonmedical reasons, 2 percent (50 cases) have been approved since 2013, according to an analysis of federal prison data. And although overall approval numbers increased slightly between 2013 and 2015, they have since fallen.").

40 Zunkel & Lessnick, *supra* note 10, at 165 ("The BOP's unwillingness to exercise its discretion galvanized a bipartisan reform of federal compassionate release, a noteworthy feat in an era of partisan gridlock.").

41 *See* 18 U.S.C. § 3582(c)(1)(A).

42 First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239.

The Sentencing Commission lost its quorum shortly after the First Step Act was passed.[43] Accordingly, it was initially unable to update its pre-First Step Act policy statement, which authorized courts to reduce a term of imprisonment only "[u]pon motion of the Director of the Bureau of Prisons."[44] This created a gap in the law, as § 3582(c)(1)(A) requires that a sentence reduction be consistent with "*applicable* policy statements issued by the Sentencing Commission."[45] Every federal circuit, except the Eleventh, to reach the issue subsequently concluded that "[§] 1B1.13 addresses motions and determinations of the Director, not motions by prisoners," so "the Sentencing Commission ha[d] not yet issued a policy statement 'applicable' to" defendant-initiated sentence-reduction motions.[46]

At first, judges had broad discretion to determine what constituted an extraordinary and compelling reason justifying a sentence reduction in the absence of an applicable policy statement.[47] Especially after the beginning of the pandemic, judges used their newfound discretion to grant relief for many unenumerated reasons, from COVID-19 to "extreme sentencing disparities, excessive and unjust sentences, nonretroactive sentencing changes, problematic government charging decisions, and sexual abuse in prisons."[48] But some federal courts of appeals began imposing categorical limitations on what could constitute extraordinary and compelling circumstances.[49]

Without an applicable policy statement, the federal courts of appeals split sharply as to whether nonretroactive changes in the law could ever constitute an extraordinary and compelling reason for a sentence

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43 *See* News Release, U.S. Sent'g Comm., New Commission Proposes Policy Priorities for 2022–2023 Amendment Year (Sept. 29, 2022) [hereinafter U.S. Sent'g Comm. News Release 2022] (available at https://perma.cc/S4EX-XQ6P).

44 U.S. SENT'G GUIDELINES MANUAL § 1B1.13(a) (U.S. SENT'G COMM'N 2023).

45 18 U.S.C. § 3582(c)(1)(A) (emphasis added).

46 United States v. Gunn, 980 F.3d 1178, 1180 (7th Cir. 2020); *see* U.S. SENT'G COMM'N, COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC 2 (2022) [hereinafter U.S. SENT'G COMM'N, COMPASSIONATE RELEASE].

47 Zunkel & Lessnick, *supra* note 10, at 164.

48 *Id.* (footnotes omitted).

49 *See id.*; *see also, e.g.*, United States v. Brock, 39 F.4th 462, 466 (7th Cir. 2022) ("Judicial decisions, whether characterized as announcing new law or otherwise, cannot alone amount to an extraordinary and compelling circumstance allowing for a sentence reduction."); United States v. Lemons, 15 F.4th 747, 751 (6th Cir. 2021) ("[A] defendant's incarceration during the COVID-19 pandemic—when the defendant has access to the COVID-19 vaccine—does not present an 'extraordinary and compelling reason' warranting a sentence reduction." (citing United States v. Broadfield, 5 F.4th 801, 803 (7th Cir. 2021)).

reduction. The Courts of Appeals for the First,[50] Ninth,[51] and Tenth[52] Circuits held that nonretroactive changes to the law could constitute extraordinary and compelling reasons when combined with a movant's other individualized circumstances. The Court of Appeals for the Fourth Circuit went even further, holding that a nonretroactive change could alone constitute an extraordinary and compelling reason for a sentence reduction.[53] In contrast, the Courts of Appeals for the Third,[54] Sixth,[55] Seventh,[56] and Eighth Circuits[57] held that district courts may never consider nonretroactive changes to the law, even when combined with other factors.

When the Commission regained its quorum in 2022, the top of its agenda was promulgating a new policy statement that addressed the "wide variation in grant rates among the federal courts."[58] After receiving more than 8,000 public comments on its tentative priorities,[59] the Commission proposed several amendments to § 1B1.13. The Commission's initial proposal for a change-in-the-law category provided that an extraordinary and compelling reason would exist when "[t]he defendant is serving a sentence that is inequitable in light of changes in the law."[60] That provision was noticeably broad; it would have conferred on judges considerable discretion in deciding whether a change in the law was "inequitable." The Commission proposed other revisions to § 1B1.13 as well, including expansions to the medical and family circumstances categories and the addition of a victims of abuse category.[61] The Commission further drafted three proposed catch-all categories to enshrine judicial discretion to grant relief for unenumerated extraordinary and compelling circumstances.[62]

At the Commission's February 23, 2023, public hearing on § 1B1.13, the most controversial proposal unsurprisingly proved to be the changes-in-the-law provision. Some witnesses and Commissioners expressed

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50 United States v. Ruvalcaba, 26 F.4th 14, 26–27 (1st Cir. 2022).

51 United States v. Chen, 48 F.4th 1092, 1098–99 (9th Cir. 2022).

52 United States v. McGee, 992 F.3d 1035, 1047 (10th Cir. 2021).

53 United States v. McCoy, 981 F.3d 271, 285–86 (4th Cir. 2020).

54 United States v. Andrews, 12 F.4th 255, 260–61 (3d Cir. 2021).

55 United States v. McCall, 56 F.4th 1048, 1065–66 (6th Cir. 2022) (en banc).

56 United States v. Thacker, 4 F.4th 569, 574 (7th Cir. 2021).

57 United States v. Crandall, 25 F.4th 582, 585 (8th Cir. 2022).

58 U.S. Sent'g Comm. News Release 2022, *supra* note 43.

59 News Release, U.S. Sent'g Comm., U.S. Sentencing Commission Seeks Comment on Proposed Revisions to Compassionate Release, Increase in Firearms Penalties (Jan. 12, 2023) [hereinafter U.S. Sent'g Comm. News Release 2023] (available at https://perma.cc/8S98-WQKC).

60 Sentencing Guidelines for United States Courts, 88 Fed. Reg. 7180, 7184 (Feb. 2, 2023).

61 *See id.*

62 *See id.*

doubt that Congress had the authority to promulgate a changes-in-the-law provision in the first place.[63] One witness, for example, objected to the provision, arguing that Congress does not "hide elephants in mouseholes."[64] Relying on two of the Supreme Court's major questions doctrine cases, he asserted that the proposed expansion of compassionate release was suspect "because the Supreme Court has made it clear on numerous occasions that courts should not try to smuggle adventurous interpretations of statutory provisions into anodyne terms."[65] Vice Chair Claire Murray similarly raised the "elephants and mouse holes point" during the hearing.[66] The Department of Justice similarly "disagree[d] with . . . the idea that [a] change in the law itself can be the extraordinary and compelling reason that warrants release."[67]

The Commission's final amendments to § 1B1.13 reflected a middle-ground approach. The updated policy statement allows judges to consider a change in the law only if (1) "a defendant received an unusually long sentence," (2) that defendant "has served at least 10 years of the term of imprisonment," and (3) "such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed."[68] The policy statement further provides that, other than in the aforementioned narrow circumstances, "a change in the law . . . shall not be considered for purposes of determining whether an extraordinary and compelling reason exists under this policy

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63 *See, e.g.*, *infra* notes 64–68.

64 Paul J. Larkin, Senior Legal Rsch. Fellow, Heritage Found., Written Statement Prepared for the United States Sentencing Commission Hearing on Proposed Amendments to the Federal Sentencing Guidelines 15 (2023) [hereinafter Larkin Written Statement] (internal quotation marks omitted) (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)), https://perma.cc/9M5E-H6VT.

65 *Id.* at 16.

66 Claire Murray, Vice Chair, U.S. Sent'g Comm'n, Remarks at the United States Sentencing Commission Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines 326 (Feb. 23, 2023) (transcript available at https://perma.cc/DS9T-GWMV); *see also* Letter from Steven B. Wasserman, Pres. Nat'l Ass'n of Assistant U.S. Att'ys, to Carlton W. Reeves, Chair, U.S. Sent'g Comm'n 4 (Feb. 15, 2023) (available at https://perma.cc/L6YN-VGQB) ("Enacting a provision that allows courts to consider changes in the law that were not expressly made to apply retroactively impermissibly encroaches on Congress's legislative authority."); R. Trent Shores, former U.S. Att'y for N.D. Okla., Written Statement Prepared for the United States Sentencing Commission Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines Concerning Compassionate Release 2 (2023), https://perma.cc/D54C-H5Z9 ("While the First Step Act made a *procedural* change by allowing a defendant to file a motion for Compassionate Release, the First Step Act did not make a *substantive* change to Compassionate Release . . . .").

67 Robert Parker, Chief, App. Section, Crim. Div., U.S. Dep't of Just., Remarks at the United States Sentencing Commission Public Hearing on Proposed Amendments to the Federal Sentencing Guidelines 29 (Feb. 23, 2023) (transcript available at https://perma.cc/DS9T-GWMV).

68 U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(6) (U.S. SENT'G COMM'N 2023).

statement."[69] The Commission thus "adopt[ed] a tailored approach, permitting the consideration of changes in the law only under limited circumstances."[70]

The Sentencing Commission's new policy statement has the potential to radically transform federal sentencing law by expanding the circumstances under which people can seek sentence modifications. The major questions doctrine is the most likely vehicle through which the Supreme Court might invalidate § 1B1.13's changes-in-the-law provision.

II. First Principles of the Major Questions Doctrine

With that background, an exposition of the major questions doctrine is now in order. Although the label "major questions" is somewhat recent, the doctrine has a robust jurisprudential foundation "spanning decades."[71] The Court has not yet articulated a single test for assessing whether the major questions doctrine applies,[72] but surveying the Court's major questions jurisprudence reveals a set of factors that are relevant to the determination.

The major questions doctrine finds its origins in *MCI Telecommunications Corp. v. AT&T*.[73] Under § 203(a) of the Communications Act, Congress required communications common carriers to file their rates with the Federal Communications Commission ("FCC").[74] The statute, however, authorized the FCC to "modify any requirement" of § 203(a).[75] Relying on that authority, the FCC attempted to exempt long-distance carriers from the mandatory filing requirement.[76]

The Court rejected the FCC's position.[77] Starting with the text, Justice Scalia, writing for the majority, observed that the word "modify" connotes only "moderate" or "modest" changes.[78] As a textual matter, the Court held

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69 *Id.* § 1B1.13(c).

70 U.S. SENT'G COMM'N, 2023 AMENDMENTS IN BRIEF 3 (2023), https://perma.cc/T3FA-9RYS.

71 Biden v. Nebraska, 143 S. Ct. 2355, 2374 (2023); *see* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) ("[T]he major questions doctrine . . . took hold because it refers to an identifiable body of law that has developed over a series of significant cases . . . .").

72 *See* Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L.J. F. 693, 698 (2022) ("[F]oundational uncertainty . . . may have prevented the bundle of principles associated with the major questions doctrine from coalescing into a single, coherent rule for the past thirty-odd years.").

73 Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENV'T & ADMIN. L. 479, 485 (2016).

74 *See* MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 220 (1994); 47 U.S.C. § 203(a).

75 47 U.S.C. § 203(b).

76 *MCI*, 512 U.S. at 220–21.

77 *See id.* at 234.

78 *Id.* at 225.

that the FCC's decision to excuse the mandatory filing requirement for long-distance carriers was a drastic change rather than a mere modification.[79]

The Court then looked beyond the text, ultimately laying the foundation for the major questions doctrine. Because the mandatory rate filings were "the *essential characteristic* of a rate-regulated industry," the Court surmised that "it [wa]s highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion."[80] The Court continued, reasoning that, had Congress intended to confer such discretion upon the FCC, it was highly "unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements."[81] Because the FCC's expansive interpretation of the word "modify" struck at the very heart of the statute, the Court hesitated to conclude that Congress had delegated to the Commission such broad authority in such modest terms.

FDA v. Brown & Williamson Tobacco Corp.[82] was the next step in the evolution of the major questions doctrine. The Food, Drug, and Cosmetic Act of 1938 ("FDCA") conferred on the Food and Drug Administration ("FDA") the authority to regulate "drugs" and "devices."[83] Since the FDCA's passage, however, the FDA had "expressly disavowed" the authority to regulate tobacco under the Act.[84] Nevertheless, in 1996, the FDA for the first time asserted the authority to regulate tobacco products, concluding that nicotine was a "drug" and that "cigarettes and smokeless tobacco [we]re 'drug delivery devices.'"[85]

The Court held that Congress had "precluded the FDA's jurisdiction to regulate tobacco products."[86] The majority first considered the text of the FDCA and recognized that "if tobacco products were 'devices' under the FDCA, the FDA would be required to remove them from the market" entirely.[87] But, the Court noted, "Congress . . . has foreclosed the removal of tobacco products from the market" in other statutory provisions, and, in fact, it had separately and "directly addressed the problem of tobacco and health through legislation on six occasions since 1965."[88]

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79 *See id.* at 228–29.

80 *Id.* at 231 (emphasis added).

81 *Id.*

82 529 U.S. 120 (2000).

83 *Id.* at 126; 21 U.S.C. §§ 321(g)–(h), 393.

84 *Brown & Williamson*, 529 U.S. at 125.

85 *Id.* at 127.

86 *Id.* at 133.

87 *Id.* at 135.

88 *Id.* at 137.

The Court's reasoning rested on two principal considerations. First, Congress had separately and specifically regulated tobacco in more recent legislation; the FDA's regulation was incompatible with the laws Congress had enacted in recent years.[89] Importantly, "Congress ha[d] acted against the backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco."[90] Second, given the "economic and political significance" of tobacco regulation, the Court was "confident that Congress could not have intended to delegate [this] decision . . . in so cryptic a fashion."[91]

The Court's skepticism of an agency's power to effectuate economically transformative regulations grew even more potent in *Utility Air Regulatory Group v. EPA*.[92] The Environmental Protection Agency ("EPA") promulgated greenhouse gas emission standards for new automobiles, concluding that these regulations automatically triggered permitting requirements under the Clean Air Act.[93] But the Court invalidated the EPA's interpretation as "unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[94]

More recently, in *West Virginia v. EPA*,[95] the Court found unreasonable an EPA interpretation of the Clean Air Act that authorized the Agency to establish a countrywide cap on carbon dioxide emissions.[96] The Court recognized this dispute as "a major questions case."[97] For one, the majority believed that the EPA's interpretation involved significant economic and political judgments "that Congress would likely have intended for itself."[98] The Court continued, "Congress certainly has not conferred a like authority upon EPA anywhere else in the Clean Air Act. The last place one would expect to find it is in the previously little-used backwater of Section 111(d)."[99] Further, the Court recognized the importance of agency expertise over the relevant policy judgments: "'When [an] agency has no comparative expertise' in making certain policy judgments, we have said,

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89 *See id.* at 143.

90 *Brown & Williamson*, 529 U.S. at 144.

91 *Id.* at 160.

92 573 U.S. 302 (2014).

93 *Id.* at 307.

94 *Id.* at 324.

95 142 S. Ct. 2587 (2022).

96 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2372 (2023) ("That case involved the EPA's claim that the Clean Air Act authorized it to impose a nationwide cap on carbon dioxide emissions.").

97 West Virginia v. EPA, 142 S. Ct. at 2610.

98 *Id.* at 2613.

99 *Id.*; *see also id.* at 2609 ("Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'" (alteration in original) (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001))).

'Congress presumably would not' task it with doing so."[100] Finally, the Court did not "ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that . . . 'Congress considered and rejected' multiple times."[101]

That said, the major questions doctrine, as applied by the Court in *West Virginia*, is not a conclusive limit on an agency's regulatory power.[102] Instead, the agency "must point to 'clear congressional authorization' for the power it claims," rather than "a merely plausible textual basis."[103] The Court rejected the government's reliance on the "vague statutory grant" as "not close to the sort of clear authorization required by our precedents,"[104] but it held open the possibility that an agency could overcome the major questions doctrine by reference to clear authorization in the statutory text.[105]

Biden v. Nebraska[106] is, of course, the most recent chapter in the Court's major questions jurisprudence. In the wake of the COVID-19 pandemic, the Secretary of Education established a student loan forgiveness program that canceled about $430 billion of federal student debt; the plan entirely erased the loan balances of twenty million borrowers, and it lowered the median amount owed by the remaining borrowers by nearly $16,000 per person.[107]

The Secretary invoked the Higher Education Relief Opportunities for Students Act of 2003 ("HEROES Act") as the basis for his plan. The law's predecessor—the Higher Education Relief Opportunities for Students Act of 2001—was enacted in response to the September 11 terrorist attacks. Congress feared that certain borrowers affected by the attacks (especially those serving in the military) would require additional financial assistance for their loan payments. That law conferred on the Secretary the ability to waive certain loan repayment requirements to respond to the extant national emergency. When it passed the HEROES Act two years later, Congress "extended the coverage of the 2001 statute to include any war or national emergency—not just the September 11 attacks."[108]

The HEROES Act's terms are limited. It permits the Secretary to "waive or modify any statutory or regulatory provision . . . as the Secretary deems necessary in connection with a war or other military operation or

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100 *Id.* at 2612–13 (alteration in original) (quoting Kisor v. Wilkie, 139 S. Ct. 2400, 1417 (2019)).

101 *Id.* at 2614 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 144 (2000)).

102 *Id.* at 2609.

103 West Virginia v. EPA, 142 S. Ct. at 2609 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

104 *Id.* at 2614.

105 *Id.*

106 143 S. Ct. 2355 (2023).

107 *Id.* at 2362.

108 *Id.* at 2363.

national emergency."[109] But the Secretary can issue such waivers or modifications only "as may be necessary to ensure that recipients of student financial assistance . . . who are affected [by the national emergency] are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals."[110]

In accordance with those limitations, the Secretary issued modest waivers and modifications in 2003 affecting only "a handful of specific issues."[111] To name but one example, the Secretary relieved affected borrowers from the requirement that they return an overpayment of certain grants mistakenly disbursed by the government.[112] Under this scheme, the Secretary "implemented only minor changes, most of which were procedural."[113]

After surveying the Secretary's limited powers under the HEROES Act, the Court invalidated the Secretary's direct cancellation of $430 billion in student debt.[114] Chief Justice Roberts, writing for the majority, explained that the statute's text makes clear that the Secretary has the authority to make only "modest adjustments and additions to existing provisions, not transform them."[115] True, the HEROES Act gives the Secretary the authority to *waive* certain requirements in addition to modifying certain requirements. "But the Secretary's invocation of the waiver power here does not remotely resemble how it has been used on prior occasions."[116] Instead, the Secretary's prior invocation of his waiver authority operated to identify "a particular legal requirement and [then] waive[] it, making compliance no longer necessary."[117] But in this case, the Secretary simply canceled hundreds of billions of dollars of loan principal.

The Court emphasized the "staggering" economic and political consequences of the Secretary's plan. The action "amount[ed] to nearly one-third of the Government's $1.7 trillion in annual discretionary spending."[118] The majority doubted that Congress had granted the

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109 20 U.S.C. § 1098bb(a)(1).

110 *Id.* § 1098bb(a)(2)(A).

111 *Biden*, 143 S. Ct. at 2363.

112 *See id.* at 2363–64.

113 *Id.* at 2369.

114 *Id.* at 2370.

115 *Id.* at 2369; *see also id.* ("The Secretary's plan has 'modified' the cited provisions only in the same sense that 'the French Revolution "modified" the status of the French nobility'—it has abolished them and supplanted them with a new regime entirely." (quoting MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 228 (1994))).

116 *Id.* at 2370.

117 *Biden*, 142 S. Ct. at 2370; *see id.* at 2372 ("The Secretary has never previously claimed powers of this magnitude under the HEROES Act. As we have already noted, past waivers and modifications issued under the Act have been extremely modest and narrow in scope.").

118 *Id.* at 2373.

Secretary "the authority to exercise control over 'a significant portion of the American economy.'"[119] The Court concluded, "[O]ur precedent—old and new—requires that Congress speak clearly before a Department Secretary can unilaterally alter large sections of the American economy."[120]

If the foregoing doctrinal recitation establishes anything, it is that the Court has not yet articulated a universally applicable standard for assessing whether the major questions doctrine applies. Scholars and practitioners disagree about the precise bounds of the doctrine given its highly contextual nature, and academic attempts to distill a coherent standard have proven both under- and over-inclusive. Some, for example, have intimated that the Court has recently "eschew[ed] an amorphous multifactor test of economic and political significance that looks at things like cost and public attention in favor of a more structured two-prong test that looks at whether the agency's action is unheralded and represents a transformative change in its authority."[121] Others have adopted nearly the opposite view of the doctrine—"The Court's precedents make clear there are at least two primary categories of 'major' questions: political and economic questions."[122]

Because the doctrine is still nascent insofar as the Court considers different factors relevant on a case-by-case basis, this Article applies all the significant factors invoked by the Court throughout its major questions precedents. Those factors include: (1) the text of the statute and the degree of the agency's deviation from the law's plain meaning;[123] (2) the historical context of the authorizing statute;[124] (3) the economic and political effect of the agency's action;[125] and (4) whether the agency has historically exercised such broad authority.[126] Even considering all of these factors, the Sentencing Commission's amendments to § 1B1.13 hardly pose major questions.

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119 *Id.* (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

120 *Id.* at 2375.

121 Natasha Brunstein & Donald L.R. Goodson, *Unheralded and Transformative: The Test for Major Questions After* West Virginia, 47 WM. & MARY ENV'T L. & POL'Y REV. 47, 74 (2022).

122 Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 228 (2023).

123 *See, e.g.*, MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 225 (1994); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 135 (2000); *Biden*, 143 S. Ct. at 2363.

124 *See, e.g.*, *MCI*, 512 U.S. at 231–32; *Brown & Williamson*, 529 U.S. at 137–44; West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022); *Biden*, 143 S. Ct. at 2363–64.

125 *See, e.g.*, *Brown & Williamson*, 529 U.S. at 160–61; West Virginia v. EPA, 142 S. Ct. at 2613; *Biden*, 143 S. Ct. at 2373–75.

126 *See, e.g.*, *Brown & Williamson*, 529 U.S. at 144; Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014); West Virginia v. EPA, 142 S. Ct. at 2613; *Biden*, 143 S. Ct. at 2370.

III. The Major Questions Doctrine and § 1B1.13

The major questions doctrine does not bar the Commission's revisions to § 1B1.13. First, the text is unambiguous on the question of the Sentencing Commission's authority. Section 994(t) authorizes the Commission to define extraordinary and compelling circumstances, and Congress in the FSA in no way textually circumscribed that authority. Second, § 3582(c)(1)(A) and § 994(t) were never intended to be limited to medical circumstances—far from it. In 1984, Congress took the significant step of abolishing federal parole, but it enacted § 3582(c)(1)(A) as a meaningful safety valve for the later modification of a term of imprisonment after its imposition. Relatedly, Congress specifically contemplated in the FSA that the Sentencing Commission would expand compassionate release beyond the unnecessarily constraining confines of the BOP's vision. Third, the Commission's amendments have modest economic consequences in relation to the major questions cases. Although the Commission's decision might have been politically controversial, that factor alone is insufficient to trigger an application of the doctrine. Finally, the Commission's amendments to § 1B1.13 are consistent with the scope of its historically exercised power. Although the updated policy statement is more detailed than previous iterations, it is actually narrower than previous iterations.

A. *The Text of § 994(t) and § 3582(c)(1)(A)*

We start our discussion, of course, with the text.[127] That involves "afford[ing] the law's terms their ordinary meaning at the time Congress adopted them."[128] The text of § 994(t) and § 3582(c)(1)(A) makes pellucid that the amended policy statement falls squarely within the authority Congress unambiguously delegated to the Commission.

Section 994(t) governs the Commission's authority over compassionate release. The provision provides:

> The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.[129]

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[127] A major questions analysis of the text sometimes involves related questions of *Chevron* deference. *See, e.g.*, *Utility Air*, 573 U.S. at 321. *But see* Loper Bright Enters. v. Raimondo, 143 S. Ct. 2244, 2273 (2024) (overturning *Chevron*).

[128] Niz-Chavez v. Garland, 141 S. Ct. 1474, 1480 (2021).

[129] 28 U.S.C. § 994(t).

The question thus becomes whether the Commission's revisions to § 1B1.13 exceed its statutory authority to "describe . . . extraordinary and compelling reasons for sentence reduction."[130]

Near the time of § 994(t)'s enactment in 1984, "describe" carried a meaning comparable to "define." The word was understood to be synonymous with "characterize, clarify, define, [and] delineate."[131] Black's Law defined the word in similar terms: "To narrate, express, explain, set forth, relate, recount, narrate, depict, delineate, portray."[132] A "description" relatedly meant a "delineation or account of a particular subject by the recital of its characteristic accidents and qualities" (i.e., a definition).[133] The Oxford English Dictionary noted that the "ordinary current sense" of the word "describe" meant "[t]o set forth in words, written or spoken, by reference to qualities, recognizable features, or characteristic marks."[134] Webster's Dictionary corroborated this understanding, suggesting the equivalency between "describe" and "define": "to represent by words written or spoken for the knowledge or understanding of others . . . to distinguish by a definitive label or other designation or by an individualizing phrase or similitude."[135]

The statute thus confers upon the Commission the authority to *define* the phrase "extraordinary and compelling" (at least within reason). To understand whether the Commission overstepped its definitional authority in its recent amendments, one must consider the amendments vis-à-vis the definition of "extraordinary and compelling" near the time of the statute's enactment.

Congress's decision to use the word "extraordinary" was no accident—the word carried a flexible meaning consistent with Congress's intent to grant the Commission latitude in implementing a compassionate release regime. Black's Law Dictionary defined "extraordinary" as "[o]ut of the ordinary; exceeding the usual, average, or normal measure or degree."[136] Crucially, the dictionary emphasized that "[t]he word is both comprehensive and flexible in meaning."[137] Black's Law also defined the phrase "extraordinary circumstances" as "[f]actors of time, place, etc., which are not usually associated with a particular thing or event; out of the ordinary factors."[138] That definition also included an internal cross-reference to the phrase "extenuating circumstances," which

130 *See id.*

131 WILLIAM C. BURTON, LEGAL THESAURUS 153 (2d ed. 1992) (listing synonyms for "describe").

132 *Describe*, BLACK'S LAW DICTIONARY (5th ed. 1979).

133 *Description*, BLACK'S LAW DICTIONARY (5th ed. 1979).

134 *Describe*, OXFORD ENGLISH DICTIONARY 511 (2d ed. 1989).

135 *Describe*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 610 (1986).

136 *Extraordinary,* BLACK'S LAW DICTIONARY (5th ed. 1979).

137 *Id.*

138 *Extraordinary Circumstances,* BLACK'S LAW DICTIONARY (5th ed. 1979).

were circumstances that would "render a delict or crime less aggravated, heinous, or reprehensible than it would otherwise be, or tend to palliate or lessen its guilt."[139] Other sources defined "extraordinary" with similarly broad language.[140] "Extraordinary" was, therefore, a broad and malleable word especially inclusive of circumstances that would show that a particular crime was less reprehensible than initially believed.

"Compelling" was understood to carry a similarly comprehensive meaning. Webster's, for example, defined the word as "demanding respect, honor, or admiration . . . calling for examination, scrutiny, consideration, or thought . . . demanding and holding one's attention . . . tending to convince or convert by or as if by forcefulness of evidence."[141] A legal thesaurus included as synonyms "emphatic," "strong," "thrustful," and "preeminent."[142] As the Oxford English Dictionary put it, when referring to "a person, his words, [or] writings," compelling meant "demanding attention, respect, etc."[143] And though Black's Law did not include a specific definition of "compelling," it defined "compel" as "[t]o urge forcefully."[144]

Putting those definitions together, § 994(t) confers on the Commission the responsibility to define circumstances that are beyond the usual—including those that might mitigate the reprehensibility of certain conduct—and demand attention and scrutiny.

Beyond the definition of the phrase "extraordinary and compelling," § 994(t) includes another clue as to the breadth of the Commission's authority. The provision places off-limits only *one* potential extraordinary and compelling reason for a sentence reduction: "Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason."[145] It is axiomatic in matters of statutory interpretation that "[t]he expression of one thing implies the exclusion of others."[146] When Congress seeks to limit the scope of sentence-modification statutes, it "is not shy about placing such limits where it deems them appropriate."[147] In many aspects of federal sentencing, "Congress . . . has expressly limited district

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139 *Extenuating Circumstances,* BLACK'S LAW DICTIONARY (5th ed. 1979).

140 *See, e.g.*, *Extraordinary*, OXFORD ENGLISH DICTIONARY 614 (2d ed. 1989) ("Out of the usual or regular course or order . . . . Exceeding what is usual in amount, degree, extent, or size."); Merriam-Webster, *Extraordinary*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 441 (1984) ("going beyond what is usual, regular, or customary"); WILLIAM C. BURTON, LEGAL THESAURUS 218 (2d ed. 1992) (defining "extraordinary" as "above average, amazing, beyond the ordinary, . . . different").

141 *Compelling*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 463 (1986).

142 WILLIAM C. BURTON, LEGAL THESAURUS 89 (2d ed.1992) (listing synonyms for "compelling").

143 *Compelling*, OXFORD ENGLISH DICTIONARY 600 (2d ed. 1989).

144 *Compel,* BLACK'S LAW DICTIONARY (5th ed. 1979).

145 28 U.S.C. § 994(t).

146 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012) (from the Latin phrase *expression unius est exclusion alterius*).

147 Concepcion v. United States, 142 S. Ct. 2389, 2400 (2022).

courts to considering only certain factors," much like it did in § 994(t).[148] Had Congress sought to limit further the authority of the Commission to describe extraordinary and compelling reasons, it would have done so explicitly. Relatedly, the fact that Congress precluded rehabilitation alone from serving as an extraordinary and compelling reason makes clear that the phrase is otherwise inclusive of nonmedical circumstances favoring a sentence reduction; otherwise, the limitation on rehabilitation would be pure surplusage.

Section 1B1.13 falls comfortably within § 994(t)'s grant of authority. The Commission narrowly crafted § 1B1.13(b)(6) to cover changes in the law only when those changes in the law produce circumstances that are truly extraordinary and compelling. In particular, the provision allows for courts to consider changes in the law only when (1) the "defendant received an *unusually* long sentence," (2) the defendant has already served at least ten years of that sentence, and (3) the "change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed."[149] Moreover, judges are instructed to consider "the defendant's individualized circumstances" when making such a determination.[150] The provision ensures that changes in the law are considered only when those changes have an outsized effect on particular defendants, such that their circumstances demand greater attention and scrutiny than the typical defendant affected by a nonretroactive change in the law.[151]

In promulgating § 1B1.13(b)(6), the Commission received testimony about many individuals who would be eligible for relief under this new category. Those examples demonstrate how the Commission's carefully drawn changes-in-the-law provision fits squarely within its authority to describe extraordinary and compelling circumstances for a sentence reduction.

Among the most moving examples, the Commission heard the story of Steve Liscano.[152] When Mr. Liscano was a young man—around eighteen

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148 *Id.*

149 U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(6) (U.S. SENT'G COMM'N 2023).

150 *Id.*

151 Section 1B1.13(b)(6) is consistent with even those opinions from circuits proscribing changes in the law from serving as extraordinary and compelling circumstances. *See, e.g.*, United States v. McCall, 56 F.4th 1048, 1053 (6th Cir. 2022) (en banc); United States v. Thacker, 4 F.4th 569, 574 (7th Cir. 2021). Those opinions recognize that "prospective changes in federal sentencing law are far from an extraordinary event." *McCall*, 56 F.4th at 1055–56. Consistent with that principle, the Commission's amendments to § 1B1.13 sharply limit the circumstances under which a change in the law can be considered extraordinary and compelling: "Except as provided in subsection (b)(6), a change in the law . . . shall not be considered for purposes of determining whether an extraordinary and compelling reason exists under this policy statement." U.S. SENT'G GUIDELINES MANUAL § 1B1.13(c) (U.S. SENT'G COMM'N 2023).

152 *See* Zunkel Written Statement, *supra* note 36, at 24–25.

years old—he was twice convicted of possession of minimal amounts of cocaine.[153] Given the "residual amount[s] of cocaine" involved both times, Mr. Liscano spent a total of just seven months in prison for the two offenses.[154] But the government later indicted Mr. Liscano as part of a federal drug conspiracy, for which it filed a § 851 enhancement based on his prior convictions.[155] Although those prior convictions "involved possession of small amounts of cocaine as a young adult, both were unrelated to violence, and both resulted in no more than a few months spent in prison,"[156] the judge was statutorily required to sentence Mr. Liscano to life behind bars.

Several years later, the Supreme Court limited the types of offenses that could serve as predicates for a § 851 life enhancement; under this clarification in the law, Mr. Liscano's life sentence was illegally imposed.[157] In fact, when Mr. Liscano filed a § 2255 petition, even the government agreed that his life sentence violated the law.[158] But the Court of Appeals for the Seventh Circuit denied his petition on procedural grounds.[159]

Mr. Liscano subsequently sought compassionate release in light of this change in the law. In ultimately granting relief, the judge noted that "[c]hanges in the law do occur with some frequency, and there are other defendants whose sentences were enhanced based on prior convictions that no longer qualify as predicates under *Mathis*."[160] "But," the judge continued, "that does not preclude a finding that Liscano's particular circumstances are extraordinary. Unlike the vast majority of criminal defendants, Liscano was sentenced to life imprisonment."[161] In the judge's nine years on the bench, twenty as a defense attorney, and thirteen as a federal prosecutor, he had "never seen a set of facts that resemble those involved here."[162] The judge concluded,

> Between the predicate offenses involving such minimal amounts of drugs, the admission that the offenses no longer support a life sentence, and the recognition that the § 851 notice should have but did not inform Liscano of the government's intent to seek a term of life imprisonment, this case—by definition—is "beyond what is usual, customary [sic], regular, or customary."[163]

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153 United States v. Liscano, No. 02 CR 719-16, 2021 WL 4413320, at *1 (N.D. Ill. Sept. 27, 2021).

154 *Id.*

155 *Id.*

156 *Id.* at *5.

157 *See generally* Mathis v. United States, 579 U.S. 500, 510–12 (2016).

158 *See* Liscano v. Entzel, 839 F. App'x 15, 16–17 (7th Cir. 2021).

159 *See id.* at 17.

160 *Liscano*, 2021 WL 4413320, at *7.

161 *Id.*

162 *Id.* at *8.

163 *Id.*

Cases like Mr. Liscano's are precisely those that fall under the new changes-in-the-law provision. Such cases involve a unique set of individualized factors that are both unusual and worthy of heightened judicial scrutiny. And it was well within the Commission's authority to define "extraordinary and compelling" to include cases involving changes in the law under such circumstances.

B. *Historical and Statutory Context*

This Section examines the historical and statutory background of the current compassionate release system. It starts with the Sentencing Reform Act of 1984, which first codified the antecedent to today's sentence-reduction scheme. It then considers Congress's revisions to that scheme in the First Step Act of 2018. All told, the statutory context of the modern compassionate release framework is at odds with an application of the major questions doctrine.

1. The Sentencing Reform Act of 1984

The history of the Sentencing Reform Act of 1984 is significant in two respects. First, the statutory context makes clear that Congress sought to confer on the Commission a flexible interpretive power with respect to the operative legal standard. Second, and at a more general level, Congress understood a vital role of the Commission as resolving circuit splits with respect to sentencing issues.

a. *Congress Intended to Give the Commission Broad Authority to Define Extraordinary and Compelling Reasons for a Sentence Reduction.*

Properly situating § 3582(c)(1)(A) in the context of the Sentencing Reform Act of 1984 confirms what the text shows: Congress never intended to cabin the Commission's authority to define extraordinary and compelling circumstances as including sentence-related reasons for a sentence reduction.

Prior to the SRA, any person could seek early release under the federal parole scheme as soon as they had served one-third of their sentence. In fact, shortly before Congress passed the SRA, "the average federal prisoner was being released on parole after serving less than half of the prison sentence that a federal judge had imposed."[164] Decisions about sentence reductions were made by the United States Parole Commission—an

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[164] Douglas A. Berman, *Reflecting on Parole's Abolition in the Federal Sentencing System*, FED. PROB., Sept. 2017, at 18.

independent body within the Department of Justice—not by courts.[165] Those decisions were made exclusively on the basis of a person's rehabilitation or lack thereof;[166] "The Parole Commission's release guidelines did not take into account various factors such as the amount of harm done by an offender, his degree of sophistication, or his role in the crime, all features Congress deemed particularly important."[167]

The SRA effectuated a sea change in the federal sentencing regime. As one commentator opined, "The SRA's elimination of parole altered the institutional dynamics of sentencing decision-making in ways that have long echoed through modern federal sentencing policies and practices."[168] Congress replaced the Parole Commission with the United States Sentencing Commission,[169] and it replaced parole with § 3582(c)(1)(A). In so doing, Congress eliminated the primary exception to sentence finality but simultaneously retained a more limited exception for cases involving extraordinary and compelling reasons for a sentence reduction.

The SRA's legislative history reveals that Congress intended § 3582(c)(1)(A) to serve as a robust post-sentencing review mechanism. The main Senate report described § 3582(c)(1)(A) as a "'safety valve' [that] applies, regardless of the length of sentence, to the unusual case in which the defendant's circumstances are so changed . . . that it would be inequitable to continue the confinement of the prisoner."[170] Though Congress recognized that this safety valve would "include cases of severe illness," it made clear that § 3582(c)(1)(A) would also apply to "cases in which *other* extraordinary and compelling circumstances justify a reduction of an unusually long sentence."[171]

The Senate report reiterated the importance of judicial review of sentences, in contrast to the Parole Commission's role under the prior regime. The report explained, "The approach taken keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations."[172] Congress "provide[d] instead in . . . 18 U.S.C. [3582(c)] for court determination, *subject to consideration of Sentencing Commission standards*, of the question whether there is a justification for reducing a term of imprisonment in situations such as those described."[173] Especially relevant here, Congress recognized

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165 *See* Peter B. Hoffman, *History of the Federal Parole System: Part 2 (1973–1997)*, FED. PROB., Dec. 1997, at 49, 51.

166 *See* Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 102 (2019).

167 Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303, 318 (2013).

168 Berman, *supra* note 164, at 19.

169 *See* Larkin, Jr., *supra* note 167, at 318–19.

170 S. REP. NO. 98-225, at 121 (1983).

171 *See id.* at 55 (emphasis added).

172 *Id.* at 121.

173 *Id.* at 56 (emphasis added).

that the safety valve might "include . . . cases in which the sentencing guidelines for the offense of which the defender was convicted have been later amended to provide a shorter term of imprisonment."[174] As one federal court of appeals summarized, Congress expressly intended that the circumstances enumerated by the Commission might "include 'unusually long sentence[s]' . . . . Though Congress did not end up expressly permitting the consideration of unusually long sentences or changes in sentencing law, it also did not expressly prohibit it."[175]

With this statutory history in mind, it is easy to understand the text of § 994(t). Congress intended to eliminate the parole system, which is why it provided that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason."[176] But the otherwise unencumbered grant of authority to the Commission reflected Congress's intent to "assure the availability of specific review" of a previously imposed sentence in "particularly compelling situations."[177]

Because Congress gave such broad power to the Sentencing Commission to define the universe of sentence-reduction-eligible defendants, it included external limitations on compassionate release. Unlike parole, a sentence reduction under § 3582(c)(1)(A) must be consistent with the § 3553(a) factors, many of which might militate against a sentence reduction even in the case of a rehabilitated prisoner.[178] Even with the broad grant of authority to the Commission, compassionate release was—and is—a much more limited avenue for relief than federal parole.

In contrast to the statutory schemes in the major questions cases, the SRA conferred intentionally broad authority to the Sentencing Commission. In eliminating federal parole, Congress sought to preserve post-sentencing review for cases involving extraordinary and compelling circumstances as described by the Sentencing Commission. Rather than creating a rigid and constricted eligibility requirement for a sentence reduction, the SRA was intended to preserve flexibility, a power which it vested in the Commission.

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174 *Id.* at 55–56.

175 United States v. Chen, 48 F.4th 1092, 1099 (9th Cir. 2022) (alteration in original) (quoting S. REP. NO. 98-225, at 55–56 (1983)).

176 28 U.S.C. § 994(t).

177 S. REP. NO. 98-225, at 121 (1983).

178 *E.g.*, 18 U.S.C. § 3553(a)(2)(A) (instructing courts to consider the need for the sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"); *id.* § 3553(a)(2)(B) (referencing the need for a sentence "to afford adequate deterrence to criminal conduct").

b. *Congress Further Intended for the Commission to Resolve Circuit Splits, Such as Those Over the Consideration of Sentence-Related Reasons for Compassionate Release.*

In addition to preserving judicial review for cases involving extraordinary and compelling circumstances, the Sentencing Commission was also created to address sentencing disparities. Indeed, "Congress acknowledged the Parole Commission had attempted to resolve sentencing disparities, but concluded the Commission had been unable to do so effectively."[179] These disparities existed because the pre-SRA "federal criminal code divided authority between district courts and the commission, which meant judges and commissioners 'second-guess[ed] each other, often working at cross-purposes.'"[180]

Congress created the Sentencing Commission to establish uniformity in sentencing. In a provision of the U.S. Code entitled "United States Sentencing Commission; establishment and purposes," Congress provided that the Commission's purpose includes "provid[ing] certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities . . . [and] maintaining sufficient flexibility to permit individualized sentences when warranted."[181]

To carry out the Commission's mission, Congress unequivocally delegated policymaking discretion of a type atypical for most agencies. In *Mistretta v. United States*,[182] the Court took note that "Congress ha[d] authorized the Commission to exercise a greater degree of political judgment than ha[d] been exercised in the past" given "the unique context of sentencing."[183] Despite "the significantly political nature of the Commission's work,"[184] the Court was confident that "Congress ha[d] delegated significant discretion to the Commission to draw judgments from its analysis of existing sentencing practice."[185]

As part of that sentencing-related policy expertise, the Supreme Court has recognized the central role of the Sentencing Commission in addressing circuit splits. In upholding the authority of the Commission to issue Sentencing Guidelines amendments that bind federal courts, the Supreme Court explained, "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial

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179 Larkin, Jr., *supra* note 167, at 318.

180 *Id.* (alteration in original) (quoting S. REP. NO. 98-225, at 113 (1983)); *see* Mistretta v. United States, 488 U.S. 361, 365–66 (1989).

181 28 U.S.C. § 991(b)(1)(B).

182 488 U.S. 361 (1989).

183 *Id.* at 395.

184 *Id.* at 393.

185 *Id.* at 379; *see also id.* at 378 & n.11.

decisions might suggest."[186] Justice Scalia, writing for the Court, continued, "In addition to the *duty* to review and revise the Guidelines, Congress has granted the Commission the unusual explicit *power* to decide whether and to what extent its amendments reducing sentences will be given retroactive effect."[187] In fact, the Court emphasized the "congressional expectation" of the Commission's broad authority as "induc[ing] [the Court] to be more restrained and circumspect in using [its] certiorari power as the primary means of resolving such conflicts."[188]

To be sure, these cases dealt with the Sentencing Guidelines, which are the Commission's primary tool to ameliorate *front-end* sentencing disparities. But the Commission's statutorily defined purpose of addressing "unwarranted sentencing disparities" is not limited to front-end Guidelines revisions.[189]

The circuit split that emerged while the Commission lacked quorum illustrates precisely why Congress gave the Commission such broad authority to describe extraordinary and compelling circumstances. Following the First Step Act of 2018 (discussed in the following Section), the circuits fractured on whether changes in the law could serve as extraordinary and compelling circumstances.[190] The effect: severe disparities in the availability of sentence reductions based merely on the geography of one's convicting jurisdiction—not on any material differences in conduct or criminal record. A 2022 report by the Sentencing Commission noted that "[i]n the absence of an amended policy statement," the expected success of a compassionate release motion "substantially varied by circuit."[191]

Consider the following pair of cases. After pleading guilty in 2006 to three methamphetamine-related offenses, Henry Lii should have been sentenced to about fifteen years in prison based on his Guidelines range.[192] But because the government had filed a § 851 notice based on Lii's two prior state court convictions for minor drug offenses, the court had no choice but to sentence him to life in prison.[193] The First Step Act modified the provisions that enhanced Lii's sentence. The court noted, "[I]f sentenced today, this court would almost certainly not sentence Defendant in excess of a 15-year mandatory minimum given the quantity

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186 Braxton v. United States, 500 U.S. 344, 348 (1991).

187 *Id.*

188 *Id.*; *see also* Stinson v. United States, 508 U.S. 36, 46 (1993) ("[P]rior judicial constructions of a particular guideline cannot prevent the Commission from adopting a conflicting interpretation . . . .").

189 28 U.S.C. § 991(b)(1)(B).

190 *See* United States v. Chen, 48 F.4th 1092, 1096–98 (9th Cir. 2022) (documenting the circuit split).

191 U.S. SENT'G COMM'N, COMPASSIONATE RELEASE, *supra* note 46, at 4.

192 United States v. Lii, 528 F. Supp. 3d 1153, 1156–57 (D. Haw. 2021).

193 *See id.* at 1157.

of drugs involved in the instant offense."[194] But those reforms did not apply retroactively under the terms of the First Step Act. The court nevertheless reduced Lii's sentence to time served, joining the circuits that had allowed changes in the law to constitute extraordinary and compelling reasons in particularly egregious circumstances.[195] Subsequently, the Court of Appeals for the Ninth Circuit ratified the district court's decision by holding that "district courts may consider non-retroactive changes in sentencing law . . . when analyzing extraordinary and compelling reasons for purposes of § 3582(c)(1)(A)."[196]

Brandon Lomax was convicted of comparable drug-related offenses in 2014.[197] Because of his two previous felony drug offenses, the government filed a § 851 notice, causing the court to impose a mandatory life sentence.[198] Due to the First Step Act, however, Lomax today would have been subject to only a twenty-five-year mandatory minimum rather than a life sentence.[199] Because he was convicted in the Southern District of Indiana, however, Seventh Circuit case law foreclosed compassionate release on this basis.[200] Despite the "admirable" rehabilitative strides Lomax had made in prison, relief was unavailable.[201]

Although they had committed similar offenses and had similar criminal records, Lii and Lomax faced starkly different outcomes given the circuit split over the availability of sentence-based compassionate release. These are precisely the "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct" that Congress tasked the Commission with eliminating.[202] In explaining the rationale behind its amendments to § 1B1.13, the Commission recognized explicitly that "Subsections (b)(6) and (c) operate together to respond to a circuit split concerning when, if ever, non-retroactive changes in law may be considered as extraordinary and compelling reasons within the meaning of section 3582(c)(1)(A)."[203] Far from being beyond the Commission's authority, the updates to § 1B1.13 fall clearly into the powers Congress intended—*instructed*, even—the Commission to exercise.

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194 *Id.* at 1162.

195 *See id.* at 1163–64.

196 United States v. Chen, 48 F.4th 1092, 1098 (9th Cir. 2022).

197 United States v. Lomax, No. 1:12-CR-00189, 2022 WL 2652123, at *1 (S.D. Ind. July 7, 2022).

198 *See id.*

199 *See id.* at *2.

200 *See id.*; *see also* United States v. Thacker, 4 F.4th 569, 574 (7th Cir. 2021).

201 *Lomax*, 2022 WL 2652123, at *2.

202 28 U.S.C. § 991(b)(1)(B).

203 U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 5 (2023) [hereinafter U.S. SENT'G COMM'N, 2023 AMENDMENTS].

2. The First Step Act of 2018

During the Sentencing Commission's 2023 hearings on compassionate release, some witnesses expressed that the First Step Act's technical revisions to § 3582(c)(1)(A) in 2018 "militate[] against transforming that provision into a broad remedial resentencing statute."[204] Because "Congress did not expand the category of permissible justifications for sentencing modifications," the argument goes, the Commission's addition of an enumerated category for changes in the law must necessarily exceed the authority conferred by Congress.[205] After all, "Congress . . . does not, one might say, hide elephants in mouseholes."[206]

This reasoning fundamentally misunderstands the relationship between the SRA's delegation of broad powers to the Commission and the First Step Act's subsequent reification of those powers. To appreciate the infirmity of the foregoing position, one must first understand the state of compassionate release between the two Acts.

Though Congress intended in the SRA to give the Sentencing Commission primary authority over the implementation of compassionate release, it made a vital error: It precluded courts from considering § 3582(c)(1)(A) motions unless the BOP had filed a motion for compassionate release on behalf of an incarcerated individual.[207] The BOP thus served a gatekeeping function—even for prisoners who faced clear extraordinary and compelling circumstances, a court could not order a sentence reduction in the absence of a motion by the BOP.

The Commission, for its part, fulfilled in 2007 its statutory obligation to promulgate a policy statement describing extraordinary and compelling circumstances.[208] It provided three categories of enumerated extraordinary and compelling circumstances: (i) "[t]he defendant is suffering from a terminal illness;" (ii) the defendant is suffering from a

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204 Larkin Written Statement, *supra* note 64, at 15.

205 Jennifer Mascott, Asst. Prof. of L., Geo. Mason. Univ. Antonin Scalia L. Sch., Written Statement Prepared for the United States Sentencing Commission Hearing on Proposed Amendments to the Federal Sentencing Guidelines Related to Compassionate Release 5–6 (2023), https://perma.cc/NW5D-9PC3.

206 Larkin Written Statement, *supra* note 64, at 15 (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)); *see also id.* ("It is dubious in the extreme that Congress snuck a second-look provision or clemency power into a revision of the compassionate relief section of the Sentencing Reform Act of 1984 without making that approach clear . . . .").

207 U.S. SENT'G COMM'N, 2023 AMENDMENTS, *supra* note 203, at 1.

208 The Commission's first policy statement simply parroted the statutory language of § 3582(c)(1)(A). *See* U.S. SENT'G GUIDELINES MANUAL app. C (Supp. 2008) (U.S. SENT'G COMM'N 2008) (Amendment 683) ("The policy statement restates the statutory bases for a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A)."). Commentary provided that "[a] determination made by the Director of the Bureau of Prisons that a particular case warrants a reduction for extraordinary and compelling reasons shall be considered as such for purposes of subdivision (1)(A)." *Id.* app. C, cmt. n.1 (Supp. 2008).

physical or mental condition "that substantially diminishes the ability of the defendant to provide self-care . . . and for which conventional treatment poses no substantial improvement;" and (iii) the death or incapacitation of the sole caregiver of the defendant's minor children.[209] Importantly, however, the Commission also created a residual catch-all category, which provided: "As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (i), (ii), and (iii)."[210] In other words, from 2007 to 2018, the BOP had broad discretion to identify any extraordinary and compelling reason that would justify a sentence reduction, beyond those enumerated with specificity in the policy statement.[211]

"This system with the BOP serving as gatekeeper was an unmitigated failure."[212] The Commission recently reflected that the "BOP filed such motions extremely rarely—the number of defendants receiving relief averaged two dozen per year—and for the most part limited its motions to cases involving inmates who were expected to die within a year or were profoundly and irremediably incapacitated."[213] This prompted an investigation by the Office of the Inspector General ("OIG"), which issued a scathing report in 2013. The report's bottom line? The "BOP does not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered."[214] In the years leading up to the First Step Act, the BOP approved a measly six percent of compassionate release applications, and more than 250 people with pending or denied compassionate release motions died in prison.[215]

Enter the First Step Act of 2018.[216] The Act removed the BOP impediment to seeking compassionate release and instead allowed individuals to file § 3582(c)(1)(A) motions directly with federal district courts.[217] The statute's compassionate release section was entitled "Increasing the Use and Transparency of Compassionate Release."[218] Senator Ben Cardin, one of the bill's cosponsors, described the First Step Act's revisions to § 3582(c)(1)(A) as "expand[ing] compassionate release,"

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209 U.S. SENT'G GUIDELINES MANUAL app. C (Supp. 2008) (U.S. SENT'G COMM'N 2008).

210 *Id.* The enumerated circumstances were expounded upon in later amendments, but the catch-all category remained substantively the same throughout subsequent revisions. *See* U.S. SENT'G GUIDELINES MANUAL app. C. (Supp. 2024) (U.S. SENT'G COMM'N 2024) (Amendment 799).

211 *See* BOP COMPASSIONATE RELEASE PROGRAM, *supra* note 38, at 13–14.

212 Zunkel Written Statement, *supra* note 36, at 5.

213 U.S. SENT'G COMM'N, 2023 AMENDMENTS, *supra* note 203, at 1.

214 BOP COMPASSIONATE RELEASE PROGRAM, *supra* note 38, at 11.

215 Thompson, *supra* note 38.

216 *See generally* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

217 *See id.* § 603(b), 132 Stat. at 5239.

218 *Id.*

while a House member commented on how the provision "improv[ed] application of compassionate release."[219] The First Step Act accomplished that expansion not by modifying the substantive standard for compassionate release, but by excising the procedural bottleneck that prevented the intended use of § 3582(c)(1)(A).

And therein lies the critics' failure. Congress had no need to broaden the § 3582(c)(1)(A) standard because the SRA had already codified a sufficiently broad compassionate release provision. It was the BOP's obstruction—not a shortcoming of § 3582(c)(1)(A)—that frustrated Congress's intention as to compassionate release. The First Step Act effectuated a procedural revision, not because Congress intended to cabin § 3582(c)(1)(A)'s potential, but because a procedural revision was all that was necessary to restore compassionate release to its intended function.

> With the First Step Act, Congress made a mere procedural change, intending for the judiciary to take on the role that the BOP once held under the pre-First Step Act Compassionate Release Statute to be the essential adjudicator of compassionate release requests. But Congress also intended for courts to grant sentence reductions on the full array of grounds reasonably encompassed by the "extraordinary and compelling" standard set forth in the applicable statute and guidelines policy statements.[220]

Notably, nothing in the text of § 994(t) or § 3582(c)(1)(A), and nothing in the legislative history of the First Step Act, suggested that Congress intended to narrow the Commission's authority or otherwise place off-limits as extraordinary and compelling circumstances sentence-related reasons for a sentence reduction.

To summarize, the progression from the SRA to the First Step Act makes clear that the Commission has always had the authority to broadly define "extraordinary and compelling circumstances"—especially to include changes in the law as the basis for an individualized sentence reduction. These statutory provisions are entirely unlike those in *Biden v. Nebraska* and *West Virginia v. EPA*, for example, where the agencies' ultimate regulations were of a qualitatively different kind than those envisioned by the authorizing statute. Sections 994(t) and 3582(c)(1)(A) are neither "mousehole[s]"[221] nor "little-used backwater" provisions nor "wafer-thin reed[s] on which to rest [a] sweeping power."[222] They are instead the bedrock of a robust sentencing-reduction scheme Congress expressly entrusted to the Sentencing Commission.

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219 164 CONG. REC. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Ben Cardin); 164 CONG. REC. H10362 (daily ed. Dec. 20, 2018) (statement of Rep. Jerrold Nadler); *see also* Hopwood, *supra* note 166, at 106–07.

220 Hopwood, *supra* note 166, at 107.

221 Larkin Written Statement, *supra* note 64, at 15 (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

222 Biden v. Nebraska, 143 S. Ct. 2355, 2371 (2023) (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam)); *id.* at 2382 (Barrett, J., concurring) (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2607 (2022)).

C. *Prior Invocations of Broad Authority*

Even where the text and history of a statute plausibly confer broad power on an agency, the major questions doctrine demands scrutiny where the agency has not previously asserted such sprawling authority.[223] In *Brown & Williamson*, for example, the Court emphasized that "[c]ontrary to its representations to Congress since 1914, the FDA ha[d] [then] asserted jurisdiction to regulate an industry" it had not previously attempted to regulate.[224] In *West Virginia v. EPA*, the Court characterized the EPA's assertion of authority as "unprecedented."[225] And in *Biden v. Nebraska*, the Court similarly observed that "[t]he Secretary has never previously claimed powers of this magnitude under the HEROES Act."[226]

To the hasty observer, § 1B1.13(b)(6) might appear as an expression of authority far broader than the Commission has historically invoked. After all, until this most recent amendment cycle, the Commission had never enumerated changes in the law as extraordinary and compelling circumstances.[227]

That view is exactly backward. In fact, the authority asserted by the Commission in its revisions to § 1B1.13 is narrower than any authority it has previously exercised. As alluded to above, the Commission's first policy statement merely "restate[d] the statutory bases for a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A)" (i.e., it simply reiterated that a defendant needed to show extraordinary and compelling reasons warranting a sentence reduction).[228] One year later, the Commission amended § 1B1.13 to enumerate three categories of extraordinary and compelling circumstances and reserve for the BOP the ability to identify "extraordinary and compelling reason[s] other than, or in combination with, the [enumerated] reasons."[229] That catch-all category persisted in subsequent revisions to § 1B1.13.[230]

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223 *See, e.g.,* West Virginia v. EPA, 142 S. Ct. at 2610–12.

224 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 156–57, 159 (2000).

225 142 S. Ct. at 2612.

226 143 S. Ct. at 2372.

227 *Compare* U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(6) (U.S. SENT'G COMM'N 2023), *with* U.S. SENT'G GUIDELINES MANUAL, app. C (U.S. SENT'G COMM'N 2011) (Amendment 683), *and* U.S. SENT'G GUIDELINES MANUAL, app. C (Supp. 2023) (U.S. SENT'G COMM'N 2023).

228 U.S. SENT'G GUIDELINES MANUAL app. C (U.S. SENT'G COMM'N 2011) (Amendment 683, effective Nov. 1, 2006).

229 U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1 (U.S. SENT'G COMM'N 2007) (Amendment 698, effective Nov. 1, 2007).

230 *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1 (U.S. SENT'G COMM'N 2016) (Amendment 799); *see also* United States v. Brooker, 976 F.3d 228, 232–33 (2d. Cir. 2020) ("By 2018, . . . the Sentencing Commission had expanded its own definition of extraordinary and compelling circumstances more broadly. . . . But, importantly for this case, it had maintained, nearly word-for-

In essence, then, the Commission has *always* asserted maximum authority under § 994(t). While the BOP was the gatekeeper of compassionate release, the Commission dictated that "what should be considered extraordinary and compelling reasons" would include *anything* deemed extraordinary and compelling by the Director of the BOP.[231] Though the Commission identified with specificity certain extraordinary and compelling circumstances, it has always left open the possibility that any number of other reasons could qualify as extraordinary and compelling (save for rehabilitation of the defendant alone). The Court of Appeals for the Fourth Circuit aptly described that history as follows:

> When the Sentencing Commission adopted § 1B1.13 in 2006, a motion could reach a reviewing court only by way of the BOP. Recognizing that it could not definitively predict every "extraordinary and compelling" reason that might arise, the Commission included a catch-all provision, subject, again, to BOP approval—which meant at the time that "every motion to reach [a] court would have an opportunity to be assessed under the flexible catchall provision."[232]

Even before the First Step Act, it was well understood that this catch-all category could include nonmedical circumstances. In reviewing the BOP's handling of compassionate release, the OIG noted that "[u]nder the [SRA]," the BOP could seek release "based on either medical or non-medical conditions."[233] In fact, even "the BOP's regulations and Program Statement permit[ted] non-medical circumstances to be considered as a basis for compassionate release," but "the BOP routinely reject[ed] such requests and did not approve a single non-medical request during the 6-year period of [the OIG's] review."[234] Ultimately, the OIG recommended that the BOP "expand[] the use of the compassionate release program as authorized by Congress . . . to cover both medical and non-medical conditions."[235] The OIG specifically emphasized the Sentencing Commission's affirmation that the BOP could seek a sentence reduction for "[a]ny other circumstances that the Director of the [BOP] finds to be an extraordinary and compelling reason."[236]

There was thus minimal record of non-medical compassionate release prior to the First Step Act—not because the Commission had failed to assert such authority, but because the BOP had failed to exercise the

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word, the catch-all provision allowing for other unidentified extraordinary and compelling reasons . . . .").

231 *See* 28 U.S.C. § 994(t); U.S. SENT'G GUIDELINES MANUAL § 1B1.13 (U.S. SENT'G COMM'N 2016) (Amendment 799).

232 United States v. McCoy, 981 F.3d 271, 283 (4th Cir. 2020) (alteration in original) (emphasis omitted) (quoting United States v. Rodriguez, 451 F. Supp. 3d 392, 399 (E.D. Pa. 2020)).

233 BOP COMPASSIONATE RELEASE PROGRAM, *supra* note 38, at i.

234 *Id.* at ii.

235 *Id.* at iv; *see id.* at 55.

236 *Id.* at 60.

discretion conferred by the Commission. Although the Commission had crafted a policy statement that ostensibly reached the outer limit of its authority under § 994(t), courts had no occasion to document that authority; during the OIG's six-year review period, the BOP requested compassionate release in just *two* cases involving nonmedical circumstances.[237]

In comparison to the pre-First Step Act policy statement, the Commission's amendments to § 1B1.13 actually *narrow* the circumstances that can be considered extraordinary and compelling. Under the pre-First Step Act catch-all category, "*every motion* to reach the court would have an opportunity to be assessed under the flexible catchall provision."[238] The BOP could have determined, for example, that *any* nonretroactive change in the law was extraordinary and compelling; it could have invoked its authority under the catch-all to file a sentence-reduction motion on that basis. In contrast, the revised policy statement sharply limits the conditions under which a change in the law can be considered extraordinary and compelling: "Except as provided in subsection (b)(6), a change in the law . . . shall not be considered for purposes of determining whether an extraordinary and compelling reason exists under this policy statement."[239] Subsection (b)(6), in turn, provides that changes in the law may be extraordinary and compelling only where "a defendant received an unusually long sentence and has served at least 10 years of the term of imprisonment," and then, "only where such change would produce a gross disparity between the sentence being served and the sentence likely to be imposed at the time the motion is filed."[240]

Far from being an unprecedented expansion of the Sentencing Commission's authority, § 1B1.13 cabins the authority previously asserted by the Commission. Although the Commission had previously promulgated policy statements coextensive with the outer limits of its authority under § 994(t), § 1B1.13(b)(6) defines "extraordinary and compelling reasons" much more narrowly than previous iterations of the

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237 *Id.* at 72.

238 United States v. Rodriguez, 451 F. Supp. 3d 392, 399 (E.D. Pa. 2020).

239 U.S. SENT'G GUIDELINES MANUAL § 1B1.13(c) (U.S. SENT'G COMM'N 2023).

240 *Id.* § 1B1.13(b)(6). This avenue for relief is also far narrower than stopgap holdings of permissive circuits in the absence of a policy statement. In joining the Courts of Appeals for the First, Fourth, and Tenth Circuits, the Court of Appeals for the Ninth Circuit previously held "that a district court may consider the First Step Act's non-retroactive changes to sentencing law, in combination with other factors particular to the individual defendant, when determining whether extraordinary and compelling reasons exist for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A)." United States v. Chen, 48 F.4th 1092, 1093 (9th Cir. 2022). Under this standard, a defendant need not have been serving an "unusually long sentence" for which he "has served at least 10 years," nor must a defendant have identified a "gross disparity" in sentence based on this change in the law. U.S. SENT'G GUIDELINES MANUAL § 1B1.13(b)(6) (U.S. SENT'G COMM'N 2023).

policy statement.[241] At bottom, the amended policy statement is hardly a "never previously claimed power[]" of the Commission.[242]

D. *Economic and Political Significance*

The precise force of the "economic and political significance" factor within the major questions analysis is subject to debate. Some scholars, as noted above, have offered that post-*West Virginia*, the Court has disavowed "an amorphous multifactor test of economic and political significance that looks at things like cost and public attention."[243] But reading *Biden v. Nebraska*, it is hard to escape the conclusion that the economic and political significance of an agency action is of minor or no consequence.[244] Regardless, neither favors invoking the major questions doctrine in this case.

Take the economic significance prong first. This prong turns not on the sheer economic impact of an action alone, but on the relationship between the segment of the economy being regulated and the authorizing statute.[245] In *Brown & Williamson*, for instance, the Court expressed doubt that Congress had given the FDA the authority to regulate the whole of the tobacco industry—which "constitut[ed] a significant portion of the American economy"—"in so cryptic a fashion."[246] In *Alabama Ass'n of Realtors v. Department of Health & Human Services*,[247] the Court similarly doubted the Centers for Disease Control and Prevention's ("CDC's") authority to impose a nationwide moratorium on evictions in counties with high rates of COVID-19 transmission. The moratorium would have covered "[a]t least 80% of the country" and might have had an economic impact of $50 billion.[248] Because Congress had not expressly authorized such an "intru[sion] into an area that is the particular domain of state law," the Court declined to uphold the CDC's moratorium.[249] The loan cancellation program in *Biden v. Nebraska* would have cost taxpayers an estimated $500 billion—"nearly one-third of the Government's $1.7 trillion in annual discretionary spending."[250] The majority reified the

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241 *See supra* text accompanying notes 238–40.

242 Biden v. Nebraska, 143 S. Ct. 2355, 2372 (2023).

243 Brunstein & Goodson, *supra* note 121, at 74.

244 *See Biden*, 143 S. Ct. at 2373 ("The 'economic and political significance' of the Secretary's action is staggering by any measure." (internal quotation marks omitted) (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022)).

245 *See infra* text accompanying notes 246–51.

246 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000).

247 141 S. Ct. 2485 (2021).

248 *Id.* at 2489.

249 *Id.*

250 Biden v. Nebraska, 143 S. Ct. 2355, 2373 (2023).

notion that the economic significance factor is intertwined with the text of the authorizing statute: "[T]he words 'waive or modify' do not mean 'completely rewrite'; and . . . our precedent—old and new—requires that Congress speak clearly before a Department Secretary can unilaterally alter large sections of the American economy."[251]

The economic significance of the Commission's § 1B1.13 revisions is dissimilar to those of the primary major questions cases. Out of the 1,672 pages of public comments submitted to the Commission following its February 2023 hearing, there was not a single mention of economically deleterious consequences of the proposed amendments.[252] In fact, the comment most directly responsive to the economic impact of the Commission's proposals came from Senators Richard Durbin, Cory Booker, and Mazie Hirono, who wrote, "Furthermore, not only is mass incarceration damaging to our communities and the families that reside in them, but it places a heavy burden on our economy."[253]

More to the point, whatever the effect of the § 1B1.13 amendments on the economy, this is an area over which Congress has unequivocally delegated authority to the Commission. Unlike the FDA in *Brown & Williamson*, the CDC in *Alabama Ass'n of Realtors*, and the Secretary of the Department of Education in *Biden*, the Commission is not asserting regulatory authority over a new area of the economy—much less an area attenuated from the Commission's purview.[254] Instead, Congress delegated to the Commission large swaths of authority over sentencing policy, even though sentencing decisions doubtlessly influence the economy in a variety of ways.

The political significance prong presents a far closer question.[255] The Court's precedents have identified several considerations in applying this prong. First, the Court considers whether the "issue is particularly controversial and has sparked widespread debate."[256] Courts "look to the number of comments submitted during a regulation's notice-and-comment procedures as a rough proxy for the public's interest in debating the issue."[257] Second, the Court implies that a provision passed without much controversy or debate likely does not confer on an agency the power to make particularly controversial decisions. As the Court elaborated in

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251 *Id.* at 2375.

252 *2022-2023 Proposed Amendments: Public Comment 88 FR 7180*, U.S. SENT'G COMM'N (2023), https://perma.cc/MAB5-3WCD.

253 Letter from Richard J. Durbin, Chair, U.S. Senate Comm. on the Judiciary, to Carlton W. Reeves, Chair, U.S. Sent'g Comm'n 8 (Mar. 14, 2023) (available https://perma.cc/MAB5-3WCD); *see also 2022-2023 Proposed Amendments: Public Comment*, *supra* note 252.

254 *See supra* text accompanying notes 246–51.

255 *See* Capozzi III, *supra* note 122, at 232 ("[The] political questions . . . part of the doctrine may prove more difficult to implement than the economic component.").

256 *Id.*

257 *Id.*

Biden v. Nebraska, "The sharp debates generated by the Secretary's extraordinary program stand in stark contrast to the unanimity with which Congress passed the HEROES Act."[258] Third, the Court is likely to find a significant political question when "Congress . . . has considered and rejected related legislation."[259] In *West Virginia v. EPA*, for instance, the Court did not "ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that . . . 'Congress considered and rejected' multiple times."[260] That is "a sign that an agency is attempting to 'work [a]round' the legislative process."[261]

The changes-in-the-law provision of § 1B1.13 did generate significant controversy and debate. The Commission received more than 1,500 pages of comments from hundreds of commentators, ranging from advocates, government officials from all three branches, affected prisoners, and so on.[262] The Commission itself emphasized the "extensive public comment" on compassionate release, "including from the Department of Justice, the Federal Public and Community Defenders, the Commission's advisory groups, law professors, currently and formerly incarcerated individuals, and other stakeholders in the federal criminal justice system."[263] Senate Republican Leader Mitch McConnell submitted a comment in opposition to the changes in the law provision, explaining, "when Congress wants to reduce criminal penalties retroactively, we say so clearly. . . . By trying to short-circuit your way to this one quasi-legislative change in the near term, you would destroy any possibility of additional future legislation in this area."[264] Senator Chuck Grassley, one of the authors of the First Step Act of 2018, "strongly encourage[d] the Commission to reject the proposed . . . 'Changes in Law'" category.[265] He continued, "I can tell you that Congress didn't intend to make the entire act retroactive."[266] Senators

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258 Biden v. Nebraska, 143 S. Ct. 2355, 2374 (2023); West Virginia v. EPA, 142 S. Ct. 2587, 2624 (2022) (Gorsuch, J., concurring) ("Instead, the agency relies on a rarely invoked statutory provision that was passed with little debate . . . .").

259 Capozzi III, *supra* note 122, at 232.

260 West Virginia v. EPA, 142 S. Ct. at 2614 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 144 (2000)).

261 *Id.* at 2621 (Gorsuch, J., concurring) (internal quotation marks omitted) (alteration in original) (quoting NFIB v. OSHA, 142 S. Ct. 661, 667–68 (2022) (Gorsuch, J., concurring)).

262 *2022-2023 Proposed Amendments: Public Comment*, *supra* note 252.

263 U.S. SENT'G COMM'N, 2023 AMENDMENTS, *supra* note 203, at 2.

264 Letter from Mitch McConnell, Republican Leader, U.S. Senate, to Carlton W. Reeves, Chair, U.S. Sent'g Comm'n 1–2 (Feb. 8, 2023) (available at https://perma.cc/MAB5-3WCD); *see also 2022-2023 Proposed Amendments: Public Comment*, *supra* note 252.

265 Letter from Chuck Grassley, Ranking Member, U.S. Senate Comm. on the Judiciary, to Carlton W. Reeves, Chair, U.S. Sent'g Comm'n 1 (Jan. 19, 2023) (available at https://perma.cc/MAB5-3WCD); *see also 2022-2023 Proposed Amendments: Public Comment*, *supra* note 252.

266 *Id.* at 2. Beyond the obvious problems with relying on the post-enactment word of a single senator, the amendment ultimately adopted by the Commission does not make retroactive all First

Durbin, Booker, and Hirono, in contrast, "strongly support[ed] inclusion of the proposed Changes in Law enumerated circumstance."[267] Such disagreement permeates the comments received by the Commission, including among judges, practitioners, and advocacy organizations.[268]

But mere controversy alone is insufficient to transform the Commission's actions into a major questions case, especially when the authorizing statute *itself* generated much controversy. The SRA was quite controversial among lawmakers at the time of enactment. For example, Senator Charles Mathias disagreed with the abolition of the parole system:

> The Federal judges and the U.S. Parole Commission are two of the most visible actors in our current sentencing system. Not surprisingly, they are the targets of this bill, which would abolish the latter, and consign the former to the task of operating a sentencing decision machine designed and built by somebody else.[269]

Demonstrating that Congress clearly contemplated the expansive role of the Commission, he continued: "Nor will the Sentencing Commission's responsibilities end with the creation of the sentencing guidelines. This new bureaucracy will be empowered to promulgate regulations on a vast array of issues which are today confided to judicial discretion."[270]

During committee hearings, the Treasury Department emphasized how compassionate release "provides [a] protection[] against unjustifiably long sentences."[271] In particular, it pointed to the "modification of a prison term" provision that allows a sentence reduction when "there are extraordinary and compelling reasons to do so . . . because of a change in the circumstances that originally justified the imposition of a particular sentence."[272] In light of that provision, the Treasury opposed a safety valve that would "authorize[] a defendant . . . to motion for reduction of a long

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Step Act changes in the law. Instead, only a limited class of prisoners can seek a reduction based on a change in the law, and even then, relief may be granted only if the § 3553(a) factors support a reduction.

267 Letter from Richard J. Durbin, *supra* note 253, at 2.

268 *E.g.*, Letter from Julie E. Carnes, Senior Circuit Judge, U.S. Court of Appeals, Eleventh Circuit, to Carlton W. Reeves, Chair, U.S. Sent'g Comm'n 1–2 (Mar. 14, 2023) (available at https://perma.cc/MAB5-3WCD); Letter from Natasha Sen, Chair, Practitioners Advisory Group, to Carlton W. Reeves, Chair, U.S. Sent'g Comm'n 1–2 (Mar. 14, 2023) (available at https://perma.cc/MAB5-3WCD); Letter from Joshua Matz, Partner, Kaplan Hecker & Fink LLP, to Carlton W. Reeves, Chair, U.S. Sent'g Comm'n 1 (Feb. 15, 2023) (available at https://perma.cc/MAB5-3WCD); *see also 2022-2023 Proposed Amendments: Public Comment*, *supra* note 252.

269 S. REP. NO. 98-225, at 792 (1983).

270 *Id.* at 793.

271 *Comprehensive Crime Control Act of 1983: Hearing on S. 829 Before the S. Subcomm. on Crim. L. of the S. Comm. on the Judiciary*, 98th Cong. 95 (1983) (statement of William French Smith, Att'y Gen. of the U.S., U.S. Dep't of Just.).

272 *Id.*

sentence after six years and at the end of the guideline years."[273] Others expressed disagreement with the removal of such an automatic safety valve: "That safety valve has been eliminated from S. 829, and that was an important safety valve given the abolition of parole."[274] The American Bar Association, for its part, advocated for the retention of the Parole Commission "to act as a safety valve for any unanticipated adverse results on our prison system."[275] The SRA in general, and its sentence-modification provisions in particular, were hardly "passed with little debate" such that a broad reading of the Commission's powers would clearly contravene Congress's intent.[276]

The compassionate release provisions of the First Step Act of 2018, by contrast, were not marked by significant controversy. Some commentators critical of the Commission's § 1B1.13 amendments have capitalized on this lack of dissensus, arguing that "we would have expected Congress to answer—or even just to have debated or acknowledged—[whether the First Step Act] . . . jettisoned the finality that sentences ordinarily receive under the Sentencing Reform Act of 1984 . . . if the First Step Act of 2018 were to have created a new second-look process."[277] But the First Step Act is a red herring for major questions purposes. The Commission's authorizing statute vis-à-vis compassionate release is not the First Step Act but the SRA; the First Step Act merely removed a procedural impediment to the vindication of the full range of the Sentencing Commission's power over compassionate release.[278] Lack of controversy pertaining to the Sentencing Commission's authority over § 3582(c)(1)(A) in 2018 tells us precious little about what Congress envisaged the Commission's role to be when it gave the Commission the authority to describe extraordinary and compelling reasons for a sentence reduction in 1984.

Finally, there is scant evidence that the Commission's amendments to § 1B1.13 are intended to circumvent congressional rejection of comparable

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273 *Id.* at 94. Note that this potential safety valve is distinct from U.S. Sentencing Guideline § 1B1.13(b)(6), as the latter allows for a sentence reduction only when the law has changed—not merely because a person has served a certain amount of his or her sentence.

274 *Id.* at 344 (statement of David E. Landau, Legis. Couns., ACLU); *see also id.* at 366 (prepared statement of John Shattuck, David E. Landau & Leon Friedman, ACLU) ("By abolishing parole and limiting good time, the bill closes the safety valves of the system and risks even longer periods of incarceration than under current law."). The defender community similarly expressed concern about a lack of "modification or safety valve mechanism." *Id.* at 462 (statement of Edward F. Marek, Public Def., N.D. Ohio).

275 *Id.* at 745 (statement of William W. Greenhalgh, Chair, Am. Bar Ass'n Crim. Just. Section).

276 West Virginia v. EPA, 142 S. Ct. 2587, 2624 (2022) (Gorsuch, J., concurring).

277 Larkin Written Statement, *supra* note 64, at 14.

278 *See supra* Section III.B.2.

legislation,[279] unlike in other major questions cases.[280] Outside of the SRA, Congress has not considered (let alone rejected) a statute that would independently authorize sentence-reduction motions in light of changes in the law. Of course, Congress made certain changes to the law retroactive in the First Step Act, but not others.[281] The decision to limit the class of automatically and categorically retroactive amendments did not, however, reject the individualized review of sentence-reduction motions based in part on changes in the law.[282]

In total, the economic and political significance of the Commission's revisions do not favor an application of the major questions doctrine. Though the amendments are politically controversial, there is minimal evidence that the Commission has deviated so markedly from the path Congress intended by enacting the SRA that the doctrine should invalidate the updated policy statement. What's more, even if this prong did favor an invocation of the major questions doctrine, the Court has never applied the doctrine based solely on the political controversy surrounding an agency decision[283]—for good reason. Were contemporary political controversy outcome-determinative in the major questions analysis, well-connected and well-funded interest organizations could simply flood an agency with wide-ranging comments for the sole purpose of triggering the doctrine.

On balance, the text of § 994(t), as well as the statutory progression from the SRA to the First Step Act of 2018, compel the conclusion that the Commission's § 1B1.13 amendments do not trigger the major questions doctrine. Rather than invoking authority over a new area of law for the first time, the Commission's revisions narrow the permissible bases for a sentence-reduction motion. Although its decision might be politically controversial, it is not at odds with the sentence-modification scheme Congress entrusted to the Commission in 1984 and strengthened in 2018.

IV. Clear Congressional Authorization

Even when the major questions doctrine applies, the Court will uphold the challenged regulation when supported by "clear congressional authorization."[284] That clear statement rule appears at first glance easy enough to apply; after all, "Courts have long experience applying clear-

279 *See* Capozzi III, *supra* note 122, at 233.

280 *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 144 (2000).

281 *See* United States v. Thacker, 4 F.4th 569, 571 (7th Cir. 2021).

282 *See* United States v. McCoy, 981 F.3d 271, 286–87 (4th Cir. 2020) ("[T]here is a significant difference between automatic vacatur and resentencing of an entire class of sentences . . . and allowing for the provision of individual relief in the most grievous cases.").

283 *See* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 289 (2022).

284 Biden v. Nebraska, 143 S. Ct. 2355, 2375 (2023).

statement rules throughout the law."[285] But in major questions cases, the Court has yet to uphold a regulation based on clear congressional authorization, engendering uncertainty about the precise mechanics of the major questions clear statement rule. Exacerbating this uncertainty, members of the Court have ostensibly disagreed about the burden imposed by the clear statement rule in major questions cases.[286]

This Part first situates that disagreement among other clear statement rules before predicting whether the Court would uphold the Commission's § 1B1.13 revisions as clearly authorized under § 994(t).

A. *Clear Disagreement About Clear Statements*

In its major questions cases, the Court has yet to authoritatively describe the showing an agency must make to uphold an action as clearly authorized by Congress. In major questions cases prior to *West Virginia v. EPA*, "extant doctrine did not clearly state that a clear statement was necessary."[287] This uncertainty might have been a product of the Court's antipathy toward *Chevron* deference, which culminated with *Chevron*'s recent demise.[288] The "old" major questions cases—when the Court would more routinely apply *Chevron* deference—"negated the agency's claim to *Chevron* deference: when a major question was implicated, the agency had to be able to persuade a court on de novo review that the statute authorized the agency's action."[289] "Now," however, following *West Virginia v. EPA*, "the burden of proof has again shifted, and it has shifted against the agency."[290] When the major questions doctrine applies, the Court has "required the [agency] to 'point to "clear congressional authorization"' to justify the challenged program."[291]

Justice Gorsuch's concurring opinion in *West Virginia* represents "[t]he first and so far only time the major questions doctrine was ever equated with a clear-statement rule in a Supreme Court opinion."[292] In that concurrence, Justice Gorsuch described the major questions doctrine's clear-statement rule in substantive terms similar to that of the avoidance canon: "Like many parallel clear-statement rules in our law, this

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285 West Virginia v. EPA, 142 S. Ct. 2587, 2622 (2022).

286 In fact, some scholarship has questioned whether the Court even applies a clear statement rule at all in major questions cases. *See* Brunstein & Goodson, *supra* note 121, at 95 ("The Court Did Not Adopt a Clear-Statement Rule.").

287 Sohoni, *supra note* 283, at 273.

288 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

289 Sohoni, *supra note* 283, at 275.

290 *Id.*

291 Biden v. Nebraska, 143 S. Ct. 2355, 2375 (2023) (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022)).

292 Brunstein & Goodson, *supra* note 121, at 97–98.

one operates to protect foundational constitutional guarantees."[293] He continued, "Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I's Vesting Clause has its own: the major questions doctrine."[294] On this view, the major questions doctrine (and its clear-authorization requirement) acts as a constitutional constraint on an agency's ability to exercise legislative power. This reading might be understood as the "substitution of a constitutional nondelegation holding with a subconstitutional major questions holding."[295]

Justice Barrett repudiated the view of the major questions doctrine as a substantive canon in her *Biden v. Nebraska* concurrence.[296] She opined, "While one could walk away from our major questions cases with [the] impression [that the doctrine is a substantive canon], I do not read them this way. . . . [N]one purports to depart from the best interpretation of the text—the hallmark of a true clear-statement rule."[297] Justice Barrett shies away from a clear statement rule because it would shift a judge's attention away from "the most natural reading of a statute" towards an overprotection of nondelegation.[298]

The diverging views put forth by Justices Gorsuch and Barrett have more than mere academic consequence. Whatever view carries the day in future major questions cases will determine the showing an agency must make to satisfy the "clear congressional authorization" exception to the doctrine. Treatment of the major questions clear-statement rule as a substantive canon would typically require the Court to "adopt an inferior-but-tenable reading" to avoid a constitutional difficulty—in major questions cases, the impermissible agency exercise of a legislative power Congress intended to reserve for itself.[299] In practical terms, this would require an agency to show more than that the better reading of the statute is that it confers the relevant authority;[300] instead, the agency would need to show that the *only* plausible interpretation of the statute is that it confers the relevant authority. As Justice Barrett put it in her *Biden* concurrence, "to achieve an end protected by a strong-form canon, Congress must close all plausible off ramps."[301]

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293 West Virginia v. EPA, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

294 *Id.* at 2619.

295 Sohoni, *supra* note 283, at 294.

296 *See* Biden, 143 S. Ct. at 2377 (Barrett, J., concurring).

297 *Id.* at 2378.

298 *Id.* at 2383 (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 111 (2010)).

299 *Id.* at 2377.

300 *See* Boechler, P.C. v. Comm'r of Internal Revenue, 142 S. Ct. 1493, 1499 (2022) ("But in this context, better is not enough.").

301 *Biden*, 143 S. Ct. at 2377 (Barrett, J., concurring).

Before discussing Justice Barrett's view, it is worth scrutinizing her characterization of Justice Gorsuch's position. Though Justice Gorsuch clearly views the major questions doctrine as a substantive canon, his *West Virginia* concurrence suggests that "a clear congressional statement" may require something less than showing that the authority-conferring reading is the only plausible interpretation of the statute. In *West Virginia*, Justice Gorsuch asks: "[W]hat qualifies as a clear congressional statement authorizing an agency's action[?]"[302] In response, he identifies four "telling clues" courts use when applying the major questions clear-statement rule.[303] "*First*," he elaborates, "'[o]blique or elliptical language' will not supply a clear statement."[304] That much is self-evident, but this factor hardly supports a rule requiring congressional authorization to be the only plausible reading of the statute—instead, the text must be more than merely oblique or elliptical. "*Second*, courts may examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address."[305] This factor counsels against finding clear congressional authorization when an agency "attempt[s] to deploy an old statute focused on one problem to solve a new and different problem."[306] "*Third*, courts may examine the agency's past interpretations of the relevant statute."[307] When an agency reverses a prior interpretation of the statute—as in *Brown & Williamson*—it is less likely that Congress has clearly authorized the agency's action (or the agency's prior interpretation might have been treated as unreasonable). "*Fourth*, skepticism may be merited when there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise."[308] It is unlikely that Congress clearly authorizes an agency to act outside of its congressionally stated purpose.

In sum, although Justice Gorsuch considers the major questions doctrine a substantive canon, it seems that in application, his clear-statement rule requires less than "clos[ing] all plausible" other interpretations of the statute.[309] In especially close cases, Justice Gorsuch might still adopt the inferior-yet-plausible interpretation of the statute, but that does not mean Justice Gorsuch would require in all cases the clear congressional authorization to be the only reading of the statute. In some cases, an agency might satisfy the four factors identified by Justice Gorsuch for establishing clear congressional authorization, even when an

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302 West Virginia v. EPA, 142 S. Ct. 2587, 2622 (2022) (Gorsuch, J., concurring).

303 *Id.*

304 *Id.* (alteration in original).

305 *Id.* at 2623.

306 *Id.*

307 *Id.*

308 West Virginia v. EPA, 142 S. Ct. at 2623 (Gorsuch, J., concurring).

309 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2377 (2023) (Barrett, J., concurring).

alternative, non-authority-conferring interpretation of the statute is plausible.

Justice Barrett's view of the "clear congressional authorization" rule would impose a less onerous burden on agencies seeking to overcome the major questions doctrine. She understands the doctrine as an "ambiguity canon," which "merely instruct[s] courts how to 'choos[e] between equally plausible interpretations of ambiguous text.'"[310] An agency under this standard need not establish that the text evinces "'an "unequivocal declaration"' from Congress authorizing the *precise* agency action under review."[311] Instead, the agency must show only that the better reading of the statute is that it confers jurisdiction to undertake the challenged action.

An exhaustive analysis of these two perspectives is beyond the scope of this Article, but Justice Barrett appears to have the view most consistent with the Court's major questions precedents. In major questions cases, the Court most often appears to seek the most faithful reading of the statute rather than adopting an inferior-but-tenable reading in light of underlying constitutional concerns. The doctrine recognizes as interpretive context "that Congress normally 'intends to make major policy decisions itself, not leave those decisions to agencies.'"[312] "Crucially, treating the Constitution's structure as part of the context in which a delegation occurs is *not* the same as using a clear-statement rule to overenforce Article I's nondelegation principle . . . ."[313]

None of the Court's major questions cases has eschewed the best reading of a statute for a plausible reading that avoids nondelegation difficulties. In *MCI*, the Court rested its holding primarily on the definition of the words in the statute, and it confirmed that reading by reference to the context in which Congress enacted the authorizing statute:

> Rate filings are . . . the essential characteristic of a rate-regulated industry. It is highly unlikely that Congress would leave the determination of whether an industry will be entirely . . . rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements.[314]

Similarly, in *Brown & Williamson*, the Court read the authorizing law in historical and statutory context, concluding that "Congress ha[d] directly

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310 West Virginia v. EPA, 142 S. Ct. at 2620 n.3 (Gorsuch, J., concurring) (second alteration in original).

311 *Biden*, 143 S. Ct. at 2378 (Barrett, J., concurring) (quoting Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, Inc., 143 S. Ct. 1176, 1183 (2023)).

312 *Id.* at 2380 (quoting U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

313 *Id.*

314 MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 231 (1994).

spoken to the issue [t]here and precluded the FDA's jurisdiction to regulate tobacco products."[315]

The Court's more recent precedents further support Justice Barrett's position. In *West Virginia*, the Court used major questions context to conclude that a "little-used backwater" provision of the Clean Air Act did not authorize an EPA rule "restructuring the Nation's overall mix of electricity generation."[316] Again, the Court relied on the interpretive presumption that Congress does not intend to delegate to agencies the power to make major policy decisions.[317] In reviewing its major questions jurisprudence, the Court recognized that "[a]ll of these regulatory assertions had a colorable textual basis."[318] But in each case, the Court concluded that it was "very unlikely that Congress had actually" conferred such broad authority to an agency.[319] The Court recognized that the "separation of powers principles" at play in major questions cases reflect "a practical understanding of legislative intent [that] make[s] [the Court] 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there."[320] The constitutional foundation of the major questions doctrine, then, is more pertinent to divining Congress's intended meaning of a statute rather than as a substantive reason to abandon the best reading of the text. In *Biden*, the Court similarly treated the major questions doctrine as evidence of the text's semantic meaning. The presumption that Congress did not intend to delegate to the Secretary of Education the power to affect such a significant part of the economy merely confirmed the Court's straightforward textual conclusion that the word "'modify' does not authorize 'basic and fundamental changes in the scheme' designed by Congress."[321]

The upshot is that the Court has never used the major questions doctrine to disturb, for constitutional reasons, the otherwise best interpretation of a statute. "[T]he Court arrived at the most plausible reading of the statute in these cases."[322] Accordingly, the "clear congressional authorization" exception is most appropriately understood to require the agency to show that the best reading of the statute confers the challenged authority, rather than proving that the *only* reading of the statute confers that authority.

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315 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

316 West Virginia v. EPA, 142 S. Ct. 2587, 2613, 2607 (2022).

317 *See id.* at 2609.

318 *Id.*

319 *Id.*

320 *Id.* (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

321 Biden v. Nebraska, 143 S. Ct. 2355, 2368 (2023) (quoting MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 225 (1994)).

322 *Id.* at 2383 (Barrett, J., concurring).

That said, the view most consistent with the Court's major questions jurisprudence will not necessarily carry the day. No other Justice joined Justice Barrett's *Biden* concurrence, while Justice Alito joined Justice Gorsuch's *West Virginia* concurrence. Especially because a "robust major questions doctrine greatly reduces the need to formally revive the nondelegation doctrine," it is exceedingly possible—if not downright likely—that the Court will treat the major questions doctrine as a substantive clear statement rule rather than a semantic ambiguity canon.[323] Accordingly, the next Section considers how the Commission's basis for authority fares under each Justice's approach.

B. *Section 994(t) as Clear Congressional Authorization*

Section 994(t) likely constitutes clear congressional authorization of the Commission's revisions to § 1B1.13 under both Justices' views, though this outcome is more probable under Justice Barrett's understanding.

Under Justice Barrett's view, § 994(t) likely constitutes clear congressional authorization, as the best reading of the statute dictates that the Commission has wide latitude to enumerate appropriately extraordinary and compelling circumstances, save for rehabilitation alone. Again, under this view, the authority-conferring reading of the statute need not be the *only* reading of the statute. Nor does this view require "'an "unequivocal declaration"' from Congress authorizing the *precise* agency action under review."[324] In other words, the statute need not state unequivocally and with particularity that the Sentencing Commission has the authority to enumerate changes in the law. Instead, the "clarity" of congressional authorization "may come from specific words in the statute, but context can also do the trick."[325]

For the reasons described in Part III, *supra*, the statute is best understood to confer on the Commission much discretion in enumerating extraordinary and compelling circumstances, including the choice of whether to enumerate certain changes in the law as extraordinary and compelling.[326] This reading flows from both text and context. Congress used intentionally flexible language—"extraordinary and compelling reasons"—when expressing the scope of the Commission's authority.[327] And that broad textual reading reflected the

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323 Sohoni, *supra* note 283, at 265–66.

324 *Biden*, 143 S. Ct. at 2378 (Barrett, J., concurring) (quoting Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, Inc., 143 S. Ct. 1176, 1183 (2023)).

325 *Id.* at 2380.

326 *See* Rachel Wilson, *Revisiting Compassionate Release: The Sentencing Commission's Compassionate Changes to the 2023 Compassionate Release Policy Statement*, 72 CLEV. ST. L. REV. 535, 538, 556–57 (2024).

327 *See supra* Section III.A.

context in which § 994(t) was enacted; while categorically eliminating federal parole, Congress sought to preserve a malleable safety valve for sentence modifications in light of changed circumstances.[328]

Justice Gorsuch's view of the major questions doctrine as a substantive canon presents a closer question vis-à-vis § 994(t). As explained above, Justice Gorsuch has identified four clues that help courts discern "what qualifies as a clear congressional statement authorizing an agency's action."[329] To reiterate, an action is unlikely to be clearly congressionally authorized when: (1) the statute uses oblique or elliptical language; (2) the agency seeks to deploy an old statute to an entirely new and distinct context or problem; (3) the agency has previously interpreted the statute as not conferring authority; and (4) the agency exceeds its congressionally assigned expertise and purpose.[330]

As to the first factor, § 994(t) does not use oblique or elliptical language. True, the statute does not state with exacting specificity that the Commission may choose to enumerate certain changes in the law as extraordinary and compelling, but it does expressly task the Commission with "describ[ing] what should be considered extraordinary and compelling reasons for sentence reduction."[331] These are hardly the "'modest words,' 'vague terms,' or 'subtle device[s]'" that the Court has previously found an insufficient foundation for an agency's authority.[332]

Nor did the Commission deploy § 994(t) in a new context or to solve a new problem. Compassionate release has always been intended to act as a "'safety valve' [that] applies . . . to the unusual case in which the defendant's circumstances are so changed . . . that it would be inequitable to continue the confinement of the prisoner."[333] The Commission simply exercised its statutory authority to identify certain changes in the law as "extraordinary and compelling circumstances justify[ing] a reduction of an unusually long sentence."[334] The Commission's revisions are unlike the example used by Justice Gorsuch on this point, where "OSHA sought to impose a nationwide COVID-19 vaccine mandate based on a statutory provision . . . that focused on conditions specific to the workplace rather than a problem faced by society at large."[335]

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328 *See supra* Section III.B.

329 West Virginia v. EPA, 142 S. Ct. 2587, 2622 (2022).

330 *See id.* at 2622–23.

331 28 U.S.C. § 994(t).

332 West Virginia v. EPA, 142 S. Ct. at 2609 (alteration in original) (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

333 S. REP. NO. 98-225, at 121 (1983).

334 *Id.* at 55.

335 West Virginia v. EPA, 142 S. Ct. at 2623 (Gorsuch, J., concurring) (citing NFIB v. OSHA, 142 S. Ct. 661, 667–68 (2022) (Gorsuch, J., concurring)).

The third factor similarly favors a finding of clear congressional authorization, as the Commission had not previously interpreted § 994(t) as depriving the agency of power to enumerate changes in the law as extraordinary and compelling circumstances. Instead, the Commission's compassionate release policy statements have always interpreted § 994(t) as broadly as possible by allowing the Director of the BOP to identify any other extraordinary and compelling reasons for a sentence reduction. That would have allowed the Director to seek compassionate release in cases involving, inter alia, certain changes in the law.[336]

Finally, the Commission's revisions to § 1B1.13 are comfortably within its "congressionally assigned mission and expertise."[337] The amended policy statement satisfies the statutory mandate that the Commission promulgate "general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A) of title 18, [including] describ[ing] what should be considered extraordinary and compelling reasons for sentence reduction."[338] The Commission's mission as to compassionate release is, quite literally, to define the scope of the "extraordinary and compelling reasons" standard. Moreover, the Commission has unique authority and expertise to address circuit splits that have emerged over the interpretation of the phrase "extraordinary and compelling," and it was well within its congressional purpose to promulgate § 1B1.13(b)(6) to settle the circuit split over changes in the law.[339] And the mere fact that the Commission's amendments reflect sound policy judgment does not transcend the Commission's expertise, especially because "Congress has delegated significant discretion to the Commission to draw judgments from its analysis of existing sentencing practice."[340]

If the Court were to adopt a more stringent substantive clear-statement rule in future major questions cases, however, the Commission's revisions might not be clearly congressionally authorized. The party seeking to vindicate the Commission's actions would need to demonstrate that the authority-constraining interpretation of the statute is untenable—a high bar.[341] Although the best reading of § 994(t) is

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336 *See supra* Section III.C.

337 West Virginia v. EPA, 142 S. Ct. at 2623 (Gorsuch, J., concurring).

338 28 U.S.C. § 994(t).

339 *See supra* Section III.B.1.b; *cf.* Braxton v. United States, 500 U.S. 344, 348 (1991) ("Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the [policy statement] conflicting judicial decisions might suggest."); *id.* at 348–49 ("[T]he Commission has already undertaken a proceeding that will eliminate circuit conflict over the meaning of § 1B1.2 . . . .").

340 Mistretta v. United States, 488 U.S. 361, 379 (1989).

341 *See* Clark v. Martinez, 543 U.S. 371, 380–81 ("In other words, when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail

authority-conferring, the Court might plausibly read into the statute certain implied structural limitations.[342]

Whether the Commission's actions are clearly congressionally authorized depends on the evolution of the clear-statement rule in future major questions cases. The two theories put forward thus far by Justices Gorsuch and Barrett, respectively, each ostensibly protect the Commission's revisions even if the major questions doctrine did generally apply. But "[o]ne thing does seem evident: there is a lack of agreement or certainty on the Court . . . concerning the precise contours of . . . the new major questions doctrine."[343]

Conclusion

The Commission's updated policy statement will have seismic consequences that reverberate throughout federal sentencing law for years and decades to come. But as this Article has endeavored to show, the mere fact that § 1B1.13 is of major significance does not necessarily give rise to a major questions issue. By enumerating certain nonretroactive changes in the law as extraordinary and compelling in narrow circumstances, the Commission fulfilled its statutory obligation 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."[344] It did not transcend the express limit Congress placed on its authority ("Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.").[345] And the historical and statutory context of compassionate release makes clear that Congress did not implicitly limit the Commission's authority to promulgate a changes-in-the-law provision of the sort expressed in § 1B1.13(b)(6).

But the major questions doctrine remains in flux. "[T]he Court can apply the new major questions doctrine on a retail basis, proceeding agency by agency and rule by rule to determine whether a given regulation

. . . ."); *see also* Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018) (noting that the avoidance canon does not apply "[i]n the absence of more than one plausible construction").

342 *See, e.g.*, United States v. McCall, 56 F.4th 1048, 1055–57 (6th Cir. 2022) (en banc) (discussing the "structure of federal sentencing law" to conclude that nonretroactive changes in the law cannot constitute extraordinary and compelling reasons for a sentence reduction).

343 Sohoni, *supra* note 283, at 314; Samantha Jumper, *Fair Questions, Major Answers: Rooting Fair Housing in an Incentive-Based Approach to Avoid Major Questions Concerns*, 50 FORDHAM URB. L.J. 505, 537–38 (2023) ("The clear statement rule creates a discrepancy between *West Virginia* and the Court's previous holdings, including *Brown* and *King*, and it is difficult to discern how this tension might be resolved.").

344 28 U.S.C. § 994(t).

345 *Id.*

promulgated by a given administration can survive."[346] Section 1B1.13 raises new and important questions about the application of the doctrine in future cases. Does the doctrine apply to agency actions that lack overwhelming economic significance but that are nevertheless politically controversial? How precise must an agency's prior assertion of authority be to avoid major questions scrutiny? How does the doctrine apply to a judicial agency like the Sentencing Commission rather than an executive agency? Does the doctrine's clear-statement rule function as a true substantive canon or as an ambiguity-resolving heuristic?

As the law exists today, the major questions doctrine should not stand as an obstacle to the implementation of § 1B1.13's changes-in-the-law provision. But so long as the doctrine continues to evolve, the future of compassionate release—and the future of people serving excessively lengthy sentences that could not be imposed today—will hang in the balance.

346 Sohoni, *supra* note 283, at 295.