YALE LAW & POLICY REVIEW

Compassionate Release During Crises: Expanding Federal Court Powers

Yolanda Bustillo *

As the coronavirus pandemic exacerbated existing racial, economic, and health disparities, it also raised questions concerning congressional intent, administrative rights, and federal court powers. These issues flooded court dockets as detained populations sought relief pursuant to the compassionate release provision of the First Step Act. Given the virus's rapid development and fatal consequences, many prisoners found themselves pressed for time and disinclined to spend it exhausting statutorily-mandated administrative requirements. The question as to whether judges may develop equitable exceptions to these procedural requirements has remained unanswered. This Note responds in the affirmative, concluding the authority vests itself when remedies are unavailable.

* Yale Law School, J.D. 2022. I am grateful to Ian Ayres and Abbe Gluck for their suggestions and encouragement. Additional thanks to Atticus Ballesteros, Max Goldberg, members of the Yale Law Journal Student Scholarship Workshop, and the editors of the *Yale Law & Policy Review* for their thoughtful feedback and support.

INTRODUCTION

On March 28, 2020, Patrick Jones, who had been serving his prison sentence for a nonviolent drug charge at a low-security facility, died after contracting the novel coronavirus.[1] Just two days prior, Attorney General William Barr issued a memorandum to Michael Carvajal, the Director of the Federal Bureau of Prisons ("BOP"), to decrease the number of prison inmates by transferring nonviolent detainees to home confinement.[2] The deadly spread of the virus prompted Attorney General Barr to issue a second memorandum on April 3, directing the BOP to prioritize home

1. *See* Sadie Gurman, *First Federal Inmate Dies of Covid-19, Deepening Fear of Coronavirus Spread in Prisons*, WALL ST. J. (Mar. 29, 2020), https://www.wsj.com/articles/first-federal-inmate-dies-of-covid-19-deepening-fear-of-coronavirus-spread-in-prisons-11585456750?st=2qqmwpc519uyj7f&reflink=desktopwebshare_permalink [https://perma.cc/4LBT-F53G].

2. Att'y Gen., *Memorandum, Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic*, DEP'T OF JUST. (Mar. 26, 2020), https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf [https://perma.cc/UJY8-2A9S].

confinement.[3] Noting the urgency of the crisis, Attorney General Barr wrote, "[g]iven the speed with which this disease has spread . . . , it is clear that time is of the essence. Please implement this Memorandum as quickly as possible and keep me closely apprised of your progress."[4] As of September 12, 2021, approximately 42,872 federal inmates, about forty percent of the total prison population in BOP-managed institutions, have tested positive for coronavirus.[5] More federal inmates have contracted the virus than there are total BOP staff and at a higher rate.[6] At least 244 federal inmates and 5 BOP staff have died due to coronavirus.[7] These statistics concern only federal prisons. By mid-September, there had been at least 428,999 total coronavirus cases reported among state and federal prisoners.[8] Appearing

3. Att'y Gen., *Memorandum, Increasing Use of Home Confinement at Institutions Most Affected by COVID-19*, DEP'T OF JUST. (Apr. 3, 2020), https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf [https://perma.cc/6VXD-PX5J].

4. *Id.*

5. *Covid-19 Coronavirus*, FED. BUREAU OF PRISONS, https://www.bop.gov/coronavirus (last updated Sept. 10, 2021). The Marshall Project, in partnership with The Associated Press, notes slightly higher cases (49,324) and deaths (258) among inmates in the federal prison system given differences in accounting for coronavirus cases. *A State-by-State Look at Coronavirus in Prisons*, THE MARSHALL PROJECT (July 1, 2021, 1:00 PM), https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons [https://perma.cc/7WFC-FZNB] ("The Federal Bureau of Prisons also had a policy of removing cases and deaths from its reports. As a result, by the spring of 2021, we could no longer accurately determine new cases in federal prisons, which had more people infected than any other system.").

6. The BOP staff force totals to approximately 36,000. *Covid-19 Coronavirus*, FED. BUREAU OF PRISONS, https://www.bop.gov/coronavirus [https://perma.cc/RXV6-V9FV] (last updated Feb. 5, 2021); *see* Julie A. Ward, Kalind Parish, Grace DiLaura, Sharon Dolovich & Brendan Soloner, *COVID-19 Cases Among Employees of U.S. Federal and State Prisons*, 60 AM. J. PREVENTIVE MED. 840 (2021).

7. *A State-by-State Look at Coronavirus in Prisons*, THE MARSHALL PROJECT (July 1, 2021, 1:00 PM), https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons [https://perma.cc/7WFC-FZNB].

8. *Covid Behind Bars Data Project*, UCLA (Sept. 10, 2021), https://github.com/uclalawcovid19behindbars/data/blob/master/latest-data/latest_national_counts.csv [https://perma.cc/C7SB-PS3K].

more like a rollercoaster than a curve, the recorded data of coronavirus cases suggest difficulties with reporting and suppression in prisons.[9]

The fluctuation and spikes in reported cases raise particular concerns regarding accuracy and containment. For example, reported cases in carceral institutions peaked after states implemented mass testing, indicating that the virus had circulated among prisoners without detection in greater numbers than previously identified.[10] Even the discrepancies seen in reporting by states, agencies, and non-profit organizations have resulted from accounting delays, differing criteria, and inconsistent collaboration, making it even more difficult to assess the magnitude of the pandemic in prisons.[11] Further, despite the fatal lessons that prison administrators learned firsthand early in the pandemic, most lifted their visitation restrictions and transferred prisoners.[12] Some facilities have even placed inmates who tested positive for the virus into cells with those who had not, violating the protocols established by the Centers for Disease Control and Prevention.[13] The loosening of policies coincided with the largest spike in coronavirus cases and deaths in prisons since the disease first appeared in the United States.[14]

9. *See* Brendan Saloner, Kalind Parish & Julie A. Ward, *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 JAMA 602 (July 8, 2020).

10. *A State-by-State Look at Coronavirus in Prisons*, *supra* note 7.

11. The Marshall Project's data set, for example, does not include records for individuals on home confinement and reflects the number of coronavirus tests administered, not the number of individuals tested. In contrast, the BOP, beginning on August 4, 2020, began reporting deaths on those on home confinement. Further, some states do not report tests until they have received results.

12. *See* Cary Aspinwall & Ed White, *COVID-19 Spikes Follow in Prisons After Inmate Transfers*, U.S. NEWS (Dec. 21, 2020), https://www.usnews.com/news/health-news/articles/2020-12-21/covid-19-spikes-follow-in-prisons-after-inmate-transfers [https://perma.cc/BY5F-K4ZG].

13. *See* Kale Williams, *'It's Just a Matter of Time': Inmates Detail Horrid Conditions Amid COVID Spike in Oregon Prisons*, THE OREGONIAN/OREGONLIVE (Jan. 30, 2021), https://www.oregonlive.com/coronavirus/2021/01/its-just-a-matter-of-time-inmates-detail-horrid-conditions-amid-covid-spike-in-oregon-prisons.html [https://perma.cc/R36E-C8A6].

14. Beth Schwartzapfel, Katie Park & Andrew Demillo, *1 in 5 Prisoners in the US Has Had COVID-19, 1,700 Have Died*, THE MARSHALL PROJECT (Dec. 18, 2020, 6:00 AM), https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19 [https://perma.cc/U4WW-3XUZ] ("New cases in

As outbreaks tend to fall heaviest on the shoulders of at-risk populations, such as the immunocompromised, the poor, the elderly, and people of color, carceral institutions provided the perfect breeding ground for the novel coronavirus: not only are many prisoners Black and Hispanic, but they also have high rates of preexisting health conditions and accelerated signs of aging.[15] Further, conditions in carceral institutions made them the ideal setting for outbreaks, eight of which ranked in the top ten coronavirus clusters in the United States.[16] Close living quarters, limited containment options, prison transports, lack of hygienic supplies, and contact from the surrounding community through guards, new prisoners, and visitors place detainees at heightened risk. Additionally, carceral institutions "may act as a source of infection, amplification and spread of infectious diseases within and beyond prisons."[17] Due to these concerns, federal detainees across the country filed petitions for relief, ranging from release to furlough to home confinement, yet were met with varying levels of success.

While the living conditions in prisons and personal characteristics of inmates exacerbate the likelihood of contraction and severity of infection, the BOP approved less than one percent of compassionate release

---

prisons this week reached their highest level since testing began in the spring, far outstripping previous peaks in April and August.").

15. *See* Roni Caryn Rabin, *Prisons Are Covid-19 Hotbeds. When Should Inmates Get the Vaccine?*, N.Y. TIMES (Nov. 30, 2020 [updated Dec. 2, 2020]), https://www.nytimes.com/2020/11/30/health/coronavirus-vaccine-prisons.html [https://perma.cc/E5EH-5WMS] (noting that inmates generally suffered from a physiological age twenty years greater than their chronological age due to drugs, fights, incarceration, homelessness, and lack of healthcare); Saloner et al, *supra* note 9, at 602 (discussing that age- and sex-adjusted death rate in prison was 3.0 times higher than for the U.S. population).

16. *See* Taylor Miller Thomas, *How U.S. Prisons Became Ground Zero for Covid-19*, POLITICO (June 25, 2020, 3:00 AM), https://www.politico.com/news/magazine/2020/06/25/criminal-justice-prison-conditions-coronavirus-in-prisons-338022 [https://perma.cc/F4EC-A8HY].

17. Reg'l Off. for Eur., *Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention*, WORLD HEALTH ORG. 1 (Mar. 15, 2020), https://www.euro.who.int/__data/assets/pdf_file/0019/434026/Preparedness-prevention-and-control-of-COVID-19-in-prisons.pdf [https://perma.cc/NK5N-FBPR].

requests.[18] Indeed, despite Attorney General Barr's explicit direction to maximize home confinement and decrease prison populations, BOP wardens either denied or did not respond to almost all compassionate release requests.[19] Failing to respond to compassionate release claims not only delayed possible relief with potentially life-threatening consequences, but it also prevented prisoners from seeking legal remedies from an alternative authority: federal courts. After "decades" of "failure" by BOP directors "to bring any significant number of compassionate release motions before the courts," Congress amended the First Step Act's compassionate release provision ("compassionate release provision" or "§ 3582") precisely to increase the viability of such claims.[20] However, the existing procedural hurdles and taxing legal standards have made it increasingly difficult for incarcerated populations to access administrative or judicial review, let alone merit relief, because of the statute's exhaustion requirement, vague criteria, and outdated guidance.

In the same spirit with which Congress expanded judicial powers to adjudicate compassionate release claims, federal courts across the country have questioned their role as gatekeeper under extenuating circumstances, like the pandemic.[21] Might the fatal consequences and urgent requests permit federal courts to create exceptions to existing statutory requirements? Or must their hands be tied in the absence of legislative or administrative guidance? These questions lack clear precedent, and the Supreme Court has remained silent on whether judges may create equitable exceptions to statutory requisites during crises.[22] Even federal circuit and district courts have split, sometimes within the very same jurisdiction, on the proper judicial parameters for granting such relief.

In this Note, I argue that federal court powers, during emergency circumstances, should include the right to affirmatively create equitable

18. Keri Blakinger & Joseph Neff, *Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent Were Denied*, THE MARSHALL PROJECT (Oct. 7, 2020, 6:00 AM), https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied [https://perma.cc/JL3C-34AE].

19. *Id.* (noting that wardens approved only 156 requests).

20. United States v. Brooker, 976 F.3d 228, 236 (2d Cir. 2020); *see* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18, 21, and 34 U.S.C.).

21. *See, e.g.*, United States v. Smith, 460 F. Supp. 3d 783, 789 (E.D. Ark. 2020).

22. *See* Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13, 18 n.3 (2017); Kontrick v. Ryan, 540 U.S. 443, 457 (2004).

exceptions to procedural rules based in statute. Indeed, the Supreme Court has established that "general equitable principles" may be read "into statutory text," as seen in the statute of limitations context and other procedural rules, like tolling, deadlines, and statutory time cutoffs.[23] The same, this Note argues, should be said of the compassionate release provision within the First Step Act. However, such judicial powers must develop by consequence of an internal dialogue between federal courts and Congress. Otherwise, such an expansion of authority, albeit one with inherently moral and just motivations, would open the gates to judicial power grabs and public distrust. Congress has not responded, and the Supreme Court has not answered the lingering question as to whether courts may proceed to create exceptions where neither text nor intent clearly do so. Must district and appellate courts wait until Congress or the Supreme Court address the question, now more than a year since the onset of the pandemic? I argue that the fatal repercussions, legislative history, and role of federal courts all weigh in favor of judicially-crafted equitable relief during time-sensitive crises, at least until an authority deems otherwise.

This Note proceeds in four parts. Part I details the history of the First Step Act's compassionate release provision, which exemplifies how judicial powers have evolved in order to grant inmate petitions and increase efficient review of claims. In particular, Part I details the origins of the compassionate release program, the BOP's administration of the program, and the Sentencing Commission's role in promulgating policy statements. Further, it elaborates on the shortcomings of the compassionate release

23. United States v. Russo, 454 F. Supp. 3d 270, 276 (S.D.N.Y. 2020); *see* Holland v. Florida, 560 U.S. 631, 645–46 (2010) (concluding that "a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in favor 'of equitable tolling'" (quoting Irwin v. Dep't of Veterans Affs., 498 U.S. 89, 95–96 (1990))); Young v. United States, 535 U.S. 43, 49 (2002) ("It is hornbook law that limitations periods are 'customarily subject to 'equitable tolling[.]'" (quoting *Irwin*, 498 U.S. at 95)); *see also* Fed. Ins. Co. v. United States, 882 F.3d 348, 361 (2d Cir. 2018) ("Claim-processing rules, much like statutes of limitations, . . . may be subject to equitable tolling doctrines."); Weitzner v. Cynosure, Inc., 802 F.3d 307, 311 (2d Cir. 2015), *as corrected* (Oct. 27, 2015) (determining that the "28-day time limit of FRAP Rule 4(a)(4)(A)(vi) . . . should be considered a 'claim-processing rule,' which is subject to equitable exception or waiver"); Paese v. Hartford Life & Acc. Ins. Co., 449 F.3d 435, 443 (2d Cir. 2006) (concluding that a "claim-processing rule" is "subject to equitable considerations such as waiver, estoppel or futility"); Hendricks v. Zenon, 993 F.2d 664, 672 (9th Cir. 1993) (holding that courts may dispense with § 2254(b) exhaustion requirements when faced with "exceptional circumstances of peculiar urgency").

program, which prompted Congress to enact the First Step Act and expand judicial discretion. While the First Step Act sought to increase access to the compassionate release program, the coronavirus pandemic illustrated the legislation's shortcomings as the BOP and federal judiciary grew inundated with petitions and prisoners struggled to avoid infection. The coronavirus pandemic also revealed one question that split the judicial landscape: whether the First Step Act's compassionate release provision—and specifically, its exhaustion requirement—may be subject to judicially-crafted equitable exceptions during crises? This Note argues the affirmative.

Part II describes the vast array of coronavirus claims during the pandemic and highlights judicial opposition concerning the legal nature and limitations of the First Step Act's compassionate release provision. I first examine the debate on characterizing the First Step Act's compassionate release provision, specifically whether it qualifies as a jurisdictional or claim-processing rule. If jurisdictional, courts lack standing to adjudicate on the merits absent exhaustion. Assuming that the First Step Act's compassionate release provision is a claim-processing rule rather than jurisdictional, I next examine the judicial debate regarding whether federal courts may waive the exhaustion requirement during emergency circumstances. I then discuss the consequences of judicially-crafted equitable exceptions to the First Step Act's compassionate release provision, such as application of other equitable remedies.

Part III then examines the existing jurisprudence concerning exhaustion requirements and the Supreme Court's explicit silence on whether courts may craft equitable exceptions to statutory claim-processing rules. I then assess recent statements and opinions by Supreme Court Justices and circuit court judges that suggest the coronavirus pandemic should provide federal courts with the power to waive administrative exhaustion requirements. After examining the First Step Act's statutory text and congressional intent as well as contrasting it to a similar statute, the Prison Litigation Reform Act, I offer normative and theoretical justifications in favor of judicially-crafted equitable exceptions during crises. Upon rooting this discussion in a legal framework, I provide a brief examination of equity's role in law, which mainly serves to provide a safety valve during unprecedented circumstances.

Part IV concludes by addressing counterarguments, such as floodgates, opportunism, and slippery slopes, and detailing outstanding questions for further research. In addition to examining counterarguments, Part IV delves into an analysis of how administrative deference and separation of powers concerns would apply to expanding judicial discretion over the compassionate release program. The unique nature of the exhaustion requirement and limited applicability to emergency circumstances cabin

these concerns and abide by legislative intent. Concluding that judicially-crafted equitable exceptions provide an effective remedy to inmates on a case-by-case basis, I also provide alternative proposals to improve the First Step Act's compassionate release program, such as legislative reform or executive action for long-term solutions.

While there has been significant scholarship concerning the relationship between the coronavirus pandemic and prisons, this Note is the first to examine the current legal debate of whether judges may craft equitable exceptions to the exhaustion requirement of the First Step Act's compassionate release provision during crises. By assessing arguments based in law and equity, this Note moves the debate forward by incorporating the array of judicial analyses and the repercussions of those rulings for prisoners, conceptions of judicial power, and the role of courts. Although a number of publications examined compassionate release requests during the pandemic or proposed expanding judicial discretion,[24] none have rooted their normative proposals in statutory interpretation, federal case law, congressional intent, and pragmatic concerns or crafted limiting boundaries for its successful adoption. Further, I argue in favor of an expanded judicial discretion that can respond to public crises while still maintaining the government structure and administrative delegation that Congress envisioned in passing the First Step Act.

I. THE EVOLUTION OF COMPASSIONATE RELEASE

The compassionate release program's evolution highlights the challenges that its current form has presented amidst the coronavirus pandemic. Its history reflects an increasing amount of scrutiny towards BOP's oversight and an authorized expansion of judicial discretion. Despite the creation of a formal protocol and guidance for the compassionate release program, the Office of the Inspector General conducted a study in

24. *See* Victoria Finkle, *How Compassionate? Political Appointments and District Court Judge Responses to Compassionate Release During COVID-19* (Mar. 10, 2021), (unpublished manuscript) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3801075 [https://perma.cc/K7XH-YGJL] (examining the variation in judicial responses to compassionate release petitions during the coronavirus pandemic); Abby Higgins, *Compassionate Release During A Pandemic: Clearer Routes for Direct Advocacy of Prisoners to Avoid Harmful Delays to Medically Vulnerable Population*, 30 ANNALS HEALTH L. ADVANCE DIRECTIVE 199 (2020); David Roper, *Pandemic Compassionate Release and the Case for Improving Judicial Discretion Over Early Release Decisions*, 33 FED. SENT. R. 27, 28 (2020).

2013 and found that the BOP failed to properly manage the program and failed to consider eligible candidates.[25] In 2018, Congress amended the compassionate release program, enabling federal courts to serve as adjudicators of these petitions.[26] The inadequacies of the BOP, revisions imposed by Congress, and authority granted to federal courts illustrate that at least some factfinding judges, who may review the underlying record, examine the petitioners, and assess the prison environment, are better suited to evaluate the merits of compassionate release requests. These trends, while not dispositive as to whether a court possesses the authority to create equitable exceptions to statutory exhaustion requirements, prove persuasive in terms of contextualizing the current state of affairs and in considering the role of federal courts.

A. The History of Compassionate Release

Although the compassionate release provision embedded in the First Step Act has provided detainees with new avenues for relief, its history reveals that legislation has expanded judicial powers over time. Congress enacted the modern iteration of the federal compassionate release program as part of the Sentencing Reform Act of 1984.[27] While Congress expanded judicial powers to revise prison sentences whenever "extraordinary and compelling reasons warrant[ed] such a reduction,"[28] the Sentencing Reform Act still did not grant courts the authority to do so independently. Rather, it required that the BOP first submit a motion on a prisoner's behalf. While the Senate Judiciary Committee's Report on the Sentencing Reform Act shed some guidance as to the underlying purpose of the legislation, Congress ultimately deferred to administrative motion and judicial discretion for

25. U.S. DEP'T OF JUST., OFF. OF THE INSPECTOR GEN., THE FEDERAL BUREAU OF PRISONS COMPASSIONATE RELEASE PROGRAM 11 (2013), https://oig.justice.gov/reports/2013/e1306.pdf [https://perma.cc/Q53R-6J3R].

26. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18, 21, and 34 U.S.C.; Found at 18 USC 3582(c) -- Title VI, Sec. 603(b) of First Step Act as enacted).

27. *See* 18 U.S.C. § 3582(c)(1)(A) (1984); Sentencing Reform Act of 1984, ch. II, Pub. L. No. 98-473, 98 Stat 1837; *see also* U.S. DEP'T OF JUST., *supra* note 25, at i & n.1 (detailing that offenses occurring on or after November 1, 1987 are governed by 18 U.S.C. § 3582(c) and those that occurred prior to that date are governed by 18 U.S.C. § 4205(g), despite it having been repealed as part of the Sentencing Reform Act).

28. 18 U.S.C. § 3582(c)(1)(A)(i) (2018).

sentencing modifications.[29] Worse still, when Congress passed the Sentencing Reform Act, it delegated the responsibility of defining "extraordinary and compelling reasons" for purposes of compassionate release to the Sentencing Commission.[30] Not only did the newly enacted statute lack guidance as to what constituted "extraordinary and compelling reasons" for compassionate release, but it also left the power to modify prison sentences entirely in the hands of the same administrative agency as before, the Federal Bureau of Prisons.[31]

To address the remaining ambiguities in the Sentencing Reform Act's compassionate release provision, the Sentencing Commission updated its Guidelines Manual, which expanded judicial powers and clarified legislative intent. The Sentencing Commission's first policy statement merely repeated the statutory text of § 3582(c) and thus did little to assist judges in assessing extraordinary and compelling reasons for relief.[32] It was not until November 2007, over two decades after the Sentencing Reform Act's enactment, that the Sentencing Commission published a policy statement with examples of extraordinary and compelling reasons meriting sentence reduction.[33] These examples include "terminal illness," "permanent physical or medical condition," "deteriorating . . . health because of the aging process," "death or incapacitation of the defendant's only family member capable of caring for the defendant's minor child," and "an extraordinary and compelling reason other than, or in combination with, the [aforementioned] reasons."[34] The catchall provision maintained judicial

29. S. Rep. No. 98-225, at 55–56 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3238–39 ("The Committee believes that there may be unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances. These would include cases of severe illness, cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence, and some cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide a shorter term of imprisonment . . . . The bill . . . provides . . . for court determination . . . [of] whether there is justification for reducing a term of imprisonment . . . ").

30. *See* 28 U.S.C. § 994(t) (2018) ("The Commission . . . 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.").

31. *Id.*

32. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt n.1(A)–(D) (2006).

33. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1(A)–(D) (2007).

34. *Id.*

discretion, limited by the BOP's motion and guided by the Sentencing Commission's policy statements, to determine whether the facts presented established extraordinary and compelling reasons for compassionate release. Notably, each example inherently included a time-based component, suggestive of future potential exceptions and relevant for purposes of review during emergencies.

In addition to the Sentencing Commission's guidance, the BOP similarly provided insight as to how courts should grant the remedy through its own regulation and application. The BOP's interpretation of the First Step Act's compassionate release provision notes its usage should apply "in particularly extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of sentencing."[35] Although the regulations acknowledge that medical and non-medical circumstances could support a motion for compassionate release, "in practice, and in internal guidance to staff, the BOP sharply limited the grounds for compassionate release to certain dire medical situations."[36] The narrow scope for claiming compassionate release is reflected in the number of successful cases, which from 1984 to 2013 averaged to approximately twenty-four inmates per year.[37] Without an affirmative motion from the BOP, however, courts remained powerless to grant compassionate release. Indeed, up until the First Step Act of 2018, the BOP retained sole discretion of deciding whether a prisoner should receive the remedy, regardless of inmate eligibility.

Under the prior system, a prisoner must proceed through the BOP's administrative process and establish eligibility as detailed in its promulgated regulations, located at 28 C.F.R. §§ 571.61–.64. If denied compassionate release, prisoners had limited appeal opportunities through the Administrative Remedy Program, which were not subject to judicial

35. 28 C.F.R. § 571.60 (2008).

36. Human Rights Watch & Families Against Mandatory Minimums, *The Answer is No: Too Little Compassionate Release in US Federal Prisons*, HUM. RTS. WATCH (Nov. 30, 2012), https://famm.org/wp-content/uploads/The-Answer-is-No-compassionate-release.pdf [https://perma.cc/PY8Y-2ZSG].

37. United States v. Rodriguez, 451 F. Supp. 3d 392, 395 (E.D. Pa. 2020) (citing *Hearing on Compassionate Release and the Conditions of Supervision Before the U.S. Sentencing Commission* (2016) (statement of Michael E. Horowitz, Inspector Gen., Dep't of Just.)).

review.[38] Despite developing a formal protocol and guidance, the BOP did "not properly manage the compassionate release program, resulting in inmates who may be eligible candidates for release not being considered."[39] Reasons for the inadequate administration of the program included insufficient guidance to staff regarding criteria for consideration, failure to provide timeliness standards for requests and appeals, no "formal procedures to inform inmates about the compassionate release program," and no system to track requests, review timeliness, or guarantee consistency.[40] These failures proved fatal since without timeliness standards in place, terminally ill patients died before their requests for compassionate release were decided.[41] Even if petitioners had meritorious claims, the BOP proved unable to provide timely review or reliable appeal opportunities.

Upon its review of the Sentencing Reform Act's compassionate release program, the Office of the Inspector General recommended that the BOP consider expanding its use, citing the agency's own regulations and Program Statement, as well as Congress's intent, in support of its recommendation.[42] Doing so would not only enhance the probability of meritorious petition review, it would also decrease prison overpopulation and conserve the agency's budget.[43] Despite an in-depth study and suggestions for improvement, the BOP still did not significantly revise or expand its compassionate release program, resulting in the rejection of approximately ninety percent of requests and the deaths of eighty-one

38. 28 C.F.R. § 571.63; *see* Fed. Bureau of Prisons, Program Statement No. 1330.18, Administrative Remedy Program (Jan. 6, 2014), https://www.bop.gov/policy/progstat/1330_018.pdf [https://perma.cc/YU46-JFDR].

39. U.S. DEP'T OF JUST., *supra* note 25.

40. *Id.*

41. *Id.* (noting that a review of the BOP's Compassionate Release Program revealed that "approximately 13 percent (28 of 208) of the inmates whose release requests had been approved . . . died before their requests were decided by the BOP Director").

42. *Id.* at 55.

43. *Id.* at 43–49; *see* Fed. Bureau of Prisons, Program Statement No. 5050.49, Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582(c)(1)(A) and 4205(g) (Aug. 12, 2013), https://www.bop.gov/policy/progstat/5050_049_CN-1.pdf [https://perma.cc/T2UQ-J59F].

inmates awaiting consideration.[44] The history of inadequate administration, unclear guidance, fatal repercussions, and limited application prompted the revision of the Sentencing Reform Act's compassionate release provision, resulting in the present version, enacted through the First Step Act, and splitting courts across the country during the pandemic.

In a bipartisan effort to reform the criminal justice system and correct decades of overly harsh prison sentences, Congress passed the First Step Act of 2018.[45] The legislation not only reduced sentences for certain federal drug offenses, but it also curbed mandatory minimum sentencing guidelines and, importantly, reformed the compassionate release program and its eligibility criteria.[46] Specifically, Congress included the right of inmates to petition courts for relief directly, rather than requiring the BOP to submit a motion on a prisoner's behalf.[47] The change is reflected in § 603(b) of the First Step Act, whose title, "Increasing the Use and Transparency of Compassionate Release," indicates its purpose.[48]

Prisoners may now file a motion under § 3582(c)(1)(A)(i) after having "fully exhausted all administrative rights to appeal a failure of the [BOP] to

44. Letter from Stephen E. Boyd, Assistant Att'y Gen., Office of Legis. Affs., to Brian Schatz, Senator (Jan. 16, 2018), https://famm.org/wp-content/uploads/Response-from-BOP-re.-Compassionate-Release-Letter-1-16-2018.pdf [https://perma.cc/4C4V-TJUQ].

45. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18, 21, and 34 U.S.C.); *see also* NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW 18 (2019); *An Overview of the First Step Act*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/fsa/overview.jsp [https://perma.cc/7LVY-Z9TX] (last visited Oct. 26, 2021); 164 CONG. REC. S7314-02, 2018 WL 6350790 (Dec. 5, 2018) (statement of Senator Cardin, co-sponsor of the First Step Act) ("[T]he bill expands compassionate release . . . and expedites compassionate release applications.").

46. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

47. 18 U.S.C. § 3582(c)(1)(A) (2018); s*ee also* United States v. Redd, 444 F. Supp. 3d 717, 725 (E.D. Va. 2020) ("The First Step Act was passed against the backdrop of documented infrequency with which the BOP filed motions for a sentence reduction on behalf of defendants."); 164 Cong. Rec. S7314-02, 2018 WL 6350790 (Dec. 5, 2018) (statement of Sen. Cardin, co-sponsor of the First Step Act) ("[T]he bill expands compassionate release . . . and expedites compassionate release applications.").

48. First Step Act of 2018 § 603(b), Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18, 21, and 34 U.S.C.).

bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request . . . whichever is earlier."[49] As a result, a "district judge has the ability to grant a prisoner's motion for compassionate release even in the face of BOP opposition or its failure to respond . . . in a timely manner."[50] Although crises would support class-based rather than individualized relief, Congress extended federal district courts the authority to review compassionate release motions precisely because they are familiar with the factual record, defendant, and emergency circumstances before them.[51] The passage of the First Step Act permitted courts to modify prison sentences whenever extraordinary and compelling reasons warranted such relief, so long as such decisions were consistent with the sentencing factors detailed in § 3553(a) and the Sentencing Commission's policy statements.[52] It is under these presumptions, however, that federal courts have found themselves with the authority to grant discretion, yet uncertain as to their limitations during emergencies.

B. Compassionate Release During the Coronavirus Pandemic

The coronavirus pandemic has hard pressed courts and defendants alike as to whether compassionate release is available and under which circumstances. Residing in overpopulated congregate settings, prisoners faced high risk of exposure, shortages of personal protective equipment, and minimal, if any, opportunities for isolation and quarantine once infected.[53] These conditions made carceral facilities an exceptionally dangerous residence during the pandemic, as can be seen by the rate of transmission, over four times as high as that of the general public, and death

49. 18 U.S.C. § 3582(c)(1)(A) (2018).

50. United States v. Young, 458 F. Supp. 3d 838, 844 (M.D. Tenn. 2020).

51. *See* United States v. McIndoo, No. 1:15-CR-00142 EAW, 2020 WL 2201970, at *9 (W.D.N.Y. May 6, 2020).

52. 18 U.S.C. §§ 3553(a), 3582(a) (2018).

53. *See* Editorial Board, Opinion, *America is Letting the Coronavirus Rage Through Prisons*, N.Y. TIMES (Nov. 21, 2020), https://www.nytimes.com/2020/11/21/opinion/sunday/coronavirus-prisons-jails.html [https://perma.cc/2N7L-PTUC] (noting that "[t]he American penal system is a perfect breeding ground for the virus," due to overcrowding, poor ventilation, "[u]neven testing, inadequate medical resources," and a disproportionate number of comorbidities).

rate, over double, as of November 2020.[54] As the pandemic worsened, however, "prisoners have inundated the [BOP] with requests for release. Frustrated with the agency's inability to adjudicate their petitions quickly, these prisoners are [now] coming to courts *en masse*."[55] Even if the BOP were to assess prisoners' claims, federal prison wardens reject or ignore approximately ninety-eight percent of compassionate release requests.[56] The onus then shifted from the BOP to federal courts as prisoners sought out their assistance regardless as to whether they satisfied the exhaustion requirement, let alone warranted relief on the merits.

The consequences of a prison outbreak and the speed at which infection spread forced courts to address matters of first impression with swift diligence and little guidance. For example, courts struggled in assessing whether the Sentencing Commission's outdated policy statement applied to compassionate release claims, even though it had not been amended to reflect the First Step Act's revisions.[57] The policy statement presently conflicts with the legislation, indicating that compassionate release "may be granted only upon motion by the Director of the [BOP]."[58] And since the Sentencing Commission is currently staffed by a lone voting member, it remains unable to update its Guidelines without the requisite voting quorum (at least four voting members).[59] While Congress explicitly sought to expand compassionate release,[60] it also limited judicial discretion, which

54. *Id.*

55. United States v. Haney, 454 F. Supp. 3d 316, 321 (S.D.N.Y. 2020).

56. Blakinger & Neff, *supra* note 18.

57. *See* United States v. Rodriguez, 451 F. Supp. 3d 392, 397 (E.D. Pa. 2020); United States v. Brown, 411 F. Supp. 3d 446, 449 (S.D. Iowa 2019), *order amended on reconsideration*, 457 F. Supp. 3d 691 (S.D. Iowa 2020); *see also* United States v. Ebbers, 432 F. Supp. 3d 421, 427 (S.D.N.Y. 2020) (noting that "[t]he USSC's applicable policy statement is . . . at least partly anachronistic because it has not yet been updated to reflect the new procedural innovations of the First Step Act").

58. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.4 (2018).

59. *See* United States v. Aruda, No. 20-10245, 2021 WL 1307884, at *3 n.1 (9th Cir. Apr. 8, 2021); Madison Adler, *Near-Vacant Sentencing Panel Gives Biden Chance for Fresh Start*, BLOOMBERG L. (June 28, 2021, 4:46 AM), https://news.bloomberglaw.com/us-law-week/near-vacant-sentencing-panel-gives-biden-chance-for-fresh-start [https://perma.cc/84GT-FWQM].

60. First Step Act of 2018 § 603(b), Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18, 21, and 34 U.S.C.).

must remain "consistent with applicable policy statements issued by the Sentencing Commission."[61]

Federal courts, even prior to the coronavirus pandemic, split on how the outdated policy statement applies to compassionate release. Some courts have held that the remedy remains governed by the Sentencing Commission's policy statement, last amended in 2018, and thus relief may only be granted upon satisfying the eligibility criteria listed in the U.S. Sentencing Manual and its corresponding commentary.[62] Others, however, have concluded that the Sentencing Commission's failure to amend its policy statement has rendered it inapplicable to compassionate release claims.[63] Therefore, while the policy statement provides helpful guidance,[64] these courts have now claimed discretion that previously belonged solely to the BOP.[65] Indeed, these courts have supported this growing consensus by examining statutory text, congressional intent, and even pragmatic constraints, such as a lack of a voting quorum and potential for unnecessary delays.[66] The coronavirus pandemic has thus not only prompted courts to determine whether the Sentencing Commission's policy statement remains in effect, but also has inevitably resulted in expansions of judicial authority. In addition, the unforeseen circumstances have vastly extended what

61. 18 U.S.C. § 3582(c)(2) (2018).

62. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1(A)–(C) (U.S. SENT'G COMM'N 2018); *see, e.g.*, United States v. Lynn, 2019 WL 3805349, at *2–*5 (S.D. Ala. Aug. 12, 2019).

63. *See e.g.*, United States v. Kelly, No. 3:13-CR-59-CWR-LRA-2, 2020 WL 2104241, at *7 (S.D. Miss. May 1, 2020) ("The Court agrees with Judges Fallon, Eagles, and others that 'this discrepancy means that the Sentencing Commission does not have a policy position applicable to motions for compassionate release filed by defendants pursuant to the First Step Act.'").

64. *See* United States v. Ebbers, 432 F. Supp. 3d 421, 427 (S.D.N.Y. 2020) (noting that "U.S.S.G. § 1B1.13's descriptions of 'extraordinary and compelling reasons' remain current, even if references to the identity of the moving party are not").

65. *See* United States v. Fox, No. 2:14-cr-03-DBH, 2019 WL 3046086, at *3 (D. Me. July 11, 2019) ("[D]eference to the BOP no longer makes sense now that the First Step Act has reduced the BOP's role . . . . I treat the previous BOP discretion to identify other extraordinary and compelling reasons as assigned now to the courts.").

66. *See* United States v. Haynes, 456 F. Supp. 3d 496, 510–14 (E.D.N.Y. 2020) (collecting cases).

constitutes "extraordinary and compelling reasons" warranting a sentence reduction.[67]

Another question of first impression concerns whether a coronavirus outbreak in a prison or one's predisposition to contracting the virus would alone establish extraordinary and compelling circumstances for compassionate release. The unequal application of the remedy across jurisdictions reflects how a prisoner's fate just might rely on luck of the draw.[68] The judicial calculus regularly fluctuated as to which preexisting health conditions, likelihood of infection, chance of recidivism, and remaining sentence length together established the standard for compassionate release. Without guidance by an appellate court, the Sentencing Commission, or Congress, judges balanced the scales according to their independent analyses.[69] Although the Sentencing Commission's policy statement established criteria for evaluating extraordinary and compelling circumstances,[70] one would assume that a global pandemic would likely qualify. Even when courts deemed such circumstances sufficiently compelling and extraordinary to grant relief to immunocompromised inmates, judges often found their hands tied by § 3582's procedural requirements.

67. *See, e.g.*, United States v. Rodriguez, 451 F. Supp. 3d 392, 405–06 (E.D. Pa. 2020) ("Without the COVID-19 pandemic—an undeniably extraordinary event—Mr. Rodriguez's health problems, proximity to his release date, and rehabilitation would not present extraordinary and compelling reasons to reduce his sentence. But taken together, they warrant reducing his sentence.").

68. *Compare* United States v. Mack, 460 F. Supp. 3d 411 (S.D.N.Y. 2020) (holding that despite the defendant's severe obesity, hypertension, and diabetes and exposure to infected inmates and staff, he did not meet the standard for compassionate release), *with* United States v. Readus, No. 16-20827-1, 2020 WL 2572280 (E.D. Mich. May 21, 2020) (granting the defendant's motion for compassionate release since his severe obesity, obstructive sleep apnea, hypertension, and prediabetes qualified as extraordinary and compelling circumstances warranting release).

69. *See* Victoria Finkle, *How Compassionate? Political Appointments and District Court Judge Responses to Compassionate Release During COVID-19* (Mar. 10, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3801075 [https://perma.cc/3PHP-REBM] (examining the variation in judicial responses to compassionate release petitions during the coronavirus pandemic).

70. U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1(A)–(D) (U.S. SENT'G COMM'N 2018).

The issue underlying many compassionate release request denials during the coronavirus pandemic was a defendant's failure to exhaust statutory administrative remedies. It is precisely this unresolved problem that has developed a circuit split, sometimes even within the same district, and the resulting answers impact judicial powers and the role of federal courts. How does the legal nature of the rule cabin judicial powers? Should administrative exhaustion requirements be waived under emergency conditions? Must Congress speak to unforeseen circumstances despite its preference for judicial deference and efficiency? These questions reflect the complex and nuanced landscape of compassionate release in general and in light of the coronavirus pandemic. The answers inherently influence the significant stakes at issue, which impact equitable remedies across legal practices, increase judicial authority despite legislative bounds, and define the role of federal courts. This Note attempts to navigate the terrain, establishing how its discoveries reflect a trend towards expanding judicial powers and developing a responsive federal court system.

II. FEDERAL COURTS AND THE EXHAUSTION REQUIREMENT

The statutory text, congressional intent, and emergency circumstances have informed judicial interpretation of the compassionate release program and its procedural requirements. As a result, federal courts have applied different legal analyses, further limiting or expanding judicial powers. These varying responses support different theories of adjudicators and roles of federal courts. Additionally, these reactions to pressing issues might also reveal judicial perspectives on congressional realities, appellate review, and administrative capacity. By delving into the legal issues that the coronavirus pandemic raised in the context of compassionate release, academics can appreciate the range of judicial responses and the underlying theories of federal courts at stake.

A. Categorizing the Exhaustion Requirement

Courts are divided not only as to whether § 3582's exhaustion requirement is jurisdictional, but also as to whether it is waivable, regardless of its classification. The type of rule also determines whether judges may create equitable exceptions to the requirement, either in general or in response to emergency circumstances. This subsection will proceed by examining the requirement first as jurisdictional and then as a claim-processing rule. The repercussions of both identifications for federal courts and legal parties alike are explored thereafter.

i. Whether the First Step Act's Compassionate Release Provision Qualifies as a Jurisdictional or Claim-Processing Rule

One of the deepest splits across federal courts is the legal nature of the First Step Act's compassionate release provision, specifically whether the exhaustion requirement is jurisdictional or a claim-processing rule. If the exhaustion requirement were jurisdictional, and thus governing a "court's adjudicatory authority,"[71] then a defendant's failure to satisfy the condition would render a court powerless to settle the issue for lack of subject matter jurisdiction.[72] Even if the parties were to consent to the court's authority, the failure to satisfy the requisites of a jurisdictional rule would strip the court of its adjudicatory capacity entirely.[73] However, if the exhaustion requirement were a claim-processing rule, the court would retain its jurisdiction over the matter.[74] Claim-processing rules "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."[75] While clear in theory, many courts have found differentiating jurisdictional from claim-processing rules challenging in practice.[76]

The difficulty in distinguishing jurisdictional provisions from claim-processing rules has resulted in courts' mischaracterizing their limitations and imposing "drive-by jurisdictional rulings."[77] Because of these misunderstandings, the Supreme Court has cautioned courts carefully to observe "the important distinctions between jurisdictional prescriptions and claim-processing rules."[78] To assist courts in assessing jurisdictional provisions and to guide Congress in drafting clearer legislation, the Supreme Court has devised a "readily administrable bright line" test.[79] If

71. Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 160 (2010).

72. United States v. Haney, 454 F. Supp. 3d 316, 319 (S.D.N.Y. 2020).

73. *Id.*

74. *See* Henderson *ex rel.* Henderson v. Shinseki, 562 U.S. 428, 435 (2011).

75. *Id.* at 435.

76. *See Reed Elsevier*, 559 U.S. at 161.

77. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998) (collecting cases in which "drive-by jurisdictional rulings of this sort" are determined to have "no precedential effect"); *see* Arbaugh v. Y&H Corp., 546 U.S. 500, 511 (2006) (collecting cases).

78. *Reed Elsevier*, 559 U.S. at 161.

79. *Arbaugh*, 546 U.S. at 516.

"Congress has 'clearly state[d]' that the rule is jurisdictional," then it will be treated as such.[80] "[A]bsent such a clear statement," the Supreme Court has cautioned, "courts should treat the restriction as nonjurisdictional in character."[81] While the Supreme Court has advised looking to the statutory text to assess the jurisdictional nature of a requirement, it has noted that the test centers on the "legal character," discernable through "the condition's text, context, and relevant historical treatment."[82] Judges should also consider the Supreme Court's "interpretation of similar provisions in many years past."[83]

The problem lies in that few circuit courts have addressed the issue and, despite the Supreme Court's bright-line rule, district courts have remained divided on how to classify § 3582's requirement to either exhaust administrative remedies after BOP failed to bring forth a motion or the passage of thirty days, whichever is earlier. Indeed, even courts within the same district differ on whether the exhaustion requirement is jurisdictional. For example, one judge within the Northern District of California stayed a defendant's motion for compassionate release until it satisfied the exhaustion requirement, "at which point the Court would have jurisdiction over the matter."[84] Just three days later, however, another judge within the same district ruled that "[n]either the language, the context, nor the history of section 3582 clearly states that its exhaustion provision imposes a jurisdictional requirement."[85] Instead, the court deemed it a mandatory claim-processing rule, concluding that it must be enforced but it was "subject to exceptions which can and should be made under present circumstances."[86] A similar split occurred within the Eighth Circuit.[87]

80. Sebelius v. Auburn Reg'l Med. Ctr., 568 U.S. 145, 153 (2013).

81. *Id.*

82. *Reed Elsevier*, 559 U.S. at 166 (citing Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 395 (1982)).

83. *Id.* at 168.

84. United States v. Reid, No. 17-CR-00175-CRB-2, 2020 WL 2128855, at *1 (N.D. Cal. May 5, 2020).

85. United States v. Connell, No. 18-CR-00281-RS-1, 2020 WL 2315858, at *2, *5 (N.D. Cal. May 8, 2020).

86. *Id.* at *5.

87. *Compare* United States v. Brown, 457 F. Supp. 3d 691, 697 n.7 (S.D. Iowa 2020) ("Statutory exhaustion requirements are presumed to be 'non jurisdictional,' and thus waivable, 'unless Congress states in clear, unequivocal terms that the

Though some circuit courts have assessed the "legal character" of § 3582(c)(2) and similarly come to varying conclusions,[88] the exhaustion requirement has remained relatively unexamined by most appellate courts.[89]

Courts that have concluded that the exhaustion requirement is jurisdictional may theoretically face a simpler analysis since their adjudicatory powers disappear absent the fulfillment of the administrative prerequisites. However, even when a court lacks jurisdiction to reach the merits, the circumstances may inspire a judge to trade his adjudicatory role for that of policy aide or administrative counsel. Rather than directly granting the motion, courts have instead recommended that the BOP and Congress provide a remedy through alternative relief or amending the statute, respectively. For example, despite finding that temporary release would provide the best relief to a defendant, the District Court for the Southern District of New York, finding itself unable to grant such a remedy, recommended that the BOP consider the request instead.[90] It further directed the federal prosecutors to "promptly serve" the order "[t]o ensure that the BOP learns of the Court's recommendation and treats this matter with the urgency it requires."[91] However, the BOP has failed to follow these judicial orders.[92] Other federal judges in the Southern District of New York

judiciary is barred from hearing an action until the administrative agency has come to a decision.' Section 3582(c)(1)(A) makes no such statement." (internal citation omitted)), *with* United States v. Smith, 460 F. Supp. 3d 783, 791 (E.D. Ark. 2020) (ruling that the exhaustion requirement is jurisdictional since "§ 3582(c)(2) 'establishes an exception to the general rule of finality' for a term of imprisonment," granting courts the authority to modify prison sentences).

88. *Compare* United States v. Johnson, 732 F.3d 109, 116 n.11 (2d Cir. 2013) (deeming § 3582(c)(2) not jurisdictional), *with* United States v. Pointer, 519 F. App'x 472, 472 (9th Cir. 2013) (ruling that § 3582(c)(2) is jurisdictional).

89. *But see* United States v. Alam, 960 F.3d 831 (6th Cir. 2020) (concluding that the exhaustion requirement was not jurisdictional, but rather a mandatory claim-processing rule not subject to judicial equitable exception); United States v. Raia, 954 F.3d 594, 596 (3d Cir. 2020) (deeming the exhaustion requirement mandatory).

90. United States v. Roberts, No. 18-CR-528-5 (JMF), 2020 WL 1700032, at *4 (S.D.N.Y. Apr. 8, 2020).

91. *Id.*

92. *See, e.g.*, Affidavit, United States v. Nkanga, No. 18-CR-713 (JMF), ECF No. 117-1, ¶ 10, 2020 WL 1695417 (S.D.N.Y. Apr. 7, 2020) ("Due to the nature of the

have similarly signaled to Congress to revise its statutes to provide a wider range of available relief in light of the pandemic: "if [the defendant] is to get relief from the grave danger he faces as COVID-19 spreads through the jail and prison system, it must come from either the political branches or from [another] source of law."[93] Both suggestions reflect that the judicial, legislative, and executive branches are all well-aware of the urgency of these requests, the fatal repercussions at stake, and the current administrative and congressional gridlocks preventing reform. These proposals, however, do little to assist defendants to achieve compassionate release once the statute is deemed jurisdictional and its exhaustion requirement unsatisfied.

Courts that have deemed the exhaustion requirement a claim-processing rule similarly face difficulty in assessing its application and limitations. Even now, only one appellate court, the Sixth Circuit, has directly concluded that the exhaustion requirement operates as a claim-processing rule.[94] Still, as a claim-processing rule, the exhaustion requirement raises additional questions, the most pertinent of which relates to equitable exceptions. The Supreme Court has explicitly "reserved whether mandatory claim-processing rules may [ever] be subject to equitable exceptions."[95] While the Sixth Circuit has deemed it a mandatory claim-processing rule,[96] district courts have split on whether it may be subject to equitable remedies.[97] Like many inconclusive legal issues, the answer lies in how a court frames the exhaustion requirement.

---

review and the volume of incoming requests, the BOP cannot set forth a firm date by which the BOP will reach a decision on Petitioner's pending application.").

93. *See* United States v. Nkanga, 452 F. Supp. 3d 91, 95 (S.D.N.Y. 2020) ("[T]he Court's constitutional obligation is 'to apply the statute as written'—even if it believes 'some other approach might accord with good policy' or the exigencies of the moment.").

94. *Alam*, 960 F.3d at 833.

95. Fort Bend Cnty. v. Davis, 139 S. Ct. 1843, 1849 n.5 (2019) (internal quotation marks omitted); *see* Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13, 18 n.3 (2017); Kontrick v. Ryan, 540 U.S. 443, 457 (2004).

96. *Alam*, 960 F.3d at 835–36.

97. *Compare* United States v. Arciero, No. CR 13-001036 SOM, 2020 WL 3037073, at *5 (D. Haw. June 5, 2020), *reconsideration denied*, No. CR 13-001036 SOM, 2020 WL 4678405 (D. Haw. Aug. 12, 2020) (deeming the exhaustion requirement a claim-processing rule that is not subject to judge-made exceptions), *with* United States v. Guzman Soto, No. 1:18-CR-10086-IT, 2020

ii. Whether Federal Courts May Waive the Exhaustion Requirement

The legal nature of the exhaustion requirement directly influences the outer bounds of judicial discretion and, potentially, the availability of equitable remedies. If a court deems the requirement a statutory exhaustion provision, then judicial authority narrows. If identified as a judicial regime, then a court's power expands. Statutory regimes limit a court's adjudicatory capacity in order to prevent judges from encroaching upon congressional intent made apparent through the plain text. Unlike judicial doctrines, the Supreme Court explains, statutory exhaustion requirements are developed by Congress, subject to exception only if Congress so chooses.[98] Therefore, "mandatory exhaustion statutes . . . establish mandatory exhaustion regimes, foreclosing judicial discretion."[99] To determine whether a provision is statutory or judicial in nature, the Supreme Court advises lower courts to examine "such statutes at face value—refusing to add unwritten limits onto their rigorous textual requirements."[100] Though the plain text and the Supreme Court's guidance would suggest the exhaustion requirement is statutory, federal courts have come to varying conclusions concerning the application of equitable remedies.

Why have courts remained divided as to whether the exhaustion requirement is subject to equitable remedies? While some courts have concluded the matter upon the existence of a statutory exhaustion requirement,[101] the Supreme Court has "held that analogous statutory rules containing seemingly mandatory language about when a claim can be

WL 1905323, at *5 (D. Mass. Apr. 17, 2020) ("[A]s Congress has carved out an alternative to exhaustion in the language of § 3582(c)(1)(A), the court finds it has authority and discretion to waive the thirty-day waiting period based on exigent circumstances.").

98. *See* Ross v. Blake, 578 U.S. 632, 639 (2016).

99. *Id.*

100. *Id.*; *see, e.g.*, McNeil v. United States, 508 U.S. 106, 111 (1993); Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 12–14 (2000).

101. *See, e.g.*, United States v. Vence-Small, No. 3:18-CR-00031, 2020 WL 1921590, at *4 (D. Conn. Apr. 20, 2020) ("Section 3582(c)(1)(A) doubtlessly creates a type of mandatory statutory exhaustion requirement . . . and the statute does not invite judges to craft additional exceptions.").

brought . . . are subject to equitable exceptions."[102] General equitable exceptions can be read into statutory text "if the litigant establishes two elements: '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.'"[103] Supreme Court precedent most directly relates to timeliness statutes, specifically those that respect legislative intent by establishing equitable tolling. However, Second Circuit precedent and congressional intent also present arguments both in favor and against judicially-crafted equitable exceptions.

In addition to different assessments of legislative intent and the statutory text, *Washington v. Barr* introduced yet another wrinkle into judicial analysis of compassionate release.[104] Addressing a statutory exhaustion requirement, the Second Circuit noted that "[e]ven where exhaustion is seemingly mandated by statute or decisional law, the requirement is not absolute."[105] Various district courts, including many that are not bound by Second Circuit precedent, have agreed and created equitable exceptions in light of the urgency of the pandemic and congressional intent.[106] First, district courts have highlighted that Congress

102. United States v. Russo, 454 F. Supp. 3d 270, 276 (S.D.N.Y. 2020); *see* Holland v. Florida, 560 U.S. 631, 632 (2010) (ruling that a nonjurisdictional statute of limitations "is subject to a 'rebuttable presumption' in *favor* 'of equitable tolling'" (quoting Irwin v. Dep't of Veterans Affs., 498 U.S. 89, 95–96 (1990))); Young v. United States, 535 U.S. 43, 49 (2002) ("It is hornbook law that limitations periods are 'customarily subject to 'equitable tolling[.]'" (quoting *Irwin*, 498 U.S. at 95–96)); *see also* Fed. Ins. Co. v. United States, 882 F.3d 348, 361 (2d Cir. 2018) ("Claim-processing rules, much like statutes of limitations, . . . may be subject to equitable tolling doctrines."); Weitzner v. Cynosure, Inc., 802 F.3d 307, 311 (2d Cir. 2015) (concluding that the "28-day time limit of FRAP Rule 4(a)(4)(A)(vi) . . . should be considered a 'claim-processing rule,' which is subject to equitable exception or waiver"); Grewal v. Cuneo Gilbert & LaDuca LLP, 803 F. App'x 457, 459 (2d Cir. 2020) ("We have held that Rule 4(a)'s 28-day deadline is not jurisdictional, but is a 'claim-processing rule' and, as such, its enforcement is subject to waiver, forfeiture, and other equitable exceptions." (citing *Weitzner*, 802 F.2d at 312)).

103. Menominee Indian Tribe of Wis. v. United States, 577 U.S. 250, 255 (2016) (quoting *Holland*, 560 U.S. at 649).

104. 925 F.3d 109 (2d Cir. 2019).

105. *Id.* at 118.

106. *See* United States v. Al-Jumail, 459 F. Supp. 3d 857, 860 (E.D. Mich. 2020); United States v. McCarthy, 453 F. Supp. 3d 520, 525–26 (D. Conn. 2020);

gave defendants the choice to bring forth a claim before fully litigating it with the BOP.[107] It follows that barring compassionate release claims for failure to exhaust administrative remedies "would be ironic, and certainly inconsistent with congressional intent."[108] Further, since the thirty-day rule predates the coronavirus pandemic, Congress could not have anticipated the unprecedented emergency.[109] Thus, deeming the statute subject to judicial waiver, courts argue, would be in line with Congress's broader intent of ensuring "meaningful and prompt judicial consideration of a relief request even if the defendant has not fully exhausted administrative remedies."[110] Congressional intent, these courts conclude, "not only permits judicial waiver of the thirty-day exhaustion period, but also, in the current extreme circumstances, actually favors such waiver, allowing courts to deal with the emergency before it is potentially too late."[111] District courts have come to different conclusions, however, about *Washington*'s application to the First Step Act's compassionate release provision and its legislative intent.

Although *Washington* addresses judicially-crafted exceptions, district courts have also found the case inapposite, supporting their interpretations

---

United States v. Colvin, 451 F. Supp. 3d 237, 240 (D. Conn. 2020) ("[I]n light of the urgency of [d]efendant's request, the likelihood that she cannot exhaust her administrative appeals during her remaining eleven days of imprisonment, and the potential for serious health consequences, the [c]ourt waives the exhaustion requirement of Section 3582(c)(1)(A)."); United States v. Powell, No. 1:94-CR-00316 (ESH), 2020 WL 1698194, at *1 (D.D.C. Mar. 28, 2020) (waiving exhaustion under § 3582(c)(1)(A) where the [c]ourt found that "requiring defendant to first seek relief through the [BOP] administrative process would be futile"); United States v. Zukerman, 451 F. Supp. 3d 329, 332–33 (S.D.N.Y. 2020); United States v. Perez, 451 F. Supp. 3d 288, 291–92 (S.D.N.Y. 2020).

107. *See* United States v. Haney, 454 F. Supp. 3d 316, 320 (S.D.N.Y. 2020); *Russo*, 454 F. Supp. 3d at 277.

108. *Russo*, 454 F. Supp. 3d at 277.

109. *See, e.g.*, United States v. Reddy, No. 13-20358, 2020 WL 2320093, at *4 (E.D. Mich. May 11, 2020) (reaching the merits because "the purposes of the exhaustion requirement have been satisfied" and because "excusing strict exhaustion . . . during the COVID-19 pandemic is consistent with the congressional intent underlying the exhaustion requirement").

110. United States v. Vence-Small, No. 3:18-CR-00031, 2020 WL 1921590, at *5 (D. Conn. Apr. 20, 2020).

111. *Haney*, 454 F. Supp. 3d at 322.

of congressional purpose. Many courts have explicitly distinguished *Washington* from compassionate release cases, noting that *Washington* dealt with the Controlled Substances Act which "does not mandate exhaustion of administrative remedies."[112] Courts have additionally refused to apply *Washington* in the compassionate release context because the relied upon rationale is comprised of dicta and contradicts the Supreme Court precedent on which it relies.[113] Further, these courts argue, congressional intent and separation of powers bind rather than increase judicial authority. Although Congress did not anticipate the coronavirus pandemic, it "could well have foreseen that medical or safety emergencies might arise . . . . Still, Congress did not create an emergency exception to the exhaustion requirement."[114] Not only did Congress explicitly impose a thirty-day bar as a method for exhaustion, but it also incorporated an emergency provision elsewhere in the statute.[115] Both provisions suggest that Congress considered delays known to stall compassionate release petitions and sought to provide alternative avenues for relief. To hold that judges may create exceptions to a statutory exhaustion requirement would be to rewrite the law. Although courts have split on whether the exhaustion requirement is statutory and, even if so, whether it is absolute, a third perspective has emerged that answers both questions in the affirmative and still asserts judges may grant relief prior to exhaustion.

Other courts have explicitly acknowledged that the exhaustion requirement is statutory in nature and not subject to judge-crafted

112. Washington v. Barr, 925 F.3d 109, 116 (2d. Cir. 2019); *see* United States v. Webman, No. 9:17-CR-80153, 2020 WL 5994046, at *2 (S.D. Fla. Oct. 9, 2020); United States v. Holden, No. 3:13-CR-00444-BR, 2020 WL 1673440, at *976–77 (D. Or. Apr. 6, 2020); *see also* United States v. Petrossi, 454 F. Supp. 3d 452, 457 n.2 (M.D. Pa. 2020) (noting that *Washington* concerned a judicially created exhaustion rule and to hold otherwise is at odds with Supreme Court precedent).

113. *See* United States v. Montanez, 458 F. Supp. 3d 146, 154 (W.D.N.Y. 2020) ("[T]he Second Circuit's statement regarding statutory exhaustion requirements was dicta and is inconsistent with the Supreme Court's holding in *Ross*."); United States v. Demaria, No. 17 Cr. 569 (ER), 2020 WL 1888910, at *3 (S.D.N.Y. Apr. 16, 2020) ("[T]his language in *Washington* is *dicta*, and, in any event, contradicted by both *Madigan*, the Supreme Court case on which it relies, and *Ross*.").

114. *Vence-Small*, 2020 WL 1921590, at *5.

115. *See* 18 U.S.C. § 3582(d)(2)(A) (2018) (requiring that terminally ill defendants receive notification and opportunity to file for sentence reduction within seventy-two hours of the diagnosis).

exceptions, yet deemed the present circumstances an occasion for concession.[116] Deferring to congressional intent, the unique structure of the provision, and judicial resources, courts have read opportunity for waiver into the provision regardless.[117] Delaying a defendant's motion for compassionate release does not "protect[] administrative agency authority and promot[e] judicial efficiency," the twin purposes that Congress considers in drafting exhaustion requirements.[118] Reducing the waiting period to thirty days or exhaustion, whichever comes sooner, reflects congressional intent to create "meaningful and prompt" judicial determination in such cases.[119] Further, § 3582(c)(1)(A) does not conform to traditional exhaustion requirement norms since it permits defendants to bring the petition directly to the court absent a final conclusion by the BOP.[120] Under such a reading, however, courts both acknowledge the mandatory nature of statutory exhaustion regimes and proceed to develop an exception, crafted by the judge because of the coronavirus pandemic. Despite the three distinct approaches towards deeming the exhaustion requirement statutory in nature, many courts have instead deemed it judicial and circumvented the limitations on exceptions entirely.

If the provision is classified as a judicially-created exhaustion requirement, then judges may freely craft exceptions and federal court powers significantly expand. Judge-made exhaustion doctrines, the

116. *See Haney*, 454 F. Supp. 3d at 320–21; United States v. Atwi, 455 F. Supp. 3d 426, 429 (E.D. Mich. 2020) ("This Court reads the FSA's exhaustion requirement similar to Judge Rakoff [in *Haney*].").

117. *See Haney*, 454 F. Supp. 3d at 320–21; United States v. Smith, No. 15-CR-30039, 2020 WL 3027197, at *5 (C.D. Ill. June 5, 2020) ("Mandating the exhaustion requirement in this case . . . during the COVID-19 pandemic cannot be what Congress intended."); United States v. Wheeler, No. 19-CR-00085, 2020 WL 2801289, at *2 (D.D.C. May 29, 2020).

118. McCarthy v. Madigan, 503 U.S. 140, 144 (1992) (quoting Patsy v. Bd. of Regents, 457 U.S. 496, 501 (1982)).

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

120. *Id*. at 321; *see Smith*, 2020 WL 3027197, at *4 (differentiating § 3582(c)(1)(A) from the PLRA, which requires exhaustion); United States v. Guzman Soto, No. 1:18-CR-10086-IT, 2020 WL 1905323, at *5 (D. Mass. Apr. 17, 2020) ("This alternative to exhaustion suggests that Congress understood that some requests for relief may be too urgent to wait for the BOP's process . . . . [N]othing in the statutory scheme suggests that Congress intended to preclude the court from exercising judicial discretion and to take into account timeliness and exigent circumstances.").

Supreme Court has clarified, "even if flatly stated at first, remain amenable to judge-made exceptions."[121] Indeed, judges may "excuse judge-made exhaustion requirements" in three circumstances: (1) "where exhaustion would unduly prejudice the defendant"; (2) "where the agency could grant effective relief"; or (3) "where exhaustion would be futile."[122] While the Supreme Court has cautioned that courts should "not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise,"[123] district courts have distinguished mandatory statutory regimes that require exhaustion from the compassionate release provision based on the text, congressional intent, and legislative history.[124] Yet, this perspective remains the minority as most district courts have identified the compassionate release provision as statutory rather than judge-made.

Despite the fact that these three occasions for excusing exhaustion requirements apply strictly to judge-made rules, courts have, albeit hesitantly, applied the same test to statutory exhaustion requirements.[125] In so doing, courts have relied upon the time-sensitive nature of the crisis and the heightened risk of contracting the virus as reasons for why the exhaustion requirement would unduly prejudice defendants.[126] Indeed, "undue delay, if it in fact results in catastrophic health consequences, could

121. Ross v. Blake, 578 U.S. 632, 639 (2016).

122. *Haney*, 454 F. Supp. 3d at 320 (citing *McCarthy*, 503 U.S. at 146–49).

123. Booth v. Churner, 532 U.S. 731, 741 n.6 (2001).

124. *See* United States v. Agomuoh, 461 F. Supp. 3d 626, 633 (E.D. Mich. 2020) ("Because the text of § 3582(c)(1)(A) gives defendants such an option, it does not speak in the same absolute, mandatory terms as does the PLRA . . . [and] the Court concludes that the text of the compassionate release provision does not contain a 'mandatory exhaustion regime' that forecloses judicial waiver.").

125. *See Haney*, 454 F. Supp. 3d at 321–22; United States v. Zukerman, 451 F. Supp. 3d 329, 332–33 (S.D.N.Y. 2020); United States v. Colvin, 451 F. Supp. 3d 237, 240 (D. Conn. 2020). *But see* United States v. Alaniz, No. 115CR00329DADBAM, 2020 WL 1974150, at *1 (E.D. Cal. Apr. 24, 2020) (noting that statutorily provided exhaustion requirements preclude judicial discretion).

126. *See* United States v. Feucht, 462 F. Supp. 3d 1339, 1342 (S.D. Fla. 2020) ("[G]iven this unprecedented virus, it would unduly prejudice the Defendant to require him to exhaust administrative remedies".).

make exhaustion futile."[127] When defendants faced a brief remaining term of imprisonment, federal courts also appeared more inclined to conclude the BOP was incapable of granting adequate relief.[128] Since neither exhausting the administrative process nor awaiting a lapse in thirty days would occur prior to the release date, federal courts often waived the exhaustion requirement for defendants with short remaining sentences.[129] However, courts have also extended the rationale for those whose "original release date may be far off, [since] the threat of COVID-19 is at [their] doorstep."[130] Together, these circumstances have provided support both for and against judicial waiver.

Without an authoritative response by Congress, the Supreme Court, or most circuit courts, district courts will continue to navigate the coronavirus pandemic with limited guidance. Even when courts deferred to the BOP, the agency, too, grew overwhelmed with the flood of compassionate release claims. The varying judicial analyses concerning both the compassionate release provision's legal character, whether jurisdictional or claim-processing, and the exhaustion requirement's nature, whether statutory or judicial, directly implicate prisoners' lives and federal court powers. These implications stretch far beyond the current coronavirus pandemic and influence how courts may respond to and potentially revise statutory procedural regimes. Examining how waiver, estoppel, and forfeiture apply to compassionate release claims clarifies the short- and long-term repercussions of the coronavirus pandemic.

B. Application of Waiver, Estoppel, and Forfeiture

Determining whether the exhaustion requirement of the compassionate release provision is statutory or judge-made impacts not only exhaustion exceptions, but also additional equitable remedies—such as waiver, estoppel, and forfeiture—and who may raise them. As with the several approaches of categorizing the exhaustion requirement, federal courts have

127. Washington v. Barr, 925 F.3d 109, 120–21 (2d. Cir 2019); *see also* Bowen v. City of New York, 476 U.S. 467, 483 (1986) (holding that irreparable injury justifying the waiver of exhaustion requirements exists where "the ordeal of having to go through the administrative process may trigger a severe medical setback" (internal quotation marks, citation, and alterations omitted)).

128. *See Colvin*, 451 F. Supp. 3d at 240; United States v. Perez, 451 F. Supp. 3d 288, 293 (S.D.N.Y. 2020).

129. *Colvin*, 451 F. Supp. 3d at 240; *Perez*, 451 F. Supp. 3d at 293.

130. *Zukerman*, 451 F. Supp. 3d at 334.

similarly come to varying conclusions concerning additional equitable remedies for defendants. While some courts have deemed the exhaustion requirement nonwaivable under any conditions, others have concluded that it is subject to judicially-crafted exceptions, government waivers, equitable estoppel, or all three. Such distinctive treatments reflect not only differing understandings of the exhaustion requirement specifically, but also federal-court powers in general.

Most courts have concluded that because the exhaustion requirement is a claim-processing rule rather than a jurisdictional bar, it is subject to the doctrines of waiver, estoppel, and forfeiture.[131] However, courts have split as to whether the court may independently waive the requirement or whether the decision lies in the hands of the prosecution.[132] Indeed, such a division is similarly reflected in judicial opinions concerning the government's behavior. Though the Sixth Circuit commended the government's timely objection to a defendant's claim,[133] many district courts have chastised similar conduct, implying that prosecutors should have instead waived the requirement in light of the pandemic.[134] Though federal courts have at times encouraged prosecutors to forfeit or waive the exhaustion requirement, they have also had occasion to reprimand prosecutorial misconduct and correct it through equitable remedies.

Since the requirement likely qualifies as a claim-processing rule, § 3582(c)(1)(A)'s exhaustion requirement is also subject to equitable estoppel "based on the conduct of the Government."[135] Such a claim may only be granted against the government "in the most serious circumstances,

131. *See, e.g.*, United States v. Alam, 960 F.3d 831, 834 (6th Cir. 2020) (holding that waiver and forfeiture provided exceptions to mandatory claim-processing rules, but that such exceptions did not apply in this case).

132. *Compare Alam*, 960 F.3d at 834 (concluding that since the government timely objected to the defendant's exhaustion failure, the court was bound to enforce the claim-processing rule), *with* United States v. Scparta, No. 18-CR-578 (AJN), 2020 WL 1910481, at *5 (S.D.N.Y. Apr. 20, 2020) (holding that both the Government and the court could excuse the requirement through equitable remedies).

133. *Alam*, 960 F.3d at 834.

134. *See* United States v. Bess, 455 F. Supp. 3d 53, 59–60 (W.D.N.Y. 2020), *appeal withdrawn*, No. 20-1491, 2020 WL 4496494 (2d Cir. May 29, 2020); United States v. McIndoo, No. 1:15-CR-00142 EAW, 2020 WL 2201970, at *6 (W.D.N.Y. May 6, 2020); United States v. Haynes, No. 18-CR-6015-EAW, ECF No. 271, at 1 (W.D.N.Y. Apr. 14, 2020).

135. *McIndoo*, 2020 WL 2201970, at *6.

and [must be] applied with the utmost care and restraint."[136] Courts should invoke the doctrine "only in those limited cases where the party can establish both that the Government made a representation upon which the party reasonably and detrimentally relied and that the Government engaged in affirmative misconduct."[137] *United States v. Wen*[138] was one such case. In *Wen*, the judge concluded that the government was equitably estopped from raising exhaustion as a bar to compassionate release because of its affirmative misrepresentations and egregious threats towards the defendant.[139] While courts have granted equitable estoppel claims when faced with serious prosecutorial misconduct, courts have also waived the claim-processing rule when the government has affirmatively foregone the exhaustion requirement in response to the pandemic.

Under these unprecedented circumstances, some courts have been gifted the opportunity to evade the question entirely since the government waived any arguments concerning the exhaustion requirement.[140] Rather than raising exhaustion as an affirmative defense, the government may instead waive the requirement, thus permitting the court to turn to the merits of the motion.[141] Courts have similarly found that if "the right to assert the defense of failure to exhaust can be waived, it can also be forfeited."[142] Even when a defendant has indicated that he or she is unable to exhaust administrative remedies, courts have deemed the requirement forfeited if the Government did not raise the argument as a barrier to

136. Rojas-Reyes v. I.N.S., 235 F.3d 115, 126 (2d Cir. 2000) (internal quotations and citations omitted).

137. City of New York v. Shalala, 34 F.3d 1161, 1168 (2d Cir. 1994).

138. 454 F. Supp. 3d 187 (W.D.N.Y. 2020).

139. *Id*. at 193–96 ("Making affirmative misrepresentations to a prisoner with preexisting health conditions about his right to seek release in the middle of a worldwide pandemic and threatening him for trying to invoke that right constitutes special circumstances so as to compel the application of equitable estoppel.")

140. *See, e.g.*, United States v. Gentille, No. 19-cr-00590, 2020 WL 1814158, at *3 (S.D.N.Y. Apr. 9, 2020).

141. *See* United States v. Gonzalez, No. 3:17-cr-00062, 2020 WL 2079110, at *7 (D. Conn. Apr. 30, 2020) (indicating that "if the Government decides to waive any objection to the exhaustion requirements," the court would rule on the merits of the motion).

142. United States v. Russo, 454 F. Supp. 3d 270, 276 (S.D.N.Y. 2020).

relief.[143] The coronavirus pandemic has resulted in a variety of government responses to compassionate release claims, including failing to raise the argument entirely and supporting a judge's decision to waive the exhaustion requirement.[144] The activist responses toward compassionate release claims have not been limited to government concession, but rather extended to judicial application.

Adopting a liberal interpretation of administrative exhaustion, some judges have deemed untraditional forms of seeking relief sufficient to satisfy the provision. Although the statute requires a defendant to exhaust all administrative rights to appeal or wait thirty days, courts have made exceptions to the rule when similar, yet still unconforming, exhaustion attempts have been made. For example, one district court concluded that the defendant had exhausted his administrative remedies despite his residing in a facility without access to a BOP warden.[145] Another ruled that exhaustion had been satisfied when the defendant's sister sent a letter to the warden on his behalf.[146] Courts have also deemed an email requesting release[147] and a letter given to the warden's representative[148] sufficient to exhaust administrative remedies. While these actions are unprecedented, these courts rely both on congressional intent and on the coronavirus pandemic to find exhaustion, albeit through unconventional means.[149]

Not only have courts differed on the legal nature of § 3582's exhaustion requirement, but they have also disagreed on which remedies are available and who might provide them. The various interpretations reveal unique

143. *See, e.g.*, United States v. Tyson, No. 3:13-CR-002 (MPS), 2020 WL 3451694, at *2 (D. Conn. June 24, 2020) (turning to the merits upon the government's failure to raise the exhaustion argument, despite the defendant asserting in his motion that he would not satisfy the requirement).

144. United States v. Connell, No. 18-CR-00281-RS-1, 2020 WL 2315858, at *3 (N.D. Cal. May 8, 2020).

145. *See* United States v. Norris, 458 F. Supp. 3d 383, 386 (E.D.N.C. 2020).

146. *See* United States v. McCollough, No. CR1500336001PHXDLR, 2020 WL 2812841, at *2 (D. Ariz. May 29, 2020).

147. *See* United States v. Burrill, 445 F. Supp. 3d 22, 25 (N.D. Cal. 2020).

148. United States v. Resnick, 451 F. Supp. 3d 262, 268–69 (S.D.N.Y. 2020) (noting that since inmates cannot access the warden directly, submissions to the warden's representative satisfy the exhaustion requirement).

149. *McCollough*, 2020 WL 2812841, at *2.

perspectives on the role of federal courts, unorthodox lawmaking,[150] judicial powers, and procedural roadblocks. What powers, then, do federal courts truly have? What does each interpretation reveal about theories of federal courts? While expanding judicial powers provides for immediate relief without waiting for Congress to revise legislation, doing so also decreases the likelihood that Congress will act in the future. Alternatively, preventing courts from excusing procedural guardrails will only hurt the defendants most at risk. The following analysis delves into the underlying justifications for expanding judicial discretion during emergency circumstances and the corresponding theoretical frameworks in favor of a responsive, pragmatic federal judiciary.

III. WHAT POWERS DO FEDERAL COURTS HAVE?

Whether federal courts actually have the authority to waive § 3582's exhaustion requirement of their own accord is a matter with repercussions that reach far beyond the coronavirus pandemic. If answered in the affirmative, judges may circumvent statutory requirements in order to grant relief to defendants who face serious medical risks, many of which could prove fatal. Federal courts are well-positioned to waive § 3582's procedural hurdles during crises on a case-by-case basis, whereas Congress, the BOP, and the President may offer largescale solutions for future emergencies. Alternatively, if courts are restricted by statutory exhaustion requirements such that they may not craft equitable exceptions, the next crisis might similarly inundate carceral facilities and devastate detained prisoners, exacerbating existing inequities present in the criminal-justice system.[151] Given the current infrastructure, then, federal courts appear the most efficient, appropriate, and informed actors to excuse administrative roadblocks during crises for individual claims for a few reasons: Supreme Court precedent offers them this power; the compassionate release provision uniquely defers to courts; and judges already review these petitions in the first instance.

150. Barbara Sinclair coined "unorthodox lawmaking," the recent deviation from conventional legislative lawmaking, in her book of the same title. *See* BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (2d ed. 2000).

151. Madeleine Carlisle & Josiah Bates, *With Over 275,000 Infections and 1,700 Deaths, COVID-19 Has Devastated the U.S. Prison and Jail Population*, TIME (Dec. 28, 2020, 2:52 PM), https://time.com/5924211/coronavirus-outbreaks-prisons-jails-vaccines [https://perma.cc/62XE-8L54].

How might the pandemic inform federal-court powers? This Note argues that judicially-crafted equitable exceptions, narrow in scope and available solely during crises, provide one answer. Even courts that had previously determined that they could not waive the exhaustion requirement changed their stances after reading judicial opinions that reached the opposite conclusion.[152] These courts determined that procedural claim-processing rules are subject to equitable exceptions, just as courts already permit tolling, waiver, and forfeiture. The proceeding two subsections elaborate on the judicial and equitable arguments in favor of such a proposal.

A. The Supreme Court's Nod Toward Equitable Exceptions

Although the Supreme Court has previously detailed the distinction between statutorily-based and judicially-crafted exhaustion requirements and the resulting federal-court powers available under each,[153] Justice Sotomayor, joined by Justice Ginsburg, suggested in *Valentine v. Collier* that the coronavirus pandemic could well provide the exception, expanding avenues of judicial relief in emergencies.[154] Indeed, in her subsequent dissenting opinion, Justice Sotomayor, joined by Justice Kagan, confirmed that the pandemic rendered the prison's grievance process unavailable and exhaustion therefore unnecessary.[155] Although the Supreme Court has "reserved whether mandatory claim-processing rules may be subject to

152. *See* United States v. Scparta, No. 18-CR-578 (AJN), 2020 WL 1910481, at *5–8 (S.D.N.Y. Apr. 20, 2020).

153. Ross v. Blake, 578 U.S. 632, 639–40 (2016).

154. Valentine v. Collier, 140 S. Ct. 1598, 1598, 1600–01 (2020) (statement of Justice Sotomayor, joined by Justice Ginsburg, respecting the denial of the application to vacate the stay).

155. *Id.* at 59 (Sotomayor, J., dissenting) (noting that the Pack Unit's grievance system did not make administrative remedies available and thus fell within the PLRA's textual exception to mandatory exhaustion).

equitable exceptions" apart from forfeiture and waiver,[156] Supreme Court precedent would appear to answer in the affirmative.[157]

The Supreme Court has read "general equitable principles into statutory text" in the statute of limitations context,[158] which provides an analogous application to the procedural exhaustion requirement at issue here. Courts may excuse time-based restrictions when a litigant "establishes two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing."[159] Both the Supreme Court[160] and circuit courts[161] have dispensed with statutorily-based exhaustion requirements when faced with unprecedented circumstances. The coronavirus pandemic proves no exception.

Of note is the Supreme Court's ruling in *Ross v. Blake*,[162] which has been construed by courts as both supporting and opposing judicial waiver of

156. Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13, 18 n.3 (2017); Kontrick v. Ryan, 540 U.S. 443, 457 (2004); *see also* Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 717 n.7 (2019) (finding "no occasion to address whether an insurmountable impediment to filing timely" would allow a court to excuse a claim-processing requirement when considering statutes of limitations).

157. *See* Holland v. Florida, 560 U.S. 631, 645–46 (2010) (concluding that "a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in favor 'of equitable tolling'" (quoting Irwin v. Dep't of Veterans Affs., 498 U.S. 89, 95–96 (1990))).

158. United States v. Russo, 454 F. Supp. 3d 270, 276 (S.D.N.Y. 2020).

159. Menominee Indian Tribe of Wis. v. United States, 577 U.S. 250, 255 (2016) (quoting *Holland*, 560 U.S. at 649).

160. *See* Granberry v. Greer, 481 U.S. 129, 134 (1987) (vacating and remanding the Seventh Circuit's rejection of exhaustion waiver and noting that unusual circumstances excused exhaustion under 28 U.S.C. § 2254(b) when comity would be better served by addressing the merits).

161. *See* Fed. Ins. Co. v. United States, 882 F.3d 348, 361 (2d Cir. 2018) ("Claim-processing rules, much like statutes of limitations, . . . may be subject to equitable tolling doctrines"); Hendricks v. Zenon, 993 F.2d 664, 672 (9th Cir. 1993) (holding that courts may dispense with § 2254(b) exhaustion requirements when faced with "exceptional circumstances of peculiar urgency").

162. 578 U.S. 632 (2016).

statutorily-mandated exhaustion regimes during crises.[163] At first glance, the First Step Act's administrative provisions appear similar to those in the Prison Litigation Reform Act (PLRA), suggesting that the First Step Act's procedures are similarly bound by the Supreme Court's ruling in *Ross*. Though the *Ross* Court concluded that judges may not excuse exhaustion failure even under "special circumstances," the Supreme Court stressed its decision relied upon the PLRA's "mandatory language," congressional history, recent amendment, and, importantly, remedial availability.[164] These factors notably distinguish § 3582(c)(1)(A) from the PLRA since the text and congressional history of the First Step Act "strongly indicate that Congress intended for the compassionate release provision to provide vulnerable inmates with speedy access to judicial relief in times of emergency."[165] Even if treated alike, however, the unavailability of prison grievance procedures would excuse § 3582's exhaustion requirement.

Circuit court judges have similarly noted that *Ross*'s application to the "PLRA's exhaustion requirement does not foreclose federal prisoners from seeking relief under the First Step Act's provisions for compassionate release."[166] In recognizing the compassionate release's exhaustion provision, Judge Higginson raised several judicially-crafted exceptions in support of finding "that this requirement is not absolute and that it can be waived by the Government or by the court, therefore justifying an exception in the unique circumstances of the COVID-19 pandemic."[167] Even if *Ross* would normally foreclose judicial discretion, however, crises like the pandemic surely render remedies unavailable and thus subject to equitable exception. The untraditional nature of the exhaustion requirement,

163. *Compare* McPherson v. Lamont, 457 F. Supp. 3d 67, 81 (D. Conn. 2020) ("In this context, the DOC's administrative grievance process is thus, 'practically speaking, incapable of use' for resolving COVID-19 grievances . . . . [T]he Court concludes that administrative remedies for the relief that plaintiffs seek are unavailable, and thus exhaustion is not required" (citing *Ross*, 578 U.S. at 642–43)), *with* United States v. Vence-Small, No. 3:18-CR-00031, 2020 WL 1921590, at *4 (D. Conn. Apr. 20, 2020) ("The Supreme Court's decision in *Ross v. Blake* dictates the outcome here because section 3582(c)(1)(A) creates a statutory exhaustion requirement").

164. Ross v. Blake, 578 U.S. 632, 638–39 (2016).

165. United States v. Agomuoh, 461 F. Supp. 3d 626, 632 (E.D. Mich. 2020).

166. Valentine v. Collier, 956 F.3d 797, 807 (5th Cir. 2020) (Higginson, J., concurring) (citation omitted).

167. *Id.* (listing examples in which district courts have waived the exhaustion requirement).

unavailable administrative remedies, and conservation of judicial resources similarly weigh in favor of reading equitable exceptions into statutory exhaustion regimes during crises.

i. The First Step Act's Uniqueness Makes All the Difference

The First Step Act uniquely defers to the judiciary in its implementation and modification: "Section 3582(c) is a distinctive federal statute . . . . [because] [i]t does not reflect unqualified commitment to administrative exhaustion and it does reflect acknowledgment that the judiciary has an independent interest in, and responsibility for, the criminal judgments it is charged with imposing."[168] Unlike the PLRA, the First Step Act's compassionate release provision does not include an "ironclad exhaustion requirement."[169] Instead, § 3582(c)(1)(a) allows "judicial review after a short waiting period . . . . [and] indicates a desire on the part of Congress to accelerate review rather than hinder it, so *Ross* would not preclude applying an exception."[170] Section 3582(c)(1)(A) proves untraditional in that defendants may satisfy the provision either through administrative exhaustion or waiting thirty days after serving a petition on the BOP warden before filing a motion in court: "Put simply, this [is] an exhaustion requirement like no other of which the Court is aware."[171] Congress's decision to incorporate choice into the statute decreases the importance of administrative agency authority while reflecting a desire for efficient judicial resolution.[172] And district courts across the country have agreed and followed suit.[173]

Though the Supreme Court has not definitively indicated whether judges may formulate equitable exceptions to § 3582's exhaustion requirement, numerous district courts have adopted reasoning similar to

168. United States v. Russo, 454 F. Supp. 3d 270, 277 (S.D.N.Y. 2020).

169. United States v. Ramirez, 459 F. Supp. 3d 333, 344 (D. Mass. 2020).

170. *Id.*

171. United States v. Scparta, No. 18-CR-578 (AJN), 2020 WL 1910481, at *6 (S.D.N.Y. Apr. 20, 2020).

172. United States v. Haney, 454 F. Supp. 3d 316, 321 (S.D.N.Y. 2020).

173. *See, e.g.*, *Russo*, 454 F. Supp. 3d at 274–75 (holding that, "[d]espite the mandatory nature of [the statute's] exhaustion requirement," the exhaustion bar is "not jurisdictional" and can therefore be waived).

that seen in *McCarthy v. Madigan*,[174] answering in the affirmative.[175] Such a determination, courts argue, arises from the statutory text, congressional intent, and unanticipated crisis.[176] The plain text of the compassionate release provision, as seen in the thirty-day rule, supports congressional intent that a defendant has a right to a prompt and meaningful judicial review, "regardless of whether administrative remedies have been exhausted."[177] Although § 3582 incorporates features of an administrative exhaustion requirement, its structure differs "from other exhaustion regimes, in that it also contains features of a timeliness statute."[178] Both the statutory text and structure suggest the availability of equitable remedies pursuant to Supreme Court precedent.

Further, the Supreme Court has explicitly noted that congressional intent is "paramount" in determining whether a particular statute's exhaustion requirement is subject to exception.[179] Congress has made its intent clear through statutory text, history, and implementation. The exhaustion requirement is meant to serve as "an accelerant to judicial review," since the thirty-day period "before which to seek judicial review would have seemed exceptionally quick."[180] Increasing judicial review of compassionate release requests, Congress "decided federal judges are no longer to be constrained or controlled by how the BOP Director sets the criteria . . . for a sentence reduction."[181] To hold otherwise would effectively delay or block judicial review and undermine congressional intent. Thus,

174. 503 U.S. 140 (1992); *see, e.g.*, United States v. Connell, No. 18-CR-00281-RS-1, 2020 WL 2315858, at *4 (N.D. Cal. May 8, 2020); *Russo*, 454 F. Supp. 3d at 277; United States v. Perez, 451 F. Supp. 3d 288, 292 (S.D.N.Y. 2020).

175. *See* Maney v. Brown, 464 F. Supp. 3d 1191, 1206 (D. Or. 2020) (noting that district courts may assess the relevant facts to determine whether remedies are unavailable).

176. *See, e.g.*, United States v. White, No. 13-CR-20653-1, 2020 WL 2557077, at *2 (E.D. Mich. May 20, 2020); *Connell*, 2020 WL 2315858, at *4; *Haney*, 454 F. Supp. 3d at 320.

177. *Russo*, 454 F. Supp. 3d at 277.

178. United States v. Scparta, No. 18-CR-578 (AJN), 2020 WL 1910481, at *6 (S.D.N.Y. Apr. 20, 2020) (citation omitted).

179. McCarthy v. Madigan, 503 U.S. 140, 144 (1992).

180. United States v. Russo, No. 16-cr-441, ECF No. 54, at *5, 2020 WL 1862294 (S.D.N.Y. Apr. 3, 2020).

181. Shon Hopwood, *Second Looks and Second Chances*, 41 CARDOZO L. REV. 101, 122 (2019).

Ross does not foreclose judicial waiver since the First Step Act's exhaustion requirement is distinct from the PLRA's "ironclad" provision, mirroring the contrasting congressional histories behind the two laws. In enacting the PLRA, Congress "removed the conditions that administrative remedies be 'plain, speedy, and effective' and that they satisfy minimum standards."[182] In stark contrast to the PLRA, the First Step Act and its incorporated compassionate release provision were intended to increase access to prompt judicial relief, as seen by the option to either exhaust the administrative appeal process or wait 30 days for judicial review.[183] Even if *Ross* were to apply, however, courts may still excuse exhaustion when concluding prison grievance procedures are unavailable. Indeed, three Supreme Court Justices have suggested as much.[184]

ii. Crises Render Remedies Unavailable Under *Ross*

The coronavirus pandemic has left prison grievance systems unavailable to detainees, and legislation, such as the First Step Act and the PLRA, "cannot be understood as prohibiting judicial relief while inmates are dying."[185] In *Ross*, the Supreme Court explained that the statutory exhaustion requirement of the PLRA depends on "available" administrative and judicial remedies, defined as "capable of use for the accomplishment of a purpose, and that which is accessible or may be obtained."[186] The statutorily-based procedures may be unavailable "when a grievance procedure is a 'dead end'" or "when 'the facts on the ground' indicate that the grievance procedure provides no possibility of relief."[187] Courts may similarly deem an administrative procedure unavailable when "an administrative scheme . . . [is] so opaque that it becomes, practically speaking, incapable of use," or when "prison administrators thwart inmates

182. Ross v. Blake, 578 U.S. 632, 641 (2016).

183. United States v. Haney, 454 F. Supp. 3d 316, 321 (S.D.N.Y. 2020).

184. *See* Valentine v. Collier, 141 S. Ct. 57 (2020) (Sotomayor, J., joined by Kagan, J., dissenting); Valentine v. Collier, 140 S. Ct. 1598 (2020) (statement of Justice Sotomayor, joined by Justice Ginsburg) (quotation marks and citation omitted).

185. *Valentine*, 141 S. Ct. at 60 (Sotomayor, J., dissenting).

186. *Ross*, 578 U.S. at 642 (internal quotation marks omitted).

187. *Valentine*, 140 S. Ct. at 1600 (citing *Ross*, 578 U.S. at 643).

from taking advantage of it through machination, misrepresentation, or intimidation."[188]

Although the *Ross* Court remanded the lower-court decision for having created an "extra-textual exception" to the requirement, the Supreme Court also noted that the PLRA included a "built-in exception to the exhaustion requirement" through its "availability" caveat.[189] Explaining the importance of the PLRA's history and text, the Supreme Court clarified that "an exhaustion provision with a different text and history . . . might be best read to give judges the leeway to create exceptions or to itself incorporate standard administrative-law exceptions."[190] As the Supreme Court discussed at length, "[t]he text and history of the compassionate release provision's exhaustion requirement are, to state it mildly, different than the PLRA's."[191] An emergency that prevents prison grievance procedures from providing relief should trigger such judicial "leeway."

If an inmate could establish that the fast-spreading pandemic rendered the BOP's procedures incapable of responding, Justice Sotomayor explains, "the procedures may be 'unavailable' to meet the plaintiff's purposes, much in the way they would be if prison officials ignored the grievances entirely."[192] Indeed, on remand from the Fifth Circuit, the *Valentine* district court agreed with Justice Sotomayor and Judge Higginson and ruled exhaustion unnecessary since administrative relief was, practically speaking, unavailable.[193] Given that the prison wardens denied or did not respond to almost 10,000 compassionate release requests in the first three months of the pandemic,[194] inmates raise a strong presumption that the existing infrastructure makes relief unavailable during times of crisis. Justice Sotomayor indicates as much, "caution[ing] that in these unprecedented circumstances, where an inmate faces an imminent risk of harm that the grievance process cannot or does not answer, the PLRA's textual exception could open the courthouse doors where they would

188. *Ross*, 578 U.S. at 643–44.

189. *Id.* at 635–36.

190. *Id.* at 642 n.2.

191. United States v. Morris, No. CR 12-154, 2020 WL 2735651, at *5 (D.D.C. May 24, 2020).

192. *Valentine*, 140 S. Ct. at 1600–01.

193. Valentine v. Collier, No. 4:20-CV-1115, 2020 WL 3491999, at *6 (S.D. Tex. June 27, 2020).

194. Blakinger & Neff, *supra* note 18.

otherwise stay closed."[195] The same legal analysis may apply to the First Step Act's compassionate release provision since it similarly offers protection to inmates who might otherwise suffer while awaiting adjudication.

The First Step Act's compassionate release provision would, under normal circumstances, conserve judicial resources and expedite prisoners' requests. Unfortunately, the opposite is true in times of crisis. As prisoners flee to courts "*en masse* irrespective of the 30-day rule," courts "determined to enforce the waiting period are essentially forced to consider each motion twice."[196] The first judicial consideration would render exhaustion unsatisfied and the second, at most a few weeks later, would finally assess the merits. Some courts have attempted to defer the initial inquiry to the BOP, ordering the agency to reach a conclusion on the underlying petition, only to be rebuffed shortly thereafter.[197] Worse still, delay does not only impact judicial resources. It also increases the risks of coronavirus exposure to prisoners, BOP staff, and visitors.[198] Even if expanding federal court powers to excuse the exhaustion requirement burdened judicial efficiency, "administrative convenience must be balanced against the risk of danger presented by emergency situations."[199]

Expanding judicial discretion directly impacts prison health, and prison health is public health.[200] First, crowded prisons and jails facilitate the

195. *Valentine*, 140 S. Ct. at 1601.

196. United States v. Haney, 454 F. Supp. 3d 316, 321–22 (S.D.N.Y. 2020).

197. *See, e.g.*, Affidavit, United States v. Nkanga, No. 18-cr-713 (JMF), ECF No. 117-1, ¶ 10, 2020 WL 1695417 (S.D.N.Y. Apr. 7, 2020) ("Due to the nature of the review and the volume of incoming requests, the BOP cannot set forth a firm date by which the BOP will reach a decision on Petitioner's pending application.").

198. *See also* United States v. Scparta, No. 18-CR-578 (AJN), 2020 WL 1910481, at *7 (S.D.N.Y. Apr. 20, 2020) ("[The risk that COVID-19 presents] is not just to prisoners—it extends to prison guards and staff . . . . Inmates who are released from prison and prison staff become additional vectors of transmission, increasing COVID-19's community spread." (citation omitted)).

199. *Valentine*, 140 S. Ct. at 1601.

200. *See* Cid Stanfider, *Prisons and Jails Have Become a 'Public Health Threat' During the Pandemic, Advocates Say*, WASH. POST (Nov. 11, 2020, 7:05 PM), https://www.washingtonpost.com/national/coronavirus-outbreaks-prisons/2020/11/11/b8c3a90c-d8d6-11ea-930e-d88518c57dcc_story.html [https://perma.cc/C9VL-5T2J].

spread of the virus, placing inmates, staff, and visitors at risk of infection.[201] Additionally, rate of infection increased in areas with larger imprisoned populations and added "more than a half million cases in just three months" during the summer of 2020.[202] Prison conditions not only maximize the spread of the coronavirus, but they were also associated with earlier reported cases and a larger number of case spikes.[203] Poor testing practices, limited vaccines, and prison overpopulation further ease the spread of the virus into local communities. Judicial discretion in assessing compassionate release petitions thus impacts much more than case-by-case adjudication: it influences the spread of the coronavirus beyond prison walls. Rather than turning away an inmate's petition for failure to wait at most a couple of weeks, a federal judge may look to the largescale repercussions of such a denial and consider the public welfare interests at stake.

B. Equity's Role in Meta-Law

Supreme Court precedent, congressional intent, separation of powers, administrative deference, judicial efficiency, and prison health all weigh in favor of judicially-created equitable exceptions to the compassionate release provision. These rationales, however, are based in law and do not delve into the legal nature of the remedy in question, namely equity. To apply an equitable exception without also examining equity's function would prove unpersuasive at best. Fortunately, equity and its functional separation from law provides additional guidance, similarly supporting the expansion of judicial discretion for purposes of the compassionate release program.

Though the equity-law divide has often fallen to the wayside, forgotten and ignored, it has reemerged, more pertinent than ever and weighing in favor of expanding federal court powers. Equity's main role in law has been to provide a safety valve for those who need it most and which is triggered by bad faith and disproportionate hardship.[204] Operating at a meta-level function and addressing misuse of law, equity reminds judges and

201. Gregory Hooks & Wendy Sawyer, *Mass Incarceration, COVID-19, and Community Spread*, PRISON POL'Y INITIATIVE (Dec. 2020), https://www.prisonpolicy.org/reports/covidspread.html [https://perma.cc/8GTB-L8H8].

202. *Id.*

203. *Id.*

204. Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1081 (2021).

academics alike of its purpose in responding to uncertainty, variability, and opportunism.[205] The three concerns together manifested themselves in the flood of compassionate release requests.[206] Sprinkled throughout the influx of claims, however, lay meritorious petitions detailing preexisting health conditions, extraordinary and compelling circumstances, and coronavirus prison outbreaks. As the BOP focused on addressing prison health and implementing safety protocols, the compassionate release program suffered greater delays and unresponsive administration, further triggering equity's application.

Equity's longstanding history and underlying justifications address these concerns and develop outer bounds for its application. First, equity arose in response to one of law's greatest weaknesses, its generality.[207] The general nature of law is problematic precisely because it cannot easily readjust to unforeseeable circumstances, like the pandemic.[208] The outdated policy statement, worsening prison conditions, statutory history, and congressional intent inspired federal courts to incorporate equitable relief into the compassionate release provision. Noting that "while States and prisons retain discretion in how they respond to health emergencies," Justice Sotomayor advised that "federal courts do have an obligation to ensure that prisons are not deliberately indifferent in the face of danger and health."[209] How might courts distinguish the meritorious claim from the opportunist petitioner? What constitutes an emergency for purposes of crafting equitable exceptions? How might the legal landscape shift in response? The following Part provides some guidance.

205. *Id.*

206. *See, e.g.*, Tim White, *RI Federal Court Flooded with 'Compassionate Release' Requests Amid Pandemic*, WPRI (May 28, 2020, 5:04 PM), https://www.wpri.com/target-12/ri-federal-court-flooded-with-compassionate-release-requests-amid-pandemic [https://perma.cc/47G7-B4JB].

207. Aristotle defined equity (epieikeia) as a correction of "law where law is defective because of its generality." ARISTOTLE, THE NICOMACHEAN ETHICS 112 (Robert C. Bartlett & Susan D. Collins eds., 2011).

208. *See* Smith, *supra* note 204, at 1083, 1100.

209. Valentine v. Collier, 140 S. Ct. 1598, 1599–1600 (2020) (statement of Justice Sotomayor, joined by Justice Ginsburg).

IV. REPERCUSSIONS

Despite the legal rationales in favor of expanding judicial discretion and crafting equitable exceptions in times of crisis, such a position raises concerns of floodgates and opportunism, among others.[210] The aforementioned arguments in favor of equitable exceptions support expanding judicial discretion, but do not address concerns of opportunism, scope, and stakes. The proceeding Part examines each in turn, briefly notes outstanding questions, and concludes.

A. Legal Constraints on Opportunism

Certain federal courts have remained steadfastly opposed to crafting equitable exceptions to the exhaustion requirement, oftentimes citing the statutory text, congressional intent, and federal court powers in support. While those arguments have been discussed at length in Parts II and III, this section turns to outstanding concerns based in opportunism, scope, and stakes. A closer look at these issues, however, does not defeat equity's purpose or develop inapplicable standards. Indeed, many arguments, including those referencing floodgates and function, weigh in favor of equitable exception. Examining the three in turn quiets the remaining discomfort and urges confidence in factfinding courts.

Opportunism, captured as "undesirable behavior that cannot be cost-effectively defined, detected, and deterred by explicit ex ante rulemaking,"[211] flooded court dockets through compassionate release requests. Though "open[ing] the courthouse doors" might naturally concern federal courts,[212] equity's distinct role makes it the first line of defense against opportunism, undetectable *ex ante*. Rather than blurring the existing legal infrastructure, equity's grounding in consensus morality permits it to address the unexpected while standing separate and apart from law.[213] Additionally, opportunism would not substantially increase the number of compassionate release requests, given that they have already flooded court dockets *en masse* absent an established means to excuse

210. These other concerns include differing interpretations of congressional intent, statutory history, separation of powers, and rule of law. Each has been discussed in prior sections, most notably Part III.B.

211. *See* Smith, *supra* note 204, at 1080.

212. *Valentine*, 140 S. Ct. at 1601.

213. *See* Smith, *supra* note 204, at 1135.

exhaustion. Even if opportunism increased the number of claims that reached the courthouse doors, it would ultimately conserve judicial resources, unburden the BOP, and expedite administrative resolutions since requests would no longer first be rejected on procedural grounds to then return for a determination on the merits. Judicially-crafted equitable exceptions would streamline a previously inefficient process, thereby flipping opportunism on its head.

Extending the outer bounds of such judicial discretion should rightly concern courts and academics alike. However, the fact-dependent inquiry should not suggest that the coronavirus pandemic or other similar emergency circumstances would "open the courthouse doors" without guiding principles or limitations. Indeed, Justice Sotomayor deferred to the factual findings of the district court, which she considered well-positioned to assess "whether the prison's system fits in that narrow category" defined by incapable procedures and unavailable remedies.[214] It follows that district courts must conduct a factual inquiry into whether the prison's administration is incapable of providing relief.[215] Even after deeming the exhaustion requirement subject to equitable exception, federal courts have still declined to grant compassionate relief to prisoners whose circumstances are neither extraordinary nor compelling.[216] Expanding judicial discretion in emergency circumstances does not provide blanket relief to all compassionate release requests. It merely allows a factfinder, entrusted with the duty to scrutinize a prison's administration, to consider a defendant's "extraordinary and compelling" circumstances, and any contextual developments.

Finally, the coronavirus pandemic does not limit the stakes of rendering federal courts the gatekeepers of equitable relief. Indeed, Justice Sotomayor highlighted the significance herself, noting that "the stakes could not be higher."[217] Such judicial responsibility extends long past the coronavirus crisis and will influence forthcoming dialogues amongst legislatures, agencies, and courts. Not only does this proposition apply to exhaustion requirements, but it also provides analogous arguments in favor of amending statutes of limitations, deadlines, equitable tolling, and other

214. *Valentine*, 140 S. Ct. at 1601.

215. *See* Maney v. Brown, 464 F. Supp. 3d 1191, 1206 (D. Or. 2020).

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

217. *Valentine*, 140 S. Ct. at 1601.

statutory time cutoffs.[218] Expanding federal court powers to affirmatively excuse administrative procedures also impacts far more agencies than just the BOP.[219] Recently courts found themselves with an opportunity to prevent coronavirus infections and potential fatalities. What tomorrow brings we cannot foresee. But there will be a tomorrow, and in permitting federal courts to proactively assess claims in an efficient and individualized manner, perhaps there will be one less unretractable consequence. Perhaps federal courts might save the next Patrick Jones.[220]

These, of course, are brief defenses in favor of equitable remedies in response to the coronavirus pandemic's impact on the compassionate release program. Academics and philosophers have long engaged in discussions concerning the equity-law divide, detailing both its productive application and its remaining shortcomings.[221] The pandemic has prompted federal judges to waive the exhaustion requirement, "allowing courts to deal with the emergency before it is potentially too late."[222] This Note argues in support of the expansion of that federal court power. Though courts have grounded their analyses in pragmatic functionalism and consensus morality, questions remain unanswered. The following section outlines remnant hesitations, potential solutions, and suggested authorities.

B. Administrative Deference and Separation of Powers

Would permitting federal courts to effectively ignore the plain text and rewrite remedies into the statute contravene separation of powers and rule of law? Some would argue in the affirmative.[223] Indeed, in most cases, it

218. *See* Holland v. Florida, 560 U.S. 631, 645–46 (2010); United States v. Scparta, No. 18-CR-578 (AJN), 2020 WL 1910481, at *6 (S.D.N.Y. Apr. 20, 2020).

219. *See, e.g.*, Mary Kramer, et al., *The Immigration Monkey Wrench*, 44 AUG CHAMP. 34, 41 (2020) (detailing compassionate release actions for non-citizens and navigating Immigration and Customs Enforcement proceedings during the pandemic).

220. *See* Introduction, *supra*, for discussion of Patrick Jones, the first federal inmate to die of coronavirus.

221. *See* Smith, *supra* note 204 (considering how equity's moralizing maxims operate as a safety valve).

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

223. *See, e.g.*, United States v. Smith, 460 F. Supp. 3d 783, 789 (E.D. Ark. 2020); United States v. McIndoo, No. 1:15-CR-00142 EAW, 2020 WL 2201970, at *7 (W.D.N.Y. May 6, 2020).

would. Others have explicitly argued that equity upholds the rule of law through its safety valve functionality which deters opportunism.[224] Given the unprecedented nature of the pandemic and fatal repercussions of infection, courts have cautiously waded into the murky waters of equitable relief with an eye ever watching the legal shoreline. By expanding federal court powers to affirmatively assess compassionate release claims, Congress indicated its interest in increasing judicial discretion and its dissatisfaction with the agency's program administration. The plain text of the compassionate release provision has clearly split courts across the country, prompting them to examine alternative materials and theories to reach a conclusion. Without a voting quorum in the Sentencing Commission, the Sentencing Guidelines and policy statement remain outdated and inapplicable. Now, a year after the virus first appeared in the United States, prisons still battle coronavirus outbreaks,[225] federal courts still create equitable exceptions, and Congress has still remained silent.[226] What shall courts do when faced with future emergencies?

Further, the untraditional nature of the exhaustion requirement favors equitable exceptions based on other canons of statutory interpretation, namely *in pari materia* and the whole code rule. Courts have explicitly noted that the exhaustion requirement is unlike most other timeliness

224. *See* Henry E. Smith, *Property, Equity, and the Rule of Law*, *in* PRIVATE LAW AND THE RULE OF LAW 224, 239–46 (Lisa M. Austin & Dennis Klimchuk eds., 2014); Smith, *supra* note 204, at 1143; *see also* Matthew Harding, *Equity and the Rule of Law*, 132 LAW Q. REV. 278 (2016) (arguing that equity supports the rule of law by contributing to circumstances that lead citizens to respect the law).

225. *See* United States v. Barndt, No. CR 13-72-LPS, 2020 WL 7771038, at *3 (D. Del. Dec. 30, 2020) (noting that from November 30, 2020 to December 30, 2020, active coronavirus infections in a federal prison increased by over 100 cases and "BOP has not mitigated that 'outbreak'").

226. The Supreme Court has endorsed the view that congressional silence on questions of statutory interpretation is probative, likened to "the dog that did not bark" in the night. *See* Chisom v. Roemer, 501 U.S. 380, 396, n. 23 (1991) (citing Arthur Doyle, *Silver Blaze*, *in* THE COMPLETE SHERLOCK HOLMES 335 (1927)). When a textual construction makes "so sweeping and so relatively unorthodox a change," such as the judicially-crafted equitable exceptions to the compassionate release provision, the presumption of acquiescence is strengthened. Harrison v. PPG Industries, Inc., 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting); *see* City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 132 (2005) (Stevens, J., concurring) ("That silence reinforces every other clue that we can glean from the statute's text and structure.").

provisions.[227] In interpreting statutes, courts assume that Congress "legislates across the entire *corpus juris*, such that like provisions are treated *in pari materia* and dissimilar provisions are treated differently."[228] Since the exhaustion requirement functions similarly to other exhaustion regimes, yet contains features of timeliness statutes, courts note that it is "extremely unusual . . . if not unprecedented."[229] Thus, despite the fact that the Supreme Court and circuit courts have rarely permitted equitable exceptions to apply to traditional exhaustion regimes, these same courts often excuse unforgiving statutory deadlines, indicating that similar treatment might well be applicable here.[230]

At first glance it would appear that to expand equitable relief in such a manner would also contravene administrative deference and decrease judicial efficiency; however, these, too, support crafting equitable exceptions to the exhaustion requirement. Due to its expertise and authority over prison administration, the BOP undoubtedly serves an invaluable function to both detainees and courts. Nonetheless, when inundated with thousands of claims and expansive coronavirus outbreaks, the BOP found itself overwhelmed and unable to grant relief, let alone review requests.[231] Even the statute itself weakens administrative agency reliance by quantifying satisfaction with exhaustion or a lapse of 30 days, permitting defendants to affirmatively seek out judicial review before the BOP has reached a decision.[232] Claimed to advance the "twin purposes protecting administrative agency authority and promoting judicial

227. *See* United States v. Scparta, No. 18-CR-578 (AJN), 2020 WL 1910481, at *6 (S.D.N.Y. Apr. 20, 2020); United States v. Russo, 454 F. Supp. 3d 270, 277 (S.D.N.Y. 2020); *Haney*, 454 F. Supp. 3d at 321.

228. *Scparta*, 2020 WL 1910481, at *6.

229. *Russo*, 454 F. Supp. 3d at 277.

230. *See Holland*, 560 U.S. at 649 (applying equitable exception even though text did not permit such an exception); *Paese*, 449 F.3d at 443.

231. Blakinger & Neff, *supra* note 18; *see also* Clare Hymes, *Federal Prison Didn't Isolate Inmates Who Tested Positive for Coronavirus, Report Finds*, CBS (Nov. 12, 2020 7:30 PM), https://www.cbsnews.com/news/federal-prison-coronavirus-outbreak-fci-oakdale [https:perma.cc/BT6Q-8UT4]; Casey Tolan, et al., *Inside the Federal Prison Where Three Out of Every Four Inmates Have Tested Positive for Coronavirus*, CNN (Aug. 8, 2020 8:07 AM), https://www.cnn.com/2020/08/08/us/federal-prison-coronavirus-outbreak-invs/index.html [https://perma.cc/AU8J-E3AX].

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

efficiency,"[233] the compassionate release provision reduces the importance of the former and contradicts the latter.

C. Outstanding Questions

Though these suggestions have found application during the coronavirus pandemic, there remain judicial gray areas in terms of federal powers, equitable relief, and administrative deference. Under which circumstances may federal courts craft equitable exceptions to statutory processing rules? What constitutes an emergency sufficient to trigger equitable relief? Can a judge differentiate emergencies warranting equitable exceptions from those that do not? If Congress were to countermand federal court decisions that waived the exhaustion requirement, would such an override be bound to the compassionate release provision or all judicially-crafted equitable exceptions? Critiques often raise these patterns of questions and legal reasoning when concerns of floodgates, slippery slopes, and opportunism present themselves. However, as is well-known by courts across the country, judicial factfinders have often confronted legal gray areas in which outer bounds might not be so readily distinguishable. The oft-repeated response of "it depends" reflects as much. Legal minds have often wrangled with nuanced balancing tests, sometimes preferring standards over bright-line rules to avoid arbitrary results. The same could be said to weigh in favor of equity. These are questions beyond the scope of this Note and which inherently pervade legal analyses.

Even if judicially-crafted equitable exceptions broadened the scope of federal court powers beyond its limitations, judges would not instruct the BOP to evacuate its facilities and release all prisoners. As this Note has established, many federal courts that have reached the merits of a defendant's compassionate release request despite exhaustion failure have still denied relief.[234] If struck by the number of meritorious claims by federal detainees, courts may also turn to the extensive and persuasive scholarship highlighting the pragmatic benefits of depopulating prisons,[235] advancing alternative theories of carceral reform,[236] and shaping the criminal justice

233. McCarthy v. Madigan, 503 U.S. 140, 145 (1992).

234. *See Haney*, 454 F. Supp. 3d 316; *Russo*, 454 F. Supp. 3d at 279.

235. *See* Nicole Smith Futrell, *Decarcerating New York City: Lessons from a Pandemic*, 48 FORDHAM URB. L.J. 57 (2020).

236. *See* Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587 (2012).

discussion in general.[237] Today, this Note establishes the extensive rationales in favor of judicially-crafted exceptions to the compassionate release provision's exhaustion requirement, triggered by complex and unforeseeable circumstances. These outstanding questions, however, will live to see another day.

CONCLUSION

Over a year has passed since the coronavirus pandemic took the life of the first federal prisoner. Still, neither the Supreme Court nor Congress has directly answered whether federal courts may create equitable relief where it might otherwise be statutorily unavailable. It is precisely this extensive delay in addressing the statute's pressing judicial, administrative, and legislative concerns that weighs in favor of expanding federal courts' adjudicatory powers. Further, the speed and severity with which the virus has infiltrated carceral institutions must be balanced against administrative convenience. Prisoners should not be forced to suffer in wait due to procedural requirements, outdated legislation, or cert denials. In construing the role of federal courts to protect the public welfare and provide remedies under emergency circumstances, courts may ensure that "our country's facilities serve as models rather than cautionary tales."[238] Apart from judicial reforms, however, there may be opportunities for legislative and executive actions to reform the First Step Act's compassionate release program for future emergencies. The two proposals are detailed below in turn.

A. Legislative Reform

Alternatively, congressional action, through the compassionate release provision or emergency-specific legislation, could prevent another crisis from overwhelming courts and prisons alike. Despite enacting responsive legislation during the pandemic, Congress failed to address the

237. *See Decarceration: A Curated Collection of Links*, MARSHALL PROJECT, https://www.themarshallproject.org/records/1094-decarceration [https://perma.cc/72DT-W3P8].

238. Valentine v. Collier, 140 S. Ct. 1598, 1601 (2020) (statement of Justice Sotomayor, joined by Justice Ginsburg).

compassionate release program or improve prison administrative policy.[239] Possible congressional responses might include amending the compassionate release provision or facilitating federal agency revisions, though this last suggestion has proven unsuccessful in the past. More likely than not, however, establishing a prison administration sufficiently effective to withstand crises will require both legislative and executive reforms.

Given the current composition of Congress, federal legislation may prove a viable route for reform. Previously, two bills that proposed compassionate release modifications in the midst of the pandemic never made it out of the Senate Judiciary Committee.[240] Unlike Congress, some state legislatures successfully enacted sentencing reforms. For example, New Jersey established a compassionate release program for certain inmates and repealed the existing medical parole law.[241] Connecticut has recently proposed a bill to modify compassionate release eligibility.[242] The potential for legislative action has improved since the pandemic has largely come under control with the emergence and distribution of vaccines in April 2021; however, the Delta variant still poses significant risks to prison populations, whose access to vaccines remains limited.[243] The continued impact of the crisis demonstrates the importance of swift congressional action and foresight in future emergencies, both of which may be addressed through newly enacted legislation or amending existing statutes.

B. Executive Authority

Reforming BOP procedures may also provide an alternative solution for future crises. However, such a solution seems unlikely to succeed given that BOP's prior failures to improve its compassionate release program

239. *See, e.g.*, Coronavirus Aid, Relief, and Economic Security (CARES) Act, H.R. 748, 116th Cong. (2020) (enacted); Families First Coronavirus Response Act, Pub. L. No. 116-127, div. A, tits. I, IV, V, VI, 134 Stat. 178, 179-80, 181-83 (2020).

240. *See* Emergency GRACE Act, S. 3698, 116th Cong. (2020); COVID–19 Safer Detention Act of 2020, S. 4034, 116th Cong.

241. *See* N.J. REV. STAT. § 30:4-123.51e (2020).

242. *See* S. 1058, 2021 Gen. Assemb., Reg. Sess. (Conn. 2021).

243. *See* Jessica Schulberg, *Delta is Coming for Jails and Prisons, and the System Isn't Ready to Protect the Incarcerated*, HUFFINGTON POST (Aug. 28, 2021, 8:00 AM), https://www.huffpost.com/entry/prisons-and-jails-not-ready-for-delta-variant-covid-19_n_611e8eeee4b0e5b5d8e79c24 [https://perma.cc/XN6W-QHRS].

prompted Congress to expand judicial discretion and limit the agency's authority. Once the BOP's inability to adjudicate petitions became abundantly clear, Congress amended the statute, allowing federal inmates to seek out judicial resolution: "[a]nyone familiar with the multiple demands that the BOP has faced for many years in this era of mass incarceration can reasonably infer that Congress recognized that there would be many cases where the BOP either could not act within 30 days on such a request or, even if it did act, its review would be superficial."[244] Without significant reforms, the Federal BOP will likely continue to be overwhelmed during crises, since "it seems apparent that the BOP . . . struggl[ed] to handle the crisis within its prison population" and lacked "the capacity to timely and effectively consider the flood of compassionate release motions."[245] Academics have taken to legal scholarship to examine BOP's actions throughout the pandemic and propose agency reforms.[246]

Although this Note proposes expanding judicial discretion such that courts may craft equitable exceptions to the First Step Act's exhaustion requirement, such a solution, alone, cannot correct decades of inadequate prison administration or protect the next Patrick Jones from an untimely death. By shining a light on the First Step Act's legislative history and congressional intent to increase compassionate release, this Note highlights the need for collaboration across government branches to improve prison conditions, review inmate petitions, and increase transparency. Since the coronavirus pandemic first appeared in the United States, the American people elected a new president, Congress enacted emergency legislation, and federal courts have crafted responsive case law. As the Delta variant continues to infect prison populations, inmates need judicial, legislative, and executive measures to "open the courthouse doors where they would otherwise" remain shut.[247]

244. United States v. Haney, 454 F. Supp. 3d 316, 321 (S.D.N.Y. 2020).

245. United States v. McIndoo, No. 1:15-CR-00142 EAW, 2020 WL 2201970, at *9 (W.D.N.Y. May 6, 2020).

246. *See* Amy B. Cyphert, *Reprogramming Recidivism: The First Step Act and Algorithmic Prediction of Risk*, 51 SETON HALL L. REV. 331, 343 (2020); Sharon Dolovich, *Mass Incarceration, Meet Covid-19*, 11/16/2020 U. CHI. L. REV. ONLINE 4 (2020); Camila Strassle & Benjamin E. Berkman, *Prisons and Pandemics*, 57 SAN DIEGO L. REV. 1083, 1085 (2020).

247. Valentine v. Collier, 140 S. Ct. 1598, 1601 (2020).