

March 13, 2023

The Honorable Carlton W. Reeves, Chair
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

RE: Public Comment on Proposed Amendment #1, “First Step Act — Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A)”

Dear Judge Reeves,

The Brennan Center for Justice at NYU School of Law welcomes the chance to share our views on the Commission’s proposed amendments to the U.S. Sentencing Guidelines. The Center has carefully monitored implementation of the First Step Act since its passage in 2018. These amendments mark an important new phase of that process.¹

We direct our comments to the Commission’s proposal to add a new subsection, (b)(5), to U.S.S.G. § 1B1.13 (“Proposal (b)(5)”).² The new subsection would clarify that judges may consider whether a prison sentence is “inequitable in light of changes in the law” when evaluating whether “extraordinary and compelling reasons warrant” a reduction under the compassionate release statute, 18 U.S.C. § 3582(c)(1)(A).

We applaud the Commission for proposing this important revision and strongly encourage its adoption. Today hundreds, maybe thousands, of people are “serving sentences that Congress itself views as dramatically longer than necessary or fair.”³ Absent intervention, some will spend decades longer in prison than they would under

¹ See, e.g., Ames Grawert & Patricia Richman, *The First Step Act’s Prison Reforms*, BRENNAN CENTER FOR JUSTICE (2022), <https://www.brennancenter.org/our-work/research-reports/first-step-acts-prison-reforms>; Ames Grawert, *What is the First Step Act — and What’s Happening With It?*, BRENNAN CENTER FOR JUSTICE (June 23, 2020), <https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it>.

² Sentencing Guidelines for United States Courts, 88 Fed. Reg. 7,180, 7,182–84 (proposed Feb. 2, 2023), <https://www.federalregister.gov/documents/2023/02/02/2023-01346/sentencing-guidelines-for-united-states-courts>.

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

current law, perpetuating racial disparities.⁴ Proposal (b)(5) would empower federal courts to remedy these injustices on a case-by-case basis. In addition to reducing unnecessary incarceration, that development would “promote respect for the law” and ensure the “just punishment” of offenses, values that are explicitly part of the Commission’s congressional mandate in setting federal sentencing policy.⁵

Other commenters are better positioned to emphasize how Proposal (b)(5) would affect people and families burdened by excessive, discredited prison terms. We respectfully refer the Commission to their work.⁶ We write, instead, to explain why Proposal (b)(5) is within the Commission’s authority and consistent with public safety.

I. Proposal (b)(5) is Consistent with the History of Compassionate Release and its Statutory Framework.

The Commission considers Proposal (b)(5) against the backdrop of a long-running legal debate. In the absence of policy guidance, courts have spent years weighing whether the compassionate release statute authorizes judges to consider nonretroactive changes in law when evaluating the existence of “extraordinary and compelling reasons” warranting a sentencing reduction.⁷ For the reasons set forth below, we believe the Commission’s proposal properly answers that question in the affirmative.⁸

⁴ See McCoy, 981 F.3d at 285–86 (noting other examples of disparities of a decade or longer); *United States v. Ruvalcaba*, 26 F.4th 14, 15–18 (1st Cir. 2022) (remanding order denying compassionate release, where petitioner claimed that his mandatory life sentence, imposed in 2009, would today be a mandatory 15-year term); *United States v. Ballard*, 552 F. Supp. 3d 461, 467 (S.D.N.Y. 2021) (Rakoff, J.) (quoting *United States v. Haynes*, 456 F. Supp. 3d 496, 517 (E.D.N.Y. 2020) (discussing the “disproportionate use” of since-abrogated 18 U.S.C. § 924(c) “stacking” penalties “against Black men”)).

⁵ See 28 U.S.C. § 994(a)(2) (directing the Commission to issue guidance to “further the purposes set forth in” 18 U.S.C. § 3553(a)(2), including, at § 3553(a)(2)(A), the need for federal sentences “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense”).

⁶ See, e.g., *Compassionate Release: Hearing before the United States Sentencing Commission* (Feb. 23, 2023) (Testimony of Mary Price, General Counsel, FAMM), <https://www.U.S.S.C.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/FAMM.pdf>.

⁷ See, e.g., *Ruvalcaba*, 26 F.4th at 24 (diagnosing a split between the courts of appeals); Ram Subramanian & Ames Grawert, *What Can Federal Courts Do About Extreme, Outdated Sentences?*, BRENNAN CENTER FOR JUSTICE (Feb. 17, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/what-can-federal-courts-do-about-extreme-outdated-sentences> (noting that the circuit split survives the Supreme Court’s decision in *United States v. Concepcion*, 142 S. Ct. 2389 (2022)).

⁸ It is worth noting the precise contours of the circuit split. Four circuits have held that nonretroactive changes “may be considered in connection with other factors” when evaluating a compassionate release motion. See *United States v. Jenkins*, 50 F.4th 1185, 1198 (D.C. Cir. 2022) (citing decisions by the First, Fourth, Ninth, and Tenth Circuits). The Second Circuit also arguably permits these considerations. See *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020) (“the First Step Act freed district courts to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release”).

The History of Compassionate Release

Compassionate release's history and purpose counsel a broad understanding of the statute. Even as it abolished federal parole in 1984, Congress took care to ensure that some avenue for relief would remain in cases where new developments render an otherwise lawful prison term inequitable.⁹

Consistent with that vision, the chief Senate report for what became 18 U.S.C. § 3582(c) described that section as providing “safety valves” to “assure the availability of specific review and reduction of a term of imprisonment.”¹⁰ Elsewhere, the report acknowledged that there would be “unusual cases in which an eventual reduction in the length of a term of imprisonment is justified by changed circumstances.” As examples of such cases, the report listed — in the disjunctive — “severe illness” and “unusually long sentences” presenting “extraordinary and compelling circumstances.”¹¹ Consistent with these remedial purposes, nothing in the statute's development suggests that Congress meant to limit compassionate release to an itemized, narrow list of reasons.¹²

Any discussion of compassionate release must also reckon with Congress's clear desire to make it a more prominent part of the current federal sentencing landscape.¹³ For years, only the federal Bureau of Prisons could petition a federal court for compassionate release, and it rarely did so. The First Step Act changed that by allowing people to file their own motions for compassionate release.¹⁴ Effectively, Congress transformed

⁹ See Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 100 (2019), <http://cardozolawreview.com/second-looks-second-chances/> (surveying the history of compassionate release).

¹⁰ S. REP. NO. 98-225, at 121–22 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3304.

¹¹ S. REP. NO. 98-225, at 55–56. Admittedly this discussion occurred in a response to “the Parole Commission's concerns about its diminished place within the new sentencing regime.” *United States v. McCall*, 56 F.4th 1048, 1065 (6th Cir. 2022) (en banc). But it would be odd for Congress to express this concern in one context and abandon it in another.

¹² The new compassionate release statute replaced a provision that allowed the BOP to move to accelerate a person's parole eligibility. *McCall*, 56 F.4th at 1059 (citing 18 U.S.C. § 4205(g) (repealed 1984)). Notably, the Senate report describes the two provisions as “similar.” S. REP. NO. 98-225, at 121 n.298. It is telling, then, that courts had granted relief under the prior statute based on prison overcrowding or exemplary conduct while incarcerated — factors that were not enumerated in the text of the law itself. Curiously, the *McCall* court recounts this history, but finds it unconvincing, because nothing in that history indicated that the prior statute had “contemplated nonretroactive legal developments.” 56 F.4th at 1059. What is more remarkable is that the compassionate release statute's predecessor appears to have allowed the BOP, and courts, to consider factors beyond health and family circumstances when accelerating parole eligibility.

¹³ The title of the section authorizing prisoner-filed motions proclaims Congress's goal of “increasing the use and transparency of compassionate release.” First Step Act of 2018, Pub. L. No. 115-391, § 603(b), 132 Stat. 5194, 5239 (2018); *United States v. Maumau*, 993 F.3d 821, 824 (10th Cir. 2021) (noting this legislative purpose).

¹⁴ In 2013, the Department of Justice Inspector General revealed that the BOP moved to reduce a sentence under the compassionate release statute at a pace of just 24 cases per year — at a time when the federal prisons held over 200,000 people. U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, I-

compassionate release from an administrative to a primarily judicial remedy, allowing courts to — for the first time — authoritatively and exclusively construe the statute’s terms. Lawmakers cannot have expected courts to replicate the BOP’s understanding of compassionate release, having just faulted the agency for underusing the law.

The Statutory Text

Congress set just one limit in 1984 on the Commission’s authority to define the “extraordinary and compelling reasons” that may merit compassionate release: though judges could consider rehabilitation as one factor among many, “[r]ehabilitation of the defendant alone” would not entitle someone to relief.¹⁵ This explicit exclusion should be understood in its historical context. It reflected Congress’s view, at the time, that rehabilitation was an elusive metric — a pessimistic outlook that the First Step Act arguably abandoned.¹⁶ However outdated that statutory boundary may be, permitting courts to consider current sentencing policy and its underlying rationales as factors in compassionate release does not transgress it.

While Congress has declined to make some recent sentencing reforms retroactive, it has never explicitly barred courts or the Commission from considering those reforms in the compassionate release context. As the Supreme Court recently observed in *United States v. Concepcion*, “Congress is not shy about placing such limits where it deems them appropriate.”¹⁷ Absent those limitations, the Court continued, federal courts enjoy “broad discretion to consider all relevant information at an initial sentencing hearing, consistent with their responsibility to sentence the whole person before them,” an authority that “carries forward to later proceedings that may modify an original sentence.”¹⁸ The *Concepcion* Court reached this conclusion in the context of a different category of

2013-006, THE FEDERAL BUREAU OF PRISONS’ COMPASSIONATE RELEASE PROGRAM, 1 (2013), <https://oig.justice.gov/reports/2013/e1306.pdf>. Nor did the process move fast enough: 81 prisoners died between 2014 and 2018 while awaiting decision. Mike Riggs, *81 Federal Prisoners Have Died While Waiting for the Government to Decide If They Were Sick Enough to Go Home*, REASON (Feb. 13, 2018), <https://reason.com/2018/02/13/81-federal-prisoners-have-died-while-wai/>.

¹⁵ 28 U.S.C. § 994(t); *see also Ballard*, 552 F. Supp. 3d at 468 (weighing rehabilitation as one of several factors demonstrating “extraordinary and compelling reasons” for relief).

¹⁶; S. REP. NO. 98-225, at 38 (“Yet almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated.”). By contrast, the legislative history of the First Step Act indicates renewed congressional faith in and commitment to rehabilitation. *See* 164 CONG. REC. H10346-04 (2018) (statement of Rep. Goodlatte) (praising the First Step Act for “plac[ing] a new focus on rehabilitation”); 164 CONG. REC. S7639-03 (2018) (statement of Sen. Cornyn) (observing that the Act would “allow[] prisons to help criminals transform their lives.”).

¹⁷ 142 S. Ct. at 2400; *see also id.* (“The only limitations on a court’s discretion to consider any relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution.”).

¹⁸ *Concepcion*, 142 S. Ct. at 2398.

resentencing, but the Ninth Circuit wisely found its general guidance informative when construing the compassionate release statute.¹⁹

The absence of further explicit limits on compassionate release is especially telling in the case of the First Step Act. Congress chose not to make the sentencing reforms in Sections 401 and 403 of the Act retroactive as part of a political compromise.²⁰ But that compromise was struck in the same breath as the Act’s path-breaking decision to allow imprisoned people to file their own compassionate release motions. If Congress intended to further limit compassionate release, whether as part of a compromise around Sections 401 and 403 or otherwise, it had every opportunity to do so while it already had pen to paper on 18 U.S.C. § 3582. It did not.

II. Proposal (b)(5) Respects the Separation of Powers.

The Commission’s proposal would permit judges to grant relief from outdated federal penalties on a case-by-case basis, within parameters first specified by Congress and then interpreted by the Commission. Far from creating a conflict between the branches, this design would facilitate the orderly administration of federal law and represents precisely the kind of policy judgment that Congress expected the Commission to make while administering the “shared responsibility” of federal sentencing.²¹

First, there can be no question that Congress properly delegated the authority to define “extraordinary and compelling” reasons to the Commission. In upholding the constitutionality of the Commission itself, the Supreme Court made clear that Congress may “delegate powers under broad standards.”²² Following that precedent, courts have consistently rejected separation-of-powers challenges to the Commission’s work.²³

Similarly, 28 U.S.C. § 994(t), the statute charging the Commission with defining the boundaries of compassionate release, gave the Commission a question to answer and specific parameters within which to operate. That is “sufficiently specific and detailed to

¹⁹ See *United States v. Chen*, 48 F. 4th 1092, 1095 n.3 (9th Cir. 2022) (“while *Concepcion* does not opine on what district courts may consider when assessing extraordinary and compelling reasons under § 3582(c)(1)(A), it does support our conclusion that a district court’s discretion in sentence modifications is limited only by an express statement from Congress.”).

²⁰ *United States v. Andrews*, 480 F. Supp. 3d 669, 681–82 n.13 (E.D. Pa. 2020) (quoting Senators Leahy and Grassley). The *Andrews* court read this compromise in isolation from the rest of the statute, and so concluded, mistakenly in our view, that it counseled *against* considering nonretroactive reforms in compassionate release motions. *Id.* at 680–82.

²¹ *Mistretta v. United States*, 488 U.S. 361, 390 (1989).

²² *Mistretta*, 488 U.S. at 373.

²³ See, e.g., *United States v. Harris*, 688 F.3d 950, 957–58 (8th Cir. 2012) (rejecting nondelegation challenge to U.S.S.G. § 1B1.10, and collecting similar cases). To our knowledge no court has addressed a nondelegation challenge to U.S.S.G. § 1B1.13. See *United States v. Bradford*, 2023 WL 334755, at *5 (11th Cir. Jan. 20, 2023) (declining to address the issue).

meet constitutional requirements.”²⁴ While this mission does empower the Commission to make vitally important determinations about the purpose and utility of federal prison sentences, the Supreme Court has never suggested that agency delegations “may not carry with them the need to exercise judgment on matters of policy.”²⁵

Proposal (b)(5) does not overstep the boundaries of that delegation. As noted above, extending compassionate release to encompass cases where changed sentencing laws render a prison term “inequitable” does not conflict with any explicit act of Congress.²⁶ While the Commission’s proposal would have the effect of giving some people the benefit of sentencing reforms that Congress, for one reason or another, did not make retroactive, it would not authorize that relief systematically — a step that would indeed require congressional action.²⁷ Instead, relief would only extend to those who demonstrate to a federal judge that (1) a change in law has occurred, (2) it renders their sentence “inequitable,” and (3) a reduced sentence is otherwise warranted.²⁸

Such individualized, discretionary relief is the domain of the judiciary, not Congress.²⁹ Additionally, there is no risk that Proposal (b)(5)’s limited exception would swallow the general rule against retroactivity. According to the Commission’s review of data from FY 2020, “courts cited a sentence-related reason as an ‘extraordinary and compelling’ reason in support of a grant for 3.2 percent of” movants.³⁰ Indeed, the most frequently cited sentence-related reason for granting a motion — “multiple 18 U.S.C. § 924(c) penalties,” a practice that produced sentences of such “sheer and unusual length” that they

²⁴ *Mistretta*, 488 U.S. at 374–75.

²⁵ *Mistretta*, 488 U.S. at 378; *see also* *Gundy v. United States*, 139 S. Ct. 2116, 2123, 2129 (2019) (“We have over and over upheld even very broad delegations”).

²⁶ *Cf.* *United States v. Feauto*, 146 F. Supp. 3d 1022, 1039–41 (N.D. Iowa 2015) (Bennett, J.) (finding that the Commission acted *ultra vires* in promulgating a policy statement that had the effect of “nullifying” governing mandatory minimum penalties), *aff’d on other grounds sub nom* *United States v. Koons*, 850 F.3d 973 (8th Cir. 2017), *aff’d* 138 S. Ct. 1783, 1790 (2018).

²⁷ Ram Subramanian & Ames Grawert, *What Can Federal Courts Do About Extreme, Outdated Sentences?*, BRENNAN CENTER FOR JUSTICE (Feb. 17, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/what-can-federal-courts-do-about-extreme-outdated-sentences> (arguing that further congressional action is needed to systematically correct outdated federal sentences).

²⁸ 18 U.S.C. § 3582(c)(1)(A) (requiring that any sentencing reduction be made only “after considering the factors set forth in section 3553(a) to the extent that they are applicable”).

²⁹ “There is a salient ‘difference between automatic vacatur and resentencing of an entire class of sentences’ on the one hand, ‘and allowing for the provision of individual relief in the most grievous cases’ on the other.” *Ruvalcaba*, 26 F.4th at 27 (quoting *McCoy*, 981 F.3d at 286–87).

³⁰ U.S. SENTENCING COMMISSION, COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC 31–33 & fig.17 (2022), https://www.U.S.S.C..gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220310_compassionate-release.pdf.

galvanized backlash from judges and across the political spectrum — was noted as a basis for relief in fewer than 300 cases between FY 2020 and 2022.³¹

To be sure, Proposal (b)(5) represents a break with the Commission’s prior guidance on compassionate release, which focused on health and family circumstances.³² But that history cannot constrain the Commission’s interpretation of the recently expanded compassionate release statute.³³ In authorizing prisoner-filed motions, Congress invited (and arguably required) the Commission to rethink the role of compassionate release in the federal sentencing landscape. Proposal (b)(5) merely accepts that invitation, and it would be strange to let a narrow, abrogated history limit that thinking.

III. The Revised Policy Statement Would Not Jeopardize Public Safety.

The Brennan Center understands and respects the need to ensure that an expanded compassionate release policy remains consistent with public safety.³⁴ However, based on the Center’s years of experience studying crime and recidivism, we do not believe that any increase in compassionate release under Proposal (b)(5) would impact crime rates.

First, in any compassionate release case, judges must explicitly consider the need to “protect the public from further crimes” before granting a motion, and regularly deny relief based on that factor.³⁵ That makes general recidivism statistics an inappropriate way to understand the effects of compassionate release on recidivism.

³¹ *McCoy*, 981 F.3d at 285; *see also Ballard*, 52 F. Supp. 3d at 467 (criticizing 924(c) “stacking”); “*Unjust, Cruel, and Even Irrational*”: *Stacking Charges under 924(c)*, FREEDOMWORKS (Jan. 29, 2018) (demonstrating broad political support for later amendments to 18 U.S.C. § 924(c)). U.S. SENTENCING COMMISSION, COMPASSIONATE RELEASE DATA REPORT: FISCAL YEARS 2020 TO 2022, tbls. 10, 12, 14 (2022), <https://www.U.S.S.C..gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20221219-Compassionate-Release.pdf>.

³² *See McCall*, 56 F.4th at 1059–60.

³³ Relatedly, the Supreme Court has recently expressed skepticism of agencies using old statutes to innovative, new ends. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2609–10 (2022); *NFIB v. OSHA*, 142 S. Ct. 661, 666 (2022) (per curiam) (“It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind”). But those concerns do not arise where, as here, Congress itself recently expanded the statute being construed.

³⁴ At least one commenter raised this issue explicitly at the recent hearing. *See Compassionate Release: Hearing before the United States Sentencing Commission* (Feb. 23, 2023) (testimony of Chief Kathy Lester, Major City Chiefs Association), <https://www.U.S.S.C..gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20230223-24/MCC.pdf> (noting elevated national crime rates and theorizing, by analogy to an unnamed jurisdiction, the impact of expanded early release). For more context on recent crime trends and a review of the best available research on the subject, *see Ames Grawert & Noah Kim, Myths and Realities: Understanding Recent Trends in Violent Crime*, BRENNAN CENTER FOR JUSTICE (July 12, 2022), <https://www.brennancenter.org/our-work/research-reports/myths-and-realities-understanding-recent-trends-violent-crime>.

³⁵ 18 U.S.C. § 3582(c)(1)(A) (incorporating 18 U.S.C. § 3553(a) factors); *see also, e.g., Ballard*, 552 F. Supp. 3d at 469–70 (weighing public safety and recidivism research before granting motion for

Research on a better point of comparison — targeted early release mechanisms — shows instead that the people who benefit from them have relatively low rates of recidivism. From late March 2020 through late July 2022, for example, the federal Bureau of Prisons transferred approximately 11,043 people from prison to home confinement. As of August 1, 2022, just 425 had been returned to prison, and only 17 had been returned to custody “based on committing an additional criminal offense.”³⁶ Turning to the courts, so far 135 people have left prison under Washington, D.C.’s Incarceration Reduction Amendment Act, a “second look” statute that allows judges to release people who were sentenced while youths or young adults after they have served 15 years in prison. According to the U.S. Attorney’s Office, just 16 have since been “rearrested” — a broad term that could encompass technical violations of supervision and charges that ultimately end in acquittal.³⁷ Indeed, practitioners are aware of only *two* rearrests involving allegations of physical violence.³⁸ Both statistics compare favorably with overall federal recidivism rates, which hover between 18 and 40 percent over the same time periods.³⁹

Similarly, there is little to no evidence that even broad retroactive application of changes in federal sentencing law leads to higher recidivism rates. The Commission’s own research shows that people released from federal prison through retroactive application of the “Drugs Minus Two” sentencing guidelines amendment were no more likely to be

compassionate release). Between FY 2020 and 2022, judges cited “protection of the public” thousands of times in denying motions for compassionate release. U.S.S.C., COMPASSIONATE RELEASE DATA REPORT: FISCAL YEARS 2020 TO 2022, tbls. 11, 13, 15.

³⁶ Email from Brad Korten, Senior Policy Advisor, Office of Rep. Bonnie Watson Coleman, to author (Oct. 31, 2022 12:09 EST) (on file with author).

³⁷ We are aware of no official report tracking the recidivism rate of those released under D.C.’s “second look” statute. The best, most recent information comes from statistics provided to a journalist covering a hearing on a resentencing motion. Keith L. Alexander, *Man Who Raped Three Women when He Was 16 Seeks Early Release from Prison*, WASHINGTON POST (Feb. 1, 2023), <https://www.washingtonpost.com/dc-md-va/2023/02/01/joshua-haggins-rape-abduction-early-release/> (“So far, D.C. judges have ordered the release of 135 people under the law, and 16 have been rearrested, according to data from the Office of the U.S. Attorney for the District of Columbia.”).

³⁸ Email from James Zeigler, Co-Executive Director and Attorney, Second Look Project, to author (Mar. 3, 2023 10:28 EST) (on file with author).

³⁹ Recidivism is generally defined as rearrest, reconviction, or reincarceration with a stated timeframe — often, three years. See Dana Goldstein, *The Misleading Math of Recidivism*, THE MARSHALL PROJECT (Dec. 4, 2014), <https://www.themarshallproject.org/2014/12/04/the-misleading-math-of-recidivism>. Because these 135 IRAA releases could have occurred at any time since the law’s enactment (2017) or its expansion (2021), it is difficult to compare them directly to overall federal recidivism rates. See Press Release, American University, SPA Professor Secures Release of Prisoner After 27 Years Under D.C.’s Second Look Act (Jan. 21, 2022), <https://www.american.edu/spa/news/second-look-act-release.cfm> (noting effective dates of both laws). However, 16 rearrests out of 135 releases suggests a roughly 12 percent rearrest rate among IRAA releases, lower than most if not all points of comparison in the federal system. See U.S. SENTENCING COMMISSION, RECIDIVISM OF FEDERAL OFFENDERS RELEASED IN 2010 21 (2021), https://www.U.S.S.C.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210930_Recidivism.pdf (indicating a one-year recidivism rate of 18.2 percent for federal releasees, and a three-year rate of 35.4 percent).

rearrested, reconvicted, or violate the terms of their release than statistically comparable people who served their full term of incarceration.⁴⁰

Lastly, the demographics of likely compassionate release beneficiaries point to a lower-than-average recidivism risk. From FY 2020 through FY 2022, the average compassionate release beneficiary was 50 years old.⁴¹ Generally, “older offenders” — defined as people 50 years of age or older at the time they are sentenced — are less than half as likely to be rearrested after release (21.3%) as those under the age of 50 (53.4%).⁴² Even if we assume the revised policy statement would shift the average age at release below 50, beneficiaries would likely continue to skew older — and present a lower risk — than others leaving federal custody.⁴³

Expanded options for early release need not come at the expense of public safety. That is especially so where, as Proposal (b)(5) contemplates, relief would be discretionary, individualized, and disproportionately granted to people with a lower risk profile.

⁴⁰ U.S.S.G., App. C, amend. 782 (effective Nov. 1, 2014); U.S.S.G. App. C, amend. 788 (effective Nov. 1, 2014) (making Amendment 782 retroactive). *See also* U.S. SENTENCING COMMISSION, RETROACTIVITY & RECIDIVISM: THE DRUGS MINUS TWO AMENDMENT 6–11 (2020), https://www.U.S.S.C..gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf.

⁴¹ U.S.S.C., COMPASSIONATE RELEASE DATA REPORT: FISCAL YEARS 2020 TO 2022, tbl. 6.

⁴² U.S. SENTENCING COMMISSION, OLDER OFFENDERS IN THE FEDERAL SYSTEM 1, 41–44 (2022), https://www.U.S.S.C..gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220726_Older-Offenders.pdf. Even these recidivism statistics are overstated, as they focus on the percentage of people who have been rearrested. “[A]rrest is a poor proxy for criminal activity, as it may reflect policing decisions . . . rather than actual criminality.” Ames Grawert & Patricia Richman, *The First Step Act’s Prison Reforms*, BRENNAN CENTER FOR JUSTICE, 4 (2022), <https://www.brennancenter.org/our-work/research-reports/first-step-acts-prison-reforms>.

⁴³ U.S.S.C., RECIDIVISM OF FEDERAL OFFENDERS RELEASED IN 2010, at 24–25 & fig.12, (demonstrating a sharp decline in recidivism as age at release increases); U.S. SENTENCING COMMISSION, RECIDIVISM OF FEDERAL DRUG TRAFFICKING OFFENDERS RELEASED IN 2010 28–29 (2022), https://www.U.S.S.C..gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220726_Older-Offenders.pdf.

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This amendment cycle represents the Commission's first opportunity to affirm the reach of the First Step Act and advance its broad remedial purpose. Proposal (b)(5) would do just that, while remaining consistent with congressional intent and public safety. We encourage the Commission to adopt it as written.

Sincerely,

Ames C. Grawert
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Ram Subramanian
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