

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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DANIEL RUTHERFORD, )  
                                Petitioner, )  
                                v. ) No. 24-820  
UNITED STATES, )  
                                Respondent. )

- - - - -  
JOHNNIE MARKEL CARTER, )  
                                Petitioner, )  
                                v. ) No. 24-860  
UNITED STATES, )  
                                Respondent. )

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1 APPEARANCES:

2 DAVID C. FREDERICK, ESQUIRE, Washington, D.C.; on  
3 behalf of the Petitioner in Case 24-820.

4 DAVID A. O'NEIL, ESQUIRE, Washington, D.C.; on behalf  
5 of the Petitioner in Case 24-860.

6 ERIC J. FEIGIN, Deputy Solicitor General, Department  
7 of Justice, Washington, D.C.; on behalf of the  
8 Respondent.

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1 P R O C E E D I N G S

2 (11:27 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next in Case 24-820, Rutherford versus  
5 United States, and the consolidated case.

6 Mr. Frederick.

7 ORAL ARGUMENT OF DAVID C. FREDERICK  
8 ON BEHALF OF THE PETITIONER IN CASE 24-820

9 MR. FREDERICK: Thank you, Mr. Chief  
10 Justice, and may it please the Court:

11 The 1984 Sentencing Reform Act  
12 confirmed that district courts have broad  
13 discretion to consider relevant information in  
14 imposing and modifying criminal sentences.  
15 Section 994(t) limits only one category of  
16 information in compassionate release cases,  
17 rehabilitation alone. Section 3661 otherwise  
18 imposes "no limitation on the information a  
19 court may receive and consider during  
20 sentencing."

21 The Third Circuit, however, imposed a  
22 judicial limitation on compassionate release.  
23 It precluded district courts from considering a  
24 change in law that prospectively lowers  
25 sentences for offenses like Mr. Rutherford's as

1 one fact in the total mix of information for  
2 sentence modifications.

3 That categorical limitation should be  
4 reversed. The government concedes that age and  
5 illness are ordinary circumstances for inmates.  
6 Yet, when combined with other factors, age and  
7 illness may be extraordinary and compelling in  
8 appropriate situations.

9 Whether a change of law is ordinary,  
10 therefore, should not matter. Congress did not  
11 expressly limit that as a factor in considering  
12 modification of extremely long sentences. The  
13 Court should reject the government's contention  
14 that the 2018 First Step Act impliedly repealed  
15 the many provisions of the 1984 Act conferring  
16 broad discretion on district courts.

17 I welcome the Court's questions.

18 JUSTICE THOMAS: Mr. Frederick,  
19 Congress -- it was Congress's choice not to  
20 make this retroactive, and it would seem rather  
21 odd that you would want to use that decision as  
22 a basis or a compelling reason to reduce a  
23 sentence that results from the prospective  
24 nature of the law.

25 MR. FREDERICK: What Congress did in

1 Section 403(b) of the First Step Act, Justice  
2 Thomas, was to apply it to pending cases. But  
3 Congress did not speak to the question of how  
4 that rule might apply in the 3582 situation.

5 So Congress was silent with respect to  
6 that. It was, as I acknowledge, with respect  
7 to pending cases, a narrowed rule about limited  
8 retroactivity. But that just means that  
9 Congress was leaving to the individual  
10 decision-making process in these compassionate  
11 release cases up to the discretion of the judge  
12 looking at the totality of the circumstances  
13 whether or not the length and duration of a  
14 sentence and the disparity might be a relevant  
15 circumstance for that particular inmate.

16 I want to point out that the  
17 government's principle here is an atextual one  
18 as it came up in the previous argument. Its  
19 idea about personal circumstances is nowhere  
20 found in the statute, and the idea of  
21 extraordinary and compelling depends on the  
22 changed circumstances that arise after the  
23 person has been sentenced.

24 Justice Kavanaugh, in the earlier  
25 case, you inquired about the Sentencing

1 Commission. And I want our position to be very  
2 clear about this. The Commission has spoken to  
3 the situation that is in Mr. Rutherford and  
4 Mr. Carter's cases.

5 If the Commission reversed its course  
6 and took those changes of law that are  
7 prospective for unusually long sentences, we  
8 would have to respect that decision because  
9 Congress said that for a compassionate release  
10 motion, it had to be done consistent with the  
11 Commission's policy statements.

12 So, under your hypothetical as you  
13 posed it in the previous case, we win our case.  
14 We could lose if the Commission were to change  
15 its position.

16 JUSTICE KAVANAUGH: You win if Justice  
17 Thomas's point, though, doesn't make the  
18 Commission's judgment inconsistent with the  
19 statute. You have an answer to that, but  
20 there's an "if," I think, that goes after what  
21 you just said.

22 MR. FREDERICK: And I'm happy to  
23 provide that answer, which is that Congress  
24 didn't intend to take the Commission's  
25 discretion away, why -- when it never addressed



1 the issue of how compassionate release motions  
2 should be treated in this gun situation when  
3 they're taking the stacking away.

4 And it certainly has a profound effect  
5 on the one issue we know Congress wanted in  
6 compassionate release cases to be considered,  
7 length of sentence. The whole idea of  
8 compassion, obviously, is to bring compassion  
9 by lowering the amount of time that a person is  
10 incarcerated.

11 And so it makes logical sense that if  
12 you're going to consider any legal change, it  
13 would be one where society has demonstrated a  
14 will to decrease the amount of incarceration  
15 time for persons who might be subject to that  
16 kind of principle.

17 And that makes sense for the totality  
18 of the circumstances that a district court  
19 would be obliged to take into account in  
20 looking at the other individual circumstances  
21 that are relevant for the person.

22 Mr. Chief Justice, you raised the  
23 question about kind of a floodgate of problems,  
24 but let me address that by saying the -- are  
25 three institutions that are relevant here.

1     There's obviously the Sentencing Commission,  
2     which takes into account data and looks at real  
3     cases. There are district courts that are  
4     entrusted with dealing with these kinds of  
5     factual matters all the time. And then there  
6     is appellate review under an abuse of  
7     discretion standard.

8             Appellate courts have exercised the  
9     reversal power under abuse of discretion where  
10    district courts have gone too far. And I would  
11    point the Court to a Sixth Circuit case called  
12    United States versus Bass, in which the Sixth  
13    Circuit said the district court had gone too  
14    far in the post-COVID situation because it  
15    allowed for the reduction of a sentence of  
16    someone who had been committed to life  
17    imprisonment for committing several murders and  
18    involved in conspiracy for other violent acts,  
19    and the Sixth Circuit said that was an abuse of  
20    discretion.

21            So our view is that although there may  
22    be some motions filed, and in the fiscal year  
23    2025, approximately 2,000 motions for  
24    compassionate release were filed, only 56 were  
25    granted under this (b)(6) provision. That

1     statistic is in the clinical law professors'  
2     brief at page 17.

3             JUSTICE BARRETT:  And is that because  
4     you think the compassionate release provision  
5     would not permit -- or would not make you  
6     eligible for a sentence reduction if this First  
7     Step Act disparity was the only basis?  Like,  
8     here, your client also alleged the COVID-19 and  
9     hypertension and obesity.

10            Is it the plus factors that then would  
11    prevent it from becoming a huge loophole?

12            MR. FREDERICK:  Justice Barrett, these  
13    are always combination of factors.  No one  
14    factor, I think, arises to the level that it  
15    would by itself be extraordinary and compelling  
16    because the word "reasons" is in the statute.  
17    So it's got to be multiple reasons.

18            Our client, of course, as you noted,  
19    had a very good rehabilitation record, has  
20    health issues, has family circumstances where  
21    his earlier release would enable him to help  
22    find and provide for his deceased sister's  
23    children.  So these are the kinds of  
24    circumstances that a judge reasonably would  
25    take into account.

1 JUSTICE BARRETT: Could a judge, let's  
2 say, before the First Step Act was enacted, say  
3 that in my judgment, I really feel like these  
4 are excessively long sentences, and treat that  
5 like the judge's -- let's just say it's  
6 disquiet about the legal penalty that Congress  
7 has chosen to impose? Would that be an  
8 extraordinary and compelling reason, or is it  
9 only the subsequent change?

10 MR. FREDERICK: Length of sentence is  
11 a change -- is a factor, and it always has been  
12 a factor. And we know that because the Diaco  
13 case, the Bureau of Prisons, represented by the  
14 Department of Justice, came to court and said  
15 the long sentence should be reduced because of  
16 these disparate circumstances.

17 The Senate --

18 JUSTICE BARRETT: Well, no, no, no.  
19 I'm just saying just based on the judge's  
20 disagreement, you know, the -- the judge's  
21 disagreement with the length of sentence that  
22 Congress chose to impose as a mandatory  
23 minimum.

24 MR. FREDERICK: Mandatory minimums  
25 have long been thought to fall within the rule

1 of compassionate release. So has life  
2 imprisonment for that matter.

3 And the Department of Justice agrees  
4 with that observation; filed a brief a couple  
5 of months ago in the Sixth Circuit in a case  
6 called Stricker in which it took that position.  
7 So that is not an unusual feature of how  
8 compassionate release works.

9 And that makes sense --

10 JUSTICE SOTOMAYOR: Mr. Frederick, I'm  
11 hearing Justice Barrett's question differently,  
12 and she'll correct me if I'm wrong.

13 I think her question is, standing  
14 alone, could a judge use their unhappiness with  
15 mandatory minimums to grant compassionate  
16 release?

17 MR. FREDERICK: That would be, I  
18 think, an abuse of discretion because the  
19 mandatory minimums set forth by statute  
20 indicates what Congress's judgment is.

21 The extraordinary and compelling  
22 reasons are almost always plural. And, in  
23 fact, the form that --

24 JUSTICE BARRETT: But, even if it  
25 weren't plural, could the judge take disquiet

1 or disagreement with the statutory scheme  
2 prescribed by the statute as one of the  
3 reasons?

4 MR. FREDERICK: Certainly, the judge,  
5 in looking at the range of factors, would take  
6 into account that person's experience in  
7 looking at like cases to determine whether  
8 there was --

9 JUSTICE BARRETT: I'm just saying  
10 disagreement. You keep going to disparity.  
11 I'm just saying just disagreement, I think  
12 Congress has been too harsh here.

13 MR. FREDERICK: I think Cong- -- a  
14 judge is certainly not within his or her  
15 discretion to disagree with an act of Congress.

16 JUSTICE BARRETT: Okay.

17 MR. FREDERICK: Where I think the  
18 judges have addressed this particular issue and  
19 where the Sentencing Commission addressed this  
20 particular issue was to say that in the total  
21 mix of circumstances and information, it could  
22 be a factor.

23 And it is certainly a factor that we  
24 would want to take into account because the  
25 whole idea behind this provision was as a

1 safety valve against unusually harsh and long  
2 sentences. The length of sentence is the key  
3 fact in all of these situations.

4 JUSTICE ALITO: Mr. Frederick, I'm not  
5 sure I understood your -- your answer to  
6 Justice Barrett.

7 Is it a permissible factor for a judge  
8 to include in -- in the determination a -- a  
9 disapproval of the -- of -- of the mandatory  
10 minimum?

11 MR. FREDERICK: A judge would be  
12 committing an abuse of discretion to disagree  
13 with a policy judgment made by Congress.  
14 However, a judge would also be within his or  
15 her discretion to say that for this particular  
16 inmate, given the circumstances here, this  
17 minimum would be subject to compassionate  
18 release.

19 JUSTICE ALITO: I don't quite see the  
20 difference between those two things.

21 MR. FREDERICK: Well, the difference,  
22 Your Honor, is that we're looking at the  
23 totality of the circumstances, the person's  
24 age, how much time the person served, whether  
25 the person has health issues, the range of

1 rehabilitation, and other family circumstances.

2 And the Court could very well say, you  
3 know, this mandatory minimum is too harsh, and  
4 because of all these other factors --

5 JUSTICE ALITO: So the -- the answer  
6 is that it can be considered. Disapproval of  
7 mandatory minimums across the board can be  
8 considered in a particular case if there is  
9 something else?

10 MR. FREDERICK: I think that the --  
11 part of where I'm going to challenge your  
12 question's premise a little bit, Justice Alito,  
13 if I might, is where you say "in all  
14 circumstances," because the judge is always  
15 looking at the one case before --

16 JUSTICE ALITO: Okay. So the judge --  
17 there's a case where the mandatory minimum is  
18 10 years, and the judge says, I know that's the  
19 mandatory minimum for -- for the -- the run of  
20 cases, but, in this particular case, I think  
21 for a variety of reasons having to do -- that  
22 that's too long. That's okay?

23 MR. FREDERICK: Well, if your question  
24 is about original sentencing, I think that's  
25 different than --



1 JUSTICE ALITO: No. On -- on this  
2 motion.

3 MR. FREDERICK: On modification?

4 JUSTICE ALITO: On this modification.

5 MR. FREDERICK: If, under your  
6 hypothetical, the person is 75 years old, has a  
7 life-threatening disease, and the court says,  
8 you know, this mandatory minimum is pretty  
9 harsh, and the BOP is likely to be coming  
10 back here to say we don't have the medical  
11 facilities to deal with that person, it is not  
12 an abuse of discretion for the court to say, in  
13 this particular circumstance, that mandatory  
14 minimum is too harsh.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Justice Thomas?

18 Well, just to continue the line of  
19 questioning briefly, well, you really shouldn't  
20 call it a mandatory minimum then. You probably  
21 should call it something like the presumptive  
22 minimum depending upon subsequent developments.

23 MR. FREDERICK: Well, it's not for me  
24 to offer up words to Congress that Congress  
25 wrote in its statutes, Mr. Chief Justice.

1           What I would say, that as a practical  
2   matter, compassionate release is the rare  
3   circumstance, whereas a safety valve, the Court  
4   takes into account the total mix of information  
5   in determining whether and a downward  
6   adjustment in the length of time that the  
7   person incarcerated should serve.

8           CHIEF JUSTICE ROBERTS: Well, in  
9   second-guessing the judgment of Congress?

10          MR. FREDERICK: Well, Congress also  
11   has -- has delegated this authority to the  
12   Sentencing Commission. And the Sentencing  
13   Commission has issued policy statements that  
14   speak to this very question that's at issue  
15   in our case. And district courts have  
16   exercised their discretion in compassionate  
17   release cases to deal with the mandatory  
18   minimum concept.

19          CHIEF JUSTICE ROBERTS: Thank you,  
20   counsel.

21          MR. FREDERICK: And so there's law on  
22   this.

23          CHIEF JUSTICE ROBERTS: Justice Alito,  
24   anything further?

25          JUSTICE ALITO: If -- if disquiet

1     about the mandatory minimum is a permissible  
2     factor so long as it's linked with something  
3     else, do you think there are going to be a lot  
4     of cases in which defense attorneys are -- are  
5     going to be totally unable to come up with some  
6     other thing to link to it?

7             MR. FREDERICK: Well, Justice Alito, I  
8     would say that we do have experience with this  
9     question, that the Bureau of Prisons does have  
10    a form that the prisoner has to fill out and go  
11    through an administrative exhaustion procedure  
12    before even going to court and that those  
13    factors are baked into the facts before,  
14    typically, a lawyer even gets involved in  
15    filing a motion for compassionate release in  
16    the district court. And district courts are  
17    free and have denied 85 percent of these  
18    motions.

19            CHIEF JUSTICE ROBERTS: Justice  
20    Sotomayor?

21            JUSTICE SOTOMAYOR: You presented your  
22    argument slightly different than Mr. Carter's  
23    attorney, but I don't want to move away from  
24    the fundamental question here, which is this --  
25    your client's situation is consonant with the

1 Sentencing Commission's policy statement,  
2 correct?

3 MR. FREDERICK: Yes.

4 JUSTICE SOTOMAYOR: And so we would  
5 have to find that the Sentencing Commission  
6 exceeded or violated the statute.

7 Why don't we deal with that, because  
8 they're not saying disagreement with the  
9 mandatory minimum is enough to get a change.  
10 They're putting other qualifications.

11 Why do those qualifications count as  
12 individual?

13 MR. FREDERICK: Because they're  
14 extratextual. The Congress made very clear in  
15 the 1984 Act, and that's why I would urge the  
16 Court to consider the intent of the 1984  
17 Congress, which delegated this authority to a  
18 new creation, the Sentencing Commission, and it  
19 said: We want the Commission to come up with  
20 an explanation for the extraordinary and  
21 compelling reasons that would underlie the  
22 inmate's compassionate release motion.

23 And the Commission, after some period  
24 of time, has done that. We now have a policy  
25 statement. That policy statement is consistent

1 with our position.

2 The extraordinary and compelling  
3 reasons do not have to be tied solely to the  
4 personal circumstances, although how long a  
5 person is being incarcerated is a personal  
6 circumstance --

7 JUSTICE SOTOMAYOR: Exactly.

8 MR. FREDERICK: -- for anybody who  
9 thinks about it.

10 And so the -- the Commission's role  
11 here is to interpret those words. It has done  
12 so. Our case fits within those structures  
13 within the Commission's policy statement.

14 JUSTICE SOTOMAYOR: And why is it not  
15 a violation of the statute?

16 MR. FREDERICK: It's not a violation  
17 of the statute --

18 JUSTICE SOTOMAYOR: The government  
19 says it is basically.

20 MR. FREDERICK: Well, we'll hear more,  
21 I'm sure, about why the government thinks that.  
22 But it is not a violation of the statute  
23 because Congress made this delegation to the  
24 Commission. It entrusted an expert agency, if  
25 you will, designed to collect information, talk

1 to stakeholders, get district court input,  
2 et cetera, and render a policy statement.

3 And, in fact, the -- the Commission's  
4 work here is a little bit narrower than if you  
5 were to take just simply the plain language of  
6 extraordinary and compelling and those words by  
7 themselves.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?

9 JUSTICE KAGAN: Mr. Frederick, if your  
10 position were accepted, would the inquiry in a  
11 case like yours look pretty similar to the  
12 compassionate release inquiry in a crack  
13 cocaine case, where there is consideration of  
14 the change in law that occurred in that area?

15 MR. FREDERICK: Not necessarily, and  
16 the reason is that in the crack cocaine  
17 context, there was a retroactive application in  
18 a categorical context, and we know what that  
19 did to the system because the federal defenders  
20 and prosecutors had to get together to design  
21 mechanisms for informing district courts about  
22 how to deal with that.

23 Here, because we're dealing with a  
24 changed circumstance for the gun offense, we're  
25 typically dealing with inmates who have a

1     proclivity to do violence, likely did do  
2     violence in prison, violated their  
3     rehabilitation terms and other terms of  
4     incarceration, and so their individual  
5     circumstances, when viewed from the total mix,  
6     are almost certainly going to be different in  
7     most of these cases.

8             JUSTICE KAGAN:   Thank you.

9             CHIEF JUSTICE ROBERTS:   Justice  
10    Gorsuch?

11            JUSTICE GORSUCH:   Mr. Frederick, I  
12    want your help with what the Sentencing  
13    Commission has said.   Put aside whether it can  
14    say it.

15            It said that you should assume a  
16    change in law applies retroactively when  
17    Congress changes a law, but it says you cannot  
18    make that assumption with respect to our work  
19    in the Sentencing Guidelines unless we say so  
20    expressly.   That seems to have things a little  
21    bit backwards, doesn't it?

22            MR. FREDERICK:   Justice Gorsuch, I  
23    would say that there are inconsistencies  
24    throughout this particular area of law that  
25    create conundrums for district courts to have

1 to grapple with.

2 JUSTICE GORSUCH: Well, this is a  
3 conundrum for us, I think.

4 MR. FREDERICK: I appreciate that, but  
5 what I would say is that in the particular  
6 circumstance that we have here, we are not  
7 talking about a retroactive application in any  
8 kind of guise. You can reserve on that  
9 question and say whatever the Commission --

10 JUSTICE GORSUCH: You want us to look  
11 at a change in law and assume Congress wanted  
12 us to do that --

13 MR. FREDERICK: Well --

14 JUSTICE GORSUCH: -- right? And --  
15 and -- and the Commission's saying, yeah, go  
16 ahead and do that, but don't do it when -- with  
17 respect to our work. And that seems rather  
18 disrespectful of Congress's work and rather  
19 solicitous to its own.

20 MR. FREDERICK: What I would say in  
21 the compassionate release circumstance and that  
22 is different than the -- or normal application  
23 of the Sentencing Guidelines, which are  
24 guidance to district courts in doing their  
25 sentences, and the reason why the Commission



1 would apply a rule about non-retroactivity in  
2 the initial sentencing is that it really will  
3 roil pending cases in a manner that would  
4 create more administrative burden.

5 Our proposal here for compassionate  
6 release doesn't do that.

7 JUSTICE GORSUCH: Well, that --  
8 that -- that gets back to all the questions  
9 we've already had about whether or not this  
10 opens up floodgates. And I guess I'm -- I'm  
11 less concerned about that than -- than, again,  
12 just the solicitude that the Commission shows  
13 to its own work but not Congress, and if you  
14 could address that.

15 MR. FREDERICK: I'm not here,  
16 obviously, representing the Commission, but  
17 what I would say is that there are  
18 administrative reasons why the Commission would  
19 determine that changes in its own guidelines or  
20 policy statements would create more uncertainty  
21 in application than where you were to take an  
22 idea that with someone incarcerated like  
23 Mr. Rutherford for 42-and-a-half years for a  
24 sentence that should be 18 years less, you  
25 might come to a different conclusion.

1 JUSTICE GORSUCH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Kavanaugh?

4 JUSTICE KAVANAUGH: Just to pick up on  
5 that and Justice Thomas's original question  
6 because the separation-of-powers issue concerns  
7 me here a bit, which is the First Step Act was  
8 obviously heavily negotiated and very  
9 carefully, a lot of back-and-forth on that, and  
10 retroactivity is, of course, always a key  
11 element in the negotiations, as it was here  
12 when you are making a change in the criminal  
13 justice and criminal sentencing laws, and so  
14 Congress specifically, I think, says this is  
15 not going to be retroactive to those cases  
16 where sentences have already been imposed.

17 And then the Commission, though, then  
18 comes in and says we're now going to give a  
19 second look for district judges to revisit  
20 those sentences even though Congress in those  
21 sentences did not want them made retroactive.  
22 And that seems to be -- obviously, the  
23 Commission was very divided on this question.  
24 And the -- you know, the Commission dissenters  
25 said this is a seismic structural change to our

1 criminal justice system that countermands  
2 Congress's judgment.

3 And that's my concern on this case,  
4 and I just want to give you an opportunity  
5 again to summarize why you don't think the  
6 Commission, by doing this, has kind of  
7 countermanded Congress.

8 MR. FREDERICK: There -- there is  
9 certainly a huge difference between a  
10 categorical application of the rule, which we  
11 know from the crack and -- and powder cocaine  
12 context, and a more limited case-by-case  
13 totality of the circumstances inquiry where you  
14 look at the effect of the stacking of the gun  
15 charges on the length of incarceration.

16 And I think it's reasonable to suppose  
17 that in the context where you're dealing with a  
18 categorical change that has a very large  
19 systemic effect -- and -- and amicus briefs on  
20 our side point to all the steps that had to be  
21 taken -- none of those have been taken and need  
22 to be taken in the 924(c) context.

23 And the reason for that, Justice  
24 Kavanaugh, is that we're looking and we're  
25 trusting district judges to look at this on a

1 case-by-case basis to decide whether or not a  
2 sentence reduction is warranted in light of the  
3 totality of the circumstances.

4 That kind of inquiry is some --

5 JUSTICE KAVANAUGH: Do the disparities  
6 there worry you? Some district judges are  
7 going to treat this wildly differently than  
8 other district judges, one imagines, you know,  
9 in the same courthouse even.

10 MR. FREDERICK: I think that the  
11 disparities problem is one that ought to be  
12 concerning to reasonable people. Where I think  
13 that it is an inherent part of the system of  
14 sentencing that's been part of our system for  
15 200 years --

16 JUSTICE KAVANAUGH: Yeah. That's  
17 fair.

18 MR. FREDERICK: -- it's -- it's  
19 impossible to say there's complete uniformity.  
20 And when you do, then we had our own problems  
21 with that uniformity.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Barrett?

24 Justice Jackson?

25 JUSTICE JACKSON: So I think you're

1     saying in response to Justice Kavanaugh that  
2     this isn't disrespectful from the Sentencing  
3     Commission's perspective because it didn't take  
4     Congress to be removing the ability for  
5     individualized consideration in particular  
6     cases.

7                 MR. FREDERICK: That's correct.

8                 JUSTICE JACKSON: And with respect to  
9     Justice Barrett's point about how this would  
10    operate with respect to a judge who had policy  
11    disagreements with a mandatory minimum, I guess  
12    I didn't take your argument in this case to  
13    really be about that at all.

14                And -- and, by that, I mean I thought  
15    what you were focusing on in this case is the  
16    fact that there's a sentencing disparity that  
17    has been created such that your client, if he  
18    was sentenced today, would not have the same  
19    sentencing exposure as Congress now has  
20    determined it because Congress has changed the  
21    statute. So it's not the court saying, I don't  
22    think people who do this sort of thing should  
23    be subject to this length of sentence. It was  
24    Congress who said that in this situation,  
25    right?

1           MR. FREDERICK: That's correct. And  
2     Mr. Rutherford here has served 19 years. He --  
3     he falls within the policy guidance that says  
4     you have to serve for more than 10 years before  
5     you even become eligible to invoke this  
6     particular argument.

7           JUSTICE JACKSON: Right. So, in some  
8     sense, we're -- in some sense, this is giving  
9     the opportunity for a consistency with what  
10    Congress has determined about what people who  
11    have done this sort of thing should get.

12          MR. FREDERICK: Yes, and doing it,  
13    though, in a contextual way that takes into  
14    account the very circumstances of that inmate's  
15    behavior in prison, age, illness, family  
16    circumstances, and the like.

17          JUSTICE JACKSON: And so -- so, in  
18    some sense, the compelling circumstance here is  
19    that the change -- this is kind of going back  
20    to Justice Kagan's point in the first case --  
21    that there's been a changed circumstance with  
22    respect to how long Congress believes that  
23    people in this circumstance should be  
24    sentenced, and even though Congress didn't  
25    necessarily want that to be applied

1 categorically, there's nothing to preclude  
2 Congress -- there's nothing to preclude courts  
3 from taking that into account in an  
4 individualized way in combination with all  
5 sorts of other factors if a person requests it?

6 MR. FREDERICK: That's correct. And  
7 in 1984, Congress used the words that enabled  
8 that particular outcome, Justice Jackson. And  
9 I would just note, in the original appeal,  
10 Judge Ambro affirmed the sentence but said it's  
11 unthinkable that in any system the sentence  
12 would be -- should be this long for the two  
13 robbery offenses that my client committed.

14 JUSTICE JACKSON: Can I just ask you  
15 one other thing? Because I notice that there  
16 are differing views about the order of  
17 operations, just as a practical matter, the  
18 judge who is trying to entertain a  
19 compassionate release motion.

20 And I think it might matter because  
21 sentencing disparities are actually prescribed  
22 by Congress as a consideration in 3553(a). So,  
23 if you have to do 3553(a), then you're going to  
24 take into account the kind of thing that the  
25 government is now saying that you don't in --

1 in the extraordinary and compelling  
2 circumstances world.

3 So what I mean is, what is -- what is  
4 your view of how this works? Lower courts, I  
5 think, are starting with the extraordinary and  
6 compelling circumstances factor with the  
7 Sentencing Commission's guide -- guidance, and  
8 then they turn to 3553(a).

9 The government seems to suggest that  
10 you start with extraordinary and compelling  
11 factor without the Sentencing Commission's  
12 guidance, then you go to 3553(a), and then you  
13 consult the Sentencing Commission as a check  
14 or, you know, a limitation.

15 But the statute suggests there's even  
16 another way of doing it, which is that you  
17 start with 3553(a) and then you go to  
18 extraordinary and compelling with the  
19 Sentencing Commission.

20 So what's your view on the -- the  
21 order of operations in this?

22 MR. FREDERICK: Justice Jackson, I  
23 confess that it has been a while since I did  
24 sentencing cases in the government, but I would  
25 say reading this particular statute, I don't



1 know where this two- or three-part step where  
2 you just start negating things if they don't  
3 meet a certain threshold.

4 The statute is worded as if certain  
5 things happen, then such and such. And that to  
6 me suggests that this is a gestalt. It is a  
7 totality of circumstances kind of inquiry,  
8 which order you do them in, we trust district  
9 judges to get to the right outcome based on  
10 those circumstances.

11 JUSTICE JACKSON: And you admit that  
12 30 -- you see that 3553(a) does require  
13 consideration of unwarranted sentencing  
14 disparities?

15 MR. FREDERICK: Yes. And it seems --

16 JUSTICE JACKSON: And it's in this  
17 statute too?

18 MR. FREDERICK: Yes. And it seems odd  
19 that you would say, well, we're only going to  
20 consider one if we've nuked you out of a  
21 position to be able to bring that argument  
22 based on considering a different factor.

23 JUSTICE JACKSON: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1           Mr. O'Neil.

2                   ORAL ARGUMENT OF DAVID A. O'NEIL

3                   ON BEHALF OF THE PETITIONER IN CASE 24-860

4           MR. O'NEIL: Thank you, Mr. Chief  
5 Justice, and may it please the Court:

6                   I'd actually like to begin directly  
7 with Justice Gorsuch's question about the  
8 language and the carveout that you referenced  
9 in the -- in the Commission policy statement.  
10 There is very good reason for that carveout,  
11 and it does not show disrespect for Congress.  
12 In fact, it shows the opposite.

13                  There is a separate statutory  
14 provision, Section 3582(c), that specifically  
15 deals with reductions based on changed  
16 sentencing guidelines, and that requires in  
17 Section 994(u) specific findings that the  
18 Commission needs to undertake.

19                  So, in response to public comment  
20 during the very robust process that the  
21 Sentencing Commission undertook, the Sentencing  
22 Commission thought it was necessary to clarify  
23 how its guidance in (b)(6) relates to that  
24 other guidance, which is set forth separately  
25 in Section 1.10.

1           I'd also like to address, Justice  
2   Kavanaugh, your question and -- and the one  
3   that Justice Thomas started with because I  
4   think it is the essential argument for the  
5   government's position. Their argument is that  
6   (b)(6) conflicts with the retroactivity  
7   provision of the First Step Act.

8           There is no conflict. Section (b)(6)  
9   does not purport to make that law retroactively  
10   applicable to final -- to -- to defendants  
11   serving final sentences. Instead, it addresses  
12   a fundamentally different issue.

13           When courts conduct an individualized  
14   assessment of a prisoner's circumstances under  
15   a separate statute, the question is, does the  
16   court have to blind itself to one factor,  
17   sentencing disparity, even though that factor  
18   may be highly relevant to the court's assigned  
19   task? We don't claim that our client could  
20   come in here under 403(a) and seek relief.

21           But all that the Commission  
22   instructed, all it decided is that courts may  
23   in their discretion take that factor into  
24   account, but they didn't -- but it allows that  
25   only in narrow and unusual circumstances.

1           I also think it's very important,  
2   Justice Kavanaugh, to recount how we got here,  
3   how this issue arrived with the Commission and  
4   how it arrived at the Court.

5           So, after Congress eliminated BOP's  
6   role as the gatekeeper in the First Step Act,  
7   courts began to address prisoner-initiated  
8   motions of the kind that Congress allowed. And  
9   the courts disagreed about whether  
10   consideration of legal changes should or should  
11   not factor into the equation, divided into two  
12   camps. One camp said they should always be  
13   taken into account, and the other said they  
14   should never be taken into account.

15          The case came here. This Court denied  
16   cert after the government said this is the  
17   Commission's job to address. The Commission  
18   undertook that process. It was perhaps the  
19   most -- the public was as interested in this  
20   issue as it had ever been in any issue.

21          And the Commission adopted a middle  
22   ground. It didn't adopt the "you can always  
23   consider these." It didn't adopt the "you can  
24   never consider these." It said you can  
25   consider them, but it responded to the

1 government's concerns about administrability by  
2 putting in a 10-year bar before you could seek  
3 relief, and it required this multi-factor test  
4 that incorporates the Section 3553(a) factors.

5 So, in fact --

6 JUSTICE GORSUCH: Mr. O'Neil, I --  
7 I -- how long was the Sentencing Commission --  
8 how long did it consider this?

9 MR. O'NEIL: I believe that this was  
10 over about a six-month period.

11 JUSTICE GORSUCH: Okay. And I  
12 understand its point -- your point about, well,  
13 the Commission, before it's going to make  
14 something retroactive, has certain hoops to go  
15 through. I get that point and I appreciate  
16 that.

17 But retroactive application of federal  
18 law also has some hoops to go through, and  
19 they're usually -- we think of Congress doing  
20 those. And the evidence we have here is 40 --  
21 40 -- 40 -- well, what is it -- 403(b) that  
22 says it shall apply. It tells us exactly when  
23 it applies to pending cases, okay, where no  
24 sentence has yet been imposed.

25 And then, with respect to

1 retroactivity, it tells us it shall also apply  
2 to those drug offenses in 404(b). That seems  
3 like Congress thought pretty hard about this,  
4 to Justice Kavanaugh's point.

5 And it is a bit of a leap to say, oh,  
6 Congress didn't think about this and  
7 retroactivity of a criminal law in a sentence,  
8 it just -- it just failed to consider it. It  
9 seems a plausible possibility but perhaps a  
10 little disrespectful?

11 MR. O'NEIL: No, Justice Gorsuch. The  
12 question that Congress was considering in 403  
13 was applicability to everybody. So does it  
14 apply to everybody moving forward and does it  
15 apply to everybody moving back? Retroactivity  
16 would have meant that every defendant who had  
17 committed an offense before the Act would have  
18 received --

19 JUSTICE GORSUCH: Yeah, that's  
20 pretty -- pretty clearly ruled out, right?

21 MR. O'NEIL: We agree that is ruled  
22 out.

23 JUSTICE GORSUCH: Okay.

24 MR. O'NEIL: Mr. Carter, because he is  
25 not in that class, he cannot claim relief under

1 Section 403(a). But Congress said nothing  
2 about whether those -- the -- the impact of  
3 those changes could be considered in the  
4 context of materially separate statutes.

5 JUSTICE GORSUCH: No, I -- I -- I -- I  
6 understand that, hence we're having to draw an  
7 inference. But, boy, Congress spoke pretty  
8 clearly to -- to retroactivity in 403 and 404.

9 MR. O'NEIL: So, Justice Gorsuch, I  
10 make two points. First, even the government  
11 agrees that these changes actually can be taken  
12 into account even for defendants serving final  
13 sentences. So the government agrees that when  
14 you get to what it calls the sentencing  
15 determining phase in this two-part stage that  
16 it imagines, that the court can take into  
17 account how the 403 changes affect the  
18 calculus. So that blows a hole in their idea  
19 that these -- that Congress never wanted these  
20 changes to have any effect on final sentences.

21 JUSTICE JACKSON: And you can take it  
22 into account because the statute says so,  
23 right?

24 MR. O'NEIL: Yes.

25 JUSTICE JACKSON: Is the government's

1 view that you can take it into account because  
2 this statute requires the court to refer to  
3 3553(a), and 3553(a) says sentencing  
4 disparities have to be taken into account?

5 MR. O'NEIL: That's exactly right.

6 The other point I would make, Justice  
7 Gorsuch, and it's baked into your question, is  
8 that this is an inference. It is an inference  
9 from congressional silence.

10 And all of the government's arguments  
11 ultimately rest on trying to find implied  
12 limitations from congressional silence. The  
13 government wants to infer -- and it's not just  
14 an implied limitation -- it wants to infer a  
15 categorical bar against consideration of this  
16 fact, the fact of sentencing disparity.

17 And it wants to infer not just a  
18 categorical bar on that factor but a  
19 categorical bar on that factor ever entering  
20 into the equation, even though, in combination  
21 with other factors or alone, even though  
22 Congress didn't do that when it identified a  
23 specific factor, rehabilitation, as one that's  
24 off limits.

25 That is a lot of meaning and content



1 to read into congressional silence. There are  
2 at least five statutory rules of construction  
3 here that rule -- that -- that counsel against  
4 exactly that inferred limitation.

5 The first is the most basic one that  
6 this Court does not lightly assume that  
7 Congress omitted from statutes text that it  
8 meant to apply. That's Justice Scalia's  
9 opinion in Jama.

10 The second one is the rule that where  
11 Congress puts a specific limitation in a  
12 particular provision, you don't infer another  
13 one.

14 The third is the rule from Kimbrough,  
15 we're dealing with a sentencing statute.  
16 Congress has said Congress -- excuse me -- this  
17 Court has said Congress knows how to direct  
18 sentencing practices in express terms and has  
19 shown that it has done so.

20 The fourth is the Concepcion  
21 principle. You start with the premise that  
22 Congress meant district courts to have the  
23 broadest possible discretion unless the  
24 Constitution or -- or Congress explicitly  
25 limits it. It hasn't done so here.

1           And then, finally, you add on top of  
2     that, because you have an express delegation to  
3     an agency or, here, to the Commission, Justice  
4     Thomas, your opinion in Little Sisters of the  
5     Poor made clear that where there is that kind  
6     of clear and express delegation, you rewrite  
7     the statute, you don't apply it, if you start  
8     inferring limitations on that discretion that  
9     Congress did not apply.

10           I will just make one more point about  
11    the scope of the Commission's discretion  
12    because, Justice Kavanaugh, I think you got  
13    that exactly right in the first argument today.  
14    This case is much simpler because Congress gave  
15    the Commission the responsibility to describe  
16    what should be considered extraordinary and  
17    compelling factors.

18           The Commission has done that. So the  
19    question in this case is very simple and  
20    straightforward, and the question is just, did  
21    the Commission's policy statement, (b)(6), is  
22    that a valid exercise of expressly delegated  
23    authority?

24           JUSTICE KAVANAUGH: When you said  
25    "middle ground earlier," you were really

1 focusing, I think, on the 10-year point. Is  
2 that accurate?

3 MR. O'NEIL: It's not just the 10-year  
4 point. When the Commission first took this  
5 issue, it was urged to adopt a provision that  
6 would have said whenever changes are  
7 inequitable in light of changes in the law,  
8 that that would have allowed it. It didn't  
9 adopt that provision.

10 JUSTICE KAVANAUGH: Do you think they  
11 could have adopted that?

12 MR. O'NEIL: I think that that  
13 probably would have been within the scope of  
14 the Commission's discretion. But I'd like to  
15 make two points about the government's parade  
16 of horrors here.

17 The first is there's nothing in the  
18 Commission's history or its composition that  
19 would suggest it's going to adopt anything like  
20 the kinds of proposals that the government  
21 fears. In fact, the Commission's history is  
22 that it has been quite cautious, not cavalier,  
23 about the use of this power. If it did adopt  
24 any of those outlandish proposals, the guidance  
25 has to go in front of -- in front of Congress

1     for six months before it goes into effect, and  
2     Congress could reject it during that time, as  
3     Congress has done with previous Commission  
4     guidance.

5             And then the second point is the fact  
6     that -- that the Commission could have gone  
7     farther but chose not to do so simply shows the  
8     modesty and care with which it undertook this  
9     task.

10            CHIEF JUSTICE ROBERTS: Thank you,  
11     counsel.

12            Justice Thomas, anything further?

13            Justice Alito?

14            JUSTICE ALITO: What do you think are  
15     the limits on how far the Commission could go?

16            MR. O'NEIL: The Commission cannot  
17     violate a specific directive of Congress. The  
18     Commission needs to adopt purposes or reasons  
19     that are grounded in the purposes of  
20     sentencing. That's Section 994(a)(2).

21            The Commission's interpretation --

22            JUSTICE ALITO: What relevant -- what  
23     factor -- you say it can't -- it can't  
24     contradict a specific direction from Congress.  
25     Which specific directions would limit it?

1           MR. O'NEIL: Well, for example, if the  
2 Commission were to say that rehabilitation  
3 alone were an adequate factor.

4           JUSTICE ALITO: Okay. What beyond  
5 that?

6           MR. O'NEIL: There were questions  
7 earlier about whether the Commission could say  
8 you may -- you, district court, may disagree as  
9 a matter of principle with mandatory minimums.  
10 And we would say that that would be a violation  
11 of the specific directive of Congress that that  
12 is a -- a reasonable punishment for that  
13 offense.

14          JUSTICE ALITO: Well, is there a  
15 provision that says specifically that the  
16 Commission cannot do that?

17          MR. O'NEIL: There is a provision that  
18 the -- I mean, it's a general principle that  
19 the Commission obviously can't violate --

20          JUSTICE ALITO: It's an inference,  
21 isn't it? It's an inference from the  
22 imposition of a mandatory minimum, right?  
23 That's -- that was what it would be based on?

24          MR. O'NEIL: No.

25          JUSTICE ALITO: No?

1           MR. O'NEIL: That would be based on  
2     the fact that Congress said you may sentence  
3     someone to this offense. If the -- if the  
4     Commission said, District Court, you may -- you  
5     may take your own disagreement with Congress  
6     about the -- about that as a policy matter, not  
7     in the context of the specific case or the --  
8     or the circumstances of the prisoner's overall  
9     situation, that that -- that would be in  
10    conflict with an act of Congress.

11           JUSTICE ALITO: I'm not sure I  
12    understood that. What is the difference  
13    between the inference that is drawn -- that one  
14    would draw from a provision that imposes a  
15    mandatory minimum, namely, that Congress did  
16    not want that to be disregarded in any case,  
17    and the inference that one might draw from a  
18    provision that says this change in the law will  
19    apply retroactively to this limited class of  
20    cases but no other? What is the difference  
21    between those two inferences?

22           MR. O'NEIL: The difference is the  
23    latter does not take into account all of the  
24    circumstances that warrant the prisoner --  
25    warrant relief in the prisoner's particular

1 case.

2 (b)(6) is all about the individual  
3 circumstances, whether in context the sentence  
4 is unusually long, whether it creates a gross  
5 disparity, whether the circumstances warrant  
6 it. The -- the one that you hypothesized is an  
7 across-the-board non-contextual rule that  
8 Congress can never consider --

9 JUSTICE ALITO: All right. Thank you.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Sotomayor?

12 JUSTICE SOTOMAYOR: Then I don't  
13 understand your answer to Justice Kavanaugh.  
14 You said that if the Commission said every  
15 prisoner is entitled to compassionate release  
16 because of the mandatory minimum, the --  
17 whatever, that that's okay, that's within their  
18 power?

19 MR. O'NEIL: If -- no, I think I was  
20 answering a different question. If the --

21 JUSTICE SOTOMAYOR: How did you  
22 understand -- because I understood your answer  
23 to him that if the Commission had taken what  
24 was the extreme position some people had  
25 proposed.

1 MR. O'NEIL: Even --

2 JUSTICE SOTOMAYOR: That the mere  
3 change in law was enough, that that's okay?

4 MR. O'NEIL: Thank you, Justice  
5 Sotomayor. What -- what -- even that more  
6 extreme position would have required an  
7 evaluation of the -- of that --

8 JUSTICE SOTOMAYOR: Yeah. But why  
9 wouldn't it be itself an abuse of discretion?  
10 I'm very surprised at your answer to him  
11 because it seems to me that the logic of your  
12 answer on the mandatory minimum is that if they  
13 do something so extreme as to ignore that  
14 Congress has not made this retroactive to all  
15 prisoners --

16 MR. O'NEIL: That's --

17 JUSTICE SOTOMAYOR: -- why isn't that  
18 equally an abuse of discretion?

19 MR. O'NEIL: Because the -- the -- the  
20 proposal that I was addressing, the inequitable  
21 in light of changes in the law, that  
22 incorporated individualized considerations.  
23 What I took Justice -- what I took the question  
24 to be asking about was an across-the-board  
25 non-contextual rule that a district court may



1     simply disagree with the policy of a mandatory  
2     minimum and treat that as an extraordinary and  
3     compelling reason. And that was Justice  
4     Alito's question.

5             What I said in response to Justice  
6     Kavanaugh was that the Commission could have  
7     adopted a rule that didn't have all of the --  
8     all of the limitations that (b)(6) ultimately  
9     adopted and simply said that --

10            JUSTICE SOTOMAYOR: I don't understand  
11     that. They had to have some limitations  
12     according to you.

13            MR. O'NEIL: Right. The --

14            JUSTICE SOTOMAYOR: They had to list  
15     some individual factors, correct?

16            MR. O'NEIL: That's correct. That's  
17     correct. And even --

18            JUSTICE SOTOMAYOR: So --

19            MR. O'NEIL: So even that proposal  
20     would have been based on the particular  
21     circumstances of the prisoner's condition and  
22     circumstances --

23            JUSTICE SOTOMAYOR: See, we're  
24     talking -- we're talking past each other.  
25     We're not talking about you arguing that they

1 can say this always constitutes a reason for  
2 compassionate --

3 MR. O'NEIL: We believe that a rule  
4 that's --

5 JUSTICE SOTOMAYOR: Standing alone.

6 MR. O'NEIL: Standing alone, exactly.  
7 We believe, standing alone, that that would be  
8 very -- coming very close to trying to treat  
9 403(b) -- sorry, 403(a) as retroactive, and we  
10 concede that that is further than the  
11 Commission could go.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 JUSTICE KAGAN: Mr. O'Neill, same  
14 question that I asked Mr. Frederick. If your  
15 position is right, does the inquiry into  
16 sentence disparities in these gun cases start  
17 to look a lot like the inquiry into sentencing  
18 disparity in the crack cocaine cases? And if  
19 it does, is that odd given the -- the textual  
20 difference between Section 403 and Section 404?

21 MR. O'NEIL: The analysis is  
22 completely different between the crack cocaine  
23 cases and the kind that are covered in (b)(6).  
24 The Federal Defenders' brief does an excellent  
25 job of explaining how different these

1 procedures are.

2 With 404, which was an actually  
3 retroactive law, district courts set up  
4 standing orders. Defendants were waived  
5 through because there was no question at the  
6 eligibility -- as to eligibility. It was all  
7 about the 3553(a) factors.

8 Here, every case is considered on its  
9 individual facts. The judge -- the courts  
10 exhaustively look at the prisoner's individual  
11 circumstances. And the statistics bear out  
12 this difference.

13 So, during the time that -- as  
14 Mr. Frederick said, I think, there have been  
15 150 grants in total under (b)(6). During that  
16 time, under 404 and the crack cocaine cases,  
17 there were 4,000. And that is a demonstration  
18 of how different these regimes are.

19 JUSTICE KAGAN: Thanks.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Gorsuch?

22 Justice Kavanaugh?

23 Justice Barrett?

24 Justice Jackson?

25 Thank you, counsel.

1 MR. O'NEIL: Thanks very much.

2 CHIEF JUSTICE ROBERTS: Mr. Feigin.

3 ORAL ARGUMENT OF ERIC J. FEIGIN

4 ON BEHALF OF THE RESPONDENT

5 MR. FEIGIN: Thank you, Mr. Chief  
6 Justice, and may it please the Court:

7 The core of the sentence reduction  
8 motions the Petitioners are making in these  
9 cases is that they'd have received lower  
10 sentences if they were sentenced after the  
11 First Step Act's changes to Section 924(c).

12 But, in enacting those very changes,  
13 Congress made a categorical judgment to, in the  
14 words of the principal opinion in Hewitt, leave  
15 Section 1924(c) offenders with final sentences  
16 stuck with their old sentences. That  
17 categorical judgment can't be leveraged into  
18 extraordinary and compelling reasons that  
19 warrant reduction in Petitioners' lawful,  
20 indeed, legally mandated sentences.

21 The -- Section 3582(c)(1)(A)(i) isn't  
22 a license for either individual judges or the  
23 Sentencing Commission to create what's  
24 effectively a new form of judicial parole where  
25 someone who does not have extraordinary and

1     compelling reasons warranting a sentence  
2     reduction can suddenly claim that they do in  
3     light of an expressly non-retroactive change in  
4     the law.

5             Now I think that's exactly what the  
6     Commission's done here. So, to respond to the  
7     suggestion that this is a moderate,  
8     middle-ground solution, it is anything but a  
9     moderate, middle-ground solution because, as to  
10    924(c) offenders, which were top of mind when  
11    this was adopted, it includes basically  
12    everybody.

13            Take the 10-year limitation. The  
14    minimum sentence for a stacked 924(c) offender  
15    is going to be 30 years, five for the first  
16    mandatory minimum and 25 for the consecutive.  
17    That could be characterized -- the difference  
18    between that and, say, a 10-year sentence under  
19    the new regime could be -- easily be  
20    characterized as a gross disparity. And then  
21    we are down to, I think, basically just the  
22    individualized circumstances.

23            And then we have judicial parole. If  
24    you -- if I may have one more second.

25            If you listen to the reasons that

1 Mr. Frederick gave for letting his client out,  
2 family circumstances and rehabilitation, that  
3 would be exactly the kind of reason that would  
4 have gotten you out on parole.

5 I'm sorry, Justice Thomas. And thank  
6 you.

7 JUSTICE THOMAS: The -- what limits  
8 would you put on the Commission's authority to  
9 describe what a compelling interest is or what  
10 an extraordinary circumstance is?

11 MR. FEIGIN: Well, I don't think that  
12 they can simply disagree with Congress or  
13 authorize individual judges to disagree with  
14 Congress.

15 JUSTICE THOMAS: Now can they do  
16 that -- what I'm hearing is that in -- standing  
17 alone, they cannot disagree with Congress.  
18 That's what I'm hearing from the other side.

19 But, if it's a part of a totality of  
20 the circumstances inquiry, then they can  
21 disagree with Congress?

22 MR. FEIGIN: I -- I -- and I think the  
23 fundamental problem with that, Justice Thomas,  
24 is the -- is exactly what I just said, which is  
25 that it's a form of judicial parole.

1           If you think back to what I said in  
2     the last case, essentially, we are taking as a  
3     given that the other circumstances, the other  
4     reasons, are not in themselves something that  
5     would warrant a sentence reduction. They're  
6     not extraordinary and compelling enough.

7           What gets them over the line is the  
8     fact that Congress adopted a non-retroactive  
9     change in law that it explicitly decided not to  
10    apply to prisoners in their circumstances, and  
11    that is what gets them consideration of these  
12    other factors that wouldn't be enough on their  
13    own.

14           JUSTICE THOMAS: So what -- what do  
15    you say to the argument that it's not  
16    necessarily a direct attack, a disagreement  
17    with Congress, but, rather, the effects of the  
18    provision, the say, for example,  
19    non-retroactivity?

20           MR. FEIGIN: Well, I think this is a  
21    direct attack on what Congress did because  
22    Congress drew a categorical line, and, as the  
23    principal opinion in Hewitt recognized, that  
24    was partly to prevent all the relitigation  
25    concerns.

1           I think the fact that, as my opponents  
2     acknowledge, these are even more burdensome to  
3     litigate than Section 404 adjustments to  
4     sentences, which Congress expressly did make  
5     retroactive, is a strike against it.

6           When Congress makes categorical  
7     judgments and it wants to allow for exceptions  
8     in individualized circumstances, it will enact  
9     something like the safety valve, which -- for  
10    mandatory minimums, which it again adjusted.  
11    That's in Section 402 of the First Step Act.

12           And, here, you have what the  
13    Sentencing Commission in 2021 estimated was  
14    2,412 offenders with stacked 924(c) sentences  
15    who would be affected if this became  
16    retroactive.

17           And, as I was just suggesting earlier,  
18    this is essentially a -- a full retroactivity  
19    provision in the sense that it opens the door  
20    to things that were not extraordinary and  
21    compelling reasons suddenly crossing that  
22    threshold.

23           JUSTICE JACKSON: So, Mr. Feigin,  
24    you've said that a couple of times, and that --  
25    I don't know that that's actually consistent



1 with how this works in real life.

2 In other words, you -- you've set up  
3 your argument both in the prior case and in  
4 this one to suggest that the court is marching  
5 in seriatim through these various criteria and  
6 it starts with age and it says: Hmm, this is  
7 not extraordinary and compelling enough, let me  
8 add illness, oh, let me add, you know,  
9 sentencing disparity, and that things that  
10 previously would not be enough to get them over  
11 the line suddenly become so when you add in  
12 this other factor.

13 My understanding through Concepcion  
14 and also experience is that that's not exactly  
15 how it works. The court is looking at the  
16 totality of the circumstances. It doesn't  
17 necessarily go through and determine whether  
18 each individual criteria itself is an  
19 extraordinary and compelling circumstance.

20 So, for example, age would never be.  
21 I mean, that's not extraordinary. Everybody  
22 gets old. So it's not really doing an  
23 individualized tick off the box for each  
24 criteria and, therefore, it becomes problematic  
25 when we look at something like sentencing

1     disparity.

2                 So, if I reject that characterization  
3     of how it works, do you lose?

4                 MR. FEIGIN:   Well, Your Honor, first  
5     of all, let me just tell you that that's not  
6     exactly what I'm saying that they do.  They  
7     don't just -- I'm not suggesting that anyone  
8     ticks through --

9                 JUSTICE JACKSON:  But you've said many  
10    times -- you've said many times that criteria  
11    that would not in themselves qualify as  
12    extraordinary and compelling circumstances  
13    become so by adding in this, and that's the  
14    problem.

15                MR. FEIGIN:  So think of it -- think  
16    of it this way, Justice Jackson.  It's as  
17    though you are weighing something and it has to  
18    weigh enough, it has to be --

19                JUSTICE JACKSON:  But I'm telling you  
20    if I reject --

21                MR. FEIGIN:  Yeah.

22                JUSTICE JACKSON:  -- that  
23    characterization.  You're starting with the  
24    empty scale and you're putting all the things  
25    on --

1 MR. FEIGIN: Well --

2 JUSTICE JACKSON: -- not one at a time  
3 and seeing whether or not each thing gets you  
4 across the line.

5 MR. FEIGIN: -- Your Honor, I --  
6 you're not doing -- necessarily doing it one at  
7 a time, but I think even they would acknowledge  
8 that their claim -- that they are not making  
9 the claim that if the question presented didn't  
10 matter, that is, if this were not a valid  
11 consideration, they would be eligible for  
12 relief.

13 JUSTICE JACKSON: They're saying you  
14 should not restrict the district court from  
15 doing a totality of the circumstances analysis  
16 that takes into account all of the  
17 circumstances, that the way you're setting  
18 this up, you're suggesting that certain  
19 circumstances should be left out because  
20 they're inappropriate, and in that case, you  
21 know, we -- the -- the -- the court should not  
22 have any ability to consider them.

23 And what I guess I'm suggesting is  
24 that we all seem to agree that this is a  
25 totality of the circumstances. And so why

1     can't the court take this sort of thing into  
2     account, especially in this case, where  
3     Congress has made a policy determination that  
4     indicates -- that -- that -- that creates a  
5     sentencing disparity and indicates that this is  
6     a really unfair circumstance?

7             MR. FEIGIN: Well, I -- I guess two  
8     points to that, Your Honor.

9             It's not phrased as a totality of the  
10    circumstances as such. It's extraordinary and  
11    compelling reasons that warrant a sentence  
12    reduction, and so you have to consider whether  
13    something that is being put on the table can  
14    contribute to that inquiry.

15            And I guess the second point, which  
16    builds on the first, is, if you don't -- you  
17    have a mix, and you don't have to, like, tease  
18    it out into individualized reasons necessarily,  
19    but, if you have a mix that is not going to be  
20    sufficient, the other reasons that  
21    Mr. Frederick mentioned this morning, and  
22    they're not going to be sufficient on their  
23    own, I think their claim in this case, the only  
24    way they can succeed in this case is if they  
25    are allowed to add this additional factor to

1 the mix.

2 Now that -- the upshot of adding that  
3 additional factor is they are adding something  
4 that is manifestly not extraordinary and not  
5 compelling because it is the normal operation  
6 and here the express operation of  
7 non-retroactivity law. And --

8 JUSTICE BARRETT: Mr. Feigin -- sorry,  
9 go ahead and finish.

10 MR. FEIGIN: And it also -- again,  
11 I -- I hate to keep repeating myself, but I  
12 think it's a point worth really driving home  
13 yet again. It's effectively, if you think  
14 about it in -- on the flip side of the coin,  
15 creating judicial parole by unlocking the door  
16 to things that would not be extraordinary and  
17 compelling if that consideration were not on  
18 the table, and all of a sudden they can become  
19 a reason for release.

20 Thank you for your patience.

21 JUSTICE BARRETT: I just wanted to ask  
22 you about your Loper Bright point and the  
23 degree of discretion that the Sentencing  
24 Commission does here -- has here.

25 Am I -- I'm going to state it, and

1     then you tell me if I'm understanding your  
2     point correctly.

3             You don't dispute -- Justice Kavanaugh  
4     pointed out that the terms "extraordinary and  
5     compelling" are capacious terms, and so the  
6     Sentencing Commission does have some discretion  
7     within words like that to -- to enact policy  
8     statements, right? Just -- just --

9             MR. FEIGIN: Correct.

10            JUSTICE BARRETT: Okay. I'm getting  
11     to the point I think that -- that you want me  
12     to.

13            Your point about Loper Bright is that  
14     that discretion has to happen between certain  
15     goalposts, and the fact that the First Step Act  
16     has imposed a rule of non-retroactivity means  
17     that the Commission has exceeded the limits on  
18     its authority. So it's not that it doesn't  
19     have a lot of discretion, but, here, it's  
20     bumped beyond that.

21            MR. FEIGIN: That's exactly right,  
22     Justice Barrett.

23            JUSTICE BARRETT: Okay.

24            MR. FEIGIN: And I think one problem  
25     with their position -- and I think it's been

1 well illustrated in the -- the other arguments  
2 in this case this morning -- is there's really  
3 no limiting principle to what they're saying  
4 the Commission could do.

5           They are -- I -- I -- I -- I -- I  
6 admit I'm a little confused as to what their  
7 answer is to the hypothetical where the  
8 Commission just decides to allow courts to  
9 disagree with mandatory minimums, but I think  
10 the reason they're not giving you a clear  
11 answer that the Commission couldn't do that is  
12 because it logically torpedoes their argument  
13 because, in their view, the Commission can say  
14 anything it wants as long as it hasn't  
15 expressly precluded sentence reductions.

16           But, of course, a mandatory minimum  
17 like the one in 924(c) just says the  
18 defendant -- if you look at the language there,  
19 that it just says the defendant "shall be  
20 sentenced to a term of no less than five  
21 years." You could --

22           JUSTICE SOTOMAYOR: So define the  
23 goalposts for me.

24           MR. FEIGIN: So --

25           JUSTICE SOTOMAYOR: I mean, you're

1 saying they've gone past some goalposts. But  
2 Congress has not said anywhere you, Commission,  
3 can't look at non-retroactive changes in law.  
4 It hasn't said you can't look at changes in  
5 mandatory minimum. It hasn't said -- the only  
6 thing you can't look at alone, it said, is  
7 rehabilitation. That's the only limitation  
8 Congress has said.

9 MR. FEIGIN: Well, it has said, Your  
10 Honor, under 994(a) that the Commission's  
11 policy statements have to be consistent with  
12 law. As for rehabilitation --

13 JUSTICE SOTOMAYOR: Well, there is no  
14 law that says that. There's no law that --  
15 that limits what they can consider as a --

16 MR. FEIGIN: Well, Your Honor, I think  
17 even -- I'm sorry.

18 JUSTICE SOTOMAYOR: And 353 -- 53 --  
19 355 -- 3553(a) -- thank you -- I'm tongue-tied  
20 on that one -- does permit courts to look at  
21 disparity with co-defendants or with others.  
22 So I don't know where you're defining that the  
23 goalpost is defined by something that's not  
24 specified in law.

25 MR. FEIGIN: So let me -- let me tease



1     that out a little bit. I think they're not  
2     trying just to look at -- there are a few  
3     points. Number one is -- is the colloquy I was  
4     having with Justice Kavanaugh in the first case  
5     about why the 3553(a) factors aren't the  
6     relevant consideration at this part of the  
7     inquiry.

8             But, even beyond that, they're not  
9     just looking at disparities alone. They're  
10    looking at disparities with offenders who were  
11    sentenced under a non-retroactive law that  
12    applied to them but didn't apply to these  
13    offenders.

14            And I think even they -- even my  
15    friends on the other side would have to agree  
16    that there -- you can draw some implicit  
17    lessons from Congress's enactments. To get to  
18    Justice Gorsuch's questions, that's exactly why  
19    the Commission claim -- I think, would claim  
20    that it has exempted its own non -- its own  
21    non-retroactive amendments from its policy  
22    statement.

23            It's because it believes that if it  
24    didn't do that, it would be overriding the  
25    limitations in 3582(c)(2). And if it can't

1     override 3582(c)(2), I don't understand why it  
2     can override Section 403(b) of the First Step  
3     Act.

4             Essentially, what they're saying is  
5     that because none of these statutes expressly  
6     speak to sentence reductions -- I guess  
7     3582(c)(2) does to some degree, but it doesn't  
8     expressly preclude the use of 3582(c)(1)(A)(i)  
9     when there are other circumstances involved --  
10    because they don't expressly speak to sentence  
11    reductions, they are automatically possibly on  
12    the table. And the -- if that's true, then  
13    there are substantial separation-of-powers  
14    concerns because then they essentially have the  
15    pen on sentencing law.

16            Now, if I could address rehabilitation  
17    for a second, Justice Sotomayor, I think there  
18    are a couple of points.

19            One is rehabilitation is something  
20    that I think could otherwise have been  
21    considered an extraordinary and compelling  
22    reason. I think there are examples of many  
23    prisoners who would claim that they have  
24    extraordinary and compelling stories of  
25    rehabilitation.

1           One thing that they're able to do  
2   under their position is just to take that  
3   rehabilitation, combine it with a  
4   non-retroactive change in law, something we  
5   know Congress didn't want to apply to these  
6   kinds of offenders --

7           JUSTICE SOTOMAYOR:   So do you think  
8   that someone who has rehabilitated, been in  
9   jail for 40 years, let's say, and is now 90  
10   years old, and they have spent most of their  
11   life in prison, could not have a claim for  
12   compassionate release if they come in and said,  
13   I'm 90 years old, I'm going to die soon,  
14   because rarely do you last very long after 90,  
15   the chances are very slim, and now there's been  
16   a change in law, I can't qualify under your  
17   reading of this?

18          MR. FEIGIN:   So, Your Honor, in the  
19   absence of (b)(6), even the Commission wouldn't  
20   allow release under those circumstances because  
21   it's not age as such.  It's limited -- I think  
22   it's (b)(2) is limited to age-related  
23   infirmities.

24          JUSTICE SOTOMAYOR:   So your answer is  
25   that wouldn't be enough?

1                   MR. FEIGIN: I think it might within  
2     the --

3                   JUSTICE SOTOMAYOR: Even if -- and  
4     there -- I didn't add that there was a change  
5     in law, all right? Because that's what's at  
6     issue here.

7                   MR. FEIGIN: So, Your Honor, if  
8     those -- I think that those may not be  
9     extraordinary and compelling on their own. If  
10    they were extraordinary and compelling on their  
11    own --

12                  JUSTICE SOTOMAYOR: We're back to that  
13    question.

14                  MR. FEIGIN: -- we wouldn't be --  
15    we -- we wouldn't have -- this question  
16    wouldn't ever come up.

17                  JUSTICE SOTOMAYOR: All right.

18                  MR. FEIGIN: The other problem with  
19    994(t) I think is a real -- that's a real  
20    problem for them is they don't -- if they want  
21    to follow the expressio unius principle from  
22    the consideration of you can't consider just  
23    rehabilitation alone to its logical conclusion,  
24    then I -- I don't see how they're able to  
25    maintain their position.

1           The -- what 994(t) says about  
2   rehabilitation is that it's a consideration  
3   that can be considered in conjunction with  
4   other factors but not on its own. But that  
5   seems to be exactly how they're treating  
6   non-retroactive changes in law as well. So, if  
7   they think 994(t) is something that says only  
8   rehabilitation can be treated in a particular  
9   way, they're violating their own principle.

10           I think 994(t) is just about limiting  
11   consideration of that one principle. If they  
12   instead think that non-retroactive changes in  
13   law can on their own be reasons why someone  
14   could get a sentence reduction, then I think  
15   there are even further problems with their  
16   position.

17           But, under their position, the  
18   Sentencing Commission could, in theory, come  
19   out with a rule that allows district courts  
20   simply to disagree with mandatory minimums.  
21   And then, as we specify in our brief, the  
22   district court says at sentencing: Well, you  
23   don't qualify for this safety valve.  
24   Unfortunately, even though I'd rather not, I'm  
25   forced to sentence you to this mandatory

1 minimum, but I'd be very open to a  
2 compassionate release motion.

3 The prisoner files one the next day.  
4 He waits 30 days. And the district court --  
5 because the BOP is not going to endorse it.  
6 And then 30 days later, the district court's  
7 able to reduce the sentence. That cannot be  
8 the way this works.

9 Yet, if they say that that can't  
10 happen, that that's somehow some kind of abuse  
11 of discretion, that the Commission doesn't have  
12 that authority, then I don't see how they have  
13 the authority --

14 JUSTICE JACKSON: That's because it's  
15 a direct --

16 MR. FEIGIN: -- they're asserting  
17 here.

18 JUSTICE JACKSON: Their -- their  
19 theory is that that is a direct conflict with  
20 Congress's statement in the statute that this  
21 is our policy choice with respect to what kind  
22 of sentence applies in this circumstance. And  
23 what I take them to be saying -- and this is, I  
24 think, a really legitimate question -- is do we  
25 have that same kind of conflict here?

1           You suggest and you -- I think the  
2    linchpin of your argument is that Congress's  
3    determination not to make this retroactive is a  
4    statement that Congress did not want anybody  
5    who was already serving these sentences to  
6    benefit from this sentence reduction.

7           But I think there's also the  
8    possibility that instead of that inference  
9    being drawn from the retroactivity  
10   determination, there's the inference that  
11   Congress did not want to impose all of the  
12   administrative burdens that would apply or that  
13   would arise if there was categorical  
14   application of this to everyone without -- you  
15   know, the -- the way in which retroactivity  
16   works.

17           If we believe that that's what  
18   Congress was saying, that's what Congress was  
19   saying when it said no retroactivity, there  
20   isn't a conflict with a circumstance in which  
21   you look at 3553(a) and you look at 3582,  
22   the -- the compassionate release, and take into  
23   account something like sentencing disparity.

24           MR. FEIGIN: Well, Your Honor, I think  
25   it's difficult to look at 403(b), particularly

1 in contexts where Congress did enact other  
2 retroactivity mechanisms and plainly did so  
3 because, in the entire interregnum period  
4 between the Fair Sentencing Act and the  
5 enactment of Section 404, which made the Fair  
6 Sentencing Act of 2010's changes for crack  
7 cocaine offenders retroactive, and during that  
8 entire eight-year period, no one ever thought  
9 that Section 3582(c)(1)(A)(i) could do work for  
10 at least some subset of those offenders, I  
11 think it's a little difficult to look at 403(b)  
12 in that context and see it as anything other  
13 than as a policy judgment to leave offenders  
14 who had final sentences stuck with their old  
15 sentences.

16 JUSTICE JACKSON: But what do we do --  
17 what do we do with the fact that Congress did  
18 not speak to its directive in the compassionate  
19 release scenario that you look, as a judge, to  
20 3553(a), which allows for consideration of  
21 sentencing disparities? It seems to me that if  
22 you're right, Congress would have needed to  
23 amend the compassionate release statute either  
24 within the statute itself or taking out 3553(a)  
25 or addressing it like it did in 90 -- 994(t) to



1 take the sentencing reductions out of it.

2 MR. FEIGIN: I don't think so, Your  
3 Honor. I think that's imposing kind of a clear  
4 statement rule on Congress to exclude  
5 particular enactments of law from the operation  
6 of 3582(c)(1)(A)(i). It certainly didn't do so  
7 in 924(c) itself in saying a defendant shall be  
8 sentenced to a particular offense.

9 And to your earlier point about  
10 administrative burdens, I think what Congress  
11 would have been creating if it allowed for this  
12 kind of judicial parole system is an even  
13 greater administrative burden on the courts  
14 because what it's telling -- what it's  
15 re-enacting is exactly what we had  
16 pre-Sentencing Reform Act, where there's kind  
17 of a forced rehabilitation scheme. We talked  
18 about this a little bit in our brief in Rico,  
19 the case the Court heard last Monday, where  
20 offenders think that -- prisoners think that  
21 they need to rehabilitate and that's how  
22 they're going to get out, and so they work to  
23 rehabilitate, and five years from now, we'll  
24 see each of these 2412 affected 924(c)  
25 offenders, to the extent they haven't already

1     been let out, claim rehabilitation.

2             And if that fails, they'll file  
3     another one a couple years after that. And I  
4     don't think that's the scheme that Congress was  
5     creating, which is even more burdensome than  
6     some of the streamlined schemes that were  
7     developed under Section 404.

8             JUSTICE KAVANAUGH: Why -- why did  
9     Congress distinguish, do you think or do you  
10    know, the crack offense retroactivity from the  
11    924(c) offense retroactivity?

12            MR. FEIGIN: Well, the crack offense  
13    retroactivity was actually making up for a -- a  
14    loop -- not a loophole but a problem it  
15    perceived after the Fair Sentencing Act, where  
16    it -- as the Court discussed in Dorsey, it had  
17    made the changes effective from that day  
18    forward, essentially, exactly what Congress  
19    then decided to do in 403(b) and was making up  
20    for that for the set of prisoners who were  
21    still in prison for those offenses.

22            I think, actually, the fact that  
23    Congress was deliberately doing that, that is,  
24    truing up offenders where it had enacted a  
25    403(b)-like scheme and at the same time

1     enacting 403(b), really does point up that  
2     contextually Congress could not have meant to  
3     be allowing the kind of thing that Petitioners  
4     say they're allowing here.

5             Nor would it just be 403(b) because  
6     Section 401 of the First Step Act made some  
7     further changes to the drug sentencing  
8     provisions of 21 U.S.C. 841, changing the  
9     nature of the predicates, and for that, there  
10    is a 401(b) that looks exactly like 403(b).

11            And there's another -- the Commission  
12    estimated in 2021 3,742 offenders who would be  
13    affected by that. So, to the extent they're  
14    still in prison, it would be opening the door  
15    to sentence reduction motions by them.

16            There's another level of the problem  
17    here, which is that it -- the Commission's Rule  
18    (b)(6) also purports to authorize reliance on  
19    other non-retroactive changes in law. So we --  
20    we will get things like and are getting things  
21    like claims under Booker, United States against  
22    Booker, which is non-retroactive about the  
23    changes to the guidelines, the advisory  
24    guidelines, and any -- all sorts of other  
25    claims about non-retroactive changes in law.

1           So you will get the -- some kinds of  
2   things that would have been a problem -- that  
3   would exhibit the sorts of problems I was  
4   mentioning in the last case, where something  
5   has to be retroactive in order to qualify as a  
6   valid Section 2255 claim.

7           I mean, it's an overused --

8           JUSTICE JACKSON: Can I just ask you  
9   one more thing about the Commission?

10          MR. FEIGIN: Yeah.

11          JUSTICE JACKSON: How is it that the  
12   Commission is way out of line in a situation in  
13   which the courts were deeply split on this  
14   issue to begin with before the Commission even  
15   entered?

16          MR. FEIGIN: Well, Your Honor, I don't  
17   think the mere fact that the courts were split  
18   reflected that the Commission could resolve  
19   that reasonable policy disagreement because, as  
20   we --

21          JUSTICE JACKSON: So you're saying the  
22   Commission had to choose, it had to pick --

23          MR. FEIGIN: Well, as we express --

24          JUSTICE JACKSON: -- either you can  
25   never use it or you -- you can always use it,

1     because that was the split?

2                 MR. FEIGIN: Well, as we expressly  
3     told the courts, like, once this became -- and  
4     as the Third Circuit recognized in this case,  
5     once one of the courts, the -- the six courts  
6     that went in our favor as opposed to the four  
7     that didn't, I mean, once they agree with us  
8     that this is not a valid consideration under  
9     the statute, the Commission doesn't have the  
10    authority to adopt under the statute.

11                And this is also what the three  
12    dissenting commissioners said. The Commission  
13    doesn't have the authority to adopt under the  
14    statute something that the statute doesn't in  
15    the first place allow.

16                JUSTICE JACKSON: That just means you  
17    disagree with the Commission's statutory  
18    reading. I guess I'm just trying to understand  
19    why it's unreasonable given that some courts  
20    agreed or thought that it was okay under the  
21    statute.

22                MR. FEIGIN: Well --

23                JUSTICE JACKSON: The Commission  
24    just -- it seems to me the Commission agreed  
25    with the courts that didn't agree with you,

1     said it was okay under the statute but only  
2     under these limited circumstances.

3             Why is that just completely an abuse  
4     of the Commission's authority?

5             MR. FEIGIN:  Because we -- I mean -- I  
6     mean, to put brass tacks to it, Your Honor, the  
7     four courts that thought this was permissible  
8     under the statute are wrong.  And it's not just  
9     a re -- it's not resolving some sort of, you  
10    know, you could do it one way, you could do it  
11    another way kind of disagreement between the  
12    courts of appeals.

13            If you can't do it under the statute,  
14    which is what the majority of courts had said,  
15    then the Commission can't do it either.  And  
16    they can't do it in a purportedly limited way  
17    that, as I mentioned earlier, is not  
18    particularly limited.

19            But, as I was about to say, I mean, I  
20    think it's an overused kind of homily that  
21    Congress doesn't hide elephants in mouse holes,  
22    but this is a -- a pretty big elephant to have  
23    hidden in this mouse hole and -- for Congress  
24    to have done with Section 3582(c)(1)(A)(i)  
25    reductions.  And I don't think there's any

1 evidence in the history, any evidence in the  
2 context, that that's what Congress was  
3 directing these things at.

4 I think this applies to both the cases  
5 this morning, both Section 2255 claims and  
6 non-retroactive changes in law. There are  
7 often cases in which Congress decides to  
8 ameliorate sentences going forward. The Court  
9 has described those as perfectly ordinary  
10 decisions by Congress. It's also the ordinary  
11 business of the courts to reinterpret statutes  
12 which can also be non-retroactive, particularly  
13 where they're just dealing with procedural  
14 matters.

15 And I don't think Congress was opening  
16 the door up for those kinds of claims either.  
17 Even if a lot of these claims are going to be  
18 rejected, they are quite burdensome on courts.  
19 That's true in the 2255 context, where you've  
20 essentially got new habeas motions and -- or  
21 post-conviction motions.

22 And it's going to be equally true in  
23 this case, where the court has to go through  
24 the individualized circumstances of each  
25 defendant and try to combine all the apples and

1 oranges to figure out whether this particular  
2 prisoner is deserving of relief.

3 JUSTICE KAGAN: I guess what strikes  
4 me, Mr. Feigin, is that there is neither an  
5 elephant nor a mouse hole here. Not a mouse  
6 hole because Congress is perfectly well aware  
7 of sentencing modification proceedings and  
8 knows that this is an important part of the  
9 criminal process and then not an -- not an  
10 elephant in -- in -- in the following way.

11 I mean, what you're saying is that  
12 when Congress set up a rule that says this  
13 statute should apply prospectively, not  
14 retroactively, Congress must have meant with  
15 respect to everybody in all circumstances.

16 And that seems, you know, just --  
17 I'm -- I -- I think I'm going to make you  
18 repeat your argument about why that's true  
19 because, if we take it as a given that the  
20 Sentencing Commission could not say, of course,  
21 if you come in in a sentencing proceeding,  
22 we'll give you relief no matter what, all you  
23 have to do is point to a sentencing disparity,  
24 then I might say, okay, now you have an  
25 elephant problem.



1           But that's not what the Sentencing  
2   Commission did. The Sentencing Commission set  
3   particular criteria and then, on top of that,  
4   said only given all the surrounding  
5   circumstances of your case.

6           So what the Sentencing Commission did  
7   was to say we're respecting the rule that  
8   Congress has set up, but the rule that Congress  
9   set up is a categorical one that doesn't ask us  
10   to say within an individual case that the  
11   sentencing disparity can have no weight at all.

12           MR. FEIGIN: Well, let me address the  
13   mouse hole and the elephant point separately.

14           As to the mouse hole point, I think we  
15   did have a mouse hole here because neither they  
16   nor any of their amici nor any of the parties  
17   or amici in the previous case have ever pointed  
18   to a single instance of Section  
19   3582(c)(1)(A)(i) ever being used for these  
20   kinds of legal changes that they're pointing to  
21   in the -- in these set of cases. So I don't  
22   think Congress had any reason to anticipate  
23   that this was an option on the table.

24           And I realize I have -- I apologize --

25           CHIEF JUSTICE ROBERTS: Why don't you

1 finish and then we won't --

2 MR. FEIGIN: I'm sorry.

3 JUSTICE KAGAN: I won't ask any more  
4 questions.

5 MR. FEIGIN: And we do have a stoppage  
6 time. So the -- as to the elephant, Your  
7 Honor, I do think that this would be  
8 authorizing quite a lot because I think there's  
9 been a lot of focus on what's going to get  
10 granted and what isn't.

11 I think there are a lot of motions  
12 that are going to get granted. It's not a huge  
13 and significant difference, but we are seeing  
14 higher percentages of grants in the circuits  
15 that do allow consideration of non-retroactive  
16 changes in law.

17 I think we have every reason to  
18 believe that that could increase in the future  
19 as prisoners decide to build up some kind of  
20 record that might suggest rehabilitation and  
21 then force the courts to evaluate whether  
22 they've done enough. There is absolutely no  
23 time limit on or numerical limit on the number  
24 of these motions that we will see.

25 JUSTICE KAGAN: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Justice Thomas, anything?

4 Justice Alito?

5 Justice Sotomayor? You don't get a  
6 chance.

7 Justice Gorsuch?

8 Justice Kavanaugh?

9 Justice Barrett?

10 Justice Jackson?

11 Okay. Thank you, counsel.

12 MR. FEIGIN: Thank you.

13 CHIEF JUSTICE ROBERTS: Rebuttal,  
14 Mr. Frederick?

15 REBUTTAL ARGUMENT OF DAVID C. FREDERICK  
16 ON BEHALF OF THE PETITIONER IN CASE 24-820

17 MR. FREDERICK: I'd like to start with  
18 Justice Barrett's question. To accept the idea  
19 that Section 403(b) applies in the way the  
20 government advocates here would be to accept  
21 the proposition of implied repeal provisions of  
22 the 1984 Act. Nothing in the 2018 Congress  
23 suggested that Congress intended to limit the  
24 scope of considerations that the Sentencing  
25 Commission would authorize.

1           I would accept, though, that under  
2   your hypothetical as you posed it, if the  
3   Sentencing Commission came and said it shall  
4   apply to pending cases, contrary to what  
5   Congress said specifically in the 403  
6   provision, that would be ultra vires and  
7   outside what the Commission did.

8           But I would urge you to look at the  
9   words in 994(t), which give the Sentencing  
10   Commission very broad authority to come up with  
11   factors, a list of criteria, and to explain the  
12   circumstances in which "extraordinary and  
13   compelling" would apply.

14           Justice Gorsuch, to your questions, I  
15   would suggest that the standard for dealing  
16   with an implied repeal are very strict. And  
17   so, to accept the government's notion here, you  
18   would have to accept the idea that words that  
19   had nothing to do with compassionate release  
20   nonetheless were intended to impose limits and  
21   that judges would be authorized to create  
22   limits.

23           And yet that goes against a number of  
24   this Court's canons. One is the idea we don't  
25   have implied repeal unless there's a strict

1 standard that is met. We don't ask for  
2 judge-made rules that interfere with  
3 congressional statutes that give broad  
4 authority. And the third is the idea that we  
5 would accept the -- the principle that a  
6 statute that speaks directly to a question is  
7 somehow going to be negated in some fashion sub  
8 silentio by a later enactment.

9 I would urge you also to consider that  
10 sentencing length is always part of these  
11 compassionate release motions. That doesn't  
12 mean that it is an automatic application of the  
13 revocation of the stacking that occurred in the  
14 2018 Act. It could very well be that a judge  
15 says you automatically would have gotten 18  
16 years lower, but, because of your prison  
17 conduct or because of other factors, I deem  
18 your reduction only to be five years.

19 This Court doesn't need to decide what  
20 the extraordinary and compelling circumstances  
21 are. It should be for district courts to  
22 decide that. All we're asking you to do is to  
23 say that judges are not authorized to preclude  
24 the consideration of factors that district  
25 courts can take into account.

1           This is not a mechanical exercise. It  
2 looks at the individual circumstances of every  
3 inmate to determine whether, based on the  
4 totality of the circumstances, that inmate is  
5 entitled to a reduction.

6           Thank you.

7           CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9           The case is submitted.

10           (Whereupon, at 12:49 p.m., the case  
11 was submitted.)

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