Case No. 21-1441

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

ALFRED W. TRENKLER,

Defendant - Appellee.

On Appeal from a Judgment of the United States District Court for the District of Massachusetts Case No. 92-cr-10369

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE ALFRED W. TRENKLER

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NACDL represents no parties in this matter. It has no pecuniary interest in its outcome. No party's counsel authored this brief in whole or in part. NACDL is being represented in this matter pro bono. No one contributed money to fund the preparation or submission of this brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Statutes, Codes & Rules

Other Authorities

STATEMENT OF INTEREST

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

The issue presented in this case is one of nationwide importance. Numerous courts have concluded, contrary to the position taken by the government in this case, that it is within a district court's discretion to find that errors in sentencing can be an extraordinary and compelling reason for a reduction in sentence in individualized cases.

NACDL respectfully submits this brief as amicus curiae in support of Defendant-Appellee Alfred W. Trenkler. NACDL supports Mr. Trenkler for the reasons set forth below.[1]

SUMMARY OF ARGUMENT

No one believes that Mr. Trenkler was properly sentenced. Not Mr. Trenkler. Not the district court. Not even the government. At the time of his sentencing, everyone, including the district court, overlooked the statutory requirement that his life sentence be imposed only on instruction from the jury. *See* 18 U.S.C. § 844(d), (i). As the district court recognized below, the appropriate sentence for Mr. Trenkler is only 41 years. Absent compassionate release, Mr. Trenkler will spend the rest of his life in prison *because of a mistake*.

After serving nearly thirty years of his sentence, Mr. Trenkler filed for compassionate release under 18 U.S.C. § 3582(c), as amended by the First Step Act. The district court correctly concluded that the error in his original sentencing constituted an "extraordinary and compelling" reason pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) for a reduction in his sentence from life to 41 years.[2] On appeal,

[1] The parties have consented to the filing of this brief.

[2] Compassionate release is actually a "misnomer." "18 U.S.C. § 3582(c)(1)(A) in fact speaks of sentence reductions." *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020). This brief uses the terms "compassionate release" and "reduction in sentence" interchangeably.

the government argues that errors in sentencing can never contribute to a finding of "extraordinary and compelling" reasons.

The government is wrong. Nothing in the text of the compassionate release statute prohibits courts from considering errors in sentencing. On the contrary, these errors fit comfortably within the statutory definition of both "extraordinary" and "compelling." Defendants are not improperly sentenced in the mine-run of cases, and the injustice of an excessive sentencing due to such error is a powerful reason for a reduction. Indeed, Congress's express intent in passing compassionate release was to provide a "safety valve" in instances where defendants were serving an "unusually long sentence." S. Rep. No. 98-225, at 55-56, 121 (1983); *United States v. Ruvalcaba*, 26 F.4th 14, 26 (1st Cir. 2022). Granting compassionate release in the face of egregious sentencing errors or ones where the defendant's circumstances are particularly worthy of a reduction fulfills Congress's intent in passing the law.

In fact, this Court has already held that analogous non-retroactive changes in sentencing law can be an extraordinary and compelling reason for relief. *See generally Ruvalcaba*, 26 F.4th 14. Its reasoning, and the reasoning of other circuits that have reached the same result, strongly support affirmance here. Congress categorically excluded only one factor from a district court's consideration of extraordinary and compelling reasons: "rehabilitation . . . alone." 28 U.S.C. §

994(t). Otherwise, a district court may consider "any complex of circumstances" that warrant relief. *Ruvalcaba*, 26 F.4th at 28. It is unfair for defendants to serve significantly more time behind bars than Congress now deems necessary for the offense they committed. This is true for sentencing mistakes even more so than for non-retroactive changes in sentencing, the latter of which Congress indicated were appropriate at the time of the initial sentencing but the former of which Congress *never* believed were fair.

The government claims that the decision in *Trenkler v. United States*, 536 F.3d 85 (1st Cir. 2008) ("*Trenkler V*"), which denied a previous motion from Mr. Trenkler based on this sentencing error, forecloses relief here. It is incorrect. *Trenkler V* was about the availability of relief pursuant to writs of corum nobis, not compassionate release. Different standards govern the two, and the requirements of compassionate release are met here. The Court should accordingly affirm the district court's decision to reduce his sentence.

ARGUMENT

I. Sentencing Errors Can Be An Extraordinary And Compelling Reason For A Reduction In Sentence.

Section 3582(c)(1)(A)(i) of Title 18 provides that "in any case . . . the court . . . may reduce the term of imprisonment . . . if it finds that . . . extraordinary and compelling reasons warrant such a reduction." *Id.* Congress carved out one, and only one, exception to this rule: "[r]ehabilitation of the defendant alone shall not be

considered an extraordinary and compelling reason." 28 U.S.C. § 994(t). A district court, of course, must comply with the statutory command that its reasons for granting a reduction in sentence be "both 'extraordinary and compelling.'" *Ruvalcaba*, 26 F.4th at 23 (quoting 18 U.S.C. § 3582(c)(1)(A)(i)). But otherwise a finding of extraordinary and compelling reasons is left to the district court's sound discretion. *See id.*; *see also United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020) (describing the district court's discretion as "broad").

In exercising that discretion, numerous district courts have found that sentencing errors can be an extraordinary and compelling reason to reduce a defendant's sentence depending on his or her individual circumstances. *See, e.g.*, *United States v. Lopez*, 523 F. Supp. 3d 432, 438 (S.D.N.Y. 2021); *United States v. Fields*, 554 F. Supp. 3d 324, 336 (D.N.H. 2021); *United States v. Gilley*, No. 04-CR-6152-CJS-2, 2021 WL 5296909, at *7 (W.D.N.Y. Nov. 15, 2021); *United States v. Wahid*, No. 1:14-CR-00214, 2020 WL 4734409, at *3 (N.D. Ohio Aug. 14, 2020); *United States v. Cano*, No. 95-00481-CR, 2020 WL 7415833, at *6 (S.D. Fla. Dec. 16, 2020). They were right to do so.

A. Sentencing Errors Fit Within The Definition Of "Extraordinary" And "Compelling."

"The plain meaning of 'extraordinary' suggests that a qualifying reason must be a reason that is beyond the mine-run either in fact or in degree." *United States v.*

Canales-Ramos, 19 F.4th 561, 566 (1st Cir. 2021); *see also* Black's Law Dictionary 527 (5th ed. 1979) ("extraordinary" means "exceeding the usual, average, or normal measure."). "By the same token, the plain meaning of 'compelling' suggests that a qualifying reason must be a reason that is both powerful and convincing." *Canales-Ramos*, 19 F.4th at 567; *see also* Black's Law Dictionary 256 (5th ed. 1979) ("compel[ling]" means "[t]o urge forcefully,"); Black's Law Dictionary 342 (10th ed. 2014) ("compelling need" means "irreparable harm or injustice would result if [the relief] is not [granted].").

Sentencing errors, in individual circumstances, clearly fall within these definitions. There is nothing "mine-run" about a defendant having been improperly sentenced, much less serving a lengthy term in prison pursuant to an illegal sentence. Most of the time in the U.S. justice system, sentences are handed down appropriately.[3] When they are not, they are corrected on appeal. And in those instances where a sentencing error remains even after direct appeal, a defendant may utilize habeas proceedings to correct the legal error. No one could seriously contend (and the

[3] In 2021, for example, only 14.3 percent of sentences were reversed or reversed in part. *See* U.S. Sentencing Commission, *Fig. A., Type and Disposition of Appeals Cases – Fiscal Year 2021*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/FigureA1.pdf. In 2020, the percentage was only 15.2 percent. *See* U.S. Sentencing Commission, *Fig. A., Type and Disposition of Appeals Cases – Fiscal Year 2020*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/FigureA.pdf. And in those cases, of course, the sentences errors were corrected.

government does not appear to dispute here) that a defendant in prison for additional years based on a mistaken sentence is highly unusual and definitely outside the "mine-run" of cases. *Cf. Ford v. Moore,* 296 F.3d 1035, 1037 n.6 (11th Cir. 2002) (per curium) ("[a] sentence that exceeds the statutory maximum has traditionally been viewed as a violation of the eighth amendment's prohibition against cruel and *unusual* punishment.") (emphasis added and internal quotation marks omitted).

Sentencing errors can also be a "powerful" and "convincing" reason for a sentence reduction. Even a minimal amount of additional time behind bars is prejudicial to a defendant. *See Glover v. United States*, 531 U.S. 198, 203 (2001); *see also Farmer v. Brennan*, 511 U.S. 825, 858 (1994) (Thomas, J., concurring) (prisons are difficult, dangerous places, where "some level of brutality and sexual aggression is inevitable.") (internal quotation marks omitted). But frequently the impact of a sentencing mistake is not minimal. It can result in years or decades of additional time improperly in prison. It is unfair for a defendant to sit behind bars for years longer than he should, with all of the attendant risks to personal safety and deprivation of liberty, simply because the judicial system made a mistake. That injustice of additional, erroneous time in prison "undermines respect for the judicial process," *Lopez*, 523 F. Supp. 3d. at 438, and can be a compelling reason to reduce an individual defendant's sentence.

Indeed, when Congress passed the original compassionate release statute in 1984, the accompanying Senate report noted that courts may consider whether a defendant is serving "an unusually long sentence" when ruling on a motion for a sentence reduction. *See* S. Rep. No. 98-225, at 55-56 (1984) (identifying "unusual cases" in which a sentence reduction is justified, including, "cases in which other extraordinary and compelling circumstances justify a reduction of an unusually long sentence."); *see also Brooker*, 976 F.3d at 238 (same); *United States v. Maumau*, No. 2:08-CR-00758-TC-11, 2020 WL 806121, at *6 (D. Utah Feb. 18, 2020), *aff'd*, 993 F.3d 821 (10th Cir. 2021) (same). A district court's conclusion that a sentencing error that results in an unfairly long sentence compared to what it should be presents an extraordinary and compelling reason fulfills the purpose of § 3582(C)(1)(A).

Take the example of *United States v. Lopez*, 523 F. Supp. 3d 432 (S.D.N.Y. 2021). In that case, the district court incorrectly applied a career offender sentence enhancement to defendant Hector Lopez's sentence on the mistaken assumption that he had committed two predicate offenses that qualified as "controlled substance offense." *Id.* at 435, 438. Absent the error, the defendant's guidelines-recommended sentence would have been half as long. *Id.* at 438. The district court, deeply troubled by its mistake and the excessive sentence it improperly imposed, concluded that this error was an extraordinary and compelling reason for a reduction in Mr. Lopez's sentence.

Ismael Wahid presents another example of a defendant being sentenced to a wildly excessive prison term due to sentencing error. In that case, the district court found Wahid to be a career offender based on two qualifying convictions, one of which was for conspiracy to sell drugs. *See United States v. Wahid*, No. 1:14-CR-00214, 2020 WL 4734409, at *2 (N.D. Ohio Aug. 14, 2020). However, after Wahid's sentencing the Sixth Circuit clarified that conspiracy offenses could not serve as the basis for career-offender status, so under the correct interpretation of the law Wahid's sentence guidelines range should have been 63 to 78 months, not the 168 to 210 months that served as the basis for his sentencing. *Id.* Consequently, Wahid was sentenced to almost twice what he should have been, because of this mistake at sentencing. *Id.* at *3. The Court, considering this sentencing error and Wahid's risk of contracting COVID-19, granted his motion for compassionate release. *Id.*

Same for Mr. Trenkler. The district court, the government, and even Mr. Trenkler's lawyer simply missed the statutory requirement that the jury find in favor of a life sentence in order for it to be imposed. The difference was substantial and affected the sentence imposed: were it not for that error, Mr. Trenkler would not be sentenced to spend the rest of his life in prison. The sentencing court concluded that writing on a clean slate the appropriate sentence for Mr. Trenkler was 37 years, not life, s*ee United States v. Trenkler*, 537 F. Supp. 3d 91, 111-12 (D. Mass. 2021)

(citing Resentencing Tr. 60-62), and the district court here, who took over the case following the sentencing judge's retirement, concluded 41 years was warranted, *id.* at 113-14. It was appropriate for the district court to reduce Mr. Trenkler's sentence in light of the extraordinary and compelling reason of the error in his sentencing.[4]

B. The Government's Argument Conflicts With This Court's Decision In *United States v. Ruvalcaba* And Similar Cases In Other Circuits.

The government argues that any sentencing or other mistakes that a defendant could have been brought in an appeal or habeas petition cannot qualify as an extraordinary and compelling reason for a sentencing reduction under Section 3582(c)(1)(A)(i). Yet, the government can point to no statutory language supporting carving out such a category from eligibility for compassionate release. Moreover, the government's argument conflicts with this Court's decision in *United States v. Ruvalcaba*, 26 F.4th 14 (1st Cir. 2022), issued after it submitted its opening brief. There, this Circuit held that non-retroactive changes in sentencing law can serve as an extraordinary and compelling reason for compassionate release, rejecting the government's argument to limit what could constitute an extraordinary

[4] In fact, the government sometimes *accedes* to compassionate release motions that seek to correct substantial errors in defendants' sentences. In *United States v. Gilley*, for example, the government did not object to reducing a defendant's sentence by 60-months (5 years) pursuant to compassionate release to correct for the district court's miscalculation of the guidelines at sentencing. *See* 2021 WL 5296909, at *7.

and compelling reason. The reasoning in *Ruvalcaba* applies equally—if not with greater force—to sentencing errors.

In *Ruvalcaba*, the defendant argued below that a change in sentencing law brought about by the First Step Act—which provided that, if sentenced today, he would face mandatory minimum of 15 years instead of the life term he received in 2009—could contribute to a finding of extraordinary and compelling reasons. *See* 26 F.4th at 17-18. The district court, believing itself legally prohibited from considering this change, denied Mr. Ruvalcaba's motion for release. *Id.* at 18.

This Court reversed. The reasoning in *Ruvalcaba* was straightforward. Nothing in 18 U.S.C. § 3582(c)(1)(A)(i)'s text precludes a district court from considering a non-retroactive change in sentencing law when making a compassionate release determination. *See id.* at 26. Congress is perfectly capable of making express categorical exclusions when it wants to, as it did with the "exclusion regarding rehabilitation," and this Court refused to infer an unwritten categorical exclusion from Congress's silence. *Id.*

> [T]here is only one explicit limitation on what may comprise an extraordinary and compelling reason. Congress has stated plainly—in a separate statute authorizing the Sentencing Commission to issue general policy statements—that "[r]ehabilitation. . . alone shall not be considered an extraordinary and compelling reason." 28 U.S.C. § 994(t). . . . [G]iven the language that Congress deliberately chose to employ, we see no textual support for concluding that such changes in the law may never constitute part of a basis for an extraordinary and compelling reason.

Id. at 25-26. Thus, the Court concluded: "As a general matter, a district court . . . may consider *any complex of circumstances* raised by a defendant as forming an extraordinary and compelling reason warranting relief." *Id*. at 28 (emphasis added).

In addition, the *Ruvalcaba* Court specifically rejected the government's argument that sentencing errors cannot contribute to an extraordinary and compelling reason for compassionate release because that would work an end-run around Congress's decision not to make them retroactive, as it had other sentencing reductions in the First Step Act. As this Court noted, "if a district court were to reduce a sentence solely because one of the FSA's non-retroactive amendments would have lowered a defendant's sentence, it might be seen as substituting its own judgment on retroactivity for Congress's." *Id.* at 27. "But that critique knocks down a straw man. . . . There is a salient 'difference between automatic vacatur and resentencing of an entire class of sentences' on the one hand, 'and allowing for the provision of individual relief in the most grievous cases' on the other hand." *Id.* (quoting *United States v. McGee*, 992 F.3d 1035, 1047 (10th Cir. 2021)). "Congress's judgment to prevent the former is not sullied by a district court's determination, on a case-by-case basis, that a particular defendant has presented an extraordinary and compelling reason due to his idiosyncratic circumstances." *Id.*; *see also McGee*, 992 F.3d at 1047 (The possibility of a district court finding

extraordinary and compelling circumstances based in part on a non-retroactive change in sentencing law does not "usurp Congressional power.").[5]

The Fourth Circuit and Tenth Circuit reached the same result, reinforcing the *Ruvalcaba* decision. *See United States v. McCoy*, 981 F.3d 271, 285-88 (4th Cir. 2020); *McGee*, 992 F.3d at 1047; *United States v. Maumau*, 993 F.3d 821, 837 (10th Cir. 2021). In *McCoy*, the Fourth Circuit affirmed the decisions of several district courts to grant compassionate release to defendants who had been sentenced to consecutive 20 or 25-year mandatory minimums that, pursuant to a recent statute, would only be 5-year mandatory minimums if sentenced today. In addition to adopting the same statutory analysis as *Ruvalcaba*, the Fourth Circuit noted that the correction of overlong sentences is in accord with congressional intent when enacting compassionate release. *See McCoy*, 981 F.3d at 286 n.8 ("The accompanying Senate Report suggested that the length of a sentence is a relevant

[5] In *United States v. Canales-Ramos*, this Court also indicated its support for sentencing errors serving as an extraordinary and compelling reason to grant a sentence reduction in individual circumstances. There, the Court reviewed a district court decision holding that an error in sentencing made apparent by subsequent circuit precedent was not an extraordinary and compelling reason for release given the defendant's individual circumstances. *Canales-Ramos*, 19 F.4th at 568. After explaining that the definition of extraordinary was beyond the mine-run, this Court suggested that the sentencing error might indeed be "extraordinary." *Id.* However, because the defendant provided only speculation that his sentence would have been different had the court had the benefit of that later precedent, this mistake was not "compelling" in Canales-Ramos' particular circumstances. *Id.*

factor, indicating that relief would be appropriate when 'extraordinary and compelling circumstances justify a reduction of an unusually long sentence.'") (quoting S. Rep. No. 98-225, at 55 (1984)).

Moreover, in reasoning directly applicable to the sentencing error now before this Court, the Fourth Circuit went on to emphasize the obvious unfairness of a defendant serving a sentence "that Congress itself views as dramatically longer than necessary or fair." *Id.* at 286-87. *McCoy* concluded that it was well within the district courts' discretion to consider the unusual length of defendants' sentences, as well as the "gross disparity" between the sentences they received and the ones they would receive if sentenced under current law. *Id.* at 285; *see also Maumau*, 993 F.3d at 837 (internal quotation marks omitted) (affirming district court decision to grant compassionate release based on, among other things, "the incredible length of [the defendant's] stacked mandatory sentences" and "the fact that [he], if sentenced today, . . . would not be subject to such a long term of imprisonment") (internal quotation marks omitted).

This Court should hold that sentencing errors can be an extraordinary and compelling reason for compassionate release in individual cases for the same reasons. As recognized by *Ruvalcaba, McCoy,* and *McGee*/*Maumau* in the comparable context of a nonretroactive change in sentencing law, nothing in 18 U.S.C. § 3582(c)(1)(A)(i)'s text prohibits district courts from considering

sentencing errors as part of their analysis of extraordinary and compelling reasons. It simply does not circumvent Congress's judgment in other areas of the law to consider these factors when providing for compassionate relief in individual egregious cases. On the contrary, that is precisely what section 3582(c)(1)(A)(i) was designed to do.

Furthermore, just like changes in sentencing law, sentencing errors can result in overlong sentences that are grossly disproportionate to the sentence that Congress and the Guidelines deemed fair and appropriate. Indeed, it would be surpassingly strange for a disparity caused by nonretroactive changes in sentencing law to support a grant of compassionate release, but a disparity caused by a mistake at sentencing not to. In one, at the time of sentencing, the law on the books expressed Congress's judgment that the sentence was appropriate; Congress just later changed its mind. But for the other, Congress never considered the sentence arrived at by mistake to be necessary or fair. Just like the nonretroactive statutory change, the defendant who was sentenced erroneously may present an equally (or more) extraordinary and compelling reason for reduction of his or her sentence in individualized cases.

The government, in reply, may attempt to distinguish *Ruvalcaba* by claiming that a preexisting legal error (unlike a non-retroactive change in law) cannot justify a sentencing reduction because compassionate release is designed to ameliorate

"intervening" hardships, not ones existing at the time of sentencing. Gov. Br. at 23 (noting its position that compassionate release is only designed to ameliorate changed circumstances). *Ruvalcaba*, however, never said that compassionate release was limited to factors that were unknown at the time of the original sentencing. On the contrary, it and numerous other courts have noted that the defendant's youth at the time (s)he committed the offense can also be considered when finding extraordinary and compelling reasons.[6] That youth, of course, was known to the court and the parties at the time of the initial sentencing. Similarly, many courts have cited to the advanced age of older defendants as a factor in finding extraordinary and compelling reasons for reducing sentences.[7] But again, it was

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[6] *See, e.g., Ruvalcaba*, 26 F.4th at 24 (finding error in district court's failure to take into account the defendant's particular circumstances when deciding compassionate release motion, including "his relatively young age" at the time he began serving his sentence); *McCoy*, 981 F.3d at 286 (affirming reasoning of district courts in granting compassionate release based on a combination of individual factors including "the defendants' relative youth—from 19 to 24 years old—at the time of their offenses"); *Maumau*, 993 F.3d at 837 (affirming the district court's grant of compassionate release based in part on "Maumau's young age at the time of sentencing"); *Brooker*, 976 F.3d at 238 (reversing and remanding for the district court to consider the full list of factors the defendant mentioned at the time he was sentenced, including his young age).

[7] *United States v. Hansen*, No. 07-CR-00520(KAM), 2020 WL 1703672, at *7 (E.D.N.Y. Apr. 8, 2020); *United States v. Poole*, 472 F. Supp. 3d 450, 459 (W.D. Tenn. 2020); *United States v. Young*, 458 F. Supp. 3d 838, 848 (M.D. Tenn. 2020); *see also* U.S.S.G. § 1B1.13 cmtt. n.1(B) (listing age of the defendant as an extraordinary and compelling reason for release); BOP Statement § 5050.50(4)(c) (including an "elderly inmates" (65+) category among extraordinary and compelling reasons).

known at the time of sentencing that the defendant would eventually be that age while serving his sentence. If youth or old age is an appropriate consideration—both of which were known or anticipated at the time of the original sentence—changed circumstances cannot be a necessary component of being extraordinary and compelling.

The text of 18 U.S.C. § 3582(c) also does not support the idea that changed circumstances are required. That phrase is not in the statute, nor is anything like it. The Sentencing Commission's policy statement on compassionate release, which is not binding in defendant-brought cases but provides helpful guidance,[8] does not support the government's position either. It says that "an extraordinary and compelling reason *need not have been unforeseen at the time of sentencing* in order to warrant a reduction in the term of imprisonment." U.S.S.G. § 1B1.13 cmt. n.2 (emphasis added).

Plus, mistakes in sentencing invariably were *not* known at the time. Otherwise, they would have been corrected. Indeed, some errors at sentencing only become apparent following subsequent court decisions and evolution of the law.[9] But regardless of when the sentencing error is identified, the bottom line is that the

[8] *See Ruvalcaba*, 26 F.4th at 23 ("[T]he current policy statement—though not 'applicable'—nonetheless may serve as a non-binding reference.").

[9] *See, e.g.*, *United States v. Williams*, No. CR 91-559-6 (TFH), 2021 WL 5206206, at *4-*5 (D.D.C. Nov. 9, 2021).

defendant is serving an illegal sentence which will cause him or her to be imprisoned for longer than Congress believed fair or appropriate for the offense. That additional prison time due to sentencing error presents an extraordinary and compelling reason for sentence reduction depending on the particular individual circumstances.

Finally, the distinction between non-retroactive changes in sentencing law and sentencing errors is more elusive than one might think. Some mistakes at sentencing become apparent only because of intervening circuit or Supreme Court precedent. These types of sentencing errors can equally be cast either as a mistake at sentencing *or* a non-retroactive change in sentencing law. And courts have held that they can contribute to a finding of extraordinary and compelling reasons for sentencing reduction under either formulation. *See Wahid*, 2020 WL 4734409, at *2-*3; *United States v. Cano*, 2020 WL 7415833, at *4-*6; *United States v. Williams*, No. CR 91-559-6 (TFH), 2021 WL 5206206, at *4-*5 (D.D.C. Nov. 9, 2021); *United States v. Rogers*, No. CR RDB-92-0154, 2021 WL 4641177, at *3 (D. Md. Oct. 7, 2021).

The government would have this Court draw a line between non-retroactive changes in sentencing law, which this Court has held can contribute to a finding of extraordinary and compelling circumstances, and sentencing errors, which the government urges should not be a reason for compassionate release. But the only

cases that fall exclusively on the sentencing error side of the line involve blatant mistakes for which no clarification by other courts was necessary; in other words, the mistakes that should never have happened. It would turn the concept of compassionate release on its head to have exceptionally obvious sentencing mistakes be the only mistakes that compassionate release cannot provide relief for.

C. A Motion for Compassionate Release is Fundamentally Different Than a Second Habeas Petition.

The government also argues that the district court decision conflicts with this Court's decision in *Trenkler V*. This is a recasting of its end-run argument which was rejected in *Ruvalcaba*. The decision in *Trenkler V* was about the scope of the common law writ of corum nobis. In that opinion, this Court concluded that the ancient writ exists only to "fill whatever interstices exist in the post-conviction remedial scheme made available to federal prisoners by way of section 2255" (as erected by the Antiterrorism and Effective Death Penalty Act (AEDPA)). *Id.* at 97. AEDPA "was intended to provide a federal prisoner with an exclusive means of challenging the validity of his conviction or sentence" save for rare exceptions. *Id.* at 96. Accordingly, Mr. Trenkler could not raise the sentencing error he points to here in a corum nobis petition, and it had to be treated as a habeas petition (which, due to timeliness concerns, had to be denied). *Id.* at 97-98.

Compassionate release, however, is fundamentally different. It is a congressionally-enacted "safety valve" intended to operate on its own and supplant

parole. *Ruvalcaba*, 26 F.4th at 26. As noted in *McCoy* and repeated in *McGee*, compassionate release was designed by Congress to provide for a reduction in sentence when "there is *not* a specific statute that already affords relief but 'extraordinary and compelling reasons' nevertheless justify a reduction." *McCoy*, 981 F.3d at 287; *McGee*, 992 F.3d at 1046. It is aimed at leniency, allowing the district court to address valid judgments and exercise its discretion to reduce overly long sentences when extraordinary and compelling reasons are present. The AEDPA was passed to advance the goal of "finality" of criminal convictions and sentences, especially in capital cases. *Rhines v. Weber*, 544 U.S. 269, 278 (2005). But the compassionate release safety-valve is a congressionally enacted "exception" to finality. *United States v. Long*, 997 F.3d 342, 347 (D.C. Cir. 2021); *Cf. U.S. v. Concepcion*, 991 F.3d 279, 286-88 (1st Cir.), *cert granted*, 142 S. Ct. 54 (2021). There is no license for this Court to rewrite a compassionate release motion into one for relief under section 2255, as the government suggests it do here, and then to deny it for failure to comply with AEDPA's requirements.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the district court and conclude that sentencing errors can be an extraordinary and compelling reason for compassionate release.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because the brief contains 4,873 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5), because it is written in 14-point Times New Roman font.

Dated: May 16, 2022

/s/ Courtney L. Millian
Courtney L. Millian

CERTIFICATE OF SERVICE

In compliance with Fed. R. App. P. 25(d), I hereby certify that on this 16th day of May, 2022, I electronically filed with the Clerk's Office of the United States Court of Appeals for the First Circuit this Brief. Notice of this filing will be sent by operation of the Court's electronic filing system to all counsel of record who have appeared in the case.

/s/ Courtney L. Millian
Courtney L. Millian