Case No. 21-1275

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

RONALD HUNTER,

Defendant - Appellee.

On appeal from Order Granting Motion to Reduce Sentence in the United States District Court for the Eastern District of Michigan Case No. 92-81058

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE RONALD HUNTER

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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

Pages

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Legislative History

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 the sea change worked by *Booker* can be an extraordinary and compelling reason for a reduction in sentence in individualized cases.

Pursuant to Sixth Circuit Local Rule of Appellate Procedure 29, NACDL respectfully submits this brief as *amicus curiae* in support of Defendant-Appellee Ronald Hunter ("Hunter"). NACDL supports Mr. Hunter for the reasons set forth below.[1]

ARGUMENT

Mr. Hunter was sentenced to life in prison before the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), made the federal sentencing guidelines discretionary. According to the Government, the district court erred in considering *Booker*'s watershed change in sentencing law and the likelihood Mr. Hunter would have received a lower sentence if he been sentenced pursuant to a constitutional sentencing regime as one of the combination of factors that established "extraordinary and compelling reasons" for Mr. Hunter's release. The Government's overarching argument—that a change in sentencing law can never contribute to establishing "extraordinary and compelling reasons"—is contrary the text of the compassionate release statute, 18 U.S.C. § 3582(c), its structure, and legislative history, as well as the decisions of the Fourth and Tenth Circuits and numerous district courts.

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

I. *Booker*'s Sea Change In Sentencing Law 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.* According to *Black's Law Dictionary* from around the time of compassionate release statute's initial enactment, "extraordinary" means "exceeding the usual, average, or normal measure." Black's Law Dictionary 256 (5th ed. 1979). "Compel[ling]" means "[t]o urge forcefully," *id.* at 527, or, extrapolating from the more recent definition of "compelling need," a "compelling reason" means one "so great that irreparable harm or injustice would result if [the relief] is not [granted]," *see* Black's Law Dictionary 342 (10th ed. 2014).

Today the authority to determine what constitutes "extraordinary and compelling reasons" rests in the sound discretion of the district court. *See, e.g.*, *United States v. Jones*, 980 F.3d 1098, 1111 (6th Cir. 2020) ("In cases where incarcerated persons file motions for compassionate release, federal judges . . . have full discretion to define 'extraordinary and compelling.'"). In exercising that discretion, numerous courts have found that the change in sentencing law precipitated by *Booker* 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. Parker*, 461 F. Supp. 3d 966, 981 (C.D. Cal. 2020); *United States*

v. Jones, 482 F. Supp. 3d 969, 979 (N.D. Cal. 2020); *United States v. Vigneau*, 473 F. Supp. 3d 31, 38 (D.R.I. 2020); *United States v. Redd*, 444 F. Supp. 3d 717, 722-23 (E.D. Va. 2020); *United States v. Clark*, No. 97-CR-817, 2021 WL 1066628, at *3 (S.D.N.Y. Mar. 18, 2021); *United States v. Rivas*, No. 91-CR-217, 2021 WL 254410, at *2-*3 (E.D. Wis. Jan. 26, 2021); *United States v. Vargas*, No. 88-CR-325, 2020 WL 6886646, at *5 (S.D.N.Y. Nov. 24, 2020); *United States v. Stuart*, 5:92-cr-00114, at 4-6 (E.D.N.C. filed Dec. 8, 2020). They were right to do so.

A. *Booker*'s Watershed Effect On Sentencing Law Is "Extraordinary And Compelling" In Individual Cases

Booker is one of, if not the, most important decisions in modern sentencing law.[2] It held that Congress's most significant effort at sentencing reform in the last century, the Sentencing Reform Act of 1984 ("SRA"), unconstitutionally usurped the role of the jury by permitting judges to find facts that raised the mandatory range of permissible sentences (the Federal Sentencing Guidelines promulgated by the U.S. Sentencing Commission) that applied to defendants. *Booker*, 543 U.S. at 226-44. It rewrote that law by striking two sections of the SRA and rendered its system

[2] *See, e.g.*, Brenda L. Tofte, *Booker at Seven: Looking Behind Sentencing Decisions: What Is Motivating Judges?*, 65 Ark. L. Rev. 529, 551 (2012) (discussing *Booker*'s "sea change" in sentencing law); Roger B. Handberg, Booker: *The First 10 Years in Florida*, 91-JAN Fla. B.J. 14, 14 (2017) (same); Edward Juel, *Renewed Opportunities for Sentencing Advocacy*, 58-JAN Fed. Law. 30, 30-31 (2011) (same).

of mandatory Guidelines "effectively advisory." *Id.* at 245. In its scope and impact, *Booker* was "extraordinary." *See, e.g.*, *id.* at 272, 274, 277, 280, 287 (Stevens, J., partially dissenting) (calling *Booker*'s remedy "extraordinary" five separate times).

Booker ushered in "another era of federal sentencing."[3] Following that decision, district courts remain obligated to begin sentencing by calculating the appropriate Guidelines range. *See Rita v. United States*, 551 U.S. 338, 347-48 (2007). But they are no longer bound by that calculation, nor even entitled to presume that the range is reasonable. *See id.* at 351. Instead, district courts must "giv[e] both parties an opportunity to argue for whatever sentence they deem appropriate" and then "consider all of the § 3553(a) factors," such as the nature and circumstances of the offense and the defendant's history and characteristics, "to determine whether they support the sentence requested." *Gall v. United States*, 552 U.S. 38, 49-50 (2007).

Booker fundamentally changed the way that defense lawyers, prosecutors, and federal courts approach sentencing. Developing a fulsome record of aggravating and mitigating factors has become a core part of the lawyers' job, just

[3] U.S. Sentencing Comm'n, Report on the Continuing Impact of *United States v. Booker* on Federal Sentencing 10 (2020), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_A.pdf#page=5; *see also Vargas*, 2020 WL 6886646, at *4 (noting that after *Booker* "the sentencing landscape has changed dramatically").

as parsing that record has become a core part of the judges'. Today "sentencing procedures are fulsome, hotly contested hearings with a lot of arguments for a below guideline sentence." *See* R. 987, PageID#2517. "[D]istrict courts can no longer simply add up figures and pick a number within a narrow range but instead must consider all of the applicable factors, listen carefully to defense and government counsel, and sentence the person before them as an individual." *See* Adam K. Miller, *A New System of Federal Sentencing: The Impact on Third Circuit Sentencing Procedure in the Wake of the Supreme Court's Landmark Decision in* United States v. Booker, 51 Vill. L. Rev. 1107, 1124 (2006).

The proof is in the numbers. Before *Booker*, defendants could not receive a sentence that fell outside the mandatory guidelines system. Today, nearly 25% of them do. *See* U.S. Sentencing Comm'n, Federal Sentencing: The Basics 7 (2020), https://www.ussc.gov/guidelines/primers/federal-sentencing-basics; U.S. Sentencing Comm'n, 2019 Annual Report and Sourcebook of Federal Sentencing Statistics 84 (Tbl. 29) (2020), https://www.ussc.gov/research/sourcebook/archive/sourcebook-2019. There can be no serious dispute that the impact of *Booker* on federal sentencing has "exceed[ed] the usual, average, or normal."

That said, *Booker*'s effect is not "extraordinary and compelling" in every or even close to every case. *Booker* was decided over 16 years ago, and only a fraction

of current federal defendants are serving sentences rendered pursuant to the mandatory federal guidelines regime. Even for most defendants sentenced pre-*Booker*, its effect is not typically extraordinary and compelling because defendants would have received the same sentence under either system. After all, most defendants today are still sentenced within the Guidelines scheme and some are even sentenced above it. *See* Federal Sentencing: The Basics, *supra*, at 7; 2019 Sourcebook of Federal Sentencing Statistics, *supra*, at tbl. 29.

But for a notable subset of pre-*Booker* defendants—those who likely would have received a lower sentence if they had been sentenced post-*Booker*—the fact that they were sentenced pursuant to an unlawful sentencing regime works a particular "injustice" that makes it "inequitable to continue their incarceration," and urges forcefully a reduction in their sentence.[4] Those defendants were deprived of the incentive and opportunity to make arguments about their individual circumstances that could have resulted in a substantially below Guidelines sentence, including: the fact that the specifics of their crimes made them less culpable than someone committing a run-of-the-mill offense; or their youth at the time they committed the offense; or the positive contributions they have made to their family

[4] *See* S. Rep. No. 98-225, at 121 (1984) (discussing how compassionate release applies "to the unusual case in which the defendant's circumstances are so changed . . . that it would be inequitable to continue the confinement of the prisoner").

and community; or the difficulty of their upbringing; or the length of the sentences of their equally or more culpable codefendants; or other mitigating factors.[5]

Thus, in *United States v. Clark*, the district court held that *Booker* was one of the extraordinary and compelling reasons for Clark's release. At the time of the original sentencing that same judge had recognized that the life term included in the Guidelines range was "uncalled for" "for a 23-year-old" and sentenced the defendant to the lowest permissible sentence. No. 97-CR-817, 2021 WL 1066628, at *3 (S.D.N.Y. Mar. 18, 2021). Because it was pre-*Booker*, the district judge had no choice under the mandatory Guidelines but to impose what he considered to be "an exceedingly harsh" 30-year sentence on Clark. *Id.* In granting compassionate release, the district court recognized that Clark was among the "many defendants who were sentenced under the mandatory Sentencing Guidelines [who] likely

[5] *See, e.g.*, *Gall*, 552 U.S. at 57-59 (holding that district court permissibly varied below the Guidelines because of the defendant's youth at the time of his offense, his short tenure in the conspiracy for which he was convicted, and "self-motivated rehabilitation"); *United States v. Tomko*, 562 F.3d 558, 572 (3d Cir. 2009) (holding that district court permissibly varied below the Guidelines in light of the defendant's remarkable record of community service and potential for defendant to aid the community in rebuilding homes in the wake of Hurricane Katrina); *United States v. Collington*, 461 F.3d 805, 809 (6th Cir. 2006) (holding that district court permissibly varied below the Guidelines in light of the defendant's difficult upbringing, which included losing his father to a murder in their home at age nine and his mother two years later to cancer, and the fact that his criminal history category overstated the severity of his offenses).

would not receive similar sentences in today's sentencing scheme." *Id.* The fact that Clark received "an undoubtedly harsh sentence" under the unconstitutional pre-*Booker* regime, combined with other factors such as his having served 23 years in prison and made significant strides toward his rehabilitation, constituted extraordinary and compelling reasons for Clark's release.[6]

Similarly, the defendant in this appeal, Ronald Hunter, was sentenced to life in prison in pre-*Booker* proceedings where the Guidelines alone dictated the result. At his sentencing, there was no presentation of individual mitigating evidence for a Guidelines variance by Mr. Hunter (since it was not permitted) and no indication that the judge believed that the mandatory life sentence was reasonable or appropriate. *See* R. 987, PageID##2513-14, 2516. As the district judge below found, Mr. Hunter had "a meaningful shot at a below guideline sentence" if he had been sentenced under a constitutional regime. *Id.* at PageID#2516. Along with Mr. Hunter's being sentenced pre-*Booker,* the court below noted his youth at the time of the conduct, the sentencing disparities between Mr. Hunter and his more culpable codefendants, and his demonstrated rehabilitation after having served more than 23

[6] *See also, e.g.*, *Parker*, 461 F. Supp. 3d at 981 (granting compassionate release; noting that defendant's co-conspirator and half-brother was "eligible for resentencing in light of *Booker*" and "the Court ultimately reduced his sentence from 360 months to 228 months," while Parker was not eligible for resentencing under *Booker* and was serving a life term).

years in prison. *See id.* at PageID##2508-17. The district court correctly found that these facts combined constituted extraordinary and compelling reasons for granting Hunter's compassionate release.

As the facts of *Clark* and *Hunter* demonstrate, *Booker* can be an extraordinary and compelling reason for compassionate release if the defendant's individual circumstances indicate that the sentence imposed under that unconstitutional regime was inappropriately long.

B. This Conclusion Is Supported By The Compassionate Release Statute's Structure And Legislative History And The Case Law In Other Circuits

The Government argues that *Booker* cannot be a reason for compassionate release because Congress did not intend for courts to use compassionate release to permit defendants to ever receive the benefit of changes in law. *See* Gov. Br. 27. This categorical position is irreconcilable with the statute's structure and legislative history and the holdings of the Fourth and Tenth Circuits.

i. Structure and Legislative History

The statute's structure and legislative history support the conclusion that Congress intended compassionate release to encompass changes in sentencing law, such as the decision in *Booker*. In 1984, Congress enacted compassionate release as part of the SRA. It set out to create a mechanism for deserving defendants to receive reductions in their sentences in light of "changed circumstances." S. Rep.

No. 98-225, at 55-56. To do so, Congress included two "safety valves." *Id.* at 121. One permits district courts to reduce sentences when there is a favorable change in the guidelines. 18 U.S.C. § 3582(c)(2). The other permits them to reduce sentences for "extraordinary and compelling reasons." *Id.* § 3582(c)(1)(A)(i).

Now, by its terms the first safety valve applies to reductions by the Sentencing Commission and does not provide for *Booker*'s retroactive application. Congress never anticipated *Booker*. *See Booker*, 543 U.S. at 265 ("We do not doubt that Congress, when it wrote the Sentencing Act, intended to create a form of mandatory Guidelines system."). But 18 U.S.C. § 3582(c)(2)'s text and legislative history make clear that Congress was not averse to, and in fact was specifically interested in, having judges use changes to the guidelines as a basis for reducing sentences.[7] And it stands to reason that a judge's application of § 3582(c)(1)(A)(ii)'s "extraordinary and compelling" safety valve may be similarly motivated by changes in sentencing law and an interest, which runs throughout the SRA, in reducing sentencing disparity. In fact, the SRA's legislative history recognizes that the "extraordinary and compelling" safety valve exists, in part, to

[7] *See* 18 U.S.C. § 3582(c)(2) ("[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission[,] . . . the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable . . . ."); S. Rep. No. 98-225, at 121 (Congress looked to "assure the availability of specific review and reduction of a term of imprisonment . . . to respond to changes in the Guidelines.").

permit reductions of "unusually long" sentences. *See* S. Rep. No. 98-225, at 55; *see also Vigneau*, 473 F. Supp. 3d at 36 (discussing the legislative history); *United States v. McDonel*, No. 07-20189, 2021 WL 120935, at *3 (E.D. Mich. Jan. 13, 2021) (same).

There is precedent for interpreting the "extraordinary and compelling" provision to cover reasons for release that are similar to, but go beyond, the reasons for release specifically prescribed in other provisions of § 3582(c). In 1996, Congress modified the SRA to add a third safety valve for defendants over 70-years-old who had served at least 30 years of a new three strikes sentence. *See* Violent Crime Control and Law Enforcement Act of 1994, PL 103–322, September 13, 1994, 108 Stat. 1796, § 70002(5) (codified at 18 U.S.C. § 3582(c)(1)(A)(ii)). From that statute's plain terms, it is clear that Congress was interested in authorizing the use of compassionate release in third strike cases where the defendant's age suggested that they were less likely to recidivate and they had served a substantial term of their sentence. Building on this, in 2016 the Sentencing Commission added to its description of "extraordinary and compelling reasons" an "age of the defendant" category, FCJ Federal Sentencing Guidelines Manual Amendment 799 (dated Nov. 1, 2016), that "considerably relaxe[d]" aspects of the third safety valve, *see* Alan Ellis & Mark H. Allenbaugh, *The U.S. Sentencing Commission Continues to Make Fundamental Fixes to the Sentencing Guidelines*, 31-WTR Crim. Just. 50,

51 (2007). That new category of extraordinary of compelling reasons, like the third safety valve, focused on the defendant's age with an eye toward their likelihood to recidivate and the amount of time they had served. But, instead of setting the threshold at 70-years-old and thirty years served of a third strike sentence, it applied to defendants over 65-years-old, who were experiencing deterioration because of their age, and who had served at least ten years of any sentence. *Id.* Courts regularly apply the Sentencing Commission's "age of the defendant" category without expressing any reservations about its overlap with the third safety valve. *See, e.g.*, *United States v. McCloud*, No. 2:08-CR-00022, 2020 WL 3066618, at *5 (D.N.D. June 9, 2020), *aff'd*, No. 20-2744, 2020 WL 8573068 (8th Cir. Aug. 25, 2020); *United States v. Greene*, No. 71-CR-1913, 2021 WL 354446, at *13-*14 (D.D.C. Feb. 2, 2021) (Jackson, K.B., J.).

The Sixth Circuit should follow suit for *Booker*. Congress's concerns about equity that caused it to include a provision in § 3582(c) permitting courts to reduce sentences based on changes to the Guidelines made by the Sentencing Commission apply equally to reductions for *Booker*. That *Booker*'s change to sentencing law came through judicial decision, rather than a Sentencing Commission decision, should make no difference.

ii. Case Law in Other Circuits

Both the Fourth and Tenth Circuits have held that district courts may consider non-retroactive changes in sentencing law when making an individualized determination about whether a defendant has established extraordinary and compelling reasons for compassionate release. *See McCoy*, 981 F.3d 271, 285 (4th Cir. 2020); *United States v. Maumau*, No. 20-4056, 2021 WL 1217855, at *12 (10th Cir. Apr. 1, 2021). *Booker* similarly is a non-retroactive change in sentencing law that should be considered when assessing whether an individual defendant can demonstrate extraordinary and compelling reasons for release.

In *Maumau*, the Tenth Circuit held that it was within a district court's discretion to consider the First Step Act's decision to eliminate stacking of 18 U.S.C. § 924(c) mandatory minimum sentences for first time offenders when determining whether extraordinary and compelling reasons existed for compassionate release based on the defendant's individual circumstances. *See* 2021 WL 1217855, at *12. It affirmed the district court's decision to grant compassionate release to the defendant "based on its individualized review of all the circumstances of Maumau's case" and its conclusion "that a combination of factors" warranted relief, including Maumau's youth and the fact that "if sentenced today, . . . [he] would not be subject to such a long term of imprisonment." *Id.* (internal quotation marks omitted).

In *McCoy*, the Fourth Circuit reached the same conclusion. The appeals court explicitly recognized that the severity of the defendants' sentences and disparity between the defendants' sentences and the sentences required by current law were an appropriate part of the district courts' extraordinary and compelling analysis. *See* 981 F.3d at 285. According to the Fourth Circuit, "consideration of the defendants' § 924(c) sentences is supported by the legislative history of the original compassionate release statute." *Id.* at 286 n.8. "The accompanying Senate Report suggested that the length of a sentence is a relevant factor" when deciding whether to grant compassionate release. *Id.* Furthermore, the Circuit emphasized, the district courts' extraordinary and compelling analysis was appropriately the product of an "'individualized assessment' of each defendant's sentence" and a "full consideration" of the defendants' circumstances. *Id.* at 289. In particular, it approved of the district courts' focus on the defendants' "relative youth . . . at the time of the offenses." *Id.*

The reasoning of *McCoy* applies likewise to *Booker*. For some pre-*Booker* defendants, there is a substantial disparity between the sentence they originally received and the one they likely would receive under the advisory guidelines today. When considered in light of the defendant's individual circumstances, such as their youth at the time of their offense, this can be an extraordinary and compelling reason for release.

C. The Treatment Of The Covid-19 Pandemic Cases Also Reinforces This Conclusion

For the past nine months, the Government has conceded, as a matter of DOJ-wide policy, that individuals incarcerated in federal prison who suffer from risk factors for a severe outcome from COVID-19 have established extraordinary and compelling reasons for release.[8] Countless courts have reached the same conclusion.[9]

Like the decision in *Booker*, the COVID-19 pandemic is not "extraordinary and compelling" simply because of the number of federal prisoners it effects. In

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[8] *See United States v. Coffman*, No. 5:09-CR-181, 2020 WL 6384406, at *2 (E.D. Ky. Oct. 29, 2020) ("In its brief on remand, the government explains that, on July 28, 2020, the Department of Justice issued a directive that the government shall concede that an inmate, who has one of the risk factors listed by the Centers for Disease Control and Prevention (CDC) for greater risk of severe illness from COVID-19, presents an 'extraordinary and compelling' reason warranting eligibility for compassionate release, even if those risk factors in ordinary, non-COVID-19 times would not.") (internal quotation marks omitted); *United States v. Brown*, No. 14-CV-60161, 2020 WL 5116781, at *4 (S.D. Fla. Aug. 31, 2020) (similar); *United States v. Turner*, No. CR DKC 13-08-6, 2020 WL 5569532, at *3 (D. Md. Sept. 17, 2020) (similar).

[9] *See, e.g.*, *United States v. Mitchell*, 472 F. Supp. 3d 403, 407 (E.D. Mich. 2020); *United States v. McKinney*, No. 3:15-CV-208, 2020 WL 5642113, at *2 (N.D. Ohio Sept. 22, 2020); *United States v. Rice*, No. 5:05-cv-00042, 2020 WL 5569616, at *1 (N.D. Ohio Sept. 17, 2020); *United States v. Smallwood*, No. 5:08-CV-00038, 2020 WL 5486729, at *3 (W.D. Ky. Sept. 11, 2020); *United States v. Williams*, No. 5:16CR386, 2020 WL 5228141, at *2 (N.D. Ohio Sept. 2, 2020); *United States v. Wren*, No. 10-cr-20137, 2020 WL 5087978, at *4 (E.D. Mich. Aug. 28, 2020); *United States v. Duncan*, 478 F. Supp. 3d 669, 674-79 (M.D. Tenn. 2020); *United States v. Goodwin*, No. 2:13-CR-00037-11, 2020 WL 4432697, at *2-*3 (E.D. Tenn. July 31, 2020).

the case of COVID-19, it is the extraordinary pandemic as applied to the particular medical, penal, and legal situation of an individual prisoner that numerous courts found established "extraordinary and compelling reasons" for granting compassionate release. *See supra* n.9.

The same is true with *Booker*. The *Booker* decision's impact on federal sentencing was wide-ranging and dramatic: a "sea change" that now allows district judges to take into account aggravating and mitigating circumstances and issue sentences outside the guidelines ranges. *See supra* pp. 4-8. Yet *Booker* did not impact all defendants, just as the pandemic did not impact all prisoners. While certain prisoners had risk factors that made them particularly vulnerable to COVID-19, certain pre-*Booker* defendants had mitigating factors and would likely have received significantly lower sentences if sentenced under a constitutional regime. Again, like the prisoners facing especially high COVID-19 risk, these pre-*Booker* defendants serving a sentence for longer than justice requires, rendered pursuant to an unconstitutional sentencing regime, satisfy the "extraordinary and compelling" threshold for compassionate release. *See, e.g.*, *Vargas*, 2020 WL 6886646, at *4 (granting compassionate release to defendant whose pre-*Booker* sentence was "draconian").

The Government attempts to distinguish the pandemic on the grounds that, unlike *Booker*, it is "factual" and "happening now." Nowhere does the text of

§ 3582 mention either of those words, and the Court should reject the Government's effort to read them into the statute. *See Hoge v. Honda of Am. Mfg., Inc.*, 384 F.3d 238, 246-47 (6th Cir. 2004) ("[C]ourts have a duty to refrain from reading a phrase into a statute when Congress has left it out."). This is particularly so in light of the compassionate release statute's own incorporation of changes in the Guidelines and the Fourth and Tenth Circuit's case law, which recognizes that changes in sentencing law can be an extraordinary and compelling reason for release. Moreover, these overlong sentences being served by defendants sentenced under the unconstitutional pre-*Booker* regime are "happening now" and result from "factual" issues such as the defendant's youth at the time of the offense, the disparate sentences given to other more culpable defendants, the defendant's difficult upbringing, and the like.

The Government also complains that permitting courts to consider *Booker* in even individualized circumstances would undermine Congress's interest in finality and work an "end run" around *Teague v. Lane*, 489 U.S. 288 (1989). Gov. Br. 12, 19. However, sentence reductions under the compassionate release statute are "acts of lenity." *United States v. Jones*, 482 F. Supp. 3d 969, 981 (N.D. Cal. 2020) (quoting *United States v. Padilla-Diaz*, 862 F.3d 856, 861 (9th Cir. 2017)). "18 U.S.C. § 3582(c) represents Congress's judgment that the generic interest in finality must give way in certain individual cases." *Id.* The Government objects that, in

some particularized cases, defendants can receive benefits under 18 U.S.C. § 3582(c) that they do not under *Teague*. But that is the statute Congress wrote. The courts' established practice of applying *Teague v. Lane* in habeas lawsuits does not "justify a rule that denies [compassionate release's] statutory text its fairest reading." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 329 (2015).

D. *United States v. Tomes* and *United States v. Wills* Do Not Dictate A Different Result

The Government argues that *United States v. Tomes*, 990 F.3d 500 (6th Cir. 2021), and *United States v. Wills*, 991 F.3d 720 (6th Cir. 2021), require this Court to conclude that *Booker* can never be a permissible basis for release. Gov. Br. 17-18. Not so. In both the *Tomes* and *Wills* cases, this Court was reviewing district court decisions *not* to grant compassionate release to defendants who were serving sentences pursuant to mandatory minimums that had been non-retroactively reduced by the First Step Act. In affirming those rulings, the Court simply held that it was not an abuse of discretion for those district courts to find that those amendments, standing on their own, did not provide extraordinary and compelling reasons to reduce the sentences of the defendants before them. *Tomes*, 990 F.3d at 505; *Wills*, 991 F.3d at 724; *see also United States v. McGee*, No. 20-5047, 2021 WL 1168980, at *10 (10th Cir. Mar. 29, 2021) (describing the Sixth Circuit's decision in *Tomes* as holding that "the fact a defendant is serving a pre-First Step Act mandatory life sentence imposed under § 841(b)(1)(A) cannot, standing alone,

serve as the basis for a sentence reduction under § 3582(c)(1)(A)(i)"); *Maumau*, 2021 WL 1217855, at *13 (Tymkovich, J. concurring) (citing *Tomes* for the same proposition). Neither opinion held, nor even considered, whether it would be an abuse of discretion for a district court to conclude that those reductions *were* extraordinary and compelling when considered in light of the individual circumstances of the particular defendant before it. *Cf. United States v. McKinnie*, No. 20-3954 (6th Cir. filed Mar. 21, 2021) (remanding for the district court to consider in the first instance whether a non-retroactive change in law should be a part of a finding of extraordinary and compelling reasons for release). To conclude that *Tomes* and *Wills* held anything more would create a split with the Fourth and Tenth Circuits. *See Maumau*, 2021 WL 1217855, at *13; *McCoy*, 981 F.3d at 286.

In addition, *Tomes* and *Wills* involved sentencing reductions enacted as part of the First Step Act. The First Step Act expressly made several of its sentence reductions retroactive but not the reductions invoked by defendants Tomes and Wills. From this, this Court inferred a congressional intent to "careful[ly] . . . limit the retroactivity of the First Step Act's reforms," which weighed against their serving as extraordinary and compelling reasons. *Tomes*, 990 F.3d at 505. *Booker*, a Supreme Court decision about constitutionality, raises no such inference of congressional intent.

In sum, neither *Tomes* nor *Wills* controls the outcome here.

CONCLUSION

The Government contends that *Booker*'s watershed change in sentencing law can never serve as grounds for granting compassionate release no matter how inequitable the individual defendant's circumstances. However, the disparity created by *Booker* in individual cases fits neatly into the dictionary definition of "extraordinary and compelling." There was nothing "usual, average, or normal" about the change in sentencing law caused by *Booker*, and the inappropriately harsh sentences received by some defendants in that unconstitutional regime would lead to "irreparable harm or injustice" unless corrected through the "extraordinary and compelling reasons" safety valve. Congress intended the compassionate release statute to allow the release of defendants where there has been "changed circumstances." The difference in sentences as a result of *Booker* can certainly be one major aspect of a defendant's changed circumstances. For these reasons, the Sixth Circuit should affirm the district court's discretionary decision to consider *Booker* as part of its "extraordinary and compelling" analysis and grant Mr. Hunter 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 4987 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) and Sixth Circuit Rule 32(b)(1).

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: April 28, 2021

/s/ Courtney L. Millian
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CERTIFICATE OF SERVICE

In compliance with Fed. R. App. P. 25(d) and 6th Cir. R. 25(f)(2), I hereby certify that on this 28th day of April, 2021, I electronically filed with the Clerk's Office of the United States Court of Appeals for the Sixth 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.

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