Appeal No. 20-CO-0467

DISTRICT OF COLUMBIA COURT OF APPEALS

MONWELL ONLEY,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division

BRIEF OF AMICI CURIAE PUBLIC DEFENDER SERVICE AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT

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STATEMENT OF AMICI CURIAE

This case presents several questions regarding the interpretation of the District of Columbia's newly enacted compassionate release statute, D.C. Code § 24-403.04, and the applicable standard of review. These issues are important to clients of the Public Defender Service and members of the National Association of Criminal Defense Lawyers.[1] The parties have consented to the filing of this brief.

BACKGROUND

"The COVID-19 pandemic is extraordinary and unprecedented in modern times in this nation." *United States v. Hernandez*, No. 18 Cr. 834-04 (PAE), 2020 WL 1684062, at *3 (S.D.N.Y. Apr. 2, 2020). In the United States, more than six million people have contracted COVID-19, and nearly 200,000 have died from it.[2]

COVID-19 is a highly contagious disease caused by a "novel coronavirus" that spreads primarily through close person-to-person contact. *Thakker v. Doll*, No. 1:20-cv-480, 2020 WL 1671563, at *4 (M.D. Pa. Mar. 31, 2020) (citing CDC, https://www.cdc.gov/coronavirus/2019-ncov/prepare/transmission.html). Although some people experience mild or no symptoms, "the effects of COVID-19 can be drastically more severe in older individuals or those with medical conditions." *Id.* "In some cases, COVID-19 can cause serious, potentially permanent, damage to lung tissue, and can require extensive use of a ventilator. The virus can also place

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[1] NACDL has a particular interest in this case because, together with its partner organizations, it is recruiting attorneys to file compassionate release motions for federal and D.C. prisoners who are vulnerable to COVID-19.

[2] Centers for Disease Control and Prevention (CDC), https://covid.cdc.gov/covid-data-tracker/#cases (last visited Sept. 11, 2020).

greater strain on the heart muscle and can cause damage to the immune system and kidneys. These long-term consequences and the likelihood of fatality increase in those of advanced age and those with other medical conditions, like [appellant]. For those in high-risk categories, the fatality rate is thought to be approximately fifteen percent." *Id.* (citations omitted).

"While the COVID-19 pandemic is devastating in every region it invades," *Samy v. United States*, No. 16-20610-1, 2020 WL 1888842, at *4 (E.D. Mich. Apr. 16, 2020), "individuals in jails and prisons are particularly vulnerable during this pandemic," *Mitchell v. United States*, No. 20-CF-73, 2020 WL 4691528, at *6 n.13 (D.C. Aug. 13, 2020), as the "social distancing measures" needed to control the spread of the virus are "nearly impossible to implement and follow [in prisons], given the large numbers of inmates held together in crowded, closed facilities," *United States v. Williams*, No. 3:04cr95/MCR, 2020 WL 1751545, at *2 (N.D. Fla. Apr. 1, 2020) ("In light of this reality, courts around the country have recognized that the risk of COVID-19 to people held in jails and prisons 'is significantly higher than in the community, both in terms of risk of transmission, exposure, and harm to individuals who become infected.'"). Indeed, recent research shows that the COVID-19 case rate among prisoners is 5.5 times higher than in the general population, and the adjusted death rate (to account for differences in age and sex distributions in prison and general populations) is 3.0 times higher.[3]

[3] Brendan Saloner et al., *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 J. AM. MED. ASS'N 602, 602–03 (Aug. 11, 2020), *available at* https://jamanetwork.com/journals/jama/fullarticle/2768249.

Accordingly, "public health experts have urged for immediate release of incarcerated individuals even from institutions that do not yet have any confirmed cases because once a case of COVID-19 is identified in a facility, it will likely be too late to prevent a widespread outbreak." *United States v. Gileno*, No. 3:19-cr-161-(VAB)-1, 2020 WL 1916773, at *4 (D. Conn. Apr. 20, 2020) (brackets and quotation marks omitted). And an "overwhelming" number of federal courts have answered that call by broadly construing the federal compassionate release statute, 18 U.S.C. § 3582(c)(1)(A)—which was amended by the First Step Act of 2018 to permit defendants, and not just the Federal Bureau of Prisons (BOP), to request relief from the court—to apply to defendants whose age or medical conditions make them particularly vulnerable to COVID-19, even if they do not otherwise meet the criteria specified in the policy statement. *Samy*, 2020 WL 1888842, at *4 (collecting cases); *see also* cases cited *infra* notes 15–16.

Against the backdrop of this federal precedent, the D.C. Council enacted Section 305 of the COVID-19 Emergency Act, entitled "Good time credits and compassionate release," "to create opportunities for safe release for individuals that are incarcerated for D.C. Code offenses in [BOP] custody," "who have so far been largely neglected by the First Step Act and are extremely vulnerable to COVID-19."[4] *See* COVID-19 Response Supplemental Emergency Amendment Act of 2020 (COVID-19 Emergency Act), D.C. Act 23-286, § 305 (Apr. 10, 2020).

[4] D.C. Council, Twenty-Seventh Legislative Meeting, COVID-19 Response Supplemental Emergency Amendment Act of 2020, B23-0733 (Apr. 7, 2020), https://bit.ly/2F1KouB (Statement of Councilmember Allen, at 47:17–47:46).

First, Section 305(a) retroactively extended a 15 percent "good time credit" to D.C. Code offenders serving indeterminate sentences for felonies committed before August 5, 2000, making some defendants immediately eligible for release. D.C. Code § 24-403.01a. When the First Step Act amended the federal good time credit statute to award 54 days of credit for "each year of the prisoner's sentence imposed by the court," 18 U.S.C. § 3624(b)(1), that benefit automatically applied to D.C. Code offenders serving determinate sentences for felonies committed after August 5, 2000, D.C. Code § 24-403.01(d), but not to those serving indeterminate sentences for older crimes. Section 305(a) of the COVID-19 Emergency Act corrected this "old inequity" between different groups of BOP inmates.[5]

Second, Section 305(b) created a "compassionate release program, modeled after [the] federal program," to protect "vulnerable individuals" during the ongoing public health crisis.[6] In explaining the purpose of this provision at the final reading of the bill, Councilmember Charles Allen, Chair of the Committee on the Judiciary and Public Safety, quoted a *Washington Post* editorial that advocated reducing the nation's prison population by releasing medically vulnerable inmates, not only to protect their individual health, but also to control the spread of the disease and its burden on our strained health care system, both inside and outside prison walls:

> The real danger is in doing nothing, on the belief that what takes place in penal institutions is less critical or somehow separate from society—or that the lives of convicts are worth less than those of free men and women. In fact, prisons and jails are porous places; their walls do nothing to impede the

[5] *Id.* at 48:26–48:39.

[6] *Id.* at 48:10–48:13, 48:56.

> spread of disease. The failure to contain the virus on the inside, for whatever reason, will accelerate its proliferation on the outside.[7]

While the D.C. compassionate release statute borrows some of its language and structure from the federal statute, reflecting the Council's intent to "align the use of compassionate release with the federal [law],"[8] it provides even broader and more immediate relief than its federal counterpart, consistent with its purpose of protecting vulnerable inmates from the unprecedented threat of COVID-19. For example, whereas the federal statute provides for relief without regard to medical conditions or other special circumstances if the defendant is at least 70 years old and has served at least 30 years in prison, 18 U.S.C. § 3582(c)(1)(A)(ii), the D.C. statute extends such treatment to prisoners who are at least 60 years old and have served at least 25 years in prison, D.C. Code § 24-403.04(a)(2). Moreover, whereas the federal statute requires defendants to first exhaust administrative remedies with the BOP before seeking relief from the court, 18 U.S.C. § 3582(c)(1)(A), the D.C. statute contains no such exhaustion requirement. And finally, whereas the federal statute requires the district court to consider all sentencing factors, such as the need "to provide just punishment for the offense," 18 U.S.C. § 3553(a), in determining whether a sentence reduction is warranted, *id.* § 3582(c)(1)(A), the D.C. statute directs the Superior Court to consider only whether the defendant poses "a danger to the safety of any other person or the community," and whether "extraordinary

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[7] *Id.* at 47:45–48:09 (quoting *Officials Must Work Quickly To Help Prevent the Coronavirus in Prisons*, WASH. POST (Mar. 17, 2020), https://wapo.st/3h6k13u).

[8] COVID-19 Response Supplemental Emergency Declaration Resolution of 2020, R23-0399, § 2(f) (Apr. 7, 2020); Coronavirus Support Congressional Review Emergency Declaration Resolution of 2020, R23-0425, § 2(x) (May 19, 2020).

and compelling reasons" warrant a sentence reduction, D.C. Code § 24-403.04(a). These expansive measures reflect the Council's desire to quickly and dramatically reduce the number of D.C. Code offenders incarcerated during the current public health crisis by releasing individuals for whom the public safety "benefits of keeping [them] in prison for the remainder of [their] sentence are minimal, and the potential consequences of doing so are extraordinarily grave." *United States v. Perez*, No. 17 Cr. 513-3 (AT), 2020 WL 1546422, at *4 (S.D.N.Y. Apr. 1, 2020).

ARGUMENT

I. The COVID-19 Emergency Act Authorizes Compassionate Release for "Extraordinary and Compelling Reasons" Not Specifically Enumerated in the Statute, Including a Prisoner's Heightened Vulnerability to COVID-19.

Section 305(b) of the COVID-19 Emergency Act, entitled "Motions for compassionate release for individuals convicted of felony offenses," provides:

> (a) Notwithstanding any other provision of law, the court may modify a term of imprisonment imposed upon a defendant if it determines the defendant is not a danger to the safety of any other person or the community, pursuant to the factors to be considered in 18 U.S.C. §§ 3142(g) and 3553(a) and evidence of the defendant's rehabilitation while incarcerated, and:
>
> (1) The defendant has a terminal illness, which means a disease or condition with an end-of-life trajectory;
>
> (2) The defendant is 60 years of age or older and has served at least 25 years in prison; *or*
>
> (3) *Other extraordinary and compelling reasons warrant such a modification, including*:
>
> (A) A debilitating medical condition involving an incurable, progressive illness, or a debilitating injury from which the defendant will not recover;

(B) Elderly age, defined as a defendant who is:

(i) 60 years of age or older;

(ii) Has served at least 20 years in prison or has served the greater of 10 years or 75% of their sentence; and

(iii) Suffers from a chronic or serious medical condition related to the aging process or that causes an acute vulnerability to severe medical complications or death as a result of COVID-19;

(C) Death or incapacitation of the family member caregiver of the defendant's children; or

(D) Incapacitation of a spouse or a domestic partner when the defendant would be the only available caregiver for the spouse or domestic partner.

D.C. Code § 24-403.04 (emphasis added).

As the government conceded below in this case and many others, the use of the word "including" to introduce the list of "[o]ther extraordinary and compelling reasons" for compassionate release indicates that those reasons are illustrative, not exhaustive, examples of grounds for relief. *See* D.C. Code § 1-301.45(10) ("For the purposes of any act or resolution of the Council of the District of Columbia, unless specifically provided otherwise," the word "including" means "including, but not limited to.").[9] Given the language and purpose of the statute, Superior Court judges have overwhelmingly and consistently interpreted the "[o]ther extraordinary and compelling reasons" provision in D.C. Code § 24-403.04(a)(3) as extending relief

[9] *See also Fed. Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."); *Aboye v. United States*, 121 A.3d 1245, 1249 (D.C. 2015) ("[T]he participle *including* typically indicates a partial list.").

to defendants whose age, medical conditions, or other circumstances increase their vulnerability to death or severe illness from COVID-19, even if they do not meet the definition of "elderly" based on their age or length of imprisonment, and even if their medical conditions do not rise to the level of "terminal" or "debilitating."[10]

[10] *See, e.g.*, *United States v. Brown*, No. 2007 CF1 007404, Order Granting Def.'s Mot. for Compassionate Release at 1–2 (D.C. Super. Ct. May 21, 2020) (Kravitz, J.) (finding "extraordinary and compelling reasons" for compassionate release of defendant who had served only 13 years of a 24-year sentence but whose "age and underlying health conditions put him at greatly increased risk of death or severe illness in the event he contracts COVID-19"); *United States v. Montgomery*, No. 2015 CF2 011794, Order at 7 (D.C. Super. Ct. May 29, 2020) (Fisher, J.) (construing the statute's list of "qualifying circumstances" as "non-exclusive," and finding that "Defendant's risk of contracting COVID-19 due to the conditions at the D.C. Jail, the difficulty ensuring that recommended precautions to protect against infection while incarcerated will be taken, and the adverse health effects Defendant could suffer if infected with COVID-19 . . . qualify as 'extraordinary and compelling reasons' for immediate release"); *United States v. McDougle*, No. 2015 CF2 003661, Order Granting Def.'s Emergency Mot. for Reduction of Sentence in Light of COVID-19 at 4–5 (D.C. Super. Ct. June 4, 2020) (McKenna, J.) (noting the government's concession that "the word 'including' prior to the list of categories of 'extraordinary and compelling reasons' would suggest that the list was intended to be non-exhaustive," and granting compassionate release to a 51-year-old defendant whose "advanced age, obesity, history of incarceration, and decades-long history of substance abuse place him at a heightened risk of severe cardiovascular complications" from COVID-19); *United States v. Bartrum*, No. 1990 FEL 002059, Mem. Op. at 5, 13–14 (D.C. Super. Ct. June 16, 2020) (Edelman, J.) (construing "the four 'extraordinary and compelling reasons' enumerated in D.C. Code § 24-403.04(a)(3)(A)–(D) as illustrations of the type of circumstances that can provide the basis for relief rather than as an exhaustive list intended to limit the possible grounds for compassionate release," and granting compassionate release to a 49-year-old defendant whose prostate cancer "makes him acutely vulnerable to suffering severe disease or death should he become ill with COVID-19"); *United States v. Dunn*, No. 1999 FEL 001751, Order at 3, 5 (D.C. Super. Ct. June 15, 2020) (Brandt, J.) (ruling that a narrow interpretation of the "extraordinary and compelling reasons" provision "cuts against the whole rationale for the emergency legislation," and granting compassionate release to a

In fact, in more than half of the 37 orders granting compassionate release as of August 31, 2020, the court found that the defendant's heightened vulnerability to COVID-19 constituted "[o]ther extraordinary and compelling reasons" for relief.

This prevailing interpretation is highly persuasive because the D.C. Council has reenacted the compassionate release statute three times without changing the "[o]ther extraordinary and compelling reasons" language,[11] indicating that "the

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defendant whose age did not meet the definition of "elderly," but whose "HIV, hypertension, and pre-diabetes" "put him at greater risk if he contracts the coronavirus"); *United States v. Workman*, No. 2015 CF2 014787, Order Granting Compassionate Release at 1, 3 (D.C. Super. Ct. June 29, 2020) (Beck, J.) (finding it "clear from the statute's use of the word 'including' . . . that the reasons listed are not exhaustive," and concluding that "the risks COVID-19 poses to Defendant because of his medical conditions and the hardships currently facing his family because of the diagnosed medical condition of his three-year old child and the potential developmental issues concerning his two-year old child are extraordinary and compelling reasons that warrant a sentence modification," even though he had served only two years of a three-year sentence); *United States v. Kitt*, No. 1997 FEL 002334, Order Granting Def.'s Mot. for Compassionate Release at 1–2 (D.C. Super. Ct. Aug. 7, 2020) (Becker, J.) (finding "extraordinary and compelling [reasons]" for compassionate release of a 44-year-old defendant who had served only 23 years of a 40-years-to-life sentence but whose medical conditions made him "acutely vulnerable to serious consequences if he becomes infected with COVID-19 while incarcerated"); *United States v. Fortune*, No. 2008 CF1 007699, Order at 1 (D.C. Super. Ct. Aug. 7, 2020) (Leibovitz, J.) (same for 35-year-old whose clinical obesity increased his vulnerability to COVID-19); *United States v. Ayers*, No. 2008 CF3 020985, Order at 9–10 (D.C. Super. Ct. Aug. 13, 2020) (Smith, J.) (same for 37-year-old whose medical conditions placed him "at an increased risk for contracting COVID-19, and of suffering severe illness from it").

[11] *See* Coronavirus Support Emergency Amendment Act of 2020, D.C. Act 23-326, § 706 (May 27, 2020); Coronavirus Support Congressional Review Emergency Amendment Act of 2020, D.C. Act 23-328, § 706 (June 8, 2020); Coronavirus Support Second Congressional Review Emergency Amendment Act of 2020, D.C. Act 23-405, § 706 (Aug. 19, 2020).

Council was satisfied with the interpretation the courts had placed on those words." *Washington Metro. Area Transit Auth. v. D.C. Dep't of Emp't Servs.*, 506 A.2d 1127, 1129 (D.C. 1986); *see also Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."); 2B NORMAN SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 49:8 (7th ed. 2019) ("Where a statute has received a contemporaneous and practical interpretation, and is then reenacted as interpreted, the interpretation carries great weight and courts presume it is correct."). In fact, in reenacting the compassionate release statute, the D.C. Council specifically declared that emergency extension of the statute was necessary "[t]o protect the health and safety of elderly individuals *and individuals who have chronic conditions* in the criminal justice system,"[12] indicating its intent to extend relief to not only elderly inmates but also younger inmates whose medical conditions increase their vulnerability to COVID-19.

This interpretation is also persuasive because it is consistent with how federal courts have interpreted similar language in the federal compassionate release statute, after which the D.C. statute was modeled. *Corley v. United States*, 416 A.2d 713, 714 (D.C. 1980) ("[W]e look to the interpretation of the federal statute for guidance in determining the construction of our own statute since it was based on the federal provision."); *Meiggs v. Ass'd Builders, Inc.*, 545 A.2d 631, 635 (D.C. 1988) ("When a local provision is borrowed directly from a federal

[12] Coronavirus Support Congressional Review Emergency Declaration Resolution of 2020, R23-0425, § 2(x) (May 19, 2020) (emphasis added).

statute, the Council of the District of Columbia is presumed to have borrowed the judicial construction thereof as well." (brackets omitted)). Similar to the D.C. statute, the federal compassionate release statute authorizes a court to reduce a defendant's sentence if: "(i) extraordinary and compelling reasons warrant such a reduction; or (ii) the defendant is at least 70 years of age, has served at least 30 years in prison . . . , and . . . is not a danger to the safety of any other person or the community," and "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c). Also similar to the D.C. statute, the applicable policy statement identifies three "extraordinary and compelling reasons" based on the defendant's medical condition, her age and length of imprisonment, and her family circumstances, plus a "catchall provision" for any "extraordinary and compelling reason other than, or in combination with, the reasons described in [the policy statement]." U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 app. note 1.[13] Accordingly, "the vast majority" of federal courts

[13] The policy statement provides that "extraordinary and compelling reasons exist under any of the circumstances set forth below:"

> (A) Medical Condition of the Defendant.
>
> (i) The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.
>
> (ii) The defendant is
>
> (I) suffering from a serious physical or medical condition,

have interpreted the federal compassionate release statute to authorize a sentence reduction for "extraordinary and compelling reasons" other than those enumerated in the policy statement,[14] including the defendant's heightened vulnerability to

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(II) suffering from a serious functional or cognitive impairment, or

(III) experiencing deteriorating physical or mental health because of the aging process,

that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

(B) Age of the Defendant.—The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(C) Family Circumstances.—

(i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.

(ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(D) Other Reasons.—As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 app. note 1.

[14] *United States v. Almontes*, No. 3:05-cr-58 (SRU), 2020 WL 1812713, at *3 (D. Conn. Apr. 9, 2020) (agreeing with "the vast majority of district courts" that "reasons other than the inmate's medical condition, age, and family circumstances [can] amount to an extraordinary and compelling reason" for a sentence reduction); *see also United States v. Maumau*, No. 2:08-cr-00758-TC-11, 2020 WL 806121, at *2 (D. Utah Feb. 18, 2020) (joining a "majority of district courts" in concluding that compassionate release can be granted "for extraordinary and compelling reasons other than those specifically identified in the . . . policy statement").

COVID-19,[15] even if the defendant falls short of the age or length of imprisonment specified in the policy statement.[16] Construing the D.C. statute more narrowly than

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[15] *See, e.g.*, *United States v. Muniz*, No. 4:09-CR-0199-1, 2020 WL 1540325, at *2 (S.D. Tex. Mar. 30, 2020) ("Because Defendant is at high-risk for severe illness from COVID-19 and because inmates in detention facilities are particularly vulnerable to infection, the Court finds that Defendant has demonstrated an extraordinary and compelling reason for compassionate release."); *United States v. Gonzalez*, No. 2:18-CR-0232-TOR-15, 2020 WL 1536155, at *2–*3 (E.D. Wash. Mar. 31, 2020) (granting compassionate release "under the 'other reasons' category" because defendant's age and "multiple chronic illnesses" "make her particularly vulnerable" to COVID-19); *United States v. Rodriguez*, No. 2:03-cr-00271-AB-1, 2020 WL 1627331, at *7 (E.D. Pa. Apr. 1, 2020) ("[Defendant's] circumstances—particularly the outbreak of COVID-19 and his underlying medical conditions that place him at a high risk should he contract the disease—present 'extraordinary and compelling reasons' to reduce his sentence."); *United States v. Perez*, No. 17 Cr. 513-3 (AT), 2020 WL 1546422, at *4 (S.D.N.Y. Apr. 1, 2020) (finding that defendant's "medical condition, combined with the limited time remaining on his prison sentence and the high risk in the [jail] posed by COVID-19, clears the high bar set by § 3582(c)(1)(A)(i)"); *United States v. Gileno*, No. 3:19-cr-161-(VAB)-1, 2020 WL 1916773, at *3 (D. Conn. Apr. 20, 2020) ("Since the outbreak of the COVID-19 pandemic, numerous courts . . . have held that a defendant's pre-existing health conditions . . . in combination with the increased risks of COVID-19 in prisons constitute 'extraordinary and compelling reasons' warranting relief.); *United States v. Brown*, No. 4:05-CR-00227-1, 2020 WL 2091802, at *9 (S.D. Iowa Apr. 29, 2020) ("[T]he number of courts that have granted compassionate release because of COVID-19 grows by the day.").

[16] Age. *See, e.g.*, *United States v. Campagna*, No. 16 Cr. 78-01 (LGS), 2020 WL 1489829, at *1 (S.D.N.Y. Mar. 27, 2020) (finding "extraordinary and compelling reasons" for compassionate release of 55-year-old whose "compromised immune system" "puts him at significant risk if he were to become infected with the current Coronavirus"); *United States v. Wen*, No. 6:17-CR-06173 EAW, 2020 WL 1845104, at *2, *7 (W.D.N.Y. Apr. 13, 2020) (same for 48-year-old whose asthma "plac[es] him at an increased risk of falling seriously ill from COVID-19"); *United States v. Scparta*, No. 18-cd-578 (AJN), 2020 WL 1910481, at *9 (S.D.N.Y. Apr. 20, 2020) (same for 55-year-old whose hypertension and other conditions "make him especially vulnerable to complications from COVID-19"); *United States v. Park*, No. 16-cr-473 (RA), 2020 WL 1970603, at *3–*4 (S.D.N.Y. Apr. 24, 2020)

its federal counterpart would contravene the D.C. Council's intent to "align the use of compassionate release with the federal [law]," *supra* note 7, and to offer even more expansive relief than that offered by the federal statute. *See supra* pp. 5–6.

(same for 44-year-old with asthma and compromised immunity); *United States v. Lacy*, No. 15-cr-30038, 2020 WL 2093363, at *6 (C.D. Ill. May 1, 2020) (same for 31-year-old with hypertension and diabetes); *United States v. Fields*, No. 3:12-cr-00022-JKS-1, 2020 WL 2744109, at *1–*2 (D. Alaska May 6, 2020) (same for 47-year-old with cancer); *United States v. Hunt*, No. 18-20037, 2020 WL 2395222, at *5 (E.D. Mich. May 12, 2020) (same for 30-year-old with congestive heart failure, diabetes, and sleep apnea); *United States v. Brooks*, No. 07-cr-20047-JES-DGB, 2020 WL 2509107, at *1 (C.D. Ill. May 15, 2020) (same for 45-year-old with obesity, hypertension, and asthma); *United States v. Stephenson*, No. 3:05-CR-00511, 2020 WL 2566760, at *6, *8 (S.D. Iowa May 21, 2020) (same for 49-year-old with hepatitis C); *United States v. Ozols*, No. 16-CR-692-7 (JMF), 2020 WL 2849893, at *2 (S.D.N.Y. June 2, 2020) (same for 42-year-old with anxiety and depression); *United States v. Fields*, No. 2:05-CR-20014-02, 2020 WL 3129056, at *1 (W.D. La. June 11, 2020) (same for 37-year-old with lung sarcoidosis); *United States v. Halliburton*, No. 17-cr-20028, 2020 WL 3100089, at *1 (C.D. Ill. June 11, 2020) (same for 42-year-old with asthma and obesity).

Length of imprisonment. *See, e.g.*, *United States v. Gonzalez*, No. 2:18-CR-0232-TOR-15, 2020 WL 1536155, at *3 (E.D. Wash. Mar. 31, 2020) (finding "extraordinary and compelling reasons" for compassionate release of defendant who had served only one month of her ten-month sentence but whose age and medical conditions made her "particularly vulnerable" to COVID-19); *United States v. Ben-Yhwh*, No. CR 15-00830 LEK, 2020 WL 1874125, at *5 (D. Haw. Apr. 13, 2020) (same for defendant who had served only eight months of his 60-month sentence but whose "serious medical conditions" "substantially increase his risk of ICU admission and death if he contracts COVID-19"); *United States v. Gileno*, No. 3:19-cr-161-(VAB)-1, 2020 WL 1916773, at *3 (D. Conn. Apr. 20, 2020) (same for defendant who had served less than four months of his 12-month sentence); *United States v. Williams*, No. 3:17-cr-121-(VAB)-1, 2020 WL 1974372, at *4 (D. Conn. Apr. 24, 2020) (same for defendant who had served only 12 months of his 54-month sentence); *United States v. Harper*, No. 7:18-cr-00025, 2020 WL 2046381, at *3 (W.D. Va. Apr. 28, 2020) (same for defendant who had served only half of his 41-month-sentence).

Finally, a broad interpretation of the compassionate release statute is compelled by its "remedial humanitarian" purpose of protecting vulnerable inmates from the unprecedented threat of COVID-19. *Hamilton v. Hojeij Branded Food, Inc.*, 41 A.3d 464, 473–74 (D.C. 2012) ("The statute is remedial humanitarian legislation of vast import, and its provisions must be liberally and broadly construed."); *see also Riggs Nat'l Bank v. District of Columbia*, 581 A.2d 1229, 1234 (D.C. 1990) ("Remedial statutes are liberally construed to suppress the evil and advance the remedy."). Limiting relief to "elderly" inmates would run contrary to the purpose of the statute, as people "of any age with certain underlying medical conditions are at increased risk for severe illness from COVID-19."[17] This Court should construe the statute liberally, as the vast majority of Superior Court judges have done, to advance the remedial purpose of the statute.

II. Courts Must Consider All Relevant Evidence in Assessing the Defendant's Vulnerability to COVID-19.

When a defendant seeks compassionate release based on acute vulnerability to COVID-19, the trial court must consider all relevant evidence in the record, including medical records, expert affidavits or testimony, and pertinent scientific studies. The court's role is to resolve any conflict in the evidence and determine whether the defendant has shown by a preponderance of the evidence that she is at increased risk of death or severe illness from COVID-19.[18] The government has

[17] CDC, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (last visited Sept. 11, 2020).

[18] Absent constitutional concerns, where a statute is silent on the standard of proof, the preponderance of the evidence standard applies. *See, e.g.*, *Raphael v. Okyiri*,

argued, however, in this case and many others, that only those medical conditions identified by the CDC as clear risk factors for severe illness from COVID-19, *see* CDC, *supra* note 17, are sufficient to establish acute vulnerability to COVID-19. According to the government, any other conditions—including those identified by the CDC as conditions that "might" increase the risk of severe complications from COVID-19, such as hypertension and asthma, *id.*—are categorically insufficient, even if the defendant presents other evidence documenting an increased risk.

The government's position finds no support in the compassionate release statute. The statute does not refer to the CDC at all, let alone designate the CDC as the sole or definitive source of evidence on which medical conditions cause "acute vulnerability to severe medical complications or death as a result of COVID-19," D.C. Code § 24-403.04(a)(3)(B)(iii). Nor does the statute define or limit what evidence can establish a defendant's vulnerability to COVID-19. The CDC's analysis is certainly relevant evidence, but it is not conclusive.

Indeed, the CDC's list of risk factors does not purport to be definitive or exhaustive. Based on its periodic review of the evolving scientific literature, the CDC has designated three categories of medical conditions for which there is scientific evidence of "an association with severe illness from COVID-19." CDC, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/evidence-table.html (last visited Sept. 11, 2020). The first category ("Strongest and most consistent evidence") includes risk factors for which there is "consistent evidence

740 A.2d 935, 957 (D.C. 1999); *see also CIGNA Corp. v. Amara*, 563 U.S. 421, 444 (2011) (preponderance standard is "the default rule for civil cases").

from multiple small studies or a strong association from a large study." *Id.* The second category ("Mixed evidence") includes risk factors for which "multiple studies . . . reached different conclusions about risk associated with a condition." *Id.* And the final category ("Limited evidence") includes risk factors for which there is "consistent evidence from a small number of studies." *Id.* Thus, a condition may be placed in the second category ("Mixed evidence"), even if numerous high-quality studies show a strong link to severe illness from COVID-19, if just a few studies reach a different conclusion. And a condition may be placed in the third category ("Limited evidence"), even if multiple studies consistently show a link, if the number of studies is not yet sufficiently large. Moreover, the CDC does not purport to have analyzed every possible medical condition or combination or conditions, or to have reviewed all available studies. A defendant could present convincing evidence of increased vulnerability to COVID-19 based on a medical condition not yet recognized by the CDC as a possible risk factor because the CDC has not yet assessed the condition or reviewed the relevant research. A defendant could also present compelling evidence from a medical expert that her particular history and combination of conditions render her acutely vulnerable to COVID-19.

The strength of evidence needed to qualify for the CDC's first category—a large set of consistent studies—is not the same as the strength of evidence needed to prevail under a preponderance standard. "A preponderance of the evidence is proof which leads the fact finder to find that the existence of the contested fact is more plausible than its non-existence." *In re T.J.*, 666 A.2d 1, 16 n.17 (D.C. 1995) (brackets and quotation marks omitted). The mere fact that the evidence is "mixed"

or "limited" does not preclude a finding by a preponderance of the evidence.[19]

Imposing a heightened standard of scientific proof would be inconsistent with the context and purpose of the compassionate release statute. The statute was enacted on an emergency basis to provide immediate relief to medically vulnerable inmates, at a time when far less was known about the risk factors for COVID-19. Even now, the CDC cautions that "COVID-19 is a new disease," "there are limited data and information about the impact of underlying medical conditions and whether they increase the risk for severe illness from COVID-19," and "[w]e are learning more about COVID-19 every day." CDC, *supra* note 17. In this context, the Council could not have expected defendants to prove heightened vulnerability to a novel disease with the clarity and consistency demanded by the government. "[I]f scientific certainty is elusive, courts adjudicating compassionate release applications must consider legitimate possibilities, supported by reliable evidence, that inmates face particularized health risks." *United States v. Salvagno*, No. 5:02-CR-51 (LEK), 2020 WL 3410601, at *13 (N.D.N.Y. Apr. 23, 2020), *recons. denied* (June 22, 2020). "[G]iven the unsettled nature of the science surrounding

[19] *See Lyons v. Barrazotto*, 667 A.2d 314, 329 (D.C. 1995) ("conflicting expert opinions" on plaintiff's injuries did not preclude verdict in his favor); *Designers of Georgetown, Inc. v. E.C. Keys & Sons*, 436 A.2d 1280, 1281 (D.C. 1981) (per curiam) ("Contradictory expert testimony presents an issue of fact for the fact-finder . . . ."); *Rock Creek Plaza-Woodner Ltd. P'ship v. District of Columbia*, 466 A.2d 857, 859 (D.C. 1983) ("[W]hen faced with conflicting expert testimony, the trial court may credit one expert over the other or even disregard both in rendering its judgment."); *Oxendine v. Merrell Dow Pharm., Inc.*, 506 A.2d 1100, 1110 (D.C. 1986) (although no single study established that defendant's product caused birth defects, plaintiff's expert testimony based on available evidence was sufficient to sustain the verdict).

risk factors, to say . . . that the Court must find that there is a *well-established* causal link between [a defendant's medical condition] and severe manifestations of COVID-19, supported by scientific consensus, or else reject [the defendant's] factual assertion that he is at heightened risk, sets an unrealistically high bar." *Id.*

Even as the scientific literature has grown in recent months, the CDC has been slow to update its list of risk factors, having done so only twice since the pandemic was declared in March, and most recently in July, when it added cancer to the top category, long after many courts had already recognized cancer as a risk factor in granting compassionate release.[20] As of September 11, 2020, the CDC has reviewed only those studies available as of July 10, even though new studies are published every day. *See* CDC, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/evidence-table.html (last visited Sept. 11, 2020). "[T]he rapidly changing nature of science surrounding this novel virus displaces the CDC as the sole medical authority on COVID-19 risk factors." *Segars v. United States*, No. 16-20222-3, 2020 WL 3172734, at *3 (E.D. Mich. June 15, 2020).

Given the limits of the CDC's list of risk factors, "[c]ourts do not regard the CDC website as the only appropriate source of scientific information bearing on the identification of risk factors." *Salvagno*, 2020 WL 3410601, at *14. Instead,

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[20] *See, e.g.*, *Bartrum*, *supra* note 10, at 14 (relying on expert affidavit and scientific studies in finding that defendant's prostate cancer and radiation therapy increased his vulnerability to COVID-19, even though "published guidance from the [CDC] does not specifically state that prostate cancer or radiation treatment enhances the risks associated with COVID-19"); *United States v. Joling*, No. 6:11-cr-60131-AA, 2020 WL 1903280, at *4 (D. Or. Apr. 17, 2020); *United States v. Fields*, No. 3:12-cr-00022-JKS-1, 2020 WL 2744109, at *2 (D. Alaska May 6, 2020).

many federal courts and D.C. Superior Court judges have relied on other evidence in finding that a defendant's medical condition increases his risk of severe illness from COVID-19, even if the condition is not currently in the CDC's top category (or any category) of risk factors.[21] Uncritical deference to the CDC's list, without due consideration of all relevant evidence in the record, is an abuse of discretion.

III. Good Time Credit Counts Toward the Percentage of the Sentence Served.

To meet the statutory definition of "Elderly age," a defendant must have "served at least 20 years in prison" or "the greater of 10 years or 75% of their sentence." D.C. Code § 24-403.04(a)(3)(B). That provision is borrowed from the policy statement for the federal compassionate release statute, which provides that the "Age of the Defendant" constitutes an "extraordinary and compelling" reason for relief if, among other things, the defendant "has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less." U.S. SENTENCING GUIDELINES MANUAL § 1B1.13 app. note 1. Unlike Section 305(b) of the COVID-19 Emergency Act, which specifies, like the First Step Act, that good time credit

[21] *See*, *e.g.*, *United States v. Mackall*, No. 1993 FEL 012822, Mem. Op. at 17 (D.C. Super. Ct. Jul. 17, 2020) (Edelman, J.) ("Numerous peer-reviewed scientific studies and research commentaries in reputable scientific journals have concluded that hypertension is independently associated with severe COVID-19, even after controlling for other confounding variables."); *United States v. Corbin*, No. 2012 CF3 010713, Order at 5–7 (D.C. Super. Ct. Aug. 31, 2020) (Salerno, J.) (noting the limitations of the CDC's list of risk factors and finding based on a study cited by the defendant that his latent tuberculosis placed him at "increased risk" of severe illness from COVID-19); *see also* cases cited *supra* note 16 (finding increased vulnerability to COVID-19 from asthma, hypertension, sleep apnea, hepatitis C, lung sarcoidosis, anxiety, and depression—none of which are in the CDC's top category of risk factors).

will be awarded based on the "sentence imposed by the court," D.C. Code § 24-403.01a, Section 305(a) uses the more ambiguous term "sentence," which can refer to the actual sentence the defendant must serve after good time credit is applied, or to the sentence imposed by the court. *Cf. Barber v. Thomas*, 560 U.S. 474, 484–85 (2010) (noting that the phrase "term of imprisonment" "can refer to the sentence that the judge imposes" or "to the time that the prisoner actually serves," and holding that the phrase, as used in the federal good time credit statute prior to its amendment by the First Step Act, refers to the sentence actually served).

Because the D.C. compassionate release statute was modeled after the federal one, federal case law is persuasive. *See supra* pp. 10–11. In applying the federal compassionate release statute, numerous district courts have calculated the percentage of the sentence served based on the actual sentence the defendant must serve, taking into account the 15 percent sentence reduction effectuated by the First Step Act's provision of good time credit. *See, e.g.*, *United States v. Asaro*, No. 17-cr-127 (ARR), 2020 WL 1899221, at *6 n.3 (E.D.N.Y. Apr. 17, 2020) ("Factoring in a 15 percent good-time credit would reduce [defendant's] total prison term to 81.6 months, of which he has served approximately 71 percent."); *United States v. Arreola-Bretado*, 445 F. Supp. 3d 1154, 1156 (S.D. Cal. 2020) ("taking into account good time credit" in calculating the percentage of the sentence served).[22]

[22] *See also United States v. Hansen*, No. 07-CR-00520 (KAM), 2020 WL 1703672, at *6 n.4 (E.D.N.Y. Apr. 8, 2020); *United States v. Hammond*, No. 02-294 (BAH), 2020 WL 1891980, at *9 (D.D.C. Apr. 16, 2020); *United States v. Clark*, No. 4:08-CR-00096, 2020 WL 3395540, at *6 (S.D. Iowa June 17, 2020); *United States v. Danson*, No. 10-0051 (PLF), 2020 WL 3467887, at *4 (D.D.C. June 25, 2020); *United States v. Yellin*, No. 3:15-cr-3181-BTM-1, 2020 WL 3488738, at *1 (S.D.

At least one D.C. Superior Court judge has followed this federal precedent in applying the D.C. compassionate release statute. *See United States v. Williams-Bey*, No. 1982 FEL 002541, Order at 8 (D.C. Super. Ct. Apr. 23, 2020) (Salerno, J.) ("Based on [the federal] case law applying the First Step Act, together with the fact that the Emergency Act provides that good time credit 'shall be retroactively awarded,' the Court concludes that the good time credit should be included in the calculation of whether [defendant] has served 75% of his sentence.").

That interpretation is not only more consistent with the Council's intent to "align the use of compassionate release with the federal First Step Act," *supra* note 7, but it also better serves the statute's remedial purpose of reducing the number of D.C. Code offenders in BOP custody during the current pandemic. Because the 15 percent good time credit effectively reduces a defendant's actual sentence to 85 percent of the imposed sentence, interpreting D.C. Code § 24-403.04(a)(3)(B) to require a defendant to serve 75 percent of his imposed sentence, rather than 75 percent of his actual sentence, would render this provision nearly useless, as it would apply only to a narrow class of defendants who have served between 75 percent and 85 percent of their imposed sentence.[23] Because the compassionate release statute is "remedial humanitarian legislation of vast import," its "provisions

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Cal. June 26, 2020); *United States v. Meron*, No. 2:18-cr-0209-KJM, 2020 WL 5257611, at *3 (E.D. Cal. Sept. 3, 2020); *United States v. Maya Arango*, No. 15-CR-104 (JMF), 2020 WL 3488909, at *1 (S.D.N.Y. June 26, 2020).

[23] Inmates who qualify for compassionate release because they pose no "danger to the safety of any other person or the community," D.C. Code § 24.403.04(a), are unlikely to have lost good time credit based on serious misconduct in prison.

must be liberally and broadly construed" "to accomplish its purpose and extend its coverage." *Hamilton*, 41 A.3d at 474.

IV. Rulings on Compassionate Release Motions Are Subject to Ordinary Appellate Review for Abuse of Discretion.

The D.C. compassionate release statute directs the Superior Court to make two determinations in deciding whether to grant relief: whether relief is warranted for any of the reasons enumerated in the statute or any "[o]ther extraordinary and compelling reasons," and whether the defendant is "a danger to the safety of any other person or the community, pursuant to the factors to be considered in 18 U.S.C. §§ 3142(g) and 3553(a)[24] and evidence of the defendant's rehabilitation while incarcerated." D.C. Code § 24-403.04(a). Like other discretionary rulings, a ruling on a compassionate release motion is subject to appellate review for "abuse of discretion" under the well-established standard described in *Johnson v. United States*, 398 A.2d 354 (D.C. 1979). Under that standard, this Court determines whether the trial court's decision rested on "a firm factual foundation," whether it "failed to consider a relevant factor" or relied on "improper reasons" or "reasons which contravene the policies meant to guide the trial court's discretion," whether "the reasons given reasonably support the conclusion," and whether the decision "was within the range of permissible alternatives." *Id.* at 364–67. In doing so, this Court reviews legal questions de novo and findings of historical fact for clear error. *See Jenkins v. United States*, 80 A.3d 978, 989 (D.C. 2013).

[24] 18 U.S.C. § 3142(g) governs federal pretrial release decisions, and § 3553(a) governs federal sentencing decisions.

The government has argued in other compassionate release cases, however, that the standard of review should be more deferential than the ordinary "abuse of discretion" standard because, in its view, a compassionate release decision is akin to an initial sentencing decision or a ruling on a motion for a sentence reduction under Rule 35(b) of the Superior Court Rules of Criminal Procedure, which are essentially "unreviewable aside from constitutional considerations." *Greene v. United States*, 571 A.2d 218, 222 (D.C. 1990); *see also Walden v. United States*, 366 A.2d 1075, 1076 (D.C. 1976). That argument fails based on the structure and purpose of the compassionate release statute.

Unlike an initial sentencing decision or a ruling on a Rule 35 motion, which are not guided by any legislative policy or statutory factors, a trial court's exercise of discretion under the compassionate release statute—similar to a decision under the Incarceration Reduction Amendment Act of 2016 (IRAA)—is constrained by the legislative purpose of the statute and the specific factors that the statute directs the trial court to consider, which makes it "reviewable . . . for abuse under [the] well-established standards of reasonableness" described in *Johnson. Williams v. United States*, 205 A.3d 837, 854 (D.C. 2019) (citing *Johnson*, 398 A.2d at 363–67) ("Although . . . generally, sentences within statutory limits are unreviewable aside from constitutional considerations, that observation has little bearing here, where not only are 'constitutional considerations' and the Supreme Court's articulation of the relevant requirements of the Eighth Amendment at the forefront, but also the IRAA itself clearly sets forth the criteria that the court must consider." (brackets, quotation marks, and footnote omitted)).

To the extent that the federal case law suggests a more deferential standard of review for decisions under the federal compassionate release statute, *see*, *e.g.*, *Chambliss v. United States*, 948 F.3d 691, 693–94 (5th Cir. 2020) (deferring to a district court's denial of compassionate release based on its determination that "requiring [defendant] to serve the remainder of his sentence would 'provide just punishment for the offense' and 'afford adequate deterrence to criminal conduct'"), that case law is not instructive here because of a crucial difference between the local and federal statutes. The federal compassionate release statute directs the district court to consider all of the factors in 18 U.S.C. § 3553(a) that govern an initial sentencing decision in deciding whether to grant compassionate release, 18 U.S.C. § 3582(c)(1)(A)—factors that include not only factual considerations such as the defendant's dangerousness but also moral considerations such as the need for "just punishment for the offense" that are quintessentially discretionary and not amenable to searching appellate review. By contrast, the D.C. statute directs the Superior Court to make the far more limited factual determination of whether the defendant is "a danger to the safety of any other person or the community," and to consider the sentencing factors in 18 U.S.C. § 3553(a) only insofar as they are relevant to the defendant's dangerousness. D.C. Code § 24-403.04(a). Thus, unlike its federal counterpart, the D.C. compassionate release statute is not structured as a resentencing statute, and a trial court's ruling on a compassionate release motion is amenable to review under the traditional "abuse of discretion" standard.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief has been served, by this Court's electronic filing system, on Elizabeth Trosman, Esq., Chief, Appellate Division, Office of the United States Attorney, and John Albanes, Esq., Counsel for Appellant, this 11th day of September, 2020.

/s/ Alice Wang
Alice Wang

Form 8. Application for Admission Pro Hac Vice.

DISTRICT OF COLUMBIA
COURT OF APPEALS

[or]

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA

Monwell T. Onley, II, Plaintiff/Appellant,	)	APPLICATION FOR ADMISSION PRO HAC VICE
v.	)	
United States, Defendant/Appellee.	)	Case No. 20-CO-0467, 2002-FEL-5490
United States	)	

I declare under penalty of perjury:

☑ (1) That I have not applied for admission pro hac vice in more than five cases in courts of the District of Columbia this calendar year;

☑ (2) That I am a member in good standing of the highest court(s) of the State(s) of California;
(state all states)

☑ (3) That there are no disciplinary complaints pending against me for violation of the rules of the courts of those states;

☑ (4) That I have not been suspended or disbarred for disciplinary reasons from practice in any court;

☑ (5) That I am associated with Kobie Flowers, 991403
(name the D.C. Bar member under Super. Ct. Civ. R. 101; and give his/her D.C. Bar Number)

☑ (6) That I do not practice or hold out to practice law in the District of Columbia; and

☑ (7) That I have read all of the rules of the relevant division of the Superior Court of the District of Columbia and the District of Columbia Court of Appeals, and have complied fully with District of Columbia Court of Appeals Rule 49 and, as applicable, Super. Ct. Civ. R. 101. The reason(s) I am applying for admission pro hac vice are as follows:

DC Bar application submitted and pending. Applying for pro hac vice admission to submit amicus brief.

I acknowledge the jurisdiction of the courts of the District of Columbia over my professional conduct, and I agree to be bound by the District of Columbia Court of Appeals Rules of Professional Conduct, in this matter, if I am admitted pro hac vice. I have applied for admission pro hac vice in the courts of the District of Columbia 0 times previously in this calendar year.

~~I attach hereto the receipt issued by the District of Columbia Court of Appeals Committee on the Unauthorized Practice of law as proof of my prior payment of the pro hac vice fee.~~ *Per the District of Columbia Court of Appeals Order of August 27, 2020, non-electronic payments are due when the Office on Admissions reopens. Receipt of application pending.*

Mukund Rathi — Mukund Rathi

Signature — Print Name

9/11/2020

Date

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