Compassionate Release, COVID-19, and the Dangerous Futility of the First Step Act's Administrative Exhaustion Requirement

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TABLE OF CONTENTS

I. INTRODUCTION

Prior to March of 2020, Marie Neba feared dying in prison from complications of stage IV cancer.[1] She had applied to the Bureau of Prisons ("BOP") to make a motion for compassionate release on her behalf the year prior due to her tragic condition, but the warden of Carswell Federal Medical Center denied her application.[2] When COVID-19 ("Covid") hit, she again applied for compassionate release—this time citing her fragile condition and the timely nature with which the situation needed to be handled to ensure her safety.[3] Rather than receiving a denial as she had before, however, the warden ignored Neba, who joined 345 of the other 349 women who had applied for compassionate release from Carswell.[4] In the coming months, over a quarter of the prison's inmates became sick with Covid, and six died—including fifty-six-year-old Marie Neba.[5]

In the face of the ubiquitous media coverage and drastic altering of Americans' daily lives, one may feel that there is not much more that can be said about Covid which has not already been discussed. However, in an unprecedented global health crisis, contemporary society is still processing all the unique issues presented by a pandemic. Covid, for anyone who has been living under a rock, is a deadly and contagious virus that disproportionately affects immunocompromised individuals and has so far resulted in the death of over 615,000 Americans[6] and 4.26 million people worldwide.[7]

Over the course of the Covid pandemic, BIPOC and Latino communities have disproportionately borne the burden of the virus. Particularly, Black people make up only 13–15% of the United States

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[1] Keri Blakinger & Joseph Neff, *Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent Were Denied.*, THE MARSHALL PROJECT (Oct. 7, 2020, 6:00 AM), https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied [https://perma.cc/2Z6X-HNAN].

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Oct. 12, 2021), https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html [https://perma.cc/B8P5-HB46].

[7] *Coronavirus World Map: Tracking the Global Outbreak*, N.Y. TIMES (Oct. 12, 2021), https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html [https://perma.cc/5SSA-VANT].

population but comprise approximately 27% of the positive Covid tests in the nation.[8] Almost half of Latino Americans have had someone in their household (including themselves) take a pay cut or lose their job due to Covid.[9] Compared to any individual state, the Navajo Nation has the highest per capita rate of infection in the United States, and Native Americans make up only 2.9% of the country's population.[10] And while these numbers may initially seem startling, when one considers systemic factors such as the higher prevalence of implicit bias and resulting inadequate health coverage, pre-existing health conditions, and essential work and service jobs within those communities, the numbers are—frustratingly—less surprising.[11]

Perhaps there is no better example of how systemic racism[12] has forced the disproportionate burden of Covid on BIPOC and Latino communities than in the prison system, where BIPOC and Latino inmates comprise around 68% of federal inmates.[13] Covid has plagued federal prisons since its emergence in the United States, and for obvious reasons. The congested nature of prisons alone, many of which are already overcrowded in America[14], often renders social distancing impossible for both the inmates

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[8] *BIPOC Communities and COVID-19*, MENTAL HEALTH AM., https://mhanational.org/bipoc-communities-and-covid-19 [https://perma.cc/DN7F-G98H].

[9] *Id.*

[10] *Id.*; Nicholas Jones et al., *2020 Census Illuminates Racial and Ethnic Composition of the Country*, U.S. CENSUS BUREAU (Aug. 12, 2021), https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html [https://perma.cc/9DWS-FUTQ].

[11] *Id.*

[12] "Racism," for the purposes of this Note, is defined as "a variety of practices, beliefs, social relations, and phenomena that work to reproduce a racial hierarchy and social structure that yield superiority, power, and privilege for some, and discrimination and oppression for others. It can take several forms, including representational, ideological, discursive, interactional, institutional, structural, and systemic." Nicki Lisa Cole, *Defining Racism Beyond its Dictionary Meaning*, THOUGHTCO. (July 14, 2019), https://www.thoughtco.com/racism-definition-3026511 [https://perma.cc/R3FT-MUAZ]. It is important to note that "racism" as it is used in this Note does not necessarily require the presence of outright racial prejudice, it only requires benefitting from a system that privileges certain people on the basis of their race.

[13] *Inmate Race,* FED. BUREAU OF PRISONS (Dec. 11, 2021), https://www.bop.gov/about/statistics/statistics_inmate_race.jsp [https://perma.cc/7656-KU63]; *Inmate Ethnicity,* FED. BUREAU OF PRISONS (Dec. 11, 2021), https://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp [https://perma.cc/45QT-EE84].

[14] *See Covid-19's Impact on People in Prison*, EQUAL JUST. INITIATIVE (Apr. 16, 2021), https://eji.org/news/covid-19s-impact-on-people-in-prison/ [https://perma.cc/9BR5-WS5N].

and staff therein.[15] Not only can one assume the chances of contracting Covid in prison are higher than those of contracting the virus outside the penitentiary, but data supports this conclusion. According to the Center for Infectious Disease Research and Policy, the average infection rate in sixteen Massachusetts prisons is around 4.8 times higher than in the United States population, and the infection rate of all incarcerated people in the United States is around five times higher than that of the rest of the population.[16]

But statistics alone cannot convey how devastating the effects of Covid can be, and how quickly it can kill in prisons. By only April 8, 2020, it was reported that five inmates had died at the FCI Oakdale federal prison in Louisiana, and 42 of the 971 inmates housed there had contracted the virus.[17] And while at least one inmate's family initially voiced concerns to prison officials, which were ignored, the revelations that unfolded in the following weeks detail how maintaining the status quo in prisons can have tragic consequences.[18] According to a report from the Inspector General of the Department of Justice, FCI Oakdale failed to isolate nearly 100 asymptomatic inmates who had tested positive for the virus.[19] As such, the prison was permitted to continue on as though nothing were different; inmates showered, used telephones, and maintained access to common areas with the rest of the population.[20] Unsurprisingly, the staff, who have the greatest potential to spread the virus to the outside world, were also inadequately protected when interacting with the inmates who had contracted the virus, and either did not have access or did not "'understand the necessity'" of

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[15] Elizabeth A. Blackwood, *Compassionate Release: NACDL and Partners Launch the COVID-19 Compassionate Release Clearinghouse*, 44 CHAMPION 51, 51 (2020).

[16] Chris Dall, *Studies Spotlight High COVID-19 Infection Rate in US Prisons*, CTR. FOR INFECTIOUS DISEASE RSCH. & POL'Y (Aug. 21, 2020), https://www.cidrap.umn.edu/news-perspective/2020/08/studies-spotlight-high-covid-19-infection-rate-us-prisons [https://perma.cc/9FPZ-W2TX]; *Covid-19's Impact on People in Prison*, *supra* note 14.

[17] Clare Hymes, *Crisis at Oakdale: Coronavirus Cripples Federal Prison in Louisiana*, CBS NEWS (Apr. 8, 2020, 11:02 AM), https://www.cbsnews.com/news/coronavirus-fci-oakdale-federal-prison-louisiana-covid-19 [https://perma.cc/43YT-PECW].

[18] *Id.* One inmate's mother "put in a request that her son [be] released to home confinement." *Id.*

[19] Clare Hymes, *Federal Prison Didn't Isolate Inmates Who Tested Positive for Coronavirus, Report Finds*, CBS NEWS (Nov. 17, 2020, 7:30 PM), https://www.cbsnews.com/news/federal-prison-coronavirus-outbreak-fci-oakdale/ [https://perma.cc/DAQ3-ARVK].

[20] *Id.*

personal protective equipment ("PPE") which could have protected both themselves and others.[21]

When the dust finally settled on the Oakdale outbreak, 225 inmates—almost a quarter of the prison's population—and 29 staff members had contracted the virus, leaving five dead.[22] The UCLA Covid Behind Bars has collected data on the prevalence of Covid in state and federal prisons since March of 2020, and has determined that, in the federal prisons which were surveyed, almost 42,000 federal inmates are known to have contracted the virus, and 279 have died.[23] Given these staggering figures, at-risk inmates are looking for ways to escape the virus, a task that is nearly impossible when incarcerated.

Included as a part of the First Step Act ("FSA" or "the Act"),[24] which was hailed by some media outlets as a "progressive," bi-partisan criminal justice reform,[25] compassionate release actually predated the Act.[26] However, the legislature initially prescribed that a sentence could only be reduced for "extraordinary and compelling reasons" if the BOP brought a motion on behalf of the inmate, which it did sparingly.[27] The FSA changed this process, however, to allow inmates to make motions for compassionate release on their own behalf after either exhausting all administrative remedies or waiting

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[21] *Id.*

[22] OFF. OF THE INSPECTOR GEN., REMOTE INSPECTION OF FEDERAL CORRECTIONAL COMPLEXES OAKDALE AND POLLOCK 21-003, at ii (2020), https://oig.justice.gov/sites/default/files/reports/21-003.pdf.

[23] *Federal Facilities in the United States*, UCLA L. COVID BEHIND BARS DATA PROJECT, https://uclacovidbehindbars.org/federal/ [https://perma.cc/MK2D-HVPU]; *see also* Katie Park & Tom Meagher, *A State-by-State Look at 15 Months of Coronavirus in Prisons*, THE MARSHALL PROJECT (July 1, 2021, 1:00 PM), https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons#prisoner-cases [https://perma.cc/HA8A-GCTK].

[24] *See generally* Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next [https://perma.cc/B6ZA-DNZ3] (discussing the First Step Act's role in reducing mass incarceration).

[25] Vivian Ho, *Criminal Justice Reform Bill Passed by Senate in Rare Bipartisan Victory*, THE GUARDIAN (Dec. 19, 2018, 7:29 AM), https://www.theguardian.com/us-news/2018/dec/18/first-step-act-criminal-justice-reform-passes-senate [https://perma.cc/M4TV-EZ92].

[26] Blackwood, *supra* note 15, at 51.

[27] *Id.* (quoting 18 U.S.C. § 3582(c)(1)(A)(i) (1984)).

thirty days from the BOP's receipt of the application.[28] To exhaust all remedies, an inmate must survive the BOP's three-level administrative process, which offers the BOP twenty to forty days to respond at each level.[29] Therefore, the chances that the BOP will decide within thirty days to bring the motion on behalf of an inmate are low even without Covid, thus rendering the exhaustion requirement and thirty-day waiting period no more than a pointless ritual.[30] In any case, under the FSA no inmate shall be denied an opportunity to have their motion for compassionate release heard in court, should they choose to bring one.[31]

Due to the devastating effect Covid can have on any individual, especially those with compromised immune systems due to pre-existing conditions, at-risk inmates have filed motions for compassionate release at unprecedented rates.[32] Between 2013 and 2017, the BOP received about 1080 applications per year.[33] In just the first month of its existence, however, the COVID-19 Compassionate Release Clearinghouse received 400 applications.[34] In total, as of June 11, 2021, some 31,000 federal inmates had sought compassionate release during Covid; of those 31,000, only 36 were approved.[35]

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[28] Comprehensive Crime Control Act, 18 U.S.C. § 3582(c)(1)(A) (1984).

[29] *Inmate Administrative Remedy Program*, ZOUKIS CONSULTING GRP., https://www.prisonerresource.com/inmate-administrative-remedy-program/ [https://perma.cc/HN53-BJNX].

[30] Thomas L. Root, *Compassionate Release Exhaustion Requirement Nonwaivable, Court Says – Update for June 12, 2020*, LISA LEGAL INFO. (June 12, 2020), https://www.lisa-legalinfo.com/2020/06/12/compassionate-release-exhaustion-requirement-nonwaivable-court-says-update-for-june-12-2020/ [https://perma.cc/3WHY-UM9A].

[31] First Step Act, 18 U.S.C. § 3582(c) (2018).

[32] Blackwood, *supra* note 15, at 52.

[33] Christie Thompson, *Old, Sick and Dying in Shackles*, THE MARSHALL PROJECT (Mar. 7, 2018, 5:00 AM), https://www.themarshallproject.org/2018/03/07/old-sick-and-dying-in-shackles [https://perma.cc/7898-VXQH].

[34] Press Release, Nat'l Ass'n of Crim. Def. Laws., FAMM, Washington Lawyers' Committee, NACDL Launch Emergency Compassionate Release Effort (Apr. 6, 2020), https://www.nacdl.org/newsrelease/FAMM-WashingtonLawyersCommittee-NACDL-04062020 [https://perma.cc/S65T-J5UL].

[35] Keri Blakinger & Joseph Neff, *31,000 Prisoners Sought Compassionate Release During COVID-19. The Bureau of Prisons Approved 36.*, THE MARSHALL PROJECT (June 11, 2021, 6:00 AM), https://www.themarshallproject.org/2021/06/11/31-000-prisoners-sought-compassionate-release-during-covid-19-the-bureau-of-prisons-approved-36 [https://perma.cc/K8SG-QVW2].

For a judge to evaluate a prisoner's motion for compassionate release on the merits, the prisoner first must overcome the procedural requirements in the FSA. Due to the unpredictable and rapid decline in health which can be brought about by such a deadly virus, several inmates have decided to make such motions without first either exhausting their administrative remedies or waiting thirty days from the BOP's receipt of their application to have a motion filed on their behalf.[36] As a result, many courts and commentators challenged these inmates for disregarding the statutorily-proscribed process for compassionate release.[37]

Federal courts have split in their response to the argument that the administrative exhaustion requirement, which includes the alternative thirty-day waiting period, is waivable.[38] The majority of courts have held that the administrative exhaustion requirement is not waivable because Congress intended for it to be mandatory by including the language in the statute. Further, those courts have stated that the exhaustion requirement ensures agency authority and judicial efficiency and have opined that compliance with the statute takes on added importance during public health crises.[39] However, several courts have determined that the exhaustion requirement is waivable because the statutory scheme shows that the statute does not require "traditional" exhaustion.[40] Additionally, a mandatory exhaustion requirement would not comport with either of the purposes of the FSA: safety and allowing the "defendant to have the right to a meaningful and prompt judicial determination of whether [they] should be released."[41]

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[36] Jolene LaVigne-Albert, *Inmate Release Exhaustion Rule Should be Waived for COVID*, LAW360 (Apr. 19, 2020, 8:02 PM), https://www.law360.com/articles/1264971/inmate-release-exhaustion-rule-should-be-waived-for-covid [https://perma.cc/YFY5-USJ6].

[37] *See* United States v. Alam, 960 F.3d 831, 835 (6th Cir. 2020); United States v. Raia, 954 F.3d 594, 597 (3d Cir. 2020); Joe D. Whitley et al., *A Prisoner's Dilemma: COVID-19 and Motions for Compassionate Release*, 2020 PRAC. INSIGHTS COMMENT. 0124 (2020).

[38] *See Alam*, 960 F.3d at 831; *Raia*, 954 F.3d at 594. *But cf.* United States v. Zukerman, 451 F. Supp. 3d 329, 336 (S.D.N.Y. 2020); United States v. Scparta, No. 18-CR-578, 2020 U.S. Dist. LEXIS 68935, at *7 (S.D.N.Y Apr. 19, 2020); United States v. Lacy, No. 15-CR-30038, 2020 U.S. Dist. LEXIS 76849, at *17 (C.D. Ill. May 1, 2020). *See* United States v. Zukerman, 451 F. Supp. 3d 329, 336 (S.D.N.Y. Apr. 3, 2020).

[39] *Alam*, 960 F.3d at 835.

[40] United States v. Witter, No. 18-CR-77-WMC-4, 2020 U.S. Dist. LEXIS 72396, at *15 (W.D. Wis. Apr. 24, 2020).

[41] United States v. Russo, 454 F. Supp. 3d 270, 271 (S.D.N.Y. Apr. 3, 2020).

This Note will argue that federal courts should hold that the administrative exhaustion requirement of the FSA is waivable in order to preserve the purpose of the statute, which was to provide inmates (who are more likely to be people of color) easier access to the opportunity to be granted compassionate release, especially due to a virus which disproportionately effects BIPOC communities. Further, this Note argues that the influx of compassionate release motions due to Covid exposes the exhaustion requirement's inherent futility as a part of the FSA's scheme. Therefore, because the justifications offered for the exhaustion requirement fail to outweigh the burden it places upon an already fragile group of citizens, Congress should remove the requirement from the FSA altogether.

II. BACKGROUND

This Note will now examine how different factors interact to show that the administrative exhaustion requirement has provided an unnecessary hindrance to at-risk inmates, who are likely to be disproportionately BIPOC or Latino. First, the Note will discuss the FSA generally, including its political complexity and legislative history, as well as more narrowly analyze the text of Section 3353(a), which details the law of compassionate release. Then, this Note will turn to the history of compassionate release, which existed as a mostly underused, difficult to contain statutory mechanism prior to the passing of the FSA. Next, this Note will provide context for how courts have ruled on the waivability of the FSA's exhaustion requirement so far and explain the viewpoints on each side of the circuit split. Lastly, this Note will provide additional information on the racial disparities within the federal prison population, as well as on the spread of Covid within them.

A. Federal Prisons Generally and the Spread of Covid Within Them

Federal prisons house BIPOC inmates at disproportional rates compared to the general population. Whereas BIPOC and Latino people make up around 40% of the total United States population,[42] they make up almost 70% of the federal prison population.[43] Specifically, Black Americans make up 25% more of the BOP's inmate population than they do United States population.[44] This is especially important when one considers the fact that

[42] *QuickFacts: United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/RHI225219 [https://perma.cc/3MHZ-8YD6].

[43] *Inmate Race*, *supra* note 13; *Inmate Ethnicity*, *supra* note 13.

[44] *Id.*; *QuickFacts: United States*, *supra* note 42.

BIPOC and Latino communities have disproportionately shouldered the tragic impact of the virus in comparison to white communities in America.[45] When one compounds the effects on these communities generally with the effects Covid has on a disproportionately BIPOC prison population, a clear picture of systemic racism prevails which further exacerbates the disproportionate burden BIPOC and Latino Americans have faced over the course of the Covid pandemic.

The statistics offered clearly show that the prison population faces at least five times the risk of the nation overall for a Covid infection,[46] as well as an increased risk of death from Covid,[47] and the reasons for this marked increase between populations are easily explainable by a consideration of the factors unique to incarceration. The biggest factor, unsurprisingly, is overcrowding, where the BOP admitted to having a total number of inmates in custody which met or exceeded its minimum number of beds just two years apart.[48] As a result, inmates are forced to live in conditions which include bunk beds, sometimes separated by only inches.[49] Accordingly, social distancing is nearly impossible in these conditions due to the large number of inmates and limited amount of space in prisons.[50]

Additionally, prisons house vulnerable populations of older adults due to decades of sentencing, infamously known for its extreme mandatory minimum provisions.[51] In fact, the percentage of people over fifty-five in state prisons tripled between 2000 and 2016 to a staggering 150,000 inmates in state prisons alone.[52] When one considers the age of the average inmate, along with the sedentary lifestyle and unhealthy food which inmates are forced to endure, one can assume that the average inmate would, for many

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[45] Richard A. Oppel Jr. et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (July 5, 2020), https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html [https://perma.cc/AF9P-QKD5].

[46] Dall, *supra* note 16.

[47] Neal Marquez et al., *COVID-19 Incidence and Mortality in Federal and State Prisons Compared With the US Population, April 5, 2020, to April 3, 2021*, 326 JAMA 1865 (2021), https://jamanetwork.com/journals/jama/fullarticle/2784944 [https://perma.cc/JNK6-T35R].

[48] *Covid-19's Impact on People in Prison*, *supra* note 14.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

reasons out of their control, be at a higher risk of death or serious health issues if they were to contract the virus.[53]

Lastly, violence and abuse within jails can add to the prevalence of Covid for several reasons.[54] The first is that Covid has forced penitentiaries to reduce the number of correctional staff, leaving the door open for increased physical conflict between staff and inmates, as well as between inmates themselves. In March and April alone, three male prisoners were killed in Alabama.[55] Not only does physical violence present an obvious primary risk of health issues for people actually involved in an altercation, but it also typically draws a crowd, thus rendering social distancing impossible and providing increased opportunities for the virus to spread in large populations over a short amount of time. For these reasons, mainly, federal prisons have been regarded as Covid hotspots.[56]

There are, unfortunately, a plethora of examples which show how Covid has spread in federal prisons. As discussed earlier, the outbreak at FCI Oakdale lead to the infection and death of several guards and inmates, which was exacerbated by the fact the prison had blatantly disregarded the guidelines and procedures meant to protect both the staff and inmates from Covid.[57] However, it is important to remember that the nature of federal prisons makes it so that outbreaks like this can happen even in the absence of any malfeasance or negligence by the prison staff. In Philadelphia's federal prison, a Covid outbreak infected at least 171 inmates and twenty-eight staff members in only four weeks.[58] At the time this outbreak occurred in November 2020, the procedures of the BOP had been implemented and the initial frenzy surrounding the virus had mostly subsided.[59] Nevertheless, the virus ran rampant through the prison, infecting inmates and guards alike

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[53] *Id.*

[54] *Covid-19's Impact on People in Prison*, *supra* note 14.

[55] *Id.*

[56] *See* Park & Meagher, *supra* note 23.

[57] Hymes, *supra* note 17.

[58] Max Marin, *Coronavirus Outbreak at Philly Federal Prison in Center City Leads to Full Lockdown*, BILLY PENN (Nov. 20, 2020, 12:35 PM), https://billypenn.com/2020/11/20/coronavirus-outbreak-at-philly-federal-prison-in-center-city-leads-to-full-lockdown/ [https://perma.cc/H8DV-5XZQ].

[59] *Id.*

without regard to their status as at-risk or their relative level of compliance with the Covid safety guidelines.[60]

Considering the nature of federal prisons—the prevalence of overcrowding, presence of vulnerable populations, and violence and abuse within them—the striking number of Covid outbreaks within federal prisons is unfortunately understandable. Nevertheless, one must remember that the people within those prisons who are being forced to face that risk are disproportionately BIPOC and Latino due to systemic racism.[61] As such, the increased risk of Covid in prisons is another factor forcing BIPOC and Latino Americans to bear the brunt of Covid, and which any decision by the courts affecting inmates generally is likely to have a disproportionate impact on the BIPOC and Latino communities given their disproportionate relative make-up of the federal prison population.

B. The Text, History, and Media Coverage of the First Step Act and Exhaustion Requirements Generally

For at least the last decade, Congress had been attempting to pass comprehensive, bi-partisan criminal justice reform—but to no avail.[62] After an arduous legislative process, however, Congress passed the FSA in 2018 and brought with it much-needed federal sentencing reform.[63] Apparently, Congress managed to overcome the prevailing partisan allegiances which had created increasing tension in the legislative branch and the country generally in recent years. And while the FSA was hailed as necessary reform by the media mostly for reducing mandatory sentencing minimums for certain drug

[60] *Id.*

[61] *Inmate Race*, *supra* note 13; *Inmate Ethnicity*, *supra* note 13.

[62] Grawert & Lau, *supra* note 24.

[63] *Id.* While reasonable minds may differ on whether the FSA was *enough* reform, it is beyond doubt that mandatory minimum sentences disproportionately plagued BIPOC communities for decades. AM. CIV. LIBERTIES UNION, RACIAL DISPARITIES IN SENTENCING 5 (2014), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf [https://perma.cc/2XN7-9L6R].

offenses,[64] for the purposes of this Note, the FSA is most relevant in that it expanded prisoners' rights to bring motions for compassionate release.[65]

Specifically, the Act states that:

> the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that— (i) extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission . . . [66]

In other words, inmates seeking compassionate release are required under the Act to fulfill the three-step administrative application process with the BOP, which provides the BOP with twenty to forty days to respond at each level in addition to automatic extensions, or to wait thirty days and make the motion on their own behalf so long as the BOP has ignored their application up to that point.[67] In a landmark case *Washington v. Barr*, however, the Second Circuit identified three circumstances where the failure to exhaust would be excused:

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[64] *See* AM. CIV. LIBERTIES UNION, *supra* note 63 at 5; German Lopez, *The First Step Act, explained*, VOX (Feb. 5, 2019, 9:42 PM), https://www.vox.com/future-perfect/2018/12/18/18140973/state-of-the-union-trump-first-step-act-criminal-justice-reform [https://perma.cc/LW87-2SGL].

[65] Blackwood, *supra* note 15, at 51.

[66] 18 U.S.C. § 3582(c)(1)(A).

[67] Federal courts have also split on the issue of whether an inmate must appeal a denial of her application with the BOP to be able to make a compassionate release motion on her own behalf with the courts even if thirty days has elapsed since the BOP's receipt of her application. United States v. Ciccotto, No. 20-14071-E, 2021 U.S. App. LEXIS 6702, at *4–5 (11th Cir. 2021).

> (1) [when] exhaustion may be unnecessary where it would be futile, either because agency decisionmakers are biased or because the agency has already determined the issue, (2) . . . where the administrative process would be incapable of granting adequate relief, and (3) . . . where pursuing agency review would subject plaintiffs to undue prejudice.[68]

There is no definitive source stating the all-encompassing purpose of the FSA, perhaps because the Act covers such a large subject-matter. However, courts have recognized that one purpose of the act was to "enhance public safety" and make "changes to Bureau of Prisons' policies and procedures to ensure prisoner and guard safety and security."[69] Thus, because Covid presents an unprecedented modern public health crisis, then, in light of its desire to enhance safety, Congress would have been particularly concerned with the unnecessary death and illness which can result from strict adherence to the statute.

The Supreme Court discussed exhaustion requirements generally in *McCarthy v. Madigan*.[70] In that case, McCarthy, an inmate, filed an action alleging that federal prison officials had been deliberately indifferent to his medical condition.[71] However, the Tenth Circuit Court of Appeals held for the respondents, asserting that McCarthy had failed to exhaust his administrative remedies as required by the BOP.[72] In response, the Supreme Court held for McCarthy, and discussed the circumstances in which exhaustion is waivable.[73] To begin, the Court held that exhaustion generally "serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency."[74] However, the Court went on to conclude that "federal courts must exercise sound judicial discretion, determining whether to require exhaustion by balancing the individual's interest in retaining prompt access to a federal judicial forum against countervailing

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[68] Washington v. Barr, 925 F.3d 109, 117–19 (2d Cir. 2019) (citing McCarthy v. Madigan, 503 U.S. 140, 146–47 (1992)) *cert. denied*, 141 S. Ct. 555 (2020).

[69] United States v. Scparta, No. 18-CR-578, 2020 U.S. Dist. LEXIS 68935, at *21 (S.D.N.Y. Apr. 19, 2020) (citing H.R. REP. NO. 115-699, at 22).

[70] *McCarthy*, 503 U.S. at 144–45.

[71] *Id.* at 140.

[72] *Id.* at 143–44.

[73] *Id.* at 144–45.

[74] *Id.* at 145.

institutional interests favoring exhaustion."[75] In identifying the situations where individual interests would most severely outweigh institutional interests, the Court created the list of exceptions to exhaustion, which include futility, the administrative process's inadequacy to grant adequate relief, and the possibility of undue prejudice which would result from an agency's review of the inmate's case. [76]

In *United States v. Scparta*, the Southern District of New York explored the differences between the FSA's administrative exhaustion requirement and the "traditional" exhaustion requirements discussed in *McCarthy*.[77] Specifically, the court recognized that the Supreme Court decided in *Ross v. Blake* that statutorily-created exhaustion requirements, such as the one at issue in this case, are distinguishable from judge-made "traditional" exhaustion requirements.[78] However, the *Scparta* court explained that this is normally because Congress' intent for the requirement to be mandatory is reflected by the fact that it is included in the statute.[79] Circular logic aside, the court explained that the exhaustion requirement of the FSA, because it allowed defendants to *either* exhaust all remedies *or* wait thirty days, reflected a third purpose for the requirement: fulfilling a defendant's right to a meaningful and prompt judicial determination of whether he should be released.[80]

C. The History of Compassionate Release

Compassionate release has been part of the statutory scheme in the United States for over three and a half decades, with the "extraordinary and compelling circumstances" standard remaining unchanged since the passing of the first federal compassionate release laws in 1984.[81] Before the passing of the FSA, courts could only hear motions for compassionate release if the

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[75] *Id.* at 146.

[76] *Barr*, 925 F.3d at 117–19 (citing *McCarthy*, 503 U.S. at 146–47).

[77] United States v. Scparta, No. 18-CR-578, 2020 U.S. Dist. LEXIS 68935, at *16–18 (S.D.N.Y. Apr. 19, 2020).

[78] *Id.* (citing Ross v. Blake, 136 S. Ct. 1850, 1854–56 (2016)).

[79] *Id.* at *17.

[80] *Id.* at *7.

[81] Lindsey E. Wylie et al., *Extraordinary and Compelling: The Use of Compassionate Release Laws in the United States*, 24 PSYCH., PUB. POL'Y, & L. 216, 217 (2018).

BOP brought the motion on behalf of the inmate.[82] The process for receiving BOP representation first required an application to the warden of their prison.[83] There, the warden made a determination on the merits of the application.[84] If the warden denied the application, inmates had an opportunity to go through the BOP's administrative appeal process.[85] If the warden referred the application to the BOP, however, the Bureau Director was required to make the final determination on the application, often disregarding the recommendations of wardens who were in the best position to evaluate their respective inmates.[86]

Despite the ethical and financial benefits of compassionate release, however, federal inmates had marginal success in securing BOP approval.[87] This is mainly because wardens and the BOP maintained complete autonomy to bring these motions and chose to do so sparingly.[88] As such, from 2014 to 2018, wardens received 5,400 compassionate release applications, and—according to statistics of questionable validity provided by the BOP—referred only 2,711 of those applications to the director of the BOP.[89] Of these 5,400 applications, the BOP claims to have approved 306 requests, marking a shocking 6% success rate for inmates.[90] And as a result of the arduous administrative process by which inmates are required to abide, eighty-one inmates died while awaiting a determination by the Director of the BOP on their application.[91] Thus, Congress's motivations in passing the

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[82] *How the First Step Act Changed Federal Compassionate Release*, COMPASSIONATE RELEASE: A PROJECT BY BRANDON SAMPLE, https://compassionaterelease.com/first-step-act-compassionate-release/ [https://perma.cc/58GJ-SU5F].

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Compassionate Release Statistics*, COMPASSIONATE RELEASE: A PROJECT BY BRANDON SAMPLE, https://compassionaterelease.com/compassionate-release-statistics/ [https://perma.cc/Q5DK-CMD6].

[88] *Id.*

[89] *See id.* The statistics provided by the BOP in this report did not match statistics covering the same period that were provided to twelve senators who penned a letter to then-BOP director Thomas Kane questioning the administration of the compassionate release program.

[90] *Id.*

[91] *Id.*

FSA become even clearer when one considers the disorganized state of compassionate release applications prior to 2018.

Initially, the statistics emerging post-FSA suggested that Congress was successful in achieving its goal of providing inmates adequate access to a judicial determination on their motion.[92] According to the BOP, since December of 2018 there have been 3,880 compassionate releases.[93] Compared to the roughly 300 BOP applications which were approved in the previous five years, this measure indicates a marked increase in releases and some level of success.[94] However, comparing those statistics to those emerging in the Covid era reveals the unfortunate truth that the Act has likewise failed in achieving its goal of providing adequate opportunities for inmates to have their compassionate release motions heard. From March to May of 2020, 10,490 federal inmates applied for compassionate release.[95] Of these, wardens approved 156 applications, and the BOP subsequently approved only 11.[96] Therefore, 10,479, or 99.9% of applicants were forced to either "exhaust[] all administrative rights,"[97] which gives the BOP twenty to forty days at each level of a three-step administrative appeal process,[98] or wait thirty days in the face of a virus which can kill the immunocompromised, at-risk, and seemingly healthy in a fraction of that time.[99]

Because compassionate release requires "extraordinary and compelling reasons,"[100] it has colloquially been regarded as pertaining to situations in

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[92] *Id.*

[93] *First Step Act*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/fsa/index.jsp [https://perma.cc/AK5R-D4YD].

[94] Thompson, *supra* note 33.

[95] Blakinger & Neff, *supra* note 1.

[96] *Id.*

[97] 18 U.S.C. § 3582(c)(1)(A).

[98] Tom Church, *What is the Compassionate Release Program at the Bureau of Prisons?*, PATE, JOHNSON & CHURCH (Feb. 25, 2020), https://www.pagepate.com/what-is-the-compassionate-release-program-at-the-bureau-of-prisons/ [https://perma.cc/9SSB-P7ES].

[99] *San Antonio Girl Dies Three Days After Testing Positive for COVID-19*, FOX 7 AUSTIN (Feb. 10, 2021), https://www.fox7austin.com/news/san-antonio-girl-dies-three-days-after-testing-positive-for-covid-19 [https://perma.cc/QY8U-DZYW]; Gromer Jeffers Jr. & Tom Benning, *Rep. Ron Wright of Arlington Dies After 18-day Battle with COVID-19*, THE DALL. MORNING NEWS (Feb. 8, 2021, 9:47 AM), https://www.dallasnews.com/news/politics/2021/02/08/rep-ron-wright-dies-after-battle-with-covid-19/ [https://perma.cc/HRT4-9K62].

[100] 18 U.S.C. § 3582(c)(1)(A)(i).

which one is either "released to die among [their] loved ones," or "left to die in prison."[101] Officially, the comments to the U.S. Sentencing Guidelines provide four "extraordinary and compelling reasons" which may justify reducing a prison term: (1) medical conditions, (2) age, (3) family circumstances, and (4) "[o]ther [r]easons."[102] However, successful movants often are terminally ill or otherwise able to present grave medical prognoses.[103] Given this trend, one may dismiss the disparity in compassionate release statistics, post-Covid, as reflecting the differences between the known diagnosis of a terminal illness and the mere potential risk of illness posed by Covid. However, when considering that compassionate release has been granted for a multitude of reasons other than terminal illness,[104] it becomes clear that the risk of Covid could plausibly be considered an "'extraordinary or compelling'" circumstance for many.[105] Even before the FSA, of the 6% of applicants who were granted approval between 2014 and 2018, one-third were actually granted for non-medical release.[106] In that same time, wardens approved about 20% of applications citing a "debilitating medical condition."[107] In any case, the standard itself implies that the circumstances must be of such a character that a successful movant will undoubtedly face a substantial physical or mental burden should release not be granted. Concluding that the unprecedented risk of Covid satisfies this

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[101] Emily Widra & Wanda Bertram, *Compassionate Release was Never Designed to Release Large Numbers of People*, PRISON POL'Y INITIATIVE (May 29, 2020), https://www.prisonpolicy.org/blog/2020/05/29/compassionate-release/ [https://perma.cc/QA3Z-NSYR].

[102] U.S.S.G. § 1B1.13 cmt. 1(A)–(D) (2018).

[103] *How the First Step Act Changed Federal Compassionate*, *supra* note 82.

[104] Compassionate Release has been approved for debilitated medical conditions, "elderly, non-medical" reasons, for elderly prisoners suffering from "deteriorating mental or physical health substantially diminishing [the] ability to function," and the need to care for a child due to death/other impairment of guardians. FAMM, NEW COMPASSIONATE RELEASE RULES: BREAKING IT DOWN 2 (2020), https://famm.org/wp-content/uploads/FAMM-explains-new-compassionate-release-rules.pdf [https://perma.cc/R55A-6DC2]. *See also* U.S.S.G. § 1B1.13 cmt. 1(A)–(D).

[105] *Compassionate Release Statistics*, *supra* note 87.

[106] Widra & Bertram, *supra* note 101; Dale Chappell, *How the Courts Are Using Compassionate Release to Fix Unfair Sentence*, SENTENCING.NET: A PROJECT BY BRANDON SAMPLE (July 30, 2020), https://sentencing.net/prison-conditions/how-the-courts-are-using-compassionate-release-to-fix-unfair-sentence [https://perma.cc/U8V4-QTZH].

[107] *Compassionate Release Statistics*, *supra* note 87.

standard, over 31,000 federal inmates have moved for compassionate release.[108]

D. Circuit-Split on Waivability of the FSA's Administrative Exhaustion Requirement

While the majority of courts have held that the FSA's administrative exhaustion requirement is mandatory, several have decided that the requirement is waivable as well. In so doing, courts have relied on similar arguments to support their respective views. This Note will now discuss these underlying arguments and detail some of the notable cases which have addressed the issue thus far.

1. Courts Holding the FSA's Exhaustion Requirement is Mandatory

It is important to note that five Federal Courts of Appeals which have addressed this issue have concluded the FSA's exhaustion requirement is mandatory.[109] In *Raia*, the Third Circuit Court of Appeals held that defendant Francis Raia, a sixty-eight year-old who suffered from Parkinson's Disease, diabetes, and heart issues, was not entitled to a judicial determination on his motion for compassionate release.[110] After being convicted for vote-by-mail fraud, Raia was sentenced to three months imprisonment.[111] Believing the sentence was too lenient, the government appealed to the Third Circuit while Raia began his sentence in New Jersey on March 3, 2020,[112] seventeen days before the Governor of New Jersey ordered the first shutdown of non-essential businesses and a stay-at-home order in the state.[113] While the government's appeal was pending, Raia first asked the BOP to move for compassionate release on his behalf, then made the motion on his own

[108] Blakinger & Neff, *supra* note 35.

[109] *See* United States v. Raia, 954 F.3d 594, 597 (3d Cir. 2020); United States v. Alam, 960 F.3d 831, 832 (6th Cir. 2020); United States v. Springer, 820 F. App'x 788, 791 (10th Cir. 2020); United States v. Franco, 973 F.3d 465. 467–68 (5th Cir. 2020); United States v. Sanford, 986 F.3d 779, 782 (7th Cir. 2021).

[110] *Raia*, 954 F.3d at 596.

[111] *Id.*

[112] *Id.*

[113] Matt Arco, *Non-Essential Businesses Will be Shut Down in N.J. Due to Coronavirus Outbreak, Gov. Murphy Says*, NJ.COM (Mar. 20, 2020), https://www.nj.com/coronavirus/2020/03/non essential-businesses-will-be-shut-down-in-nj-due-to-coronavirus-outbreak-gov-murphy-says.html [https://perma.cc/RR5N-AASJ].

before waiting thirty days for its response.[114] The United States District Court for New Jersey held on March 26, 2020 that, despite having the "substantive merit" for a successful application, [115] the government's pending appeal had stripped that court of its jurisdiction.[116]

Thus, Raia appealed to the Third Circuit as well, asking for a resolution of his compassionate release motion on the merits.[117] In a short opinion, the court did not expand on its rationale, but simply stated that it was the sentencing court's place, not the circuit court's, to decide on compassionate release motions.[118] More importantly, though, the court stated that the "BOP has not had thirty days to consider Raia's request to move for compassionate release on his behalf, and there has been no adverse decision by BOP for Raia to administratively exhaust within that time period."[119] While this may seem like a glaring roadblock to compassionate release applicants with no time to spare, it is important to note that Raia had not actually argued that the exhaustion requirement was waivable in this case.[120] In fact, he seemingly did not address that fact to the Third Circuit at all[121]; so, while this decision seems to suggest that the Third Circuit has supported the viewpoint that the FSA's administrative exhaustion requirement is mandatory, the circuit has yet to deeply analyze the issue. Two months after this ruling, however, Raia was released to home confinement for health reasons exacerbated by the risk of Covid.[122]

Conversely, the Sixth Circuit adopted strict adherence to the exhaustion requirement in *United States v. Alam*.[123] There, sixty-four-year-old Waseem Alam, who suffers from obesity, diabetes, sleep apnea, coronary artery disease, kidney stones, and bladder issues sent a letter to the warden of his

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[114] *Raia*, 954 F.3d at 596.

[115] *Exclusive: Frank Raia Released from Jail to Home Confinement*, GRAFIX AVENGER (May 8, 2020), https://grafixavenger.blogspot.com/2020/05/exclusive-frank-raia-released-from-jail.html [https://perma.cc/K99R-ZBS9].

[116] *See Raia*, 954 F.3d at 596.

[117] *Id.*

[118] *Id.*

[119] *Id.* at 597.

[120] *See id.*

[121] *See id.*

[122] *Exclusive: Frank Raia Released from Jail to Home Confinement*, *supra* note 115.

[123] United States v. Alam, 960 F.3d 831, 836 (6th Cir. 2020).

prison requesting compassionate release on March 25, 2020.[124] Ten days later, he made an emergency motion for compassionate release to the district court, who dismissed it because Alam had failed to wait thirty days to comply with the exhaustion requirement.[125]

The Sixth Circuit affirmed, reasoning that "'Congress sets the rules'" for exhaustion requirements, and that the judiciary should craft exceptions "'only if Congress wants them to.'"[126] Pointing to the statute, the Sixth Circuit relied on the language that *a* "'*court may not*'" grant relief without exhaustion compliance as evidence suggested that Congress meant for the rule to be mandatory.[127] And while Alam pointed to examples of judicially-proscribed exceptions to exhaustion requirements, the court maintained that those judicially-crafted exceptions had only been applied to *judicially-crafted exhaustion requirements*.[128] Where the requirement is by statute, the court held, it was not the place for the judiciary to cross congressional will.[129] Additionally, the court dismissed Alam's argument that the backdrop of the FSA suggests Congress wanted to make compassionate release available to a broader group of inmates.[130] While the court conceded that the statutory scheme was changed to increase access to compassionate release, it maintained that Congress would not have been willing to excuse the failure to comply with the language of the same amendment.[131]

Rather than stopping there though, the Sixth Circuit went even further to state that even if the court had the power to create exceptions, it would choose not to do so in this case.[132] Because Covid makes time of the essence for *everyone*, it reasoned, nearly every inmate would be "eligible to invoke 'irreparable harm' and eligible to jump the line of applications—making the process less fair, not more fair."[133] The court also noted that invoking a

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[124] *Id.* at 832.

[125] *Id.*

[126] *Id.* at 834.

[127] *Id.* (emphasis added) (quoting 18 U.S.C. § 3582(c) (2018)).

[128] *Id.*

[129] *Alam*, 960 F.3d at 834.

[130] *Id.* at 834–35.

[131] *Id.* at 835.

[132] *Id.*

[133] *Id.*

futility requirement would require inmates and courts to make several assumptions about the BOP's administrative process.[134] For one, the court noted that it was impossible to divine whether the BOP would act on an individual petition.[135] Additionally, the court recognized that allowing the BOP thirty days, during which the inmate is waiting, is not futile because it allows them to prioritize the most urgent claims.[136] Lastly, the court responded to Alam's final argument, citing the unprecedented nature of Covid, by stating, "[f]air enough. Diseases with the morbidity of COVID-19 arise only occasionally."[137] While reasonable minds may differ on whether viruses which kill over a half-million people in the United States in less than a year happen "occasionally," the court concluded that the BOP should "have authority to process these applications fairly," stating that fairness was more imperative now than ever before, notwithstanding the fact that every defendant has a right to have their motion heard in court eventually should they so choose.[138]

In the months following the Sixth Circuit's decision in *Alam*, several other federal courts of appeals followed suit. In *United States v. Springer*, the Tenth Circuit held that defendant Lindsey Springer "was required to request that the BOP file a compassionate-release motion on his behalf to initiate his administrative remedies."[139] Therefore, while the court did not technically address whether the thirty-day waiting period could be waived following an inmate's filing of an application with the BOP, it did conclude that inmates must at least *start* the administrative process.[140] In *United States v. Franco*, the Fifth Circuit similarly decided that inmate Zaira Franco, who failed to file an application with the BOP altogether, was required to do so before having her motion considered by the courts.[141] In *Franco*, however, the court relied on the plain meaning of the FSA's text to unequivocally state that the requirement is mandatory.[142] Lastly, the Seventh Circuit recently held in

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[134] *Id.*

[135] *Alam*, 960 F.3d at 835.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 835–36.

[139] United States v. Springer, 820 F. App'x 788, 791 (10th Cir. 2020).

[140] *See id.*

[141] United States v. Franco, 973 F.3d 465, 469 (5th Cir. 2020).

[142] *Id.* at 468.

United States v. Sanford, without much analysis of the issue other than a reference to the text of the statute, that inmates are required to exhaust their administrative remedies or wait thirty days after the BOP's receipt of their applications to make their own compassionate release motions with the courts.[143]

While there is a multitude of jurisprudence which has emerged on each side of this issue, most courts holding that the requirement is mandatory, have relied on similar rationales to the two most commonly cited cases: *Alam* and *Raia*.[144] Again, the primary arguments presented by those courts are (1) that congressional intent is paramount to statutory interpretation, and the "*court may not*" text of the statue supports the inference that Congress intended for the requirement to be mandatory; (2) that the judiciary may not craft exceptions to statutory exhaustion requirements; (3) that the purpose of increasing access to compassionate release does not excuse the failure to comply with the requirement; (3) that the exhaustion requirement fulfills the twin purposes of protecting administrative agency authority and promoting judicial efficiency; (4) that fairness requires allowing the BOP to take its time now more than ever; (5) that a futility requirement would require unproven assumptions by the judiciary about the BOP's administrative process; and (6) compliance takes on added importance now because the government has provided alternative forms of relief during Covid, such as those available under the CARES Act.[145]

2. Courts Holding the FSA's Exhaustion Requirement is Waivable

The rationales utilized by courts who have held the requirement as waivable[146] also demonstrate aforementioned arguments such as those focusing on the uniqueness of the situation; the failure of the exhaustion requirement to comport with the offered purposes for both the FSA and exhaustion requirements generally; and the newly offered idea that "crafting

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[143] United States v. Sanford, 986 F.3d 779, 782 (7th Cir. 2021).

[144] *See* United States v. Epstein, No.14-287, 2020 U.S. Dist. LEXIS 62833, at *8–9, 13 (D.N.J. Apr. 9, 2020) (relying on *Alam* and *Raia*, among other cases, to hold that the requirement to exhaust administrative remedies and wait thirty days is mandatory).

[145] *See supra* Part II.D.1.

[146] *See, e.g.,* United States v. Haney, 454 F. Supp. 3d 316, 320 (S.D.N.Y. 2020); United States v. Scparta, No. 18-CR-578, 2020 U.S. Dist. LEXIS 68935, at *3 (S.D.N.Y. Apr. 19, 2020); United States v. Lacy, No. 15-CR-30038, 2020 U.S. Dist. LEXIS 76849, at *4 (C.D. Ill. May 1, 2020); United States v. Zukerman, 451 F. Supp. 3d 329, 331 (S.D.N.Y 2020).

judicial equitable exceptions further, rather than hinder, Congress['s] intent to promote speedy and efficient resolution of an inmate's claim for release."[147] Particularly, courts have recognized that administrative remedies would "result in undue prejudice and render exhaustion of the full Bureau of Prisons administrative process both futile and inadequate."[148]

In *United States v. Haney,* the Southern District of New York ("S.D.N.Y.") decided the case of Hugh Haney, aged sixty-one, who made a motion for compassionate release based on his age and his risk of contracting Covid without first exhausting his administrative remedies with the BOP or waiting thirty days from the time he first notified the warden of his intention to do so.[149] While the S.D.N.Y. denied Haney's motion on the merits, the court decided that the defendant's failure to exhaust his administrative remedies was waivable in this case.[150] To begin, the court noted that it was aware of the difference between judicially-crafted exhaustion requirements, like the one discussed in *McCarthy v. Madigan*, and statutorily-imposed requirements, like the one discussed in this case.[151] In cases of judge-made requirements, courts have stated that "congressional intent is paramount . . ."[152] When the *statute* provides the requirement, one could argue Congress indicated its intent for the requirement to be mandatory simply by including it in the text of the statute. Nevertheless, the court determined that Congress simply could not have intended for the exhaustion requirement to apply in a situation such as the Covid pandemic.[153]

Additionally, the court explained that because "the [FSA] does not necessarily require the moving defendant to fully litigate his claim before the agency (i.e., the BOP) before bringing his petition to court," it is distinguishable from traditional exhaustion requirements, to which some courts have compared the requirement in the FSA, where applicants have no choice but to exhaust all remedies.[154] Accordingly, the court decided that the

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[147] Fern L. Kletter, Annotation, *COVID-19 Related Litigation: Effect of Pandemic on Release from Federal Custody*, 54 A.L.R. Fed. 3d Art. § 119 (2020).

[148] *Id.* at § 122. *See also Zukerman*, 451 F. Supp. 3d at 333.

[149] *Haney*, 454 F. Supp. 3d at 318.

[150] *Id.* at 322–23.

[151] *Id.* at 320.

[152] *Id.* (citing *McCarthy*, 503 U.S. at 144).

[153] *Haney*, 454 F. Supp. 3d at 321.

[154] *Id.*

unique structure of the FSA's exhaustion requirement rendered it inadequate to serve the goals of protecting administrative agency authority and promoting judicial efficiency.[155] This is because congressional intent evidenced the presence of an option to exhaust *or* wait, which cannot be said to promote autonomy when defendants have the option to come to court before a final decision has been made by the BOP.[156] The court offered further support by explaining that, in practice, Congress knew the BOP would often not be able to provide anything more than a superficial review, if any review at all, to an inmate's request within thirty days.[157] In light of this option, the court concluded that a third purpose must have existed in enacting this requirement: "congressional intent for the defendant to have the right to a meaningful and prompt *judicial* determination of whether he should be released."[158]

Therefore, the court held that it could waive the exhaustion requirement where strict enforcement would not serve these congressional objectives.[159] Applying this analysis to Covid, the court concluded:

> in the extraordinary circumstances now faced by prisoners as a result of the COVID-19 virus and its capacity to spread in swift and deadly fashion, the objective of meaningful and prompt judicial resolution is clearly best served by permitting Haney to seek relief before the 30-day period has elapsed . . . each day a defendant must wait before presenting what could otherwise be a meritorious petition threatens him with a greater risk of infection and worse.[160]

For good measure, the court then explained that the requirement also failed to serve the judicial efficiency requirement in the Covid context.[161] This failure, the court reasoned, is because the flood of compassionate release applications to the BOP has forced many to go unseen within thirty days, directly refuting the often-cited benefit of exhaustion requirements: that they

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155 *Id.*

156 *Id.*

157 *Id.* at 321–22.

158 *Id.* at 321 (citing United States v. Russo, 454 F. Supp. 3d 270, 271 (S.D.N.Y. 2020)).

159 *Id.*

160 *Id.*

161 United States v. Haney, 454 F. Supp. 3d 316, 321 (S.D.N.Y. 2020).

allow administrative agencies to develop a factual record available for use by the judiciary.[162]

In *United States v. Scparta*, the S.D.N.Y. again ruled on a compassionate release motion filed absent compliance with the administrative exhaustion requirement, though in this case the defendant had actually already been granted home confinement by the BOP while the motion was pending.[163] However, BOP policy dictated that inmates were required to quarantine—while remaining in custody during one of the virus' peaks—for fourteen days before being released.[164] When one of the other at-risk inmates with which he was quarantining before their release to home confinement tested positive for the virus, however, the fourteen-day clock "restart[ed]," and Mr. Scparta remained in custody.[165] Therefore, Scparta pressed the S.D.N.Y. to decide on his motion.[166]

The court agreed that the requirement was waivable and relied on many of the same arguments it had in *Haney*.[167] Additionally, though, the court added some novel arguments, such as the fact that the government, through prosecutors, does not contest that the requirement is waivable, but argued that it could only be waived by the government itself.[168] The court also pointed out that there are many situations in which courts have recognized equitable exceptions to statutory exhaustion requirements and distinguished this context from contexts in which the Supreme Court has cautioned against excusing statutory exhaustion requirements.[169] Specifically, the court pointed to the Supreme Court's holding in *Ross v. Blake* that the text and congressional intent of the Prison Litigation Reform Act ("PLRA") required adherence to the statutory scheme and precluded a judge-made exception to the exhaustion requirement in that case.[170] However, when analyzing Congress's

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[162] *Id.*

[163] United States v. Scparta, No. 18-CR-578, 2020 U.S. Dist. LEXIS 68935, at *3 (S.D.N.Y Apr. 19, 2020).

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*; *see also supra* Part II.D.2.

[168] *Id.* at *14.

[169] United States v. Scparta, No. 18-CR-578, 2020 U.S. Dist. LEXIS 68935, at *15 (S.D.N.Y Apr. 20, 2020).

[170] *Id.* at *16 (citing Ross v. Blake, 136 S. Ct. 1850, 1854–56 (2016)).

intent in passing the FSA, the court, like in *Haney*, concluded that the unique choice provided in the exhaustion requirement and unprecedented global health crisis require waiver of the requirement.[171]

And while the *Scparta* court concluded that the text and structure of the FSA create a distinguishable situation from "traditional" exhaustion requirements, it also found support from the legislative history of the FSA.[172] Specifically, the court referenced the House Report for the FSA, which detailed that the statute was designed to "enhance public safety" and "make[] . . . changes to Bureau of Prisons" policies and procedures to ensure prisoner and guard safety and security."[173] Due to the deadly and fast-acting nature of Covid, then, a mandatory requirement would achieve the exact opposite result by forcing at-risk individuals to remain in an environment which renders adherence to Covid-safe health practices essentially impossible.[174]

In *United States v. Camacho-Duque*, the Southern District of Florida granted compassionate release for a prisoner suffering from hypertension and type-II diabetes, two at-risk predispositions to Covid.[175] In her initial request, the defendant did not specifically identify that she was seeking release under the FSA.[176] Therefore, the government opposed her motion as one which was brought despite failing to exhaust administrative remedies (or wait the required thirty days).[177] Deciding through a reasonability analysis, the court determined, using *McCarthy*, that the exhaustion requirement to the FSA was waivable.[178] Specifically, the court stated:

> [G]iven this unprecedented virus, it would unduly prejudice Defendant to require her to exhaust administrative remedies. If Defendant were found not to have exhausted administrative remedies, she would have to start over, waiting another 30 days until she could file a renewed

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[171] *Id.* at *18–19.

[172] *Id.* at *21–22.

[173] *Id.* at *21 (citing H.R. Rep. 115-699 at 22).

[174] *Id.* at *21–22.

[175] United States v. Camacho-Duque, No. 18-80238-CR, 2020 WL 5951340 (S.D. Fla. Oct. 5, 2020).

[176] *Id.* at *2.

[177] *Id.*

[178] *Id.* at *3.

> motion for compassionate release in this court. Each day that Defendant spends in confinement, she is at a heightened risk of contracting the COVID-19 virus. Delaying a ruling on Defendant's motion until such time as the BOP can consider her circumstances and take action would be unreasonable and would expose Defendant to unnecessary risk. Accordingly, to the extent that Defendant has not exhausted administrative remedies, I still find that it is appropriate to allow her to proceed with this action.[179]

In *United States v. Witter*, the Western District of Wisconsin decided the case of seventy-year-old inmate Rita Witter, who made a motion for compassionate release on April 22, 2020 due to the fact that she suffered from stage IV kidney failure, congestive heart failure, chronic obstructive pulmonary disease (COPD), atrial fibrillation, and stage IV lung cancer without first exhausting her administrative remedies.[180] In fact, Witter offered no excuse for failing to notify the warden of her intent to file a motion for compassionate release, and on appeal argued only that the requirement is excusable due to her condition and the futility of the administrative process.[181]

While the court reserved deciding on Witter's motion on the merits, it held that "this court is more persuaded by the authority suggesting that in very limited circumstances, equitable exceptions may apply."[182] In so holding, the court relied mainly upon the rationales explained in *Haney* and *Sparta*, and provided an outline of the primary arguments supporting this position.[183] In summary, those arguments are: (1) that this exhaustion requirement is distinguishable from "traditional" exhaustion requirements because it does not require a determination from the BOP; (2) that given the fact that congressional intent is paramount in determining whether equitable exceptions apply to exhaustion requirements, the text, structure, and history of the FSA do not support the position that statutorily-prescribed exhaustion requirements are mandatory; (3) that the exhaustion requirement cannot

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[179] *Id.*

[180] United States v. Witter, No. 18-CR-77-WMC-4, 2020 U.S. Dist. LEXIS 72396, at *2–3 (W.D. Wis. Apr. 24, 2020).

[181] *Id.* at *11–12.

[182] *Id.* at *13.

[183] *Id.* at *16.

achieve the main goals of deference to administrative agency authority and judicial efficiency; and (4) that the exhaustion requirement cannot serve its third purpose, allowing "defendant[s] to have the right to a meaningful and prompt judicial determination of whether [they] should be released,"[184] in the Covid context.[185]

Lastly, the S.D.N.Y. went one step further in *United States v. Zukerman* when it decided that Morris Zukerman, aged seventy-five, was entitled to compassionate release despite failing to exhaust all of his administrative remedies or waiting thirty days.[186] Particularly, the court first concluded that the exhaustion requirement was waivable as a matter of law, for the same reasons discussed above, before turning to the specific instances in which the exceptions to the exhaustion requirement should apply.[187] Particularly, the court held that the three equitable exceptions outlined *Washington v. Barr* would apply to the FSA's exhaustion requirement despite the fact that the requirement is proscribed by statute and not judge-made.[188] Deciding on these three factors, the court concluded that Covid presented a situation that would implicate all three.[189] In light of the health risks and speed with which Covid can spread, the court concluded, the thirty-day waiting period presented a situation in which exhaustion would be futile, potentially inadequate, and potentially unduly prejudicial to defendants due to the health effects which can result to an at-risk inmate as a result of the undue delay.[190]

While no federal court of appeals has explicitly stated the requirement is waivable, the Fifth Circuit suggested so in *Valentine v. Collier*.[191] In that case, prisoners brought a class-action suit under the PLRA to challenge the sufficiency of preventive measures in place to prevent spread of Covid among prisoners.[192] The court decided that the administrative exhaustion

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[184] United States v. Russo, No. 16-CR-441, 2020 U.S. Dist. LEXIS 59223, at *7 (S.D.N.Y. Apr. 3, 2020).

[185] *See supra* Part II.D.2.

[186] United States v. Zukerman, 451 F. Supp. 3d 329, 330–31 (S.D.N.Y. 2020).

[187] *See id.* at 332–33.

[188] *Id.*; *see also supra* Part II.B.

[189] *Zukerman*, 451 F. Supp. 3d at 333.

[190] *Id.* at 333–35.

[191] Valentine v. Collier, 956 F.3d 797, 807 (5th Cir. 2020) (Higginson, J., concurring) (per curiam).

[192] *Id.* at 799.

requirement of the PLRA was waivable due to the dangerous, time-sensitive nature of Covid.[193] However, in a concurring opinion Judge Higginson noted that this decision under the PLRA "does not foreclose federal prisoners from seeking relief under the [FSA]'s provisions for compassionate release."[194] Rather, he added, "several courts have concluded that this requirement is not absolute and that it can be waived by the government or by the court, therefore justifying an exception in the unique circumstances of the COVID-19 pandemic."[195]

III. ANALYSIS

This Part will first argue that the administration exhaustion requirement is waivable because it aligns with both the text and purpose of the FSA, which was to increase inmate access to the courts for a prompt judicial determination on their motion. Next, this Part will argue that the unique structure of the requirement separates it from "traditional" exhaustion requirements. Then, the Part will discuss the exhaustion requirement's failure to achieve its own goals in support of this Part's conclusion that the requirement is waivable. Lastly, this Part will turn to the effects Covid has had on BIPOC and Latino communities to support the argument that this bright-line denial to inmates seeking compassionate release burdens a group of disproportionately BIPOC and Latino people who are already bearing the worst of the virus across the country. Particularly, the Note will show that the exhaustion requirement is waivable in the Covid context before arguing that the flaws Covid has exposed in the requirement show that it should and could be waived in any circumstance.

A. The Administrative Exhaustion Requirement is Waivable, in Accordance with the Text and Purpose of the FSA

After evaluating the rationales provided by the *Alam, Raia, Scparta,* and *Haney* courts, as well as the data regarding the spread and tragedy of Covid both in prisons and the United States generally, it is clear that the text, structure, and purpose of the FSA require that the administrative exhaustion requirement be waived for at-risk compassionate release movants looking to avoid the effects of Covid. However, looking purely at the text of the FSA, it is admittedly easy to see why courts' first impressions would be to hold that

[193] *Id.* at 805.

[194] *Id.* at 807.

[195] *Id.*

the exhaustion requirement is mandatory. As the court reasoned in *Alam*, why would Congress include the requirement if it did not mean for it to be followed?[196] And further, if Congress meant for exceptions to apply to the statute, why did it not include them in the text?[197] However, when one compares the language of the FSA to other mandatory administrative rules, it is distinguishable in that it does not include, as most do, the language "no action shall be brought."[198] Despite the Sixth Circuit's response to this argument, that "a sufficient explanation for a mandatory rule is not a necessary one,"[199] Congress's intent in enacting the FSA sufficiently shows that it would have supported the imposition of certain equitable exceptions which increased inmates' chances for a prompt determination on their motion.[200]

Adhering strictly to the text of the FSA represents an overly formalistic approach which would create a bright-line test denying judicial determinations on the motions of inmates in a statute which was designed to increase inmate access to such determinations. As the court explained in *Haney*, and as a general principle of statutory interpretation, congressional intent is "paramount" when construing the meaning of a statute.[201] And while the court in *McCarthy* expounded this principle when crafting exceptions to a *judge-made* exhaustion requirement,[202] this distinction should not render congressional intent immaterial when interpreting a statute. Rather, while the text of the statute itself obviously remains the primary source of evidence for Congress's intent, the legislative history and general purpose of the Act should also be considered.

As the *Haney* court put simply, Covid presents a situation which Congress would certainly have intended to exclude from the administrative

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196 United States v. Alam, 960 F.3d 831, 834–35 (6th Cir. 2020).

197 *Id.*

198 *See, e.g.*, 42 U.S.C. § 1997(e).

199 *Alam*, 960 F.3d at 834.

200 *See* FAMM, COMPASSIONATE RELEASE AND THE FIRST STEP ACT: THEN AND NOW 4 (2021), https://famm.org/wp-content/uploads/Compassionate-Release-in-the-First-Step-Act-Explained-FAMM.pdf [https://perma.cc/W2MJ-RZLE].

201 United States v. Haney, 454 F. Supp. 3d 316, 320 (S.D.N.Y. 2020) (quoting McCarthy v. Madigan, 503 U.S. 140, 144 (1992)).

202 *McCarthy*, 503 U.S. at 144.

exhaustion requirement in the FSA.[203] The FSA was notable in that, due to the shockingly low number of compassionate release motions brought by the BOP on behalf of inmates before it, it greatly expanded the opportunity for inmates to have a judicial determination on their motion.[204] Compassionate release, because it is a mechanism designed to recognize extraordinary circumstances, would and has been granted on the merits to at-risk inmates fearing Covid.[205] In fact, as discussed in *Camacho-Duque*, requiring exhaustion in the Covid context would unduly prejudice prisoners; delaying an inmate's opportunity to have their motion heard would not only be unreasonable given the goals of the FSA, but it would pose an unnecessary risk to the inmate's health.

In response, the court in *Alam* stated the backdrop of the Act would not excuse failures to comply with a provision deliberately included in its text.[206] However, this narrow viewpoint ignores how this ruling functionally defeats the purpose for which the Act was created. Therefore, construing a statute designed to increase access to the courts for determinations on what are normally time-sensitive motions in a way which would hinder the ability of immunocompromised inmates to receive those determinations at the risk of their lives cannot comport with Congress's intent in enacting the FSA.

This is further supported by the analysis of the *Scparta* court, which correctly recognized that the general purpose of "safety" would not comport with the result of forcing at-risk inmates to remain in prison for thirty extra days, risking increased exposure to a virus which can kill in a fraction of that time.[207] This is especially true when one considers that this "safety" was meant to include not only inmates, but the prison staff and the public, too. While it is obvious that Covid presents a great risk to the health and safety of inmates, the threat of spread to the staff presents issues not only to the staff themselves, but to the public at large.[208] Whereas inmates are confined to a type of perpetual, non-socially-distant quarantine, correctional staff are free

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[203] *Haney*, 454 F. Supp. 3d at 320–21.

[204] *Compassionate Release and the First Step Act: Then and Now*, *supra* note 200 at 1.

[205] *See generally* United States v. Epstein, No. 14-287, 2020 U.S. Dist. LEXIS 62833 (D.N.J. Apr. 9, 2020) (collecting cases).

[206] United States v. Alam, 960 F.3d 831, 834–35 (6th Cir. 2020).

[207] United States v. Scparta, No. 18-CR-578, 2020 U.S. Dist. LEXIS 68935, at *7 (S.D.N.Y. 2020) (citing H.R. Rep. No. 115–699, at 22 (2018)).

[208] *See e.g.,* Park & Meagher, *supra* note 23.

to travel to and from the prison. Therefore, they can not only be infected with the virus themselves but can turn around and transfer an outbreak from the confines of the prison's walls into the unimpeded movement of the public. Thus, a bright-line denial of judicial determinations to a group of movants, many of whom could be successful, at least temporarily is complicit with the overcrowding which has driven so many of the outbreaks in prisons like FCI Oakdale thus far.[209]

In summary, based on the text of the statute alone, it may seem as though the administrative exhaustion requirement of the FSA is mandatory. However, the legislative history and purpose of the Act generally show that Congress would have intended for equitable exceptions to apply to the requirement. The structure of the act further exacerbates this truth.

B. The Structure of the FSA's Administrative Exhaustion Requirement is Distinguishable from "Traditional" Exhaustion Requirements

As the court explained in *Haney*, the FSA's administrative exhaustion requirement is different from "traditional" exhaustion requirements.[210] Typically, exhaustion requirements require moving defendants to fully litigate their claims before the agency before bringing the motion to the courts.[211] Under the FSA, however, defendants have the option to either exhaust all administrative remedies, which takes an average of about six months, or to wait thirty days before bringing their own motions to the courts.[212] Therefore, the Act does not require the moving defendant to fully litigate the request at every step in the agency before petitioning the court, but gives them the option to either pursue administrative relief, or to wait.[213]

As the Supreme Court mentioned in *McCarthy*, the main goals of exhaustion requirements are to "protect[] administrative agency authority and promot[e][] judicial efficiency."[214] However, because this requirement is structured differently than a "traditional" exhaustion requirement, one can

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[209] *See supra* Part I.

[210] United States v. Haney, 454 F. Supp. 3d 316, 321 (S.D.N.Y. 2020).

[211] *Id.*

[212] Christie Thompson & Anna Flagg, *Frail, Old, and Dying, but Their Only Way Out of Prison Is a Coffin*, N.Y. TIMES (May 7, 2018), https://www.nytimes.com/2018/03/07/us/prisons-compassionate-release-.html [https://perma.cc/PAD5-LDPA].

[213] *See* 18 U.S.C. § 3582(c)(1)(A).

[214] McCarthy v. Madigan, 503 U.S. 140, 145 (1992).

infer that Congress deliberately structured the FSA differently to serve the purpose of some additional goal. Because the *Alam* court and other courts which have held the exhaustion requirement is mandatory have not identified an explanation for this difference in structure, it is fair to assume that Congress included the exhaustion requirement with the expectation that it would comply with Congress' intention and purpose in passing the Act. Thus, as the *Russo, Haney,* and *Scparta* courts further discussed, this is evidence of a third goal that the administrative exhaustion requirement was designed to meet—fulfilling a defendant's right to a meaningful and prompt judicial determination of whether he should be released.[215]

C. Courts Which have Held that the Exhaustion Requirement is Mandatory have Ignored that the Requirement Cannot Meet the Goals of the FSA in the Covid Context

The administrative exhaustion requirement cannot ensure administrative agency authority because the FSA still allows for situations in which a movant can go directly to the courts without their request first being considered by the BOP.[216] As the courts which have held the exhaustion requirement is waivable have noted, the FSA is distinguishable from traditional exhaustion requirements in that it allows defendants to choose after thirty days whether or not they would like to continue on with the administrative relief process or bring their motion directly to the courts.[217] Because inmates are not required to continue on with the process, the BOP by definition does not maintain the autonomy or authority which exhaustion requirements are enacted to serve. Therefore, the thirty-day requirement cannot be mandatory for the purpose of providing agency authority when it is the very provision which allows the purpose to be contravened.

While it is true this would at least allow the BOP to have the inmate on file as moving for compassionate release, the BOP will likely end up with this information regardless.[218] Additionally, it is likely the thirty-day requirement which discourages inmates from petitioning the BOP in the first place. Specific to the Covid context, due to the rapid increase in the number of

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[215] *See* United States v. Russo, No. 16-CR-441, 2020 U.S. Dist. LEXIS 59223, at *7 (S.D.N.Y. Apr. 3, 2020); *Haney*, 454 F. Supp. 3d at 321; United States v. Scparta, No. 18-CR-578, 2020 U.S. Dist. LEXIS 68935, at *23 (S.D.N.Y Apr. 20, 2020).

[216] *See* 18 U.S.C. § 3582(c)(1)(A).

[217] *Haney*, 454 F. Supp. 3d at 321.

[218] LaVigne-Albert, *supra* note 36.

applications for compassionate release since the start of the Covid pandemic, the BOP is likely to be even further behind on its influx of paperwork than it already was before the number of applicants skyrocketed.[219] Therefore, because inmates are likely to view the administrative relief process as futile because the BOP is unlikely to respond within thirty days,[220] forcing those inmates to wait that long is nothing more than a pointless ritual, while the deadly risk of Covid persists in prisons with each passing second.

Judicial efficiency is an even more obvious case which would fall outside the purpose of the statute for the same reasons in the Covid context. Because motions will end up in the dockets of the court regardless of whether or not they are brought by the BOP or the inmate directly, the thirty-day exhaustion requirement cannot be said to promote judicial efficiency.[221] Further, as the court stated in *Haney*, Covid creates a situation in which the exhaustion requirement is actually inefficient.[222] The court in *Alam* noted that the exhaustion requirement and thirty-day waiting period allowed the BOP to prioritize those motions which it thought were most urgent.[223] In the current situation posed by Covid, however, this expectation is unrealistic. As the flood of applicants for compassionate release are increasingly unlikely to receive a response from the BOP within thirty days (there were over double the amount of compassionate release requests from March to May of 2020 than from 2014 to 2017),[224] the exhaustion requirement forces courts to turn away movants who have failed to wait thirty days.[225] However, because the BOP is inundated with compassionate release motions to the point that it is unlikely any applicant will have their application reviewed within thirty days, and because the time-sensitive nature of Covid understandably drives at-risk inmates to obtain release as quickly as possible, courts end up hearing the same motions twice after the waiting period has expired.[226] In light of these factors, then, the FSA cannot be said to promote judicial efficiency in the Covid context.

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[219] *See* Blakinger & Neff, *supra* note 1.

[220] *See id.*

[221] LaVigne-Albert, *supra* note 36.

[222] *Haney*, 454 F. Supp. 3d at 321–22.

[223] United States v. Alam, 960 F.3d 831, 835 (6th Cir. 2020).

[224] Blakinger & Neff, *supra* note 1; *Compassionate Release Statistics*, *supra* note 87.

[225] *See id.*

[226] *Haney*, 454 F. Supp. 3d at 322.

Lastly, the administrative exhaustion requirement cannot be said to serve the third purpose identified in *Russo* because it presents a direct hindrance to a defendant receiving a "prompt and meaningful judicial determination" on their motion.[227] First, it would be hard to argue that waiting thirty days to bring a motion to the court which one is entitled to bring at that time regardless of the agency's administrative determination—in the face of a disease which has the potential to kill at-risk individuals in a tenth of that time—would allow for a "prompt" determination. Additionally, for the same reason, the exhaustion requirement does not allow for "meaningful" determinations to those inmates who died during the exhaustion process. Therefore, in light of the circumstances presented by Covid, the exhaustion requirement cannot be said to provide a meaningful and prompt judicial determination on the motion.

Because the administrative exhaustion requirement of the FSA does not protect administrative agency authority, promote judicial efficiency, or provide defendants with a meaningful and prompt judicial determination on their motion, it does not meet any of the goals it was designed to achieve. Especially when one considers the text and purpose of the statute, which was designed to increase the inmate access to the courts, it is clear that Congress would have intended for the exhaustion requirement to be waived in circumstances such as Covid which bring about an influx of meritorious, time-sensitive applications. Therefore, courts should be able to impose the equitable exceptions offered in *Washington v. Barr* to this case.

D. Courts Must Consider Other Public Policy Considerations; BIPOC Communities have Disproportionately Shouldered the Burden of Covid Both in Prisons and Nationally, and These Decisions Add to that Burden

Aside from the traditional factors influencing statutory interpretation discussed thus far, the public policy considerations implicated by Covid should be considered by courts denying these motions to a population disproportionately comprised of BIPOC and Latino people, who are already hit hardest by the virus in the outside world.[228] As Mental Health America explained, the main factors contributing to this disproportionate impact are implicit bias, a higher prevalence of pre-existing conditions, a higher prevalence of essential work and service jobs, and inadequate health

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[227] United States v. Russo, No. 16-CR-44, 2020 U.S. Dist. LEXIS 59223, at *7 (S.D.N.Y. Apr. 3, 2020).

[228] Oppel Jr. et al., *supra* note 45.

insurance coverage.[229] However, considering the systemic racism and related factors which drive mass incarceration and racial disparity in the United States prison population, it becomes clear that the same factors are implicated in the Covid/compassionate release contexts.[230] Inmates obviously experience implicit bias,[231] and there is no question that judges, a disproportionately white class,[232] ruling on whether defendants from a class which is disproportionately BIPOC and Latino can excuse the administrative exhaustion requirement will have to manage these biases.

Additionally, as previously discussed, prisons are comprised of an inherently vulnerable group of aging populations restricted to a sedentary and unhealthy lifestyle.[233] For these reasons, the plight of United States inmates during the Covid pandemic has mirrored that of BIPOC and Latino communities nationally, which is perhaps unsurprising when you consider the similarity between the groups and the fact that the federal prison population is nearly 73% BIPOC and Latino.[234] As such, judges deciding the requirement is mandatory are denying a prompt opportunity for judicial determination to a group of disproportionately BIPOC and Latino people, requiring many members of already marginalized communities, both in the Covid and historical contexts, to risk exposure to a deadly virus for more than enough time than it would need to wreak havoc on the populations.

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[229] *BIPOC Communities and COVID-19*, *supra* note 8.

[230] *See generally* Marcus Bell, *Criminalization of Blackness: Systemic Racism and the Reproduction of Racial Inequality in the US Criminal Justice System*, *in* SYSTEMIC RACISM 163 (Ruth Thompson-Miller & Kimberley Ducey eds., 2017).

[231] *See, e.g.,* Tasha Hill, *Inmates' Need for Federally Funded Lawyers: How the Prison Litigation Reform Act, Casey, and Iqbal Combine With Implicit Bias to Eviscerate Inmate Civil Rights*, 62 UCLA L. REV. 175 (2015) (discussing implicit biases faced by inmates in federal prisons and the need for improved representation).

[232] DEMOCRACY AND GOV'T REFORM TEAM, CTR. FOR AM. PROGRESS, EXAMINING THE DEMOGRAPHIC COMPOSITIONS OF U.S. CIRCUIT AND DISTRICT COURTS 10 (2020), https://cdn.americanprogress.org/content/uploads/2020/02/12075802/Judicial-Diversity-Circuit-District-Courts.pdf?_ga=2.166946942.1741691428.1633737331-922543328.1633737331 [https://perma.cc/Q4FG-UC3V].

[233] *Covid-19's Impact on People in Prison*, *supra* note 14.

[234] *Inmate Race*, *supra* note 13; *Inmate Ethnicity*, *supra* note 13.

E. The Applicability of Any Circumstance, Including Covid, to the FSA's Exceptions Show that the Thirty-day Exhaustion Requirement Inherently Falls Within the Exceptions Outlined in the FSA

After concluding that the administrative exhaustion requirement is waivable as a matter of law, courts must then turn to the judicially-crafted equitable exceptions outlined in *Washington v. Barr* to see if Covid presents an adequate circumstance to require waiver.[235] Upon evaluation of these exceptions, the *Zukerman* and *Camacho-Duque* courts were correct in holding that the exception would be futile and would create undue prejudice and an inadequate process to the movant in the Covid context.[236] Specifically, the *Zukerman* court pointed out that undue delay could render exhaustion futile if it resulted in catastrophic health consequences.[237] Clearly, that fear is implicated here as Covid has the potential to bring about the most catastrophic health consequence of all, death, in only a fraction of the time that inmates are required to wait. Additionally, when one considers that the BOP has been so flooded with applications which it is highly unlikely to respond within thirty days, this points to that delay being undue.[238]

The same fact can be used as support for the conclusion that strict enforcement of the exhaustion requirement in this scenario has the opportunity to prevent adequate administrative relief. This is because, due to the fast-acting nature with which Covid has the potential to kill those who contract it, fully participating in the administrative relief process would require waiting around six months for a final determination—far too long for at-risk inmates.[239] Lastly, the thirty-day waiting period in the Covid context, in addition to being an undue delay, could potentially unduly prejudice the defendant for the same reasons. This is because the rigor of the administrative process, i.e., waiting in prisons during a pandemic where inmates are five times more likely to contract the virus, has the potential to trigger a severe medical setback.[240]

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[235] *See, e.g.,* United States v. Zukerman, 451 F. Supp. 3d 329, 333–35 (S.D.N.Y. 2020) (holding the exhaustion requirement is mandatory).

[236] *See id.*; United States v. Camacho-Duque, No. 18-80238-CR, 2020 WL 5951340, at *3 (S.D. Fla. Oct. 5, 2020).

[237] *Zukerman*, 451 F. Supp. 3d at 334.

[238] *See* Blakinger & Neff, *supra* note 1.

[239] Thompson & Flagg, *supra* note 212.

[240] *Zukerman,* 451 F. Supp. 3d at 334.

In summary, because Covid presents a situation in which inmates are not guaranteed an administrative determination in thirty days, the determination is futile because the inmate still has the option to bring the motion notwithstanding being denied by the BOP. Further, the administrative relief could be inadequate because the inmates remain housed in a place where they are at an increased likelihood to contract the virus, and if they are at-risk, die in the time it would take to go through the administrative relief process. Lastly, the undue and futile delay in this context could also present undue prejudice to defendants as, again, the inmate is at an increased risk of dying by waiting. Therefore, all three exceptions apply in the Covid context, and upon further evaluation of these three exceptions, and in light of the purpose of the FSA, should apply in almost any context.

F. The Magnitude of the Futility and Inadequacy of Administrative Determination Factors of the FSA Exceptions Demonstrate that the Thirty-day Exhaustion Requirement Should be Waived in Any Circumstance.

The competing views on whether or not the administrative exhaustion requirement of the FSA is waivable due to Covid have exposed flaws within the administrative process prescribed by the Act which further expose the exhaustion requirement as at least superfluous and at most inhibitive for inmates seeking compassionate release. In a "normal" year, most people who apply for compassionate release are elderly, disabled, or terminally ill.[241] And unlike in the Covid context, where it is the threat of contracting the virus which has drawn so many to compassionate release, many "normal" applicants have to go through the unfortunate experience of *already suffering* at the time they apply. Rather than fearing dying, they already know they are; rather than avoiding illness, they are already weakened. Because of the vulnerability of the typical class of applicants and time-sensitive nature of any meritorious claim for compassionate release, forcing these applicants to wait before making their motions leads one to ask—why?

As previously mentioned, it is futile to wait thirty days in any circumstance, because inmates are not required to continue on with the BOP's administrative relief process notwithstanding its determination.[242] Therefore, in light of the small number of applications which the BOP actually approves and the increased number of applications it has received following the passing of the FSA, one can conclude that the great majority

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[241] Chappell, *supra* note 106.

[242] *See* 18 U.S.C. § 3582(c)(1)(A).

of applicants are going to file motions for compassionate release on their own anyway.[243] Thus, the exhaustion requirement can never promote judicial efficiency, and can always be argued to be futile. In fact, the choice given to the applicant to continue on with the process or take their motion to the courts after thirty days cannot comport with any of the offered purposes for the exhaustion requirement.

The administrative exhaustion requirement inherently cannot protect administrative authority because, again, it provides inmates with a choice about whether or not to make their own motion with the courts after thirty days.[244] As the court pointed out in *Zukerman*, even if the justification offered is that the BOP should be given an opportunity to review the case because it is in the best position to do so, there is nothing preventing the BOP from monitoring these cases and stepping in for situations it believes to be most urgent—which is why it claims the exhaustion requirement is necessary.[245] Because the BOP would not maintain authority following thirty days, and often cannot review an application within thirty days, the exhaustion requirement can never be said to protect agency authority.

Lastly, the exhaustion requirement generally cannot be said to provide a prompt judicial determination on the motion because it inherently hinders the ability of inmates to bring such motions. Especially when one considers the plight of the average compassionate release movant, the requirement feels like not only a "pointless ritual",[246] but an unnecessary roadblock which only adds to the suffering of a population already in pain. As such, it undoubtedly also provides a heightened risk for undue prejudice to often-grieving inmates.

As the FSA—the purpose of which was at least in part to alleviate discrimination by the BOP in the sentencing context[247]—stands, inmates with stronger physical and/or mental faculties are rewarded with greater chances to satisfy the strenuous administrative requirements necessary to be considered for compassionate release than the typical applicant. Because the Act is inherently aimed towards situations involving disabled, ill, or elderly patients, however, its process alienates the same people it is designed to

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[243] *See* Blakinger & Neff, *supra* note 1.

[244] *See* 18 U.S.C. § 3582(c)(1)(A).

[245] *See Zukerman*, 451 F. Supp. 3d at 334.

[246] Root, *supra* note 30.

[247] *See* NATHAN JAMES, THE FIRST STEP ACT OF 2018: AN OVERVIEW 1 (2019), https://crsreports.congress.gov/product/pdf/R/R45558 [https://perma.cc/5NKG-GCNT].

support for essentially no extra benefit to the BOP or the court. Along the same lines, the requirement takes away time from a group of inmates who often are running out of exactly that—time. Therefore, Congress should amend the FSA and eliminate or create statutory exceptions to the minimum thirty-day exhaustion requirement which mirrors those discussed in *Washington v. Barr*, or in the alternative, courts should liberally waive the requirement in cases where the exceptions outlined in *Washington v. Barr* would apply.

IV. CONCLUSION

Federal courts should hold that the First Step Act's administrative exhaustion requirement for compassionate release is waivable because that decision aligns with Congress's intent in passing the Act and provides potentially immunocompromised inmates, who are disproportionately BIPOC, an opportunity to be considered for compassionate release.[248] Despite the conclusions of some courts that the text of the Act precludes judges from waiving the administrative exhaustion requirement, the language of the FSA differs from the text of other mandatory administrative rules.[249] Therefore, when one turns to Congress's intent in passing the FSA for guidance, they see that Congress would have supported the imposition of equitable exceptions to the exhaustion requirement because the Act was designed to expand the opportunity for inmates to have a judicial determination on their motions.[250] Further, the purposes of the FSA pertaining to safety and the "extraordinary" nature of compassionate release generally support the conclusion that Congress would have wanted inmates to be excepted from the thirty-day waiting period in situations where waiting thirty days creates a substantially increased risk of illness or death to the inmates.[251]

In fact, the structure of the FSA has created scenarios where, regardless of the defendant, the goals of administrative exhaustion requirements cannot be met. The Act provides two avenues for inmates to have their motions heard by the courts, one of which allows an inmate to make a motion with the courts without even receiving a response from the BOP, so it cannot be

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[248] *See supra* Part III.A.; *see supra* Part III.D.

[249] *See supra* Part III.B.

[250] *See supra* Part III.A.

[251] *Id.*

said to promote agency authority.[252] Additionally, the structure of the exhaustion requirement makes it so that courts often hear the same motions twice; once when it is dismissed for failing to meet the administrative exhaustion requirement because an inmate has not waited thirty days after applying with the BOP, and again after they have waited and likely still have not received a response from the agency.[253] Therefore, the exhaustion requirement cannot be said to serve the goal of judicial efficiency. Lastly, the requirement certainly cannot meet the goal outlined in *Scparta* to ensure defendants are receiving meaningful and prompt judicial determinations on their motions, because it directly hinders their ability to do so for at least sixty days.[254]

For these reasons, Covid has rendered the administrative exhaustion requirement of the FSA futile.[255] Immunocompromised federal inmates face heightened risks to their lives each day they are forced to wait on their hearings on motions for compassionate release, and they will continue to do so until the Act is amended or courts decide that inmates can have a prompt judicial determination on their motions so long as they meet one of several equitable exceptions. And while it feels easier now more than ever before to turn a blind eye to this issue as vaccines are administered across the United States and life slowly returns to "normal," inmates continue to be plagued by injustice and forced to deal with prison conditions which exacerbate effects of a deadly virus which has killed over 500,000 Americans.[256]

Most importantly, even after Covid becomes a memory for most, the administrative exhaustion requirement of the FSA will continue to prolong the suffering many inmates face in prison. Whether it is a terminal illness, chronic and debilitating illness, or a non-medical family emergency, the FSA has created an ableist system which rewards only those who are most equipped to deal with its rigorous exhaustion standards.[257] Because no system should prolong suffering of inmates before they have even had an opportunity for their situation to be considered by the court, and because statistics have shown that inmates are likely to be ignored by the BOP for the

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[252] *See supra* Part III.C.

[253] *Id.*

[254] *See supra* Part III.A.

[255] *See supra* Part III.E.

[256] *See supra* Part II.A.

[257] *See supra* Part III.F.

thirty-day period they are forced to wait, consequences created by the Act have compelled the conclusion that the administrative exhaustion requirement is inherently exceptional and should be disregarded by courts or removed from the FSA.