FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. HOWARD CHEN, *Defendant-Appellant.*	No. 20-50333 D.C. No. 2:07-cr-00463-JFW-1 OPINION

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted June 16, 2022[*]
Pasadena, California

Filed September 14, 2022

Before: Johnnie B. Rawlinson and Morgan Christen, Circuit Judges, and Gloria M. Navarro,[**] District Judge.

Opinion by Judge Navarro

---

[*] Since oral argument, the parties filed several notices of supplemental authorities, all of which have been considered by the panel.

[**] The Honorable Gloria M. Navarro, United States District Judge for the District of Nevada, sitting by designation.

SUMMARY[***]

Criminal Law

The panel vacated the district court's denial of Howard Chen's motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A), and remanded.

The panel held that a district court may consider the First Step Act's non-retroactive changes to sentencing law, in combination with other factors particular to the individual defendant, when determining whether extraordinary and compelling reasons exist for a sentence reduction under § 3582(c)(1)(A). Because the district court declined to consider the First Step Act's non-retroactive changes to the mandatory minimum sentencing requirements of 18 U.S.C. § 924(c) when considering whether to reduce Chen's sentence, the panel remanded for the district court to reassess the motion under the correct legal standard.

COUNSEL

Joshua D. Weiss (argued) and Kathryn A. Young, Deputy Federal Public Defenders; Cuauhtemoc Ortega, Federal Public Defender; Office of the Federal Public Defender, Los Angeles, California; for Defendant-Appellant.

David R. Friedman (argued), Assistant United States Attorney; Bram M. Alden, Chief, Criminal Appeals Section;

[***] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Tracy L. Wilkison, United States Attorney; United States Attorney's Office, Los Angeles, California; for Plaintiff-Appellee.

OPINION

NAVARRO, District Judge:

Howard Chen appeals from the district court's order denying his motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A). We hold that a district court may consider the First Step Act's non-retroactive changes to sentencing law, in combination with other factors particular to the individual defendant, when determining whether extraordinary and compelling reasons exist for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A). Because the district court declined to consider the First Step Act's non-retroactive changes to the mandatory minimum sentencing requirements of 18 U.S.C. § 924(c) when considering whether to reduce Chen's sentence, we vacate and remand for the district court to reassess the motion for compassionate release under the correct legal standard.

I. BACKGROUND

Chen's case arises out of a conspiracy to traffic large quantities of MDMA between November 2006 and May 2007. After Chen negotiated to sell MDMA pills to an informant for the DEA, local law enforcement agents stopped Chen's car and found 831 grams of MDMA and a firearm. DEA agents later recovered MDMA pills, drug paraphernalia, and two firearms from Chen's house. In total, Chen possessed or distributed 13,934 grams of MDMA, and the DEA recovered around $140,000 in proceeds. Other

than juvenile offenses, Chen had no prior criminal history at the time of his arrest.

On November 29, 2007, a jury convicted Chen of six drug-related counts and two counts of possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i). At the time of Chen's sentencing in 2008, § 924(c) imposed a mandatory minimum sentence of 5 years[1] for a defendant's first § 924(c) conviction, and a mandatory minimum sentence of 25 years "in the case of a second or subsequent" § 924(c) conviction. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005(a), 98 Stat. 2138, 2138–39 (as amended by Pub. L. No. 105-386, 112 Stat. 3469 (1998)). Under *United States v. Deal*, the Supreme Court established that the 25-year mandatory minimum enhancement for "second or subsequent" convictions applied to multiple § 924(c) counts charged in a single case, even when that case marked the first time a defendant was ever charged with a § 924(c) offense, creating what is colloquially known as the practice of "§ 924(c) stacking." *See Deal*, 508 U.S. 129, 130–36 (1993). Accordingly, the district court sentenced Chen to 48 months for the six drug offenses, 60 months for his first § 924(c) conviction and a stacked 300 months for his second § 924(c) conviction, for a total of 408 months' imprisonment.

[1] "[A]ny person who, during or in relation to any crime of violence . . . uses or carries a firearm . . . shall . . . be sentenced to a term of imprisonment of not less than 5 years." 18 U.S.C. § 924(c)(1)(A)(i). If the firearm is brandished during the crime, the mandatory minimum increases to 7 years. *Id.* § 924(c)(1)(A)(ii). If the firearm is discharged, the mandatory minimum increases to 10 years. *Id.* § 924(c)(1)(A)(iii). Chen's conviction is for *possession* of a firearm, and thus, his sentence is subject to the 5-year mandatory minimum in § 924(c)(1)(A)(i).

In 2018, § 403(a) of the First Step Act negated *Deal* by clarifying that the 25-year enhancement is triggered only by a § 924(c) conviction occurring after the initial § 924(c) conviction "has become final." *See* First Step Act of 2018, Pub. L. No. 115-391, § 403(a), 132 Stat. 5194, 5221–22 (codified at 18 U.S.C. § 924(c)(1)(C)). In practice, § 403(a) of the First Step Act ended § 924(c) stacking because first-time offenders no longer receive stacked sentences for multiple § 924(c) convictions in the same proceeding. However, Congress limited the application of § 403(a) only to defendants who have not yet been sentenced for their § 924(c) convictions, which courts routinely interpret as meaning that § 403(a) is non-retroactive. Pub. L. No. 115-391, § 403(b), 132 Stat. 5194, 5221–22 ("This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.").

On September 2, 2020, Chen filed a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A). Chen argued that § 403(a)'s changes to § 924(c) stacked sentencing constitute extraordinary and compelling reasons for reducing his sentence. Chen explained that, if sentenced today, his second § 924(c) conviction would only require a 60-month sentence, instead of the 300 months he received in 2008. The district court denied Chen's motion, concluding that § 403(a)'s changes cannot be considered when assessing whether a defendant has shown extraordinary and compelling reasons for purposes of § 3582(c)(1)(A) because Congress expressly declined to make § 403(a) retroactive. For reasons this opinion lays out below, we disagree.

II. STANDARD OF REVIEW

We review 18 U.S.C. § 3582(c)(1) sentence reduction decisions for abuse of discretion. *United States v. Aruda*, 993 F.3d 797, 799 (9th Cir. 2021). "A district court may abuse its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." *United States v. Dunn*, 728 F.3d 1151, 1155 (9th Cir. 2013) (citation omitted). "Statutory interpretation is a question of law that we review de novo." *United States v. Washington*, 971 F.3d 856, 861 (9th Cir. 2020).

III. DISCUSSION

Section 3582(c)(1)(A) empowers either a defendant, or the Director of the Bureau of Prisons on behalf of a defendant, to file a motion to modify a term of imprisonment. When, as here, a defendant moves for compassionate release under § 3582(c)(1)(A), district courts may reduce his term of imprisonment if four conditions are met: (1) the defendant exhausted administrative remedies; (2) "extraordinary and compelling reasons" warrant a sentence reduction; (3) a sentence reduction is "consistent with applicable policy statements" issued by the U.S. Sentencing Commission; and (4) the district court considered the factors set forth in 18 U.S.C. § 3553(a). Our inquiry today is limited to the relationship, or lack thereof, between § 3582(c)(1)(A)'s extraordinary and compelling reasons element and the Sentencing Commission's policy statements in defendant-filed motions. Congress directed the Sentencing Commission to promulgate general policy statements to "describe what should be considered extraordinary and compelling reasons for sentence reduction." 28 U.S.C. § 994(t). For motions filed by the BOP Director, the Sentencing Commission's current policy statement limits "extraordinary and compelling reasons" to:

(1) medical conditions of the defendant; (2) age of the defendant; (3) family circumstances; or (4) any other extraordinary and compelling reason as determined by the BOP Director. *See* U.S.S.G. § 1B1.13, cmt. n.1(A)–(D). As a result, district courts assessing motions for compassionate release brought by the BOP Director are bound by the Sentencing Commission's limited definition of "extraordinary and compelling reasons." *See* 18 U.S.C. § 3582(c)(1)(A).

However, in *Aruda*, 993 F.3d at 801–02, this Court determined that the Sentencing Commission's current policy statement, which is applicable to motions filed by the BOP Director, does not also apply to defendant-filed motions for compassionate release, and thus, there is no applicable policy statement binding the district court's consideration of extraordinary and compelling reasons in Chen's case.[2] *Aruda* concluded that "district courts are empowered . . . to consider any extraordinary and compelling reason for release that a defendant might raise." *Id.* at 801. In the absence of an applicable policy statement from the Sentencing Commission, the determination of what constitutes extraordinary and compelling reasons for

[2] Chen also argues that the district court abused its discretion by treating the Sentencing Commission's policy statement, U.S.S.G. § 1B1.13, as binding in violation of *Aruda*. However, as laid out above, the district court denied Chen's motion by reasoning that § 403(a)'s changes to stacked sentences cannot be considered when determining whether extraordinary and compelling reasons exist because Congress made § 403(a) non-retroactive. Had the district court impermissibly treated § 1B1.13 as binding, it would have simply found that Chen failed to establish extraordinary and compelling reasons because § 924(c) stacked sentences are not one of § 1B1.13's enumerated extraordinary and compelling reasons. By reaching the merits of Chen's argument, the district court clearly demonstrated that it did not treat § 1B1.13 as binding.

sentence reduction lies squarely within the district court's discretion. *Id.* The question before us is whether that discretion extends to considering § 403(a)'s changes to stacked sentencing, or whether non-retroactive changes in sentencing law present an exception to the general principal that district courts may consider "any" extraordinary and compelling reason.

A district court's discretion of course has limitations and is first and foremost constrained by any express mandate from Congress. In *Concepcion v. United States*, the Supreme Court recently stated that "[i]t is only when Congress or the Constitution limits the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, that a district court's discretion to consider information is restrained." 142 S. Ct. 2389, 2396 (2022).[3] With regard to § 3582(c)(1)(A),

[3] In *Concepcion*, the defendant moved for a sentence reduction under § 404 of the First Step Act, which explicitly made retroactive the sentencing changes from the Fair Sentencing Act of 2010 and allowed defendants sentenced prior to the Fair Sentencing Act to move for a sentence reduction. 142 S. Ct. 2389. The defendant's motion for sentence reduction was made directly under § 404, and not under § 3582(c)(1)(A), so that case does not discuss extraordinary and compelling reasons. In *Concepcion*, all parties agreed that the defendant was eligible for a sentence modification under § 404; the question for the Supreme Court was whether, in calculating the modification, the district court could also consider non-retroactive changes to the career offender enhancement. (The enhancement applied to Concepcion at the time of his original sentencing, but would not apply if sentenced today. 142 S. Ct. at 2397–98.) The Supreme Court held that the district court could consider intervening changes in law or fact in exercising its discretion to reduce a sentence pursuant to § 404, because the only limit on a district court's sentencing discretion is an explicit statement by Congress or the Constitution, and the First Step Act "does not so much as hint that district courts are prohibited from considering evidence of rehabilitation, disciplinary infractions, or unrelated Guidelines changes." *Id*. at 2401.

Congress has only twice directly addressed what can be considered "extraordinary and compelling." First, as discussed above, the definition of extraordinary and compelling is bound by *applicable* policy statements from the Sentencing Commission. *See* 18 U.S.C. § 3582(c)(1)(A); 28 U.S.C. § 994(t). Second, in 28 U.S.C. § 994(t), Congress explained that "[r]ehabilitation . . . alone" cannot be extraordinary and compelling. Because there is no applicable policy statement governing Chen's motion, seemingly the only direct congressional limitation to a district court's discretion is the prohibition against consideration of "[r]ehabilitation . . . alone." The issue now becomes whether, by making § 403(a)'s changes to stacked sentencing non-retroactive, Congress indirectly limited a district court's discretion to consider those changes when assessing extraordinary and compelling reasons.

Other circuits are split concerning this issue. The Third, Seventh, and Eighth Circuits have ruled that district courts may not consider § 403(a)'s non-retroactive changes, whether offered alone or in combination with other factors. *United States v. Crandall*, 25 F.4th 582 (8th Cir.), *cert. denied,* 142 S. Ct. 2781 (2022); *United States v. Andrews*, 12 F.4th 255 (3d Cir. 2021), *cert. denied,* 142 S. Ct. 1446 (2022); *United States v. Thacker*, 4 F.4th 569 (7th Cir. 2021), *cert. denied,* 142 S. Ct. 1363 (2022). They reached this conclusion by reasoning that Congress explicitly made § 403(a)'s sentencing changes non-retroactive and that

---

Therefore, while *Concepcion* does not opine on what district courts may consider when assessing extraordinary and compelling reasons under § 3582(c)(1)(A), it does support our conclusion that a district court's discretion in sentence modifications is limited only by an express statement from Congress.

§ 3582(c)(1)(A) should not provide a loophole to get around explicit non-retroactivity.

In *Andrews*, the Third Circuit held: "we will not construe Congress's nonretroactivity directive as simultaneously creating an extraordinary and compelling reason for early release." 12 F.4th at 261. The Third Circuit further explained that convention in federal sentencing law is to treat changes as presumptively non-retroactive, so § 403(a)'s non-retroactivity is the ordinary practice, and thus, cannot be used as an extraordinary reason for release. *Id.* Ultimately, the Third Circuit concluded that "considering the length of a statutorily mandated sentence as a reason for modifying a sentence would infringe on Congress's authority to set penalties." *Id.* Similarly, in *Thacker*, the Seventh Circuit held that "the discretionary authority conferred by § 3582(c)(1)(A) only goes so far. It cannot be used to effect a sentencing reduction at odds with Congress's express determination embodied in § 403(b) of the First Step Act that the amendment to § 924(c)'s sentencing structure apply only prospectively." 4 F.4th at 574. Finally, in *Crandall*, the Eighth Circuit reasoned that:

> Congress opted in 2018 to assign a new, less substantial, mandatory punishment for multiple violations of § 924(c) going forward, but it did not declare that the previous Congress—decades earlier—prescribed an inappropriate punishment under the circumstances that confronted that legislative body. To the contrary, the more recent Congress declined to change the law retroactively and left existing sentences in place.

25 F.4th at 585–86. The *Crandall* court continued that "[t]he compassionate release statute is not a freewheeling opportunity for resentencing based on prospective changes in sentencing policy or philosophy." *Id.* at 586. Nonetheless, both *Andrews* and *Thacker* still allow district courts to consider § 403(a)'s changes to stacked sentencing when analyzing the § 3553(a) factors. *Andrews*, 12 F.4th at 262 ("If a prisoner successfully shows extraordinary and compelling circumstances, the current sentencing landscape may be a legitimate consideration for courts at the next step of the analysis when they weigh the § 3553(a) factors."); *Thacker*, 4 F.4th at 576 ("Congress's changes to the statutory sentencing scheme in § 924(c) might factor into a district court's individualized determination of whether the § 3553(a) sentencing factors weighed in favor of . . . early release.").

The First, Fourth, and Tenth Circuits, on the other hand, all determined that district courts may consider § 403(a)'s non-retroactive changes to penalty provisions, in combination with other factors, when determining whether extraordinary and compelling reasons for compassionate release exist in a particular case. *United States v. Ruvalcaba*, 26 F.4th 14 (1st Cir. 2022); *United States v. Maumau*, 993 F.3d 821 (10th Cir. 2021); *United States v. McCoy*, 981 F.3d 271 (4th Cir. 2020). They reach this conclusion for two primary reasons: (1) none of the statutes directly addressing "extraordinary and compelling reasons" prohibit district courts from considering non-retroactive changes in sentencing law; and (2) a sentence reduction under § 3582(c)(1)(A) based on extraordinary and compelling reasons is entirely different from automatic eligibility for resentencing as a result of a retroactive change in sentencing law.

In *Maumau*, the Tenth Circuit confirmed that extraordinary and compelling reasons for release could be derived from a combination of factors, such as "Maumau's young age at the time of sentencing; the incredible length of his stacked mandatory sentences under § 924(c); the First Step Act's elimination of sentence-stacking under § 924(c); and the fact that Maumau, if sentenced today, . . . would not be subject to such a long term of imprisonment." 993 F.3d at 837 (internal citations and quotation marks omitted). Similarly, in *McCoy*, the Fourth Circuit held that "courts legitimately may consider, under the 'extraordinary and compelling reasons' inquiry, that defendants are serving sentences that Congress itself views as dramatically longer than necessary or fair." 981 F.3d at 285–86. This consideration should be the "product of individualized assessments of each defendant's sentence" and circumstances. *See id.* at 286. The Fourth Circuit explains that, unlike retroactivity, where the entire class of defendants is automatically eligible for relief, "[u]nder § 3582(c)(1)(A) . . . only those defendants who can meet the heightened standard of 'extraordinary and compelling reasons' may obtain relief." *Id.* at 287. The *McCoy* Court concludes:

> The fact that Congress chose not to make § 403 of the First Step Act categorically retroactive does not mean that courts may not consider that legislative change in conducting their individualized reviews of motions for compassionate release under § 3582(c)(1)(A)(i) . . . [T]here is a significant difference between automatic vacatur and resentencing of an entire class of sentences . . . and allowing for the provision of individual relief in the most grievous cases.

Id. at 286–87 (internal citations omitted). Finally, and most recently, in *Ruvalcaba*, the First Circuit performed a textual analysis of both § 3582(c)(1)(A) and the First Step Act, concluding that there is no textual basis for assuming that § 403(b) imposed a categorical prohibition on considering non-retroactive changes in sentencing law under § 3582(c)(1)(A). 26 F.4th at 25–26. "Nowhere has Congress expressly prohibited district courts from considering non-retroactive changes in sentencing law" and no provision in the First Step Act indicates "Congress meant to deny the possibility of a sentence reduction, on a case-by-case basis, to a defendant premised in part on the fact that he may not have been subject to a mandatory sentence of life imprisonment had he been sentenced after passage of the FSA." *Id.* at 25. The First Circuit declined to infer that by making the § 403(a) non-retroactive, Congress intended to place a categorical bar and unwritten exclusion on what may be considered as extraordinary and compelling reasons under § 3582(c)(1)(A)(i).[4] *Id.* at 27–28.

We now join the First, Fourth, and Tenth circuits and conclude that district courts may consider non-retroactive changes in sentencing law, in combination with other factors particular to the individual defendant, when analyzing extraordinary and compelling reasons for purposes of § 3582(c)(1)(A). There is no textual basis for precluding

[4] The Sixth Circuit has an intra-circuit split on the issue. *Compare United States v. Jarvis*, 999 F.3d 442, 446 (6th Cir. 2021), *cert. denied,* 142 S. Ct. 760 (2022) ("The district court, moreover, correctly concluded that it lacked the authority to reduce Jarvis's sentenced based on a non-retroactive change in the law . . . ."), *with United States v. Owens*, 996 F.3d 755, 763 (6th Cir. 2021) ("[A] district court may include, along with other factors, the disparity between a defendant's actual sentence and the sentence that he would receive if the First Step Act applied."); *see also Ruvalcaba*, 26 F.4th at 25 n.8 (collecting Sixth Circuit cases).

district courts from considering non-retroactive changes in sentencing law when determining what is extraordinary and compelling.

Congress has only placed two limitations directly on extraordinary and compelling reasons: the requirement that district courts are bound by the Sentencing Commission's policy statement, which does not apply here, and the requirement that "[r]ehabilitation . . . alone" is not extraordinary and compelling. Neither of these rules prohibit district courts from considering rehabilitation in combination with other factors. *See* 18 U.S.C. § 3582(c)(1)(A); 28 U.S.C. § 994(t). Indeed, Congress has never acted to wholly exclude the consideration of any one factor, but instead affords district courts the discretion to consider a combination of "any" factors particular to the case at hand. *See Aruda*, 993 F.3d at 801.

To hold that district courts cannot consider non-retroactive changes in sentencing law would be to create a categorical bar against a particular factor, which Congress itself has not done. In fact, such a categorical bar would seemingly contravene the original intent behind the compassionate release statute, which was created to provide the "need for a 'safety valve' with respect to situations in which a defendant's circumstances had changed such that the length of continued incarceration no longer remained equitable." *Ruvalcaba*, 26 F.4th at 26 (citing S. Rep. No. 98-225, 55–56, 121 (1983); *see also McCoy*, 981 F.3d at 287 ("Indeed, the very purpose of § 3582(c)(1)(A) is to provide a "safety valve" that allows for sentence reductions when there is not a specific statute that already affords relief but "extraordinary and compelling reasons" nevertheless justify a reduction.").

Legislative history reveals that Congress originally contemplated "extraordinary and compelling reasons" to potentially include "unusually long sentence[s]" or cases where "the sentencing guidelines for the offense of which the defender was convicted have been later amended to provide a shorter term of imprisonment." S. Rep. No. 98-225, 55–56 (1983). Though Congress did not end up expressly permitting the consideration of unusually long sentences or changes in sentencing law, it also did not expressly prohibit it.

The Supreme Court's recent decision in *Concepcion* confirms that, in the context of modifying a sentence under the First Step Act, "[i]t is only when Congress or the Constitution limits the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, that a district court's discretion to consider information is restrained." 142 S. Ct. at 2396. Since Congress has not legislated to create a third limitation on extraordinary and compelling reasons prohibiting district courts from considering non-retroactive changes in sentencing law, we decline to create one now. We instead follow our precedent in *Aruda* and allow district courts to consider any extraordinary and compelling reason a defendant might raise, including § 403(a)'s non-retroactive changes in sentencing law.

The counterargument to this position is that Congress actually did limit a district court's ability to consider § 403(a)'s changes to stacked sentences by making § 403(a) non-retroactive. However, this argument does not overcome the fact that "[n]owhere has Congress expressly prohibited district courts from considering non-retroactive changes in sentencing law." *Ruvalcaba*, 26 F.4th at 25. Further, § 403 itself does not address § 3582(c)(1)(A), and thus, neglects to

explain how district courts should interpret its non-retroactive sentencing changes in the context of compassionate release. Using § 403(b)'s non-retroactivity provision to superimpose a limitation on § 3582(c)(1)(A)'s extraordinary and compelling reasons does not follow the same pattern as Congress's previously legislated limitations. Through § 3582(c)(1)(A) and § 994(t), Congress has demonstrated that it can, and will, directly limit what constitutes extraordinary and compelling reasons. It is therefore hard to reconcile the argument that we should infer a categorical bar on extraordinary and compelling reasons with Congress's prior decisions not to create such stark limitations on a district court's discretion.

We are not persuaded by the reasoning in *Andrews* and *Thacker* that forbids district courts from considering § 403(a)'s changes in the extraordinary and compelling context, but nevertheless permits those same changes to be considered in the § 3553(a) context. *Andrews*, 12 F.4th at 262; *Thacker*, 4 F.4th at 576. Permitting district courts to consider non-retroactive changes in sentencing law for the § 3553(a) analysis undercuts the logic that non-retroactive changes cannot be considered in the extraordinary and compelling reasons analysis; if Congress truly intended to bar district courts from considering § 403(a)'s changes to mandatory minimums in the compassionate release context by making the changes non-retroactive, then it is doubtful those changes should be considered at all, whether as extraordinary and compelling reasons or under § 3553(a). Indeed, in *United States v. Lizarraras-Chacon*, 14 F.4th 961 (9th Cir. 2021), we emphasized that, in conducting an analysis of the § 3553(a) factors, a district court is "mandate[d]" to "consider the totality of the circumstances," *id.* at 967–68. These circumstances include "subsequent developments in the law," *id.* at 967, which may impact

analysis of the "nature and circumstances of the offense, the seriousness of the offense, the need to provide just punishment for the offense, and [the need] to afford adequate deterrence to criminal conduct." *Id.* (quoting 18 U.S.C. § 3553(a)(1)(2)(A)–(B) (internal quotation marks omitted). Our determination in *Lizarraras-Chacon* thus supports the conclusion that a non-retroactivity clause does not simultaneously bar application in the compassionate release context. *Id.* at 967–68.

Even more poignantly, automatic resentencing as a result of retroactive sentencing changes, which is what Congress prohibits in § 403(b), is far different from merely proffering § 403(a)'s non-retroactive changes as an argument for extraordinary and compelling reasons under § 3582(c)(1)(A). As the Fourth Circuit stated in *McCoy*, "there is a significant difference between automatic vacatur and resentencing of an entire class of sentences . . . and allowing for the provision of individual relief in the most grievous cases." 981 F.3d at 286–87; *see also Ruvalcaba*, 26 F.4th at 27 ("There is a salient 'difference between automatic vacatur and resentencing of an entire class of sentences' on the one hand, 'and allowing for the provision of individual relief in the most grievous cases' on the other hand."). Making a change in law retroactive and allowing a defendant to petition for sentence reduction in light of that change, produce two vastly different results. For example, if § 403(a)'s changes to § 924(c) stacked sentences had been retroactive, every defendant that received a stacked sentence would be automatically eligible for resentencing under the new law. *McCoy*, 981 F.3d at 286–87. In contrast, allowing defendants to petition for compassionate release, based in part on the sentencing disparities created by § 403(a), does not automatically make every defendant who received a stacked sentence eligible for a sentence reduction; the

petitioning defendant still must demonstrate that § 403(a)'s non-retroactive changes rise to the level of "extraordinary and compelling" in his individualized circumstances. As a result, "only those defendants who can meet the heightened standard of 'extraordinary and compelling reasons' may obtain relief." *Id.* at 287. Even when a defendant can satisfy the threshold requirement of demonstrating extraordinary and compelling reasons, a sentence reduction would still not be guaranteed until the district court also considers administrative exhaustion and the § 3553(a) factors. *See* 18 U.S.C. § 3582(c)(1). To obtain a sentence reduction based in part on § 403(a)'s non-retroactive changes, each defendant will have to overcome many more obstacles than a defendant who is automatically eligible for a resentencing due to a truly retroactive change in the law. In sum, petitioning for compassionate release does not retroactively apply § 403(a)'s sentencing changes, and thus, allowing courts to consider § 403(a)'s changes in the extraordinary and compelling analysis does not conflict with § 403(b)'s non-retroactivity provision.

The Government proffers several other arguments to support its position that district courts should be prohibited from considering § 403(a), none of which prove convincing. First, the Government argues that non-retroactive changes in sentencing law cannot be "extraordinary" because the ordinary practice in federal sentencing is to make changes non-retroactive. We agree the ordinary practice in federal sentencing is to "apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced." *Dorsey v. United States*, 567 U.S. 260, 280 (2012). However, by petitioning for compassionate release, § 403(a)'s changes are not being retroactively applied to a defendant's case, and thus, the ordinary practice of federal sentencing law is upheld because the new

mandatory minimums are not being automatically applied to defendants already sentenced.

Similarly, the Government points out that § 404 of the First Step Act retroactively applied the sentencing reforms enacted in the Fair Sentencing Act of 2010 to defendants who were sentenced prior to passage of the Fair Sentencing Act. *See* First Step Act of 2018, Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222. The Government argues that § 404 demonstrates that because Congress chose to give retroactive effect to some sentencing changes in the First Step Act, we should not infer a retroactive application of § 403(a) by allowing district courts to consider it in the extraordinary and compelling reasons analysis. However, as discussed above, permitting § 403(a)'s changes to stacked sentences to be considered as part of the extraordinary and compelling threshold inquiry does not guarantee a particular result and is not a retroactive application of § 403(a). Therefore, such a use does not usurp congressional intent.

Finally, the Government argues that 28 U.S.C. § 2255 provides a mechanism to obtain post-conviction relief based on changes in the law and that a defendant should not be able to bypass it through compassionate release. "Section 2255 grants a prisoner in custody the right 'at any time' to bring a motion 'to vacate, set aside or correct the sentence' upon the ground that the 'sentence was imposed in violation of the Constitution or laws of the United States . . . or that the sentence was in excess of the maximum authorized by law . . . .'" *United States v. Baron*, 172 F.3d 1153, 1157 (9th Cir. 1999) (quoting 28 U.S.C. § 2255). The Government argues that defendants should not be allowed to move for a sentence reduction under Section 3582(c)(1)(A) because Section 2255 already provides a mechanism to challenge a sentence based on nonretroactive changes in sentencing law. This

argument fails to persuade because Congress has provided a mechanism in § 3582 (c)(1) that allows defendants to seek modifications even if their sentences were not imposed in violation of the Constitution or federal law. By not restricting the district courts' ability to consider non-retroactive changes in sentencing law as an extraordinary and compelling reason under § 3582(c)(1)(A), Congress itself has left that possibility open.

The district court erred when it declined to consider § 403(a)'s non-retroactive changes to § 924(c) stacked sentencing when evaluating Chen's motion for compassionate release. We remand for the district court to reassess whether extraordinary and compelling reasons exist when considering non-retroactive changes in sentencing law, in combination with other factors particular to Chen's case.

VACATED AND REMANDED.