No. 20-5904

IN THE

Supreme Court of the United States

TARAHRICK TERRY,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF FLORIDA, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE R STREET INSTITUTE, IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici are organizations from across the ideological spectrum. Amici disagree on numerous issues but agree that many criminal sentences are overly harsh. Amici have supported efforts to redress unfair disparities in how the federal criminal law treats crack and powder cocaine, and in particular the First Step Act, which made retroactive changes that the Fair Sentencing Act had made to cocaine laws. Amici agree that the First Step Act made all those sentenced for crack cocaine offenses under 21 U.S.C. § 841 under pre-Fair-Sentencing-Act penalties eligible to seek resentencing under the amended statute.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil-rights laws. Since its founding more than 100 years ago, the ACLU has appeared before this Court in numerous cases, both as direct counsel and as amicus curiae. The **ACLU of Florida** is one of its statewide affiliates.

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is the nation's first and foremost civil rights organization. Since its founding in 1940, LDF has fought to secure the promise of equality for

[1] Pursuant to Rule 37.6, amici affirm that no counsel for any party authored this brief in whole or in part and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The United States has consented to this amici curiae brief and Mr. Terry has filed a blanket consent letter on the docket.

all people. LDF has a longstanding concern with racial discrimination in the administration of criminal justice, including the devastating effects of America's "War on Drugs" on the Black community, and the detrimental impact of the discriminatory treatment of Black people in the context of federal crack-cocaine sentencing. Since before the enactment of the First Step Act, LDF has advocated for retroactive application of the Fair Sentencing Act's provisions to all persons sentenced under the pre-Fair-Sentencing-Act 100-to-1 crack-cocaine disparity, a large proportion of whom are Black.

The R Street Institute is a non-profit, non-partisan public policy research organization. R Street's mission is to engage in policy research and educational outreach that promotes free markets, as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth.

SUMMARY OF ARGUMENT

This case will determine whether a significant number of people serving extraordinarily long sentences for crack cocaine offenses handed down under a much-criticized and twice-amended statute are eligible for resentencing, as Congress intended.

Congress has twice taken action to correct the profound unfairness and racial disparities caused by federal criminal statutes that created a 100-to-1 disparity between the treatment of crack and powder cocaine—two forms of the same drug that are simply prepared differently. Enforcement of the crack-powder differential led to vast racial disparities, as crack cocaine defendants were disproportionately Black, while powder cocaine defendants were not.

Responding to longstanding and widespread criticism, Congress first enacted the Fair Sentencing Act of 2010, which reduced sentences for crack cocaine going forward (and reduced the disparity between crack and powder to 18-to-1). Then, in 2018, Congress enacted the First Step Act, which made the changes in the Fair Sentencing Act retroactive. Those changes, properly construed, affect *all* sentences for crack cocaine offenses imposed when the 100-to-1 crack to powder cocaine disparity was in effect, as several courts of appeals have held. Yet under the contrary interpretation adopted by the court below, only those convicted of possessing *larger* amounts of crack cocaine would get retroactive resentencing, while those convicted of *smaller* amounts would not. That perverse result rests on a misreading of the text of the statute and frustrates its evident ameliorative purpose.

The text of the First Step Act requires that all those convicted of certain crack cocaine offenses are eligible to seek resentencing under the terms of the Fair Sentencing Act. The statute authorizes resentencing for anyone convicted of a "covered offense," which it defines as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010." Section 2 of the Fair Sentencing Act modified penalties for *all* violations of 21 U.S.C. § 841(a), which makes it unlawful to manufacture, distribute, dispense, or possess with intent to distribute, crack cocaine.

The penalties for violating Section 841(a) are specified in Section 841(b)(1)(A), (B), and (C). *Before* the Fair Sentencing Act reforms, those convicted of having less than 5 grams were subject to one set of

penalties (specified in § 841(b)(1)(C)), those convicted of having 5 or more grams were subject to higher penalties (specified in § 841(b)(1)(B)), and those convicted of having more than 50 grams were subject to the highest penalties (specified in § 841(b)(1)(A)). Under the Fair Sentencing Act, by contrast, the lowest (subparagraph (C)) penalties were extended to those convicted of possessing up to 28 grams, the second tier of penalties (subparagraph (B)) was reserved for those having 28 grams or more, and the highest penalties (subparagraph (A)) applied only to those convicted of possessing 280 grams or more. Because Section 2 of the Fair Sentencing Act thus modified the penalties for *all* violations of the "covered offense" of 21 U.S.C. § 841(a), all those convicted of violating that provision should be eligible for resentencing.

The court below erroneously concluded otherwise. Because Congress effectuated these changes without editing the words of subparagraph (C), but instead by the interaction of subparagraph (C) with subparagraphs (A) and (B), the court concluded that those convicted of violating subsection 841(a) and subject to a sentence under subparagraph (C) are not eligible for resentencing, even though the range of convictions subject to that penalty was in fact changed dramatically—from those convicted with less than 5 grams of crack cocaine, to those convicted with less than 28 grams of crack cocaine. But as this Court has recognized, one statutory provision can be modified by its interaction with another, which is precisely what happened here.

This plain text reading is reinforced by the fact that Congress legislated against the backdrop of the U.S. Sentencing Commission's interpretation of the Fair Sentencing Act. In response to the Fair

Sentencing Act, the U.S. Sentencing Commission modified its Sentencing Guidelines for *all* weights of crack cocaine under Section 841, so that each base offense level reflected the new crack-to-powder cocaine ratio of 18-to-1. The Sentencing Commission's changes affected the base offense levels of people sentenced for less than 5 grams of crack cocaine—namely, those whose penalty was governed by subparagraph (C), as well as those sentenced for larger amounts under subparagraphs (A) and (B). If Congress had meant to provide relief only to those people whose drug quantities triggered subparagraphs (A) or (B), and not (C), and therefore to depart from the Sentencing Commission's interpretation, it would have said so. It did not.

Interpreting the First Step Act to make all people sentenced for crack cocaine offenses eligible for resentencing furthers Congress's ameliorative purpose in correcting the long-recognized and widely criticized racial disparities caused by the crack-powder differential. That differential, and those disparities, affected *all* crack cocaine sentencing. It would make little sense to provide redress only for those convicted of possessing *larger* amounts of crack cocaine. The First Step Act's bipartisan extension of the Fair Sentencing Act reforms to people currently in prison under the subsequently amended statutes was a central feature of the legislation. The racial disparities that animated Congress affected all people sentenced for crack cocaine, whether under subparagraph (A), (B), or (C). All should be eligible for resentencing.

Finally, accounts of individuals sentenced under the pre-amended law illustrate that barring any resentencing of those whose penalty was

prescribed by subparagraph (C) would have perverse results. It would deny any possibility of relief to individuals convicted for smaller quantities of crack cocaine, while extending relief to individuals convicted for larger quantities. And it would lead to absurd inconsistencies, such as a single individual convicted of two offenses being eligible for a reduced sentence for only the crime involving the greater drug quantity, or the member of a conspiracy convicted for the smallest amount of crack cocaine remaining in prison after a co-conspirator convicted for a greater quantity has been granted a reduced sentence.

Properly construed, the First Step Act avoids these absurd and unjust results, while maintaining fidelity to the statute's text and Congress's evident purpose.

ARGUMENT

I. THE FIRST STEP ACT MADE THE FAIR SENTENCING ACT RETROACTIVE FOR ALL INDIVIDUALS SENTENCED FOR CRACK COCAINE OFFENSES UNDER 21 U.S.C. § 841.

The text of the First Step Act makes clear that it permits resentencing for *all* persons convicted of crack cocaine offenses under 21 U.S.C. § 841 prior to the amendments made by the Fair Sentencing Act. The First Step Act specifically authorizes resentencing of people convicted of "covered offenses," which the Act defines as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010." Pub. L. No. 115-391, 132 Stat. 5194 (2018). Section 2 of the Fair Sentencing Act, in turn, entitled "Cocaine Sentencing Disparity Reduction,"

changed the amounts of crack cocaine that would trigger various penalties for crack cocaine offenses under 21 U.S.C. § 841. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (2010).[2] Because Section 2 "modified" the penalties for the "covered offense" of crack cocaine manufacture, distribution, and possession with intent to distribute, the First Step Act made all persons sentenced for that "covered offense" eligible to have their sentence reconsidered by a judge.

The underlying criminal statute at issue in this case, 21 U.S.C. § 841, makes it a crime to manufacture, distribute, or possess with intent to distribute, certain controlled substances, including crack cocaine.[3] It consists of two parts. Subsection (a) identifies the "unlawful acts" that are proscribed, namely to "knowingly or intentionally. . . manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." Subsection (b) then enumerates the "penalties" for "a violation of subsection (a)," based principally on the amount of the controlled substance involved.

The Fair Sentencing Act amended the penalties for crack cocaine offenses under Section 841, and the First Step Act in turn made those amendments retroactive. The First Step Act's retroactive effect

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[2] Section 3 of the Fair Sentencing Act "eliminated the 5–year mandatory minimum for simple possession of crack." *Dorsey v. United States*, 567 U.S. 260, 269 (2012).

[3] Section 2 of the Fair Sentencing Act also amended 21 U.S.C. § 960, which makes it a crime to import or export a controlled substance, or to bring or possess on board a vessel, aircraft, or vehicle a controlled substance.

extends, by its own terms, to the "covered offense," namely any convictions under 21 U.S.C. § 841, the "Federal criminal statute" or in the alternative, subsection 841(a), which is the only portion of the statute that can be "violated." *See* Pet. 11 ("The district court's final judgment listed § 841(a)(1) alone as the statute of conviction."). The definition of "covered offense" specifically refers to "a violation of a Federal criminal statute," and the defendant in this case, Tarahrick Terry, was convicted of violating that "Federal criminal statute." It makes no sense to say that Mr. Terry violated subsection 841(b), which simply delineates penalties. Indeed, subsection (b) itself says it applies only to "any person who *violates* subsection (a) of this section." 21 U.S.C. § 841(b) (emphasis added). Thus, anyone convicted for a crack cocaine violation of subsection 841(a), regardless of which "penalty" in subsection (b) applies, committed a "covered offense" for purposes of the First Step Act.

The government argues that the "covered offense" referred to in the First Step Act should be construed to mean *both* the *offense* described in subsection 841(a) and the *penalty* separately identified in subsection 841(b). BIO 11, 16. That interpretation contravenes the plain text, as explained above. But even under that reading, Mr. Terry and others sentenced under subparagraph (C) should still be eligible for resentencing. Subparagraph 841(b)(1)(C) *was* "modified" by the Fair Sentencing Act. Prior to the Fair Sentencing Act, subparagraph (C) applied to convictions for less than 5 grams (or an unspecified amount); after the Fair Sentencing Act, it applies to convictions for less than 28 grams (or an unspecified amount). This will almost certainly affect how one is sentenced. Under the old

regime, for example, someone convicted of possessing 4.5 grams would be at the very top of the subparagraph (C) range, triggering a sentence at the top of that range, while under the amended regime they would fall far below the top of the range (28 grams), and would therefore warrant a lesser sentence within the range. *See* Pet'r's Br. 19–20, 31.

Thus, whether one reads the "covered offense" subject to resentencing to refer to Section 841 as a whole, to 841(a) only, or to 841(a) and (b) together, the plain text of the First Step Act makes Mr. Terry eligible for resentencing.

The government maintains that subparagraph (C) was not amended by the First Step Act because its literal terms were not altered. But statutes can be modified by their interaction with other statutory provisions. As this Court made clear in *Nielsen v. Preap*, 139 S. Ct. 954, 966 (2019), one provision can be modified by another because of how the two interact. In *Preap*, this Court read the mandatory detention provision of 8 U.S.C. § 1226(c) "as *modifying* its counterpart"—the discretionary detention and release provision of § 1226(a)—where § 1226(a) directs the actions of the Attorney General "except[] 'as provided in subsection (c).'" *Id* (quoting § 1226(a)). (emphasis added). Subsection 1226(c) does not include a textual reference to § 1226(a). *Id.* Nonetheless, the Court reasoned that § 1226(c) modifies the discretion granted by § 1226(a) because § 1226(a) "creates authority for *anyone*'s arrest or release under § 1226—and it gives the Secretary [of Homeland Security] broad discretion as to both actions—while [§ 1226](c)'s job is to *subtract* some of that discretion when it comes to the arrest and release of criminal aliens." *Id.* (emphasis in original).

Identical reasoning applies here. Subparagraph (C) creates sentencing authority over *anyone* who commits an unlawful act under Subsection 841(a), and subparagraphs (A) and (B) carve out exceptions to that authority for persons charged with more than the drug amounts specified in subparagraphs (A) and (B). *See* 21 U.S.C. § 841(b)(1)(C) (establishing sentencing authority for violations of § 841(a) "*except* as provided in subparagraphs (A), (B), and (D)" (emphasis added)).[4] In the Fair Sentencing Act, Congress raised the threshold amounts for coverage by subparagraphs (A) and (B), and thereby necessarily also raised the amount of crack cocaine an individual can be convicted of and still be subject to subparagraph (C). Because the provisions are expressly interrelated by the "except" clause, a change to subparagraphs (A) and (B) necessarily also effectuates a change to subparagraph (C). And as noted above, because (A) and (B) effectively expand the amounts of drugs subject to (C), they have the effect of altering substantially where any particular offender with 5 grams or less falls within that range—and therefore altering the relative severity of his crime within those covered by (C). Accordingly, because the Fair Sentencing Act modified the penalties for all Section 841 crack cocaine offenses, the First Step Act made that change available retroactively to all persons sentenced for crack cocaine offenses under Section 841, whether they were sentenced under subparagraphs (A), (B), or (C).

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[4] The subparagraph (D) exception is not relevant here, as it applies only to marihuana, hashish, and hashish oil.

II. CONGRESS ENACTED THE FIRST STEP ACT AGAINST THE BACKDROP OF THE SENTENCING COMMISSION HAVING IMPLEMENTED THE FAIR SENTENCING ACT BY AMENDING THE SENTENCING GUIDELINES FOR ALL CRACK COCAINE AMOUNTS.

The textual argument above is reinforced by the fact that, when Congress enacted the First Step Act, it knew that the U.S. Sentencing Commission had treated the Fair Sentencing Act as having amended sentences for *all* crack cocaine sentences for violating subsection 841(a), *including those covered by subparagraph (C)*, and not just for those governed by subparagraphs (A) and (B). The Commission made these changes pursuant to "emergency authority" granted by Congress in the Fair Sentencing Act, § 8, 124 Stat. at 2374, so that it could quickly "incorporate the statutory changes." *Dorsey v. United States*, 567 U.S. 260, 269 (2012). Had Congress, seeing that the Sentencing Commission had modified sentence guidelines for all levels of crack cocaine offenses, intended to make resentencing available *only* to those sentenced under subparagraphs (A) and (B), and *not* subparagraph (C), it would have said so. Instead, Congress ratified the Sentencing Commission's across-the-board approach.

The Sentencing Commission has always treated the federal penalties for crack cocaine set forth in subparagraphs (A), (B), and (C), as inextricably interrelated. The Commission creates the Federal Sentencing Guidelines for most drug-crime offenses by the Drug Quantity Table "that lists amounts of various drugs and associates different amounts with different 'Base Offense Levels' (to which a judge may

add or subtract levels depending upon the 'specific' characteristics of the offender's behavior)." *Id*. at 266. After passage of the Anti-Drug Abuse Act of 1986,[5] the Commission "used the 100-to-1 ratio to define base offense levels for all crack and powder offenses." *Kimbrough v. United States*, 552 U.S. 85, 97 (2007). "[T]he Commission derived the Drug Quantity Table's entire set of crack and powder cocaine offense levels by using the 1986 Drug Act's two (5- and 10-year) minimum amounts as reference points and then extrapolating from those two amounts upward and downward to set proportional offense levels for other drug amounts." *Dorsey*, 567 U.S. at 268. Thus, the 1986 Drug Act 100-to-1 disparity affected "offense levels for small drug amounts that did not trigger the 1986 Drug Act's mandatory minimums," because the Commission created its Drug Quantity Table "so that the resulting Guidelines sentences would remain proportionate to the sentences for amounts that did trigger these minimums." *Id.* at 267.

In the decades thereafter, "[t]he Commission issued four separate reports telling Congress that the ratio was too high and unjustified" and "also asked Congress for new legislation embodying a lower crack-to-powder ratio." *Id.* at 268–69. "In 2010, Congress accepted the Commission's recommendations and enacted the Fair Sentencing Act into law." *Id.* at 269 (internal citations omitted).

The Commission then "us[ed] the new drug quantities established by the [Fair Sentencing] Act" to "extrapolat[e] proportionally upward and downward on the Drug Quantity Table." U.S. Sent'g Comm'n,

[5] Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended, in pertinent part, at 21 U.S.C. § 841(b)).

Sentencing Guidelines for United States Courts, 76 Fed. Reg. 24,960, 24,963 (May 3, 2011). The authority given to the Commission by the Fair Sentencing Act required it to make "conforming amendments. . . necessary to achieve consistency with other guideline provisions." § 8, 124 Stat. at 2374. And, as this Court has explained, the Commission understood this provision to require "reducing the base offense levels for *all crack amounts* proportionally (using the new 18-to-1 ratio), including the offense levels governing small amounts of crack that did not fall within the scope of the mandatory minimum provisions." *Dorsey*, 567 U.S. at 276 (emphasis added).

Critically, the Commission's amendments in response to the Fair Sentencing Act produced significant changes to the offense levels of those sentenced for amounts of crack cocaine less than 5 grams—the amount which prior to the Fair Sentencing Act fell under subparagraph (C). For example, the Commission adjusted the "offense level" for an individual convicted of 4.9 grams of crack cocaine from Level 22 to Level 16 because of the Fair Sentencing Act. *Compare* U.S. Sent'g Guidelines Manual § 2D1.1(c) (U.S. Sent'g Comm'n 2009) ("Drug Quantity Table"), *with* U.S. Sent'g Guidelines Manual § 2D1.1(c) ("Drug Quantity Table") (U.S. Sent'g Comm'n 2011).[6] To come under offense Level 22, the guidelines after the Fair Sentencing Act require more than *four times* the prior triggering weight (at least 16.8 grams). In short, the Sentencing Commission treated the Fair Sentencing Act as modifying

[6] U.S. Sentencing Guideline § 2D1.1 governs "Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy" and includes the Drug Quantity Table.

penalties for offenses subject to subparagraph (C), just as much as those subject to subparagraphs (A) and (B).

When it enacted the First Step Act, Congress was fully aware of the Commission's interpretation.[7] Had Congress disagreed with the Commission, and intended to make the Fair Sentencing Act's crack cocaine changes retroactive only as to sentences imposed under subparagraphs (A) and (B), and not as to (C), it would have said so. Absent such action, its enactment should be read in light of the backdrop against which it legislated, namely the Sentencing Commission's implementation of the Fair Sentencing Act as having modified all sentences for crack cocaine violations of Section 841. *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) ("[O]nce an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects,

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[7] U.S. Sent'g Comm'n, Report to Congress: Impact of the Fair Sentencing Act of 2010 10 (Aug. 2015) (explaining that the Fair Sentencing Act "impacted the sentences of crack cocaine offenders sentenced . . . regardless of whether a mandatory minimum applied."); *see also* U.S. Sent'g Comm'n, Final Crack Retroactivity Data Report Fair Sentencing Act 2–3 (Dec. 2014) (explaining that on "April 28, 2011, the Commission submitted to Congress, Amendment 750, the permanent guideline amendment implementing the F[air] S[entencing] A[ct]" which "adjust[s] the crack cocaine quantity levels in the Drug Quantity Table" and that Congress allowed it to take effect on November 1, 2011); U.S. Sent'g Guidelines Manual App. C, amend. 750 (U.S. Sent'g Comm'n 2018) (reflecting changed guidelines for all crack cocaine offenders, including those governed by subparagraph (C)); U.S. Sent'g Guidelines Manual App. C, amend. 748 (same).

then presumably the legislative intent has been correctly discerned." (quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940))).

III. RETROACTIVE APPLICATION TO ALL CRACK COCAINE OFFENDERS FURTHERS CONGRESS'S INTEREST IN CORRECTING LONG-RECOGNIZED AND WIDELY CRITICIZED RACIAL DISPARITIES IN ALL CRACK COCAINE SENTENCING.

The interpretation advanced here also best furthers Congress's purpose in remedying the widely criticized racial disparities that were the target of both the Fair Sentencing Act and the First Step Act.

The Fair Sentencing Act reduced "the crack-to-powder cocaine disparity from 100-to-1 to 18-to-1." *Dorsey*, 567 U.S. at 264. It reflected "a bipartisan consensus" that the "cocaine sentencing laws" were "unjust."[8] The sponsors "believe[d]" the Act "w[ould] decrease racial disparities."[9] Other Members made similar statements.[10]

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[8] 156 Cong. Rec. S1681 (daily ed. Mar. 17, 2010) (statement of Sen. Dick Durbin (D-IL)); *see id.* (noting Senate Judiciary Committee reported the Fair Sentencing Act by a unanimous 19-to-0 vote).

[9] Letter from Senators Dick Durbin and Patrick J. Leahy to Attorney General Eric Holder (Nov. 17, 2010), https://www.fd.org/sites/default/files/criminal_defense_topics/common_offenses/controlled_substances/crack_cocaine_sentencing/november-2010-durbin-and-leahy-letter-regarding-retroactivity-of-fair-sentencing-act.pdf.

[10] *See* 156 Cong. Rec. E1498-99 (daily ed. July 28, 2010) (statement of Rep. Henry C. "Hank" Johnson (D-GA)) (urging

The Anti-Drug Abuse Act of 1986 had created a sentencing scheme that unequally punished comparable offenses involving crack and powder cocaine—two forms of the same drug, simply prepared differently.[11] "[B]oth forms of cocaine cause identical effects."[12] Under the unequal punishments someone convicted of an offense involving just five grams of crack cocaine was subject to the same five-year mandatory minimum federal prison sentence as someone convicted of an offense involving 500 grams of powder cocaine.

The problem was recognized by those involved in the administration of these very penalties. In 1997, 27 federal judges, all of whom had previously served as U.S. Attorneys, sent a letter to the U.S. Senate and House Judiciary Committees stating that "[i]t is our strongly held view that the" 100-to-1 ratio "cannot be justified and results in sentences that are unjust and

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colleagues to vote for the bill because "[t]here is absolutely no justification for this racial disparity in federal cocaine sentencing policy"); 156 Cong. Rec. H6203 (daily ed. July 28, 2010) (statement of Rep. Steny Hoyer (D-MD)) ("It has long been clear that 100-to-1 disparity has had a racial dimension . . . helping to fill our prisons with African Americans disproportionately put behind bars for longer. The 100-to-1 disparity is counterproductive and unjust."); 156 Cong. Rec. H6199 (daily ed. July 28, 2010) (statement of Rep. Sheila Jackson Lee (D-TX)) ("It is time for us to realize that the only real difference between these two substances is that a disproportionate number of the races flock to one or the other.").[11] *See* U.S. Sent'g Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* 17 (May 2002).

[11] *See* U.S. Sent'g Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* 17 (May 2002).

[12] U.S. Sent'g Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 62 (May 2007).

do not serve society's interest."[13] The Sentencing Commission also "acknowledged that its crack guidelines bear no meaningful relationship to the culpability of defendants sentenced pursuant to them. . . .[T]he Commission ha[d] never before made such an extraordinary mea culpa acknowledging the enormous unfairness of one of its guidelines." *United States v. Anderson*, 82 F.3d 436, 449–50 (D.C. Cir. 1996) (Wald, J., dissenting) (footnotes omitted). In 2007, the Commission explained that "[f]ederal cocaine sentencing policy, insofar as it provides substantially heightened penalties for crack cocaine offenses, continues to come under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups, and inaction in this area is of increasing concern to many, including the Commission."[14]

"Approximately 85 percent of defendants convicted of crack offenses in federal court are black; thus the severe sentences required by the 100-to-1 ratio are imposed 'primarily upon black offenders.'" *Kimbrough*, 552 U.S. at 98 (quoting U.S. Sentencing Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* 103 (May 2002)). Federal judges responsible for implementing the cocaine sentencing

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[13] Letter from Judge John S. Martin, Jr. to Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, and Congressman Henry Hyde, Chairman of the House Judiciary Committee (Sept. 16, 1997), *reprinted in* 10 Fed. Sent'g. Rptr. 194, 194 (Jan./Feb. 1998), 1998 WL 911896.

[14] U.S. Sent'g Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 2 (May 2007).

statute, wrote often about the "deeply troubling," *United States v. Then*, 56 F.3d 464, 467 (2d Cir. 1995) (Calabresi, J., concurring), and "unwarranted," *United States v. Williams*, 472 F.3d 835, 845 n.4 (11th Cir. 2006) (Barkett, J.,dissenting from denial of rehearing en banc), "racial injustice flowing from this policy," *United States v. Williams*, 982 F.2d 1209, 1214 (8th Cir. 1992) (Bright, J., concurring), which "the African-American community has borne the brunt of," *United States v. Smith*, 73 F.3d 1414, 1418 (6th Cir. 1996) (Jones, J., concurring).

Judges, the Commission, and others also noted that the "disparate treatment of crack and powder cocaine" corresponded with the "ballooning of the percentage of blacks incarcerated." *United States v. Gregg*, 435 F. App'x. 209, 221 (4th Cir. 2011) (Davis, J., concurring). In 1995, the Commission reported to Congress that the "100-to-1 crack cocaine to powder cocaine quantity ratio *is a primary cause* of the growing disparity between sentences for Black and White federal defendants."[15] From 1994 to 2003, the average time Black drug offenders served in prison increased by 77%, compared to an increase of 33% for white drug offenders.[16] Before the 1986 Drug Law,

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[15] U.S. Sent'g Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 154 (Feb. 1995) (emphasis added).

[16] Dep't of Justice, Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 1994*, at 85 (Table 6.11) (of people sentenced pursuant to the provisions of the Sentencing Reform Act of 1984, average was 29.1 months for white drug offenders, 33.1 months for Black drug offenders) (Mar. 1, 1998); Dep't of Justice, Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2003*, at 112 (Table 7.16) (average of 38.6

the average federal drug sentence for Black Americans was 11% higher than for whites; four years later, it was 49% higher.[17] By 2004, Black Americans served virtually as much time in prison for a non-violent drug offense (58.7 months) as whites did for a violent offense (61.7 months).[18]

The Fair Sentencing Act began the task of mitigating the injustice of the crack-powder disparity. The First Step Act continued that enterprise by including as a central element the retroactive application of the Fair Sentencing Act reforms. The push for retroactivity crossed political lines. Senator Grassley highlighted the "broad bipartisan support," for the First Step Act, explaining:

> [There was] support from conservative organizations. At the same time, there are a lot of law enforcement organizations and liberal organizations, and I will just name four or five at this point: The Fraternal Order of Police, the American Civil Liberties Union, the American Conservative Union, and the

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months for white drug offenders, 58.7 months for Black drug offenders) (Oct. 1, 2005).

[17] Barbara S. Meierhoefer, Federal Judicial Center, *The General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentences Imposed* 20 (1992), https://www.fjc.gov/content/general-effect-mandatory-minimum-prison-terms-longitudinal-study-federal-sentences-imposed-0.

[18] Dep't of Justice, Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2003*, at 112 (Table 7.16) (Oct. 1, 2005).

International Association of Chiefs of Police.[19]

The ACLU, and 108 other civil rights organizations, opposed the First Step Act when it was first introduced in the House and lacked a provision retroactively applying the Fair Sentencing Act,[20] but changed their position, and supported the bill after the Senate version was introduced, which "would apply the Fair Sentencing Act of 2010 . . . retroactively to those sentenced before the law passed."[21] LDF has likewise long recognized as essential to true criminal justice reform and racial parity in crack-cocaine

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[19] 164 Cong. Rec. S7777 (daily ed. Dec. 18, 2018).

[20] *See* Letter from ACLU to Majority Leader McConnell and Minority Leader Schumer (July 11, 2018), https://www.aclu.org/letter/aclu-letter-senate-federal-sentencing-reform ("No attempts to improve our criminal justice system will prove effective or meaningful without the sentencing reform that the federal system desperately needs."); Leadership Conference on Civil and Human Rights, et al., *Vote "No" on The FIRST STEP Act* (May 21, 2018), https://civilrights.org/resource/vote-no-first-step-act-2 (criticizing the omission of sentencing reform).

[21] Charlotte Resing, *How the FIRST STEP Act Moves Criminal Justice Reform Forward*, ACLU Speak Freely (Dec. 3, 2018), https://www.aclu.org/blog/smart-justice/mass-incarceration/how-first-step-act-moves-criminal-justice-reform-forward; *see* 164 Cong. Rec. H10399-99 (daily ed. Dec. 20, 2018) (including letter in the Congressional record from the ACLU and The Leadership Conference on Civil and Human Rights urging a "yes' vote on the "revised FIRST STEP Act" despite its "problems" because "[t]he new version of FIRST STEP Act would retroactively apply the statutory changes of the Fair Sentencing Act . . . which reduced the disparity in sentence lengths between crack and powder cocaine.").

sentencing practices the retroactive application of the Fair Sentencing Act.[22]

Support for the Act explicitly referred to the retroactive application of the Fair Sentencing Act, and the need to address racial disparities in sentencing created by the 100-to-1 ratio. For example, Senator Booker explained:

> [T]he racially biased crack cocaine sentencing disparity has already been negotiated down from 100 to 1 to 18 to 1. It should be equal. It should be 1 to 1, but we made progress. The problem was the change wasn't retroactively applied. . . . Making this fix in this bill alone will mean that thousands of Americans who have more than served their time will become eligible for release, and it addresses some of the racial disparities in our system because 90 percent of the

[22] *See NAACP Legal Defense Fund Statement on First Step Act* (Nov. 16, 2018), https://www.naacpldf.org/press-release/naacp-legal-defense-fund-statement-first-step-act/; *LDF Statement on Senate Passage of First Step Act* (Dec. 19, 2018), https://www.naacpldf.org/press-release/ldf-statement-senate-passage-first-step-act/ (noting that "[w]hile the final legislation still includes some provisions that are deeply troubling," . . . we are pleased with those reform provisions," like the retroactivity provision, "that constitute a first step forward to make our criminal justice system truly just"); *see also* Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc. in Support of Defendants-Appellants, *United States v. Blewett*, Nos. 12-5226/12-5582, 746 F.3d 647 (6th Cir. Dec. 3, 2013) (en banc), https://www.naacpldf.org/wp-content/uploads/US-v-Blewett-08-08-2013-Tendered-Brief-in-support-of-defendants-appellants.pdf (discussing the importance of retroactive application of the Fair Sentencing Act's crack cocaine sentencing laws).

> people who will benefit from that are African Americans; 96 percent are Black and Latino.

164 Cong. Rec. S7764 (daily ed. Dec. 18, 2018) (Sen. Cory Booker (D-NJ)).[23] And in statements celebrating the passage of the First Step Act, Members highlighted the retroactive application of the Fair Sentencing Act.[24]

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[23] *See also* 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (Sen. Dianne Feinstein (D-CA)) ("The bill also helps address some of the racial disparities in our criminal justice system. . . .Congress addressed this [crack/powder cocaine] disparity in 2010, when the Fair Sentencing Act became law . . . . Unfortunately, this new law did not apply retroactively, and so there are still people serving sentences under the 100–1 standard. The bill before us today fixes that and finally makes the Fair Sentencing Act retroactive so that people sentenced under the old standard can ask to be resentenced under the new one."); 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (Sen. Ben Cardin (D-MD)) ("The legislation includes key sentencing reform provisions. . . .[I]t makes retroactive the application of the Fair Sentencing Act, in which Congress addressed the crack-powder sentencing disparity and allows individuals affected by this disparity to petition for sentence reductions."); 164 Cong. Rec. S7782 (daily ed. Dec. 18, 2018) (Sen. Van Hollen (D-MD)) ("The bill incorporates important provisions that allows for the retroactive application of the Fair Sentencing Act, which removed the sentencing disparity between the crack-powder and cocaine."); 164 Cong. Rec. S7749 (daily ed. Dec. 18, 2018) (Sen. Patrick Leahy (D-VT)) ("[T]his legislation doesn't go as far as I would like. Far from it. . . . But this is the nature of compromise. . . . And when I look at the scope of reforms before us today—including…retroactive application of the Fair Sentencing Act, …I believe this is a historic achievement.").

[24] *See, e.g.*, Rep. Brian Fitzpatrick (R-PA), *Fitzpatrick, House Send Historic Criminal Justice Reform to President* (Dec. 20, 2018), https://fitzpatrick.house.gov/2018/12/fitzpatrick-house-send-historic-criminal-justice-reform-president ("Allows for the

The racial disparities created by the crack-powder differential were not limited to those whose "penalty" fell under subparagraph (A) or (B); they affected *all* people convicted of crack cocaine offenses under the Federal Sentencing Guidelines ranges implementing the 100-to-1 disparity, including those sentenced under subparagraph (C). No one even suggested that the latter offenders, often those with the least amounts of drugs, were somehow undeserving of the retroactive relief afforded other crack cocaine offenders. As this was Congress's evident intent, it makes sense that the text of the First Step Act so clearly leads to this result.

IV. INTERPRETING THE FIRST STEP ACT TO DENY RELIEF TO INDIVIDUALS SENTENCED UNDER SUBPARAGRAPH (C) WOULD INEQUITABLY DENY RELIEF TO PERSONS CONVICTED OF THE SMALLEST DRUG QUANTITIES AND LEAD TO ABSURD RESULTS.

Individual cases illustrate that the Eleventh Circuit's countertextual interpretation would produce inequitable and arbitrary results. Denying the opportunity for a sentence reduction to those

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retroactive application of the Fair Sentencing Act of 2010 for drug offenders sentenced under the 'crack disparity' who petition for a reconsideration of their sentence."); Rep. French Hill (R-AR), *Hill: 'This bill offers incarcerated Arkansans and Americans aid in living better lives'* (Dec. 21, 2018), https://hill.house.gov/news/documentsingle.aspx?DocumentID=2447 (explaining the First Step Act as "[r]etroactively extending the reductions in sentencing disparity between crack-cocaine and powder-cocaine, as codified in the 2010 Fair Sentencing Act").

sentenced under subparagraph (C) would deny resentencing to those convicted of the smallest quantities of crack cocaine, while granting it to persons convicted for greater quantities. And it would lead to absurd inconsistencies, such as a single individual convicted of two offenses being eligible for a reduced sentence for only the more serious crime, and a person convicted of a conspiracy remaining in prison after a co-conspirator convicted of a greater drug quantity has been resentenced and released under the First Step Act. *Cf. United States v. Booker*, 543 U.S. 220, 253–54 (2005) (explaining "[t]hat uniformity" in sentencing "does not consist simply of similar sentences for those convicted of violations of the same statute . . . It consists, more importantly, of similar relationships between sentences and real conduct").

Trentavius Arline, a 38-year-old Black man, pleaded guilty to selling 500 milligrams to 1 gram of crack cocaine for $40. He was sentenced to almost sixteen years and remains in prison after almost eleven years.[25] During that time, his conduct has been exemplary. His probation review noted that "[t]here is no indication . . . that a reduction in the term of imprisonment would present a danger to any person or the community."[26] But the district court held that because Arline was sentenced for an amount of crack cocaine that fell under subparagraph (C), he was ineligible for a sentence reduction under the First

[25] *United States v. Arline*, No. 09-CR-00026, slip op. at 1–2 (M.D. Ga. June 4, 2020), ECF No. 75.

[26] Brief in Support of Motion for Sentence Reduction Under the First Step Act at 18, *United States v. Arline*, No. 09-CR-00026 (M.D. Ga. June 28, 2019), ECF No. 55.

Step Act.[27] His appeal is stayed pending the Court's decision here.[28]

Similarly, Kenyatte Brown, a 44-year-old Black man, was convicted in 2003 for the sale of 0.1 grams of crack cocaine for $20, and sentenced to almost twenty-two years in prison, under the then-mandatory guidelines.[29] The district court at first denied resentencing as not authorized by the First Step Act.[30] But after the Fourth Circuit remanded in light of its opinions allowing resentencing for those sentenced pursuant to subparagraph (C),[31] the district court reduced Brown's sentence to time served—after he had spent sixteen years in prison.[32] Under the government's position here, Brown would still be facing almost six years in prison today.

Individuals sentenced for an unspecified amount of crack cocaine are also sentenced pursuant to subparagraph (C), and thus would be left without the opportunity for a reduced sentence, while those sentenced for large, specified amounts are eligible.

Tuesday Johnson, for example, a 51-year-old Black woman, has spent more than eleven years of a twenty-year sentence in prison after pleading guilty to

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[27] *Arline,* slip op. at 3–4.

[28] *United States v. Arline*, No. 20-12229 (11th Cir. Feb. 2, 2021).

[29] Supplemental Motion for Relief at 1, *United States v. Brown*, No. 01-CR-1109, 2020 WL 6482397 (D.S.C. Aug. 3, 2020).

[30] *United States v. Brown*, No. 01-CR-1109, 2020 WL 6482397, at *1 (D.S.C. Nov. 4, 2020).

[31] *United States v. Brown*, 811 F. App'x 869 (4th Cir. 2020).

[32] *Brown*, 2020 WL 6482397, at *3.

an unspecified amount of crack cocaine. She has completed over fifty programs with thousands of hours of course work and has secured a promise of employment upon release. Johnson was selected as one of four inmates from the entire Bureau of Prisons to speak before a nationwide panel of twenty-five judges.[33] Yet the district court denied her request for resentencing, concluding that because she was sentenced under subparagraph (C), "it lacks jurisdiction to entertain Defendant's request."[34] Her appeal is being held in abeyance by the Tenth Circuit pending this Court's decision here.[35]

Martin Richardson, a 43-year-old Black man, was convicted for a single sale of 1.798 grams of crack cocaine, sentenced to almost seventeen years in prison, and remains in prison over eleven years later. He was prosecuted as part of a conspiracy, involving eleven people and twenty-three controlled buys—but Richardson himself was involved in just one, and along with another defendant present for the same sale, was convicted of the smallest amount of all the co-conspirators. Yet, he is the *only* defendant of the eleven who is still in prison. His release date is

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[33] Motion for Sentence Reduction Under the First Step Act at 2, 9–10, *United States v. Johnson*, No. 09-CR-00021 (D. Okla. Dec. 2, 2019), ECF No. 939.

[34] *United States v. Johnson*, No. 09-CR-00021, slip op. at 3 (D. Okla. June 11, 2020), ECF No. 951.

[35] *United States v. Johnson*, No. 20-6095 (Jan. 12, 2021).

projected to be June 18, 2024.[36] In a recent letter to the district court, Richardson wrote:

> Clearly, I failed but prison has left me with a searing sense of responsibility. Nowadays I recognize this life isn't just mine; though it appeared my own, virtually every decision made affected others—especially my children.[37]

The government has opposed his pending motion for a reduced sentence based on its "position that the defendant is not eligible for relief" because he was sentenced pursuant to subparagraph (C).[38]

Meanwhile, one of Richardson's co-conspirators, who was convicted of possessing a *greater* amount of crack cocaine and sentenced under subparagraph (B), was granted relief—unopposed by the Government—and has long since been free.[39]

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[36] Motion for Reduced Sentence Under the First Step Act at 1–2, 4–5, *United States v. Richardson*, No. 08-CR-00150 (W.D. Wis. Dec. 30, 2020), ECF No. 186.

[37] Letter in Support of Motion, *United States v. Richardson*, No. 08-CR-00150 (W.D. Wis. Jan 4, 2021), ECF No. 187 (letter dated Dec. 19, 2020).

[38] United States' Brief in Opposition to Defendant's First Step Act Motion and Request the Court Stay Its Decision at 1, *United States v. Richardson*, No. 08-CR-00150 (W.D. Wis. Feb. 1, 2021), ECF No. 188.

[39] Motion Under the First Step Act, *United States v. Mason*, No. 08-CR-00148 (W.D. Wis. Mar. 7, 2019), ECF No. 127; United States' Response to Defendant's First Step Act Motion, *United States v. Mason*, No. 08-CR-00148 (W.D. Wis. Apr. 11, 2019), ECF No. 131; Amended Judgment, *United States v. Mason*, No. 08-CR-00148 (W.D. Wis. Apr. 22, 2019).

The government's position also leads to inconsistent and arbitrary results as to a single person. Cecil Ray, Jr., a 42-year-old Black man, for example, was sentenced in 2007 to life in prison on two crack cocaine counts: Count 1, for conspiracy to possess with intent to distribute and to distribute more than 50 grams of crack cocaine, the penalty for which fell under subparagraph (A); and Count 8, involving distribution of 1.95 grams of crack cocaine within 1,000 feet of a school, the penalty for which fell under subparagraph (C). Initially, the district court reduced Ray's Count 1 sentence but determined that it could not reduce his Count 8 sentence because it adopted the government's reading of the statute. Upon reconsideration, the court held that it had "erroneously deemed Count 8 to not be a covered offense," and imposed a reduced sentence of time served on both counts.[40] The court noted, "evidence irrefutably demonstrates that . . . there is every reason to acknowledge Mr. Ray's potential," given his hard work to "become a better person even when he had no reason to believe it could benefit him in any other way," and that "not one, but four staff members" from the prison where he was housed "wrote strong letters of support for him based on his time there."[41] Yet, under the Eleventh Circuit's reading, Ray would be eligible for a reduction on his most serious count, but not on his least serious count.

The cases discussed here reflect but a handful of the many individuals who, under the decision below, would arbitrarily be left to languish in prison

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[40] *United States v. Ray*, No. 06-CR-8, 2020 WL 5229114, at *1 (N.D.W. Va. Sept. 1, 2020).

[41] *Id.* at *2–3.

for years because they were sentenced for having a *small* or unspecified amount of crack cocaine, under a repudiated sentencing scheme that created a 100-to-1 disparity between the treatment of cocaine in its crack and powder forms. The text of the First Step Act does not support that perverse result.

CONCLUSION

Amici respectfully request that the Court reverse the decision of the Eleventh Circuit.

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