No. 20-1650

IN THE

Supreme Court of the United States

CARLOS CONCEPCION,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF OF DUE PROCESS INSTITUTE, AMERICAN CIVIL LIBERTIES UNION, ACLU OF MASSACHUSETTS, AND SOUTHERN POVERTY LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF AMICUS CURIAE

Due Process Institute is a nonprofit, bipartisan, public interest organization that works to honor, preserve, and restore procedural fairness in the criminal legal system because due process is the guiding principle that underlies the Constitution's solemn promises to "establish justice" and to "secure the blessings of liberty." U.S. Const., pmbl. The just and equal application of our nation's federal sentencing laws is a primary concern of the organization's due process based mission.[1]

The Southern Poverty Law Center (SPLC) is a nonprofit civil rights organization dedicated to advancing and protecting the rights of all citizens, especially racial minorities and those living in economically disadvantaged communities. Since its founding in 1971, the SPLC has won numerous landmark legal victories on behalf of the exploited, the powerless, and the forgotten. As part of its work, SPLC has filed multiple *amicus curiae* briefs in the Supreme Court of the United States and the United States Courts of Appeals.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to the principles of liberty and equality embodied in

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[1] Pursuant to Supreme Court Rule 37, amicus states that no counsel for any party authored this brief in whole or in part, and that no entity or person other than amicus and its counsel made any monetary contribution toward the preparation and submission of this brief. Both of the parties have consented to the filing of this brief.

the Constitution and our nation's civil rights laws. The American Civil Liberties Union of Massachusetts, Inc., is a statewide affiliate of the national ACLU.

This case presents a question central to the fairness of our federal, criminal sentencing regime: whether a district court must or may consider intervening legal and factual developments when deciding if it should "impose a reduced sentence" on an individual under Section 404(b) of the First Step Act of 2018. An affirmative answer to that question is most faithful to the statutory text; it also ensures that, consistent with basic sentencing principles, courts retain the ability to make sentencing decisions based on present circumstances—and are not shackled by repudiated legal rules and stale facts.

SUMMARY OF ARGUMENT

All parties agree that petitioner could not receive his existing sentence under current law. They also agree that petitioner is entitled to be resentenced under Section 404(b) of the First Step Act. But they disagree on whether the court resentencing petitioner should blind itself to any factual or legal developments—other than Section 404(b)—that postdate petitioner's original sentence. It should not. The text and context of Section 404(b) show that a court resentencing someone under that provision should take into account the *entirety* of the law and facts as they exist at the time of resentencing. To the extent any doubt remains, the rule of lenity resolves this case squarely in petitioner's favor.

ARGUMENT

The First Step Act of 2018 was a bipartisan effort to improve our criminal legal system. Among other reforms, the Act sought to ameliorate the effects of the sentencing disparity between crack and powder cocaine, which drove criminal and racial injustice by imposing harsher penalties on the use and possession of crack. The Act advanced this purpose by making retroactive the portions of the Fair Sentencing Act of 2010 that reduced the crack-to-powder disparity. *See* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

"Crack and powder cocaine are two forms of the same drug." *Kimbrough v. United States*, 552 U.S. 85, 94 (2007). But, before the Fair Sentencing Act, federal law treated crack and powder cocaine "very differently for sentencing purposes." *Id.* Under the Anti-Drug and Abuse Act of 1986, every gram of crack cocaine was treated as the equivalent of 100 grams of powder cocaine. *Id.* at 95-96. As a result, ten- and five-year mandatory minimums applied to offenses involving 50 and 5 grams of crack, respectively—as compared to offenses involving 5,000 and 500 grams of powder, respectively. *Dorsey v. United States*, 567 U.S. 260, 266 (2012). Offenders whose drug amounts fell below these thresholds were not subject to any mandatory minimum imprisonment term. *See* 21 U.S.C. § 841(b)(1)(C).

Repeat offenders with certain prior felony drug convictions faced enhanced mandatory penalties. *See* 21 U.S.C. § 851. One qualifying prior offense could raise a defendant's statutory range from 20 years to life or 10 years to life, depending on the amount of drugs involved. Two qualifying prior offenses could

subject the defendant to a mandatory life term. Because of these enhanced penalties, many defendants sentenced under the 1986 Act were still incarcerated when the First Step Act took effect.

In the decades leading up to the First Step Act, many "strongly criticized Congress' decision to set the crack-to-powder mandatory minimum ratio at 100-to-1." *Dorsey*, 567 U.S. at 268. There was no empirical reason to treat the two forms of the same substance so differently, and the disparity in sentencing fell most heavily on Black Americans. *Kimbrough*, 552 U.S. at 97-98; *see also Terry v. United States*, 141 S. Ct. 1858, 1864 n.1 (2021) (Sotomayor, J., concurring in part and concurring in the judgment).

In 2010, Congress enacted the Fair Sentencing Act to rectify, at least to some degree, this disparity. *See* Pub. L. No. 111-220, 124 Stat. 2372. That statute increased the drug amounts triggering mandatory minimums for crack offenses and "eliminated the 5-year mandatory minimum for simple possession of crack." *See Dorsey*, 567 U.S. at 269; Fair Sentencing Act, §§ 2(a), 3. But these reforms did not apply retroactively, and thus did not help defendants sentenced before the effective date of the Fair Sentencing Act. *See Dorsey*, 567 U.S. at 280.

In 2018, Congress passed the First Step Act, which, among other things, sought to make the reforms of the Fair Sentencing Act retroactive. Section 404(b) of the First Step Act provides that a district court "that imposed a sentence for a covered offense may . . . impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act . . . were in effect at the time the covered offense was committed." First Step Act, § 404(b), (c), 132 Stat. at

5222. The statute defines a "covered offense" 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 . . . , that was committed before August 3, 2010." *Id.* § 404(a).

In deciding whether to impose a reduced sentence under Section 404(b), district courts have discretion to consider the existing circumstances of the defendant in light of current law. This is because, as petitioner explains, Section 404(b)'s grant of authority to "impose a reduced sentence" requires courts calculating new sentences to consider any factual or legal developments since a defendant's original sentence. *See* Pet. Br. 18-21. To the extent Section 404(b) contemplates an initial step whereby a court must decide whether it "may" impose a sentence before actually imposing it—as the court below concluded—that does not change the analysis. *See* Pet. App. 18a-19a. In order for a court to competently ascertain whether resentencing is warranted, it must necessarily be permitted to consider all the factors on which the new sentence could be based—including current law and facts. The alternative result would vitiate Section 404(b)'s grant of resentencing authority to district courts and run afoul of the rule that "[n]o limitation" may be placed on the factual information courts can "consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661. And to the extent any doubt remains about the meaning of Section 404(b), the rule of lenity resolves this case in petitioner's favor.

A. Sentencing Courts Take The Law And Facts As They Exist At The Time Of "Imposing" A Sentence

1. The usual rule in sentencing is that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court . . . may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661. Thus, "[a] court's duty is always to sentence the defendant as he stands before the court on the day of sentencing." *Pepper v. United States*, 562 U.S. 476, 492 (2011) (citation omitted). Whether good or bad, a defendant's conduct up to the day of sentencing "constitutes a critical part of the 'history and characteristics' of a defendant that Congress intended sentencing courts to consider." *Id.* (quoting 18 U.S.C. § 3553(a)). This rule reflects the "federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Gall v. United States*, 552 U.S. 38, 52 (2007) (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)).

A similar rule applies in the context of legal developments. In general, "a court is to apply the law in effect at the time it renders its decision." *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 (1974); *cf. Henderson v. United States*, 568 U.S. 266, 271 (2013) (recognizing this general rule applies to appellate sentencing decisions); *Weaver v. Graham*, 450 U.S. 24, 37-38 (1981) (Rehnquist, J., concurring) (noting that ameliorative sentence-adjustment laws apply immediately to all prisoners, but concluding

that the challenged law was not ameliorative). This rule is sometimes tempered in the context of sentencing law amendments by the presumption that a statute's repeal does not "extinguish any penalty . . . incurred under such statute." 1 U.S.C. § 109. But as petitioner explains, that presumption has no applicability here because Congress decided to apply the Fair Sentencing Act retroactively. *See* Pet. Br. 22-23.

This general rule is also consistent with the text of 18 U.S.C. § 3553—the provision that guides district courts as they impose criminal sentences. That statute expressly provides that, when "determining the particular sentence to be imposed," the sentencing court "shall consider," among other things, the "sentencing range" established by the Guidelines that are "*in effect on the date that the defendant is sentenced*." 18 U.S.C. § 3553(a)(4)(A)(ii) (emphasis added). The Sentencing Commission likewise instructs sentencing judges to "use the Guidelines Manual in effect on the date that the defendant is sentenced," regardless of when the defendant committed the offense, unless doing so would result in a *higher* sentence, which "would violate the *ex post facto* clause." U.S.S.G. § 1B1.11. "When the Commission adopts new, lower Guidelines amendments, those amendments become effective to offenders who committed an offense prior to the adoption of the new amendments but are sentenced thereafter." *Dorsey*, 567 U.S. at 275.

Had Congress wanted to preclude courts sentencing defendants under Section 404(b) of the First Step Act from considering developments in the law after the defendant's prior sentencing, it knew

how to do so. *See Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016) ("Congress well knows how to instruct sentencing judges."). For example, in 18 U.S.C. § 3742(g)(1), Congress provided that certain defendants should be resentenced "in accordance with section 3553 . . . except that" the court must "apply the guidelines issued by the Sentencing Commission . . . that were in effect on the date of the previous sentencing of the defendant." That is, Congress expressly assumed that the baseline rule—apply the law as it exists at the time a sentence is imposed—would generally govern, and explicitly identified a limited exception to that rule. There is no language suggesting that type of exception in the First Step Act. This choice should be interpreted as an adoption, not a rejection, of the background principles applicable to sentencing proceedings. *See Dean v. United States*, 137 S. Ct. 1170, 1173 (2017) ("'[D]rawing meaning from silence is particularly inappropriate where, as [here], Congress has shown that it knows how to direct sentencing practices in express terms." (quoting *Kimbrough*, 552 U.S. at 87)); *Staples v. United States*, 511 U.S. 600, 619 (1994) ("Silence does not suggest that Congress dispensed with" the "background rule.").

2. The usual rule that sentencing courts apply the law existing at the time of sentencing has special force in the context of this case.

When Congress adopted the Fair Sentencing Act, and when it made Sections 2 and 3 of that Act retroactive through the First Step Act, it acted in part to remedy the racial disparities in sentences that flowed from the now-defunct 100-to-1 crack-to-powder ratio. In 1993, Black and Hispanic individuals

accounted for over two-thirds of all drug offenses, despite comprising only approximately 12 and 9 percent of the U.S. population, respectively. *See* U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 152 (Feb. 1995) ("1995 Report"); U.S. Census Bureau, *Population by Race and Hispanic or Latino Origin for the United States: 1990 and 2000*, tbl.4 (Apr. 2001). But Black Americans made up an "overwhelming majority" of those incarcerated for crack offenses. U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 102 (May 2002). Black defendants comprised 91.4 percent of all convicted crack offenders in 1992, and 88.3 percent of all convicted crack offenders in 1993. *Id.* at 63 & tbl.3; 1995 Report at 152; U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 16 tbl.2-1 (May 2007); 155 Cong. Rec. S10491 (daily ed. Oct. 15, 2009) ("While African Americans constitute less than 30 percent of crack users, they make up 82 percent of those convicted of Federal crack offenses.").

The disproportionate number of Black Americans convicted for crack-related offenses, coupled with the severe penalties imposed for such offenses, resulted in both the "rate and the average length of imprisonment for federal offenders increas[ing] for Blacks in comparison to Whites." 1995 Report at 153. In fact, "[t]he 100-to-1 crack cocaine to powder cocaine ratio [was] the *primary cause* of the growing disparity between sentences for Black and White federal defendants." *Id.* at 154 (emphasis added). And this disparity "undermined citizens' confidence

in the justice system." 155 Cong. Rec. S10492 (daily ed. Oct. 15, 2009) (statement of Senator Leahy).

The First Step Act was adopted in part to alleviate these harms. It sought to reduce "the racial disparities in [the federal prison] system" by offering "thousands of Americans who have more than served their time" a second chance. 164 Cong. Rec. S7764 (daily ed. Dec. 18, 2018) (statement of Senator Booker); *see* 164 Cong. Rec. S7745 (daily ed. Dec. 18, 2018) (statement of Senator Blumenthal) ("This bill . . . mak[es] it possible for nearly 2,600 Federal prisoners sentenced on racially discriminatory drug laws to petition for a reduced sentence.").

But by precluding courts from considering any factual or legal developments that post-date an individual's original sentence, the government's interpretation of the law would handicap judges' ability to effectuate Congress's intent to reduce racial disparities in criminal sentencing. For example, courts could not consider ameliorative revisions to the Career Offender Guideline, *see* U.S.S.G. § 4B1.2(a)—even though the Sentencing Commission implemented them in part to correct racial disparities in their administration. *See* U.S. Sentencing Comm'n, *Report to the Congress: Career Offender Sentencing Enhancements* 7, 19 (Aug. 2016) ("Career Offender Report") ("In fiscal year 2014, Black offenders accounted for more than half (59.7%) of offenders sentenced under the career offender guideline."); *see generally, e.g.*, Eric P. Baumer, *Reassessing and Redirecting Research on Race and Sentencing*, 30 JUST. Q. 231, 240 (2013) (Guidelines have long been "defined by features that may be

highly correlated with race, including offense and prior record").

This Court has previously explained that it will "imput[e] to Congress an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose, and would be unnecessarily vindictive." *Hamm v. City of Rock Hill*, 379 U.S. 306, 313 (1964). In *Hamm*, the Court held that petitioners' state-trespass convictions—which were based on their participation in lunch-counter sit-ins—could no longer stand after Congress adopted the Civil Rights Act, even though the Act post-dated their convictions. *Id.* at 307, 317. The Court explained that it would be "unnecessarily vindictive" to insist on imposing the old regime. *Id.* at 313. The same is true here: Congress has replaced one discriminatory legal regime with a new, less discriminatory one. The purpose of the First Step Act was, much like the Civil Rights Act, "to obliterate the effect of a distressing chapter of our history." *Id.* at 315. Here, too, the old regime "no longer further[s] any legislative purpose." *Id.* at 313. District courts applying Section 404(b) should not be required to adhere to the old regime despite Congress's repudiation of it in light of its patently discriminatory effect.

Any other conclusion would hamstring sentencing judges' ability to carry out their statutory duty "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Under the rule endorsed by eight circuits, a judge may "impose a [] sentence" on two defendants for identical drug offenses yet apply different Guidelines to each—with results that may

vary by more than a decade. *See* Pet. App. 70a (applying career offender enhancement to raise Mr. Concepcion's Guidelines range from 57-71 months to 188-235 months). Beyond being "unnecessarily vindictive," such a result is textually unsupported, *see* Pet. Br. 17-25, and inconsistent with the aims of federal sentencing. *See Freeman v. United States*, 564 U.S. 522, 534 (2011) (explaining that "reduc[ing] unwarranted disparities in federal sentencing" is "consistent with the purposes of the Sentencing Reform Act").

Moreover, this view of the law makes no sense. Where circumstances have changed between the defendant's initial sentencing and his Section 404(b) resentencing, there is no justification for continuing to apply law that Congress has rejected or facts that are now stale. As one district court wrote when applying the Fair Sentencing Act: "what possible reason could there be to want judges to *continue* to impose new sentences that are not 'fair' over the next five years while the statute of limitations runs?" *United States v. Douglas*, 746 F. Supp. 2d 220, 229 (D. Me. 2010) (emphasis in original), *aff'd*, 644 F.3d 39 (1st Cir. 2011). Absent much clearer guidance from Congress, the Court ought not read the First Step Act to override general sentencing rules.

B. To The Extent Any Doubt Remains, The Rule Of Lenity Resolves This Case In Petitioner's Favor

As petitioner describes, the text and statutory structure of Section 404(b) establish that a court resentencing someone under that provision may consider legal and factual developments that post-date his original sentencing proceeding. *See* Pet Br.

17-25. Amicus adopts those arguments. But even if, after applying traditional tools of statutory interpretation, the Court concludes that Section 404(b) remains ambiguous, *see, e.g.*, *Shular v. United States*, 140 S. Ct. 779, 787 (2020), the rule of lenity requires this Court to adopt petitioner's interpretation of the law.

1. The rule of lenity teaches "that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019); *see Jones v. United States*, 529 U.S. 848, 858 (2000) (similar); *Liparota v. United States*, 471 U.S. 419, 427 (1985) (similar). This rule applies equally to "sentencing provisions" as to "criminal statutes" defining underlying crimes. *Taylor v. United States*, 495 U.S. 575, 596 (1990).

The rule of lenity serves several important purposes, two of which are implicated here. First, by dictating that any "tie" in an interpretation of a statute "must go to the defendant," the rule requires "Congress to speak more clearly" when needed and "keep[s] courts from making criminal law in Congress's stead." *United States v. Santos*, 553 U.S. 507, 514 (2008). Second, it helps "minimize the risk of selective or arbitrary enforcement" of criminal statutes, *United States v. Kozminski*, 487 U.S. 931, 952 (1988), and "foster uniformity in the interpretation of criminal statutes," *Bryan v. United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting).

These purposes have special force here, where the statute being interpreted was enacted specifically to rectify unequal treatment of defendants. Under

the rule adopted by the decision below, a defendant is subject to a double injustice: The first injustice occurred when the defendant was sentenced under the initial sentencing regime; as Congress has now concluded, that regime required courts to impose sentences far longer than was just. But a second injustice occurs when, under the rule adopted by the court below, a court cannot look to any factual or legal developments that post-date the defendant's original sentencing. In this context, resolving any statutory ambiguity in favor of defendants, and thus permitting courts to apply the current Guidelines and consider present individualized circumstances, promotes the purposes of the First Step Act and our sentencing regime overall, *see Kozminski*, 487 U.S. at 952.

2. This Court has sometimes required a criminal statute to have "ambiguity" and other times required it to have "grievous ambiguity" before finding that the rule of lenity comes into play. *Shular*, 140 S. Ct. at 788 (Kavanaugh, J., concurring). But while the rule of lenity itself dates back centuries, *see United States v. Wiltberger*, 18 U.S. 76, 95, 105-06 (1820), the notion that lenity applies only in cases of "grievous ambiguity" appeared only when *Chapman v. United States*, 500 U.S. 453, 463 (1991), quoted *Huddleston v. United States*, 415 U.S. 814, 831 (1974), for that proposition. But *Huddleston* merely stated that the Court "perceive[d] no grievous ambiguity or uncertainty in" a particular statute, without suggesting that "grievous ambiguity" was a new threshold requirement for lenity. 415 U.S. at 831. "The Court used the word 'grievous' when it applied lenity to the facts of th[at] case; it did not purport to

offer a new trigger for lenity or change the rule of lenity." David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 553 (2018).

Of the two, the ambiguity standard is more consistent with the rule's origins and purpose. For much of the country's early history, the "rule reflected a strong preference for individual liberty and against excessive punishments." Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918, 926 (2020) (cataloguing development of the rule). In Chief Justice Marshall's classic formulation, lenity is "founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not the judicial department." *Wiltberger*, 18 U.S. at 95.

Requiring "grievous ambiguity" before the rule of lenity applies advances neither principle. It hardly provides a compelling incentive to Congress to prescribe clear punishments, nor does it help ensure that citizens understand the thrust of the law or reduce disparities in how ambiguous statutes are applied. It instead ensures that judge-made rules, not legislation, will define the outer limits of criminal punishment.

Indeed, the "grievous ambiguity" standard threatens to "reduce" the rule of lenity from a "presupposition of our law" to "a historical curiosity." *Holloway v. United States*, 526 U.S. 1, 21 (1999) (Scalia, J., dissenting). Together with the rule that lenity only comes "into operation at the end of the process," *Callanan v. United States*, 364 U.S. 587, 596 (1961), the "grievous ambiguity" standard ensures that "lenity plays almost no role in deciding

cases of statutory ambiguity." Hopwood, *supra*, at 931. Tellingly, of the 13 cases in which this Court has applied the standard, *none* resulted in application of the rule of lenity. *See* Daniel Ortner, *The Merciful Corpus: The Rule of Lenity, Ambiguity and Corpus Linguistics*, 25 B.U. PUB. INT. L.J. 101, 117 (2016) (collecting cases through June 2014); *Shaw v. United States*, 137 S. Ct. 462, 469 (2016); *Salman v. United States*, 137 S. Ct. 420, 429 (2016). And "[t]he picture is similarly stark at the circuit and trial court level." Ortner, *supra*, at 117-18 & nn.125-126 (surveying 69 circuit cases, only ten of which applied lenity). Returning to the original formulation of the rule of lenity—which did not require "grievous ambiguity"—would allow that rule to serve its critical functions.

3. Here, at the very least, the government's expansive reading of Section 404(b) is not unambiguously correct—and when all the statutory construction tools fail to resolve genuine ambiguity about whether Congress has demanded an inflexible and serious prison term, that ambiguity can fairly be categorized as "grievous." Even applying the "grievous ambiguity" standard, *Chapman* acknowledged that the rule of lenity would come into play when a statute produced a result that was "glaringly unjust" and "raise[d] a reasonable doubt about Congress's intent." 500 U.S. at 463-64 (internal quotation marks and citations omitted); *see Barber v. Thomas*, 560 U.S. 474, 488 (2010) (rule of lenity relevant where "the Court must simply guess as to what Congress intended" (internal quotation marks and citations omitted)). That is precisely the case here: On the government's account, Congress

sub silentio permitted district courts to ignore extant law and facts in resentencing defendants pursuant to a statute specifically designed to provide relief from an unduly punitive and discriminatory sentencing regime. That reading of the First Step Act is implausible. It is also "glaringly unjust," *Chapman*, 500 U.S. at 463-64, given that the proper interpretation of the statutory terms here determines whether a defendant spends decades of his life in or out of prison, *see, e.g.*, Pet. Br. 9-12. To the extent such an unjust result is made possible by Section 404(b)'s ambiguity, that ambiguity is surely grievous.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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