No. 20-291

IN THE

Supreme Court of the United States

JAMELL BIRT,

Petitioner,

—v.—

UNITED STATES,

Respondent.

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

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF PENNSYLVANIA, THE RUTHERFORD INSTITUTE, AND THE R STREET INSTITUTE, IN SUPPORT OF PETITIONER

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911

Arthur Rizer
R STREET INSTITUTE
1212 New York Ave., NW,
Suite 900
Washington, D.C. 20005

Witold J. Walczak
AMERICAN CIVIL LIBERTIES
UNION OF PENNSYLVANIA
247 Ft. Pitt Blvd., 2nd Floor
Pittsburgh, PA 15222

David D. Cole
Counsel of Record
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005
(212) 549-2611
dcole@aclu.org

Jennesa Calvo-Friedman
Ezekiel R. Edwards
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici represent organizations from across the ideological spectrum. Amici disagree on numerous issues but agree that many criminal sentences are overly harsh. Amici supported the enactment of the Fair Sentencing Act, which sought, among other things, to redress unfair disparities in how the criminal federal law treats crack and powder cocaine, and the First Step Act, which made the Fair Sentencing Act's changes retroactive. 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 Pennsylvania** is one of its statewide affiliates.

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

[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. All parties have consented to this amici curiae brief in support of certiorari and letters of consent have been filed with the Clerk.

well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth.

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute's mission is to provide legal representation without charge to individuals whose civil liberties have been violated and to educate the public about constitutional and human rights issues. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom, ensuring that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed to persons by Constitution and laws of the United States.

SUMMARY OF THE ARGUMENT

The question presented by this petition will determine whether a significant number of individuals serving extraordinarily long sentences for crack cocaine offenses handed down under a much-criticized and twice-amended statute are eligible for resentencing under the criminal law as amended. The courts of appeals are divided on the question, resulting in similarly situated individuals serving very different sentences for the same offenses. The Court should grant review to resolve this important conflict and afford individuals the opportunity for resentencing that Congress sought to give them.

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 cocaine in its crack and powder forms. The crack-powder differential in

turn resulted in 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 large amounts of crack cocaine would get the benefit of retroactive resentencing, while those convicted of *small* amounts would not. That perverse result rests on a misreading of the text of the statute and frustrates its 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 in turn 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 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 it was the interpretation of the U.S. Sentencing

Commission, which Congress explicitly considered when it enacted the First Step 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). When asked by Congress for an assessment of the impact of applying the Fair Sentencing Act changes retroactively, the Commission defined those who would be eligible for resentencing as *all* those whose sentencing range would be lower under the current version of the Guidelines, including people sentenced under subparagraph (C). Members of the Senate and House both cited the Commission's analysis in supporting the First Step Act. If Congress had meant to provide relief only to a subset of those people whose sentences the Commission changed in response to the Fair Sentencing Act, it would have said so. It did not.

Finally, interpreting the First Step Act to make all people sentenced for crack cocaine offenses eligible for resentencing furthers Congress's purpose in correcting the long-recognized and widely criticized racial disparities caused by the crack-powder differential, which affected *all* crack cocaine sentencing. The First Step Act was a historic bipartisan agreement, and extension of the Fair Sentencing Act reforms to people currently in prison 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.

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 § 2, Pub. L. No. 111-220, 124 Stat. 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

[2] Section 3 of the Fair Sentencing Act "eliminated the 5–year mandatory minimum for simple possession of crack. § 3, 124 Stat. 2372." *Dorsey v. United States*, 567 U.S. 260, 268 (2012).

"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 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. App. 11a (acknowledging "Birt's charging document lists only the violation of § 841(a)(1) as his crime."). The definition of "covered offense" specifically refers to "a violation of a Federal criminal statute," and Birt was convicted of violating that "Federal criminal statute." It makes no sense to say that Birt violated subsection

[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.

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). Thus, anyone convicted for violation of Section 841(a), regardless of which "penalty" in subsection (b) applies, committed a "covered offense" for purposes of the First Step Act, and is eligible for retroactive resentencing.

The Third Circuit rejected this straightforward textualist reading, reasoning that "if we treat § 841(a) as the crime of conviction, defendants convicted of, say, heroin offenses, would be entitled to resentencing because the penalties in § 841(b) have been modified." Pet. App. 13a. But the First Step Act expressly authorizes courts only to "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." *See* § 404, 132 Stat. at 5194 ("Application of Fair Sentencing Act") (emphasis added). And Section 2 of the Fair Sentencing Act, as its title makes clear, only applies to "Cocaine Sentencing Disparity Reduction," 124 Stat. at 2372. Defendants sentenced for any drug offense other than crack cocaine do not satisfy the "as if" requirement of the First Step Act.

The Third Circuit concluded that the "covered offense" referred to in the First Step Act should be construed to mean *both* the *offense* described in Section 841(a) and the *penalty* separately identified in Section 841(b). Pet. App. 8a. That countertextual reading is wrong for the reasons explained above. But even under that reading, Birt and others sentenced under subparagraph (C) should still be eligible for resentencing, because Section 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). And this affects how one will be sentenced, because under the old regime, someone with 4.5 grams would be at the very top of the subparagraph (C) range, whereas under the amended regime they would be far below the top of the range. *See* Pet. 7, 19–20, 32 (discussing anchoring effects); Amicus Br. of National Association of Criminal Defense Lawyers at 10–13 (same).

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

The Third Circuit appears to have assumed that a statutory provision can be modified only by a direct change to its specific text. But 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 "[e]xcept as provided in subsection (c)." *Id.* (emphasis added). Section 1226(c) itself does not include a textual reference to § 1226(a). *Id.* Nonetheless, the Court reasoned that § 1226(c) modifies the discretion granted in the first sentence of § 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 authority over *anyone*'s sentencing who commits an unlawful act under Section 841(a), and subparagraphs (A) and (B) effectively carve out exceptions to that authority for persons charged with more than the specified amounts of the drug. 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)[4]" (emphasis added)). 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) penalties.

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).

[4] Subparagraph (D) 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 Section 841(a), and not just for those amounts that triggered penalties under 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 re-sentencing available *only* to those sentenced under subparagraphs (A) and (B), it would have said so. Instead, it effectively 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 "extrapolate[e] proportionally upward and downward on the Drug Quantity Table." U.S. Sentencing Comm'n, Sentencing Guidelines for United States

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

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 mean "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.S.G. § 2D1.1(c) (Nov. 1, 2009) ("Drug Quantity Table"), *with* U.S.S.G. § 2D1.1(c) ("Drug Quantity Table") (Nov. 1, 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 penalties for offenses

[6] U.S.S.G. § 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.

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. Indeed, that interpretation was the explicit basis for the Commission's report to Congress on the impact of the retroactivity language ultimately adopted in the First Step Act.[7] The Commission's estimate that 2,660 inmates would be affected expressly included all "[o]ffenders incarcerated in the BOP as of May 26, 2018 whose sentencing range would be lower under the current version of U.S.S.G. § 2D1.1 than the version of that guideline in effect on the date they were sentenced."[8] As shown above, that included individuals who fell within subparagraph (C), such as a defendant sentenced for possession of 4.9 grams of crack cocaine. Both Democrats and Republicans cited the Commission's estimated impact.[9] After the First

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[7] *See* Comm. on the Judiciary, The First Step Act of 2018 (S.3649) – As Introduced (Nov. 15, 2018), https://www.judiciary.senate.gov/imo/media/doc/S.%203649%20First%20Step%20Act%20Summary%20-%20As%20Introduced.pdf (summarizing provisions including "Retroactive Application of the Fair Sentencing Act of 2010 – S.1917 Section 105").

[8] *See* U.S. Sentencing Comm'n, Sentence and Prison Impact Estimate Summary S.1917 (Aug. 3, 2018), https://www.ussc.gov/research/data-reports/prison-sentencing-impact-assessments.

[9] *See, e.g.*, Congressman Mark Walker (R-N.C.), *House Sends FIRST STEP Act – Co-Sponsored by Chairman Walker and Chairman Richmond – to the President's Desk* (Dec. 20, 2018), https://walker.house.gov/media-center/press-releases/house-sends-first-step-act-co-sponsored-chairman-walker-and-chairman (explaining the Act "[m]ake[s] the 2010 Fair Sentencing Act retroactive, which changed sentencing guidelines to treat offenses involving crack and powder cocaine equally. This could impact nearly 2,600 federal inmates, according to the

Step Act was passed, the Commission reaffirmed its interpretation.[10]

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

Marshall Project."); 164 Cong. Rec. S7,740, *7,745 (daily ed. Dec. 18, 2018) (statement of Sen. Richard Blumenthal D-CT) ("This bill would make the Fair Sentencing Act retroactive, making it possible for nearly 2,600 Federal prisoners sentenced on racially discriminatory drug laws to petition for a reduced sentence.").

[10] *See* U.S. Sentencing Comm'n, Sentence and Prison Impact Estimate Summary: S. 756, The First Step Act of 2018, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/January_2019_Impact_Analysis.pdf (last visited Oct. 1, 2020).

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."[11] The sponsors "believe[d]" the Act "w[ould] decrease racial disparities."[12] On the day the Fair Sentencing Act passed in the House, Representative Dan Lungren (R-CA), who "helped to write the Drug Control Act of 1986," told his colleagues that "one of the sad ironies...is that a bill which was characterized by some as a response to the crack epidemic in African American communities has led to racial sentencing disparities which simply cannot be ignored in any

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[11] 156 Cong. Rec. S1,680, *S1681 (daily ed. Mar. 17, 2010) (statement of Sen. Richard Durbin (D-IL)); *see id.* (noting Senate Judiciary Committee reported the Fair Sentencing Act by a unanimous 19-to-0 vote).

[12] 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.

reasoned discussion of this issue."[13] Other Members made similar statements.[14]

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.[15] "[B]oth forms of cocaine cause identical effects."[16] 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,

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[13] 156 Cong. Rec. H6,196, *H6,202 (daily ed. July 28, 2010).

[14] *See* 156 Cong. Rec. E1,498, *E1,498-99 (daily ed. July 28, 2010) (statement of Rep. Hank Johnson (D-GA)) (urging 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. H6,196, *H6,203 (daily ed. July 28, 2010) (statement of Rep. Steny Hoyer (D-MD)) ("[i]t 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. H6,196, *H6,199 (daily ed. July 28, 2010) (statement of Rep. Sheila Jackson Lee (D-TX)) ("[i]t 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.").

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

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

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 do not serve society's interest."[17] 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."[18]

"Approximately 85 percent of defendants convicted of crack offenses in federal court are black; thus the severe sentences required by the 100-to-1

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[17] 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.

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

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 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, 846 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 Fed. Appx. 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."[19] 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.[20] Before the 1986 Drug Law,

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

[20] 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

the average federal drug sentence for Black Americans was 11% higher than for whites; four years later, it was 49% higher.[21] 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).[22]

The Fair Sentencing Act began the task of correcting, or at least mitigating, the injustice of the crack-powder disparity. The First Step Act, a historic bipartisan compromise,[23] continued that enterprise, by including as a central element the retroactive application of the Fair Sentencing Act reforms. Senator Grassley praised 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

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Act of 1984, average was 29.1 months for white drug offenders, 33.1 months for Back 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 months for white drug offender, 58.7 months for Black drug offenders) (Oct. 1, 2005).

[21] 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.

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

[23] *See*, *e.g.*, 164 Cong. Rec. S7,777 (Dec. 18, 2018) (statement of Sen. Chuck Grassley (R-IA)) ("This is a big bipartisan bill. Senators Durbin, Lee, Graham, Booker, and I…had spoken extensively with our colleagues to address their concerns and to gain their support….").

five at this point: The Fraternal Order of Police, the American Civil Liberties Union, the American Conservative Union, and the International Association of Chiefs of Police."[24] The retroactive sentencing provision was critical to the broad bipartisan coalition supporting the First Step Act. The ACLU, and 108 other civil rights organizations, opposed the First Step Act when it was first introduced in the House,[25] 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. This improvement would allow over 2,600 people the chance to be resentenced." [26]

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[24] 164 Cong. Rec. S7,777 (Dec. 18, 2018).

[25] *See* ACLU Letter to Speaker Ryan and Minority Leader Pelosi (May 21, 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).

[26] 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. H1,0399-99 (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 "The 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.").

Support for this bipartisan compromise from Congress 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, a broker of the bipartisan compromise, 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 people who will benefit from that are African Americans; 96 percent are Black and Latino.

164 Cong. Rec. S7,764 (Dec. 18, 2018) (Sen. Cory Booker (D-NJ)).[27] And in statements celebrating the

[27] *See also* 164 Cong. Rec. S7,774 (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. S7,774 (daily ed. Dec. 18, 2018) (Sen. Ben Cardin (D-MD)) ("The legislation includes key sentencing reform provisions….[I]t

passage of the First Step Act, Members highlighted the retroactive application of the Fair Sentencing Act.[28]

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

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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. S7,782 (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. S7,749 (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.").

[28] *See, e.g.*, Rep. Brian Fitzpatrick (R-PA), *Fitzpatrick, House Send Historic Criminal Justice Reform to President* (Dec. 20, 2018), https://fitzpatrick.house.gov/media-center/press-releases/fitzpatrick-house-send-historic-criminal-justice-reform-president ("Allows for the 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 "Retroactively extending the reductions in sentencing disparity between crack-cocaine and powder-cocaine, as codified in the 2010 Fair Sentencing Act").

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.

CONCLUSION

Amici respectfully request that the Court grant certiorari and reverse the decision of the Third Circuit.

Respectfully Submitted,

David D. Cole
Counsel of Record
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005
(212) 549-2611
dcole@aclu.org

Jennesa Calvo-Friedman
Ezekiel R. Edwards
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911

Arthur Rizer
R STREET INSTITUTE
1212 New York Ave., N.W.,
Suite 900
Washington, D.C. 20005

Witold J. Walczak
AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA
247 Ft. Pitt Blvd., 2d Fl.
Pittsburgh, PA 15222

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