NO. 20-5904

In the
Supreme Court of the United States

TARAHRICK TERRY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF AMERICAN CONSERVATIVE UNION & ACU FOUNDATION, CATO INSTITUTE, LINCOLN NETWORK, AND RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether pre-August 3, 2010 crack offenders sentenced under 21 U.S.C. § 841(b)(1)(C) have a "covered offense" under Section 404 of the First Step Act.

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INTEREST OF AMICI CURIAE[1]

The **American Conservative Union & ACU Foundation** ("ACUF") is a tax-exempt organization whose mission is to develop conservative solutions to address some of the nation's most pressing problems. ACUF's Nolan Center for Justice ("NCJ") has been at the forefront of criminal-justice policy at the national and state levels since its inception seven years ago. ACUF-NCJ actively pursues reforms that improve public safety, strengthen government accountability, and advance human dignity, and was intimately involved in the drafting and enactment of the First Step Act.

The **Cato Institute** is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999 and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal-

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

justice system, and accountability for law-enforcement officers.

The **Lincoln Network** is a nonprofit organization founded in 2014 to help bridge the gap between Silicon Valley and Washington, D.C., and advance a more perfect union between technology and republican democracy. Lincoln Network advocates for personal liberty, competitive markets, and a robust but responsible innovation ecosystem. Arthur Rizer, a former police officer and federal prosecutor, is Vice President of Tech, Justice and Civil Liberties at the Lincoln Network. His program seeks, among other goals, to reduce overincarceration and advance rehabilitative and reentry opportunities for persons in prison.

The **Rutherford Institute** is a nonprofit civil-liberties organization founded in 1982 by 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 threats to freedom, ensuring that the government abides by the rule of law and is held accountable when it infringes on rights guaranteed by the Constitution and laws of the United States.

Amici are interested in this case because the decision below costs people years of freedom. Contrary to Congress' clear intent in reforming sentencing laws to combat overcriminalization and disparate sentencing, the Eleventh Circuit's decision

erroneously eliminates resentencing under the First Step Act of the least culpable offenders. That decision is also contrary to the statute's plain text and ignores the Sentencing Commission's longstanding interpretation of the Fair Sentencing Act that Congress adopted when it enacted the First Step Act. In short, the decision threatens the First Step Act itself and the principles for which *amici* stand.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Congress enacted the Fair Sentencing Act of 2010[2] and the First Step Act of 2018[3] for laudable reasons: Congress sought to rectify decades of injustice during which persons who possessed or trafficked in crack cocaine (a smokable freebase form of cocaine) were punished far more harshly than those who possessed or trafficked in powder cocaine. The previous sentencing regime—which resulted in a sentencing disparity between crack and powder cocaine of 100-to-one—led to overincarceration and massive racial disparities. Congress first tried to mitigate these problems in the Fair Sentencing Act of 2010 by reducing the sentencing disparity between crack and powder cocaine offenses. But that Act reached only those offenders sentenced after August 2, 2010—meaning that anyone sentenced before then remained stuck in prison. In 2018, Congress sought to ameliorate that second problem with the First Step Act, which made the Fair Sentencing Act's sentencing

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[2] Pub. L. No. 111-220, 124 Stat. 2372 (2010).

[3] Pub. L. No. 115-391, 132 Stat. 5194 (2018).

changes retroactive so that thousands of defendants serving lengthy prison sentences for crack-related offenses could have a "second chance at life." 164 Cong. Rec. H10362 (daily ed. Dec. 20, 2018) (statement of Rep. Goodlatte).

The Eleventh Circuit's decision denies Petitioner and others like him that second chance. The decision below wrongly holds that crack offenders convicted under 21 U.S.C. § 841(a)(1) but sentenced under a provision that applies to the lowest-level crack offenders (§ 841(b)(1)(C)) before August 3, 2010, have not been convicted of a "covered offense" under the First Step Act, and are therefore ineligible for resentencing. Pub. L. No. 115-391, § 404, 132 Stat. at 5222. In the Eleventh Circuit's view, the First Step Act authorizes courts to resentence only those convicted of more serious crack offenses that trigger a mandatory minimum sentence.

Petitioner's brief persuasively explains why that conclusion cannot be squared with the plain text of the First Step Act, which permits retroactive resentencing for *all* persons convicted of crack cocaine offenses under 21 U.S.C. § 841. Pub. L. 115-391, § 404(a)–(c), 132 Stat. at 5222. The statute authorizes a court to resentence anyone convicted of a "covered offense," which includes "a violation of a Federal criminal statute, the statutory penalties for which were modified by [S]ection 2 or 3 of the Fair Sentencing Act of 2010 … committed before August 3, 2010." *Id.* § 404(a). Section 2 of the Fair Sentencing Act, in turn, "modified" the penalties for *all* violations of 21 U.S.C. § 841(a) by raising the crack-cocaine quantities that

determine three tiers of penalties set out in 21 U.S.C. § 841(b)(1)(A)–(C). Petitioner was convicted of a "covered offense" under the First Step Act because he was convicted of violating 21 U.S.C. § 841(a) before August 3, 2010, and Section 2 of the Fair Sentencing Act "modified" the statutory penalty provision that he was sentenced under. Pet. Br. 10–12.

Petitioner's brief also sheds light on the Eleventh Circuit's error in holding that Section 2 of the Fair Sentencing Act "modified" the sentencing penalties set out in subparagraphs (A) and (B) of 21 U.S.C. § 841(b)(1), but not the one set out in subparagraph (C). Where death or serious injury did not result, the pre–Fair Sentencing Act regime assigned sentences of zero to 20 years for those who possessed or trafficked in less than five grams of crack cocaine; five to 40 years for five to 49 grams; and 20 years to life for 50 or more grams. *See* 21 U.S.C. § 841(b) (2010). The Fair Sentencing Act retained those sentence ranges but adjusted the corresponding drug-quantity thresholds for the mandatory minimum sentences, multiplying them by a factor of 5.6—meaning that a person convicted of possessing or trafficking in crack cocaine had to have a far higher amount to qualify for the mandatory minimums. Thus, the threshold for a 20-to-life sentence was raised from 50 to 280 grams of crack, and the threshold for a five-to-40-year sentence went from five to 28 grams of crack. After the Fair Sentencing Act, the bottom-tier range, which has no mandatory minimum, *see* § 841(b)(1)(C), now applies to all amounts *less* than 28 grams of crack. Thus, just like subparagraphs (A) and (B), subparagraph (C) was also "modified by [S]ection 2 … of the Fair Sentencing

Act of 2010." Pub. L. No. 115-391, § 404(a), 132 Stat. at 5222. And because Section 2 modified the penalties for *all* violations of the "covered offense" set out in 21 U.S.C. § 841(a), *all* defendants convicted of violating that provision should be eligible for resentencing. Pet. Br. 18–21.

Amici agree with this plainly correct reading of the Fair Sentencing Act and submit this brief to further explain how it is the only reading that can be squared with Congress' intent. In enacting the First Step Act, Congress considered the Sentencing Commission's understanding that the Fair Sentencing Act would apply retroactively to those convicted of federal crack-cocaine crimes, regardless of which subparagraph their sentence fell under. Congress enacted the legislation to reduce mass incarceration against a backdrop of overcriminalization—an objective that is met only if *all* crack offenders convicted before August 3, 2010, are eligible for resentencing. Respondent's reading—which echoes the Eleventh Circuit's in reserving reduced sentences only for more serious offenders—would do nothing but hinder Congress' goals.

I. The Sentencing Commission's longstanding interpretation of the Fair Sentencing Act—which Congress explicitly considered when it enacted the First Step Act—reinforces Petitioner's straightforward, textualist reading. After Congress enacted the Fair Sentencing Act, the U.S. Sentencing Commission modified its Sentencing Guidelines for *all* weights of crack cocaine so that each base offense level reflected the new 18-to-one crack-to-powder ratio.

These changes affected defendants sentenced under subparagraphs (b)(1)(A), (B), and (C) alike. The Commission explained this interpretation in its reports to Congress before Congress enacted the First Step Act. If Congress, in enacting the First Step Act, had meant to provide relief to only a subset of crack cocaine defendants, it would have said so. It did not.

II. The textualist interpretation of the First Step Act is also consistent with Congress' bipartisan policy goals.

A. The emerging consensus on both sides of the political aisle is that there are too many criminal laws on the books and that their penalties are too harsh. Congress enacted the Fair Sentencing Act and, later, the First Step Act in direct response to extensive criticism (including from the Sentencing Commission itself) that the 100-to-one crack-to-powder sentencing disparity was unwarranted and unjust. The interpretation of the statute urged by Respondent is entirely at odds with this policy goal. Extending retroactive relief to offenders sentenced under subparagraphs (b)(1)(A) and (B), but not to low-level offenders sentenced under subparagraph (b)(1)(C), is a perverse result that Congress could not have intended.

B. Interpreting the First Step Act to make all defendants sentenced for crack-cocaine offenses eligible for resentencing also furthers Congress' intent to reverse the mass incarceration epidemic. Mass incarceration has wrought enormous economic and social damage. Congress understood that the costs of

mass incarceration have been borne by defendants sentenced under subparagraphs (b)(1)(A), (B), and (C) alike, and made them all eligible for resentencing.

ARGUMENT

I. THE FIRST STEP ACT ADOPTS THE SENTENCING COMMISSION'S VIEW THAT THE FAIR SENTENCING ACT EMPOWERS COURTS TO RESENTENCE ALL CRACK OFFENDERS.

When enacting the First Step Act, Congress knew that the U.S. Sentencing Commission had consistently interpreted the Fair Sentencing Act as amending *all* crack-cocaine penalties for violations of 21 U.S.C. § 841(a), not just the mandatory minimums imposed under subparagraphs (b)(1)(A) and (B). If Congress had intended to make the Fair Sentencing Act's crack-cocaine changes retroactive only for more severe crimes and not for low-level ones, it would have said so. Instead, Congress effectively ratified the Sentencing Commission's interpretation.

A quick historical detour provides the necessary context. In 1986, Congress enacted a drug-related sentencing statute, the Anti-Drug Abuse Act of 1986,[4] which "set[ ] forth mandatory minimum penalties of 5 and 10 years applicable to a drug offender depending primarily upon the kind and amount of drugs involved in the offense." *Dorsey v. United States*, 567 U.S. 260, 266 (2012) (citing 21 U.S.C. § 841(b)(1)(A)–(C) (2006

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

ed. and Supp. IV)). An offender convicted of possessing with intent to distribute half a kilo (about a pound) or more of powder cocaine faced a five-year minimum sentence, and an offender busted for possessing with intent to distribute *five* kilograms (11 pounds) or more of powder faced a 10-year minimum sentence. § 841(b)(1)(A)(ii), (B)(ii).

"The 1986 Drug Act, however, treated crack cocaine crimes as far more serious," *Dorsey*, 567 U.S. at 266, imposing a 100-to-one crack-to-powder ratio. § 841(b)(1)(A)(iii), (B)(iii) (2006). That Act applied a five-year minimum sentence to an offender convicted of possessing with intent to distribute five *grams* of crack. In other words, a teaspoon of crack yielded the same penalty as a pound of powder cocaine.

The 1986 Act similarly imposed a 10-year minimum sentence for 50 grams of crack. That's about what's left in a can of soda after you've drunk down to the bottom of the logo—and, again, the penalty for that amount of crack was the same as the penalty for over *11 pounds* of powder cocaine. In other words, the Act produced a 100-to-one crack-to-powder ratio. § 841(b)(1)(A)(iii), (B)(iii) (2006).

The Sentencing Commission originally incorporated the 1986 Drug Act's 100-to-one crack-to-powder ratio into its Federal Sentencing Guidelines for even the lowest-level offenses, not just for those offenses that triggered the five- and 10-year mandatory minimum sentences. Those Guidelines instruct sentencing courts to consult the Drug Quantity Table, which "lists amounts of various

drugs" including crack and powder cocaine "and associates different amounts with different 'Base Offense Levels.'" *Dorsey*, 567 U.S. at 266 (quoting U.S.S.G. § 2D1.1). After passage of the 1986 Act, the Commission "used the 100-to-1 ratio to define base offense levels for *all* crack and powder offenses," including the lowest-level offenses punishable under § 841(b)(1)(C). *Kimbrough v. United States*, 552 U.S. 85, 97 (2007) (emphasis added). It did so 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 (emphasis added). The Sentencing Commission did this "so that the resulting Guidelines sentences" for smaller amounts that did not trigger the mandatory minimums would nevertheless "remain proportionate to the sentences for amounts that did trigger these minimums." *Id*. at 267.

After the 2010 Fair Sentencing Act, the Commission maintained this proportionality for *all* crack and powder offenses regardless of whether the offense involved enough drugs to trigger a mandatory minimum. The Fair Sentencing Act lowered the sentencing disparity between crack and powder cocaine from 100-to-one to 18-to-one by increasing the crack cocaine amounts required to trigger the five-year mandatory minimums from five grams to 28 grams and the amount required for the 10-year minimum from 50 grams to 280 grams. *See Dorsey*, 567 U.S. at 276. The Fair Sentencing Act also required the Commission to make "conforming

amendments … necessary to achieve consistency with other guideline provisions." Section 8, 124 Stat. at 2374. As this Court knows, the Commission understood this provision meant that it must "reduc[e] 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).

And the Commission did just that. The Sentencing Guidelines amendments under the Fair Sentencing Act significantly changed the offense levels of defendants sentenced for less than five grams of crack cocaine. For example, before the Fair Sentencing Act, the offense level of a defendant convicted of possessing 4.9 grams of crack cocaine was 22. *See* U.S.S.G. § 2D1.1(c) (Nov. 1, 2009) ("Drug Quantity Table").[5] After the Commission's amendments, that same defendant's offense level would be 16. *See* U.S.S.G. § 2D1.1(c) (Nov. 1, 2011) ("Drug Quantity Table").

The difference between the two offense levels is even greater than those numbers may indicate on their face. Guidelines sentences for level 16 offenders are often *less than half* the length of sentences for level 22 offenders. For a defendant with no prior criminal history, for example, that could represent the

[5] 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.

difference between a Guidelines sentence of more than four years and a Guidelines sentence of less than two.

The Commission's longstanding view that the Fair Sentencing Act modified all the statutory penalty provisions for crack offenses merits serious consideration because there is no doubt that Congress was aware of it. "[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." *United States v. Rutherford*, 442 U.S. 544, 554 n. 10 (1979) (quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940)). That's the case here.

When Congress enacted the First Step Act in 2018, it was aware that the Sentencing Commission interpreted the Fair Sentencing Act as amending *all* crack cocaine sentences. In 2015, the Commission reported to Congress that "even though the [Fair Sentencing Act] itself only changed the two mandatory minimum penalties for crack cocaine trafficking offenses," the Commission nonetheless incorporated the new 18-to-one ratio into the Guidelines for *all* offense levels.[6] The Commission spelled out its approach: it "conformed the drug guideline penalty structure for crack cocaine offenses to the amended statutory quantities," and then established offense

[6] U.S. Sentencing Comm'n, Report to the Congress: Impact of the Fair Sentencing Act of 2010 10 (2015), https://bit.ly/2LYqMe9.

levels for other quantities "by extrapolating upward *and downward*."[7] Thus, the Commission concluded that "the [Fair Sentencing Act] impacted the sentences of crack cocaine offenders … *regardless of whether a mandatory minimum applied*."[8] In other words, the Commission reported to Congress that the Fair Sentencing Act impacted the sentences of offenders sentenced under subparagraphs (A), (B), and (C) alike.

If Congress had *disagreed* with the Commission—that is, if Congress had intended to make the Fair Sentencing Act's crack cocaine changes retroactive only as to drug crimes that qualified for mandatory minimums but not for lesser crimes—it would have said so. It did not.

II. INTERPRETING THE FIRST STEP ACT TO APPLY TO ALL CRACK-COCAINE SENTENCES FURTHERS CONGRESS' GOALS.

Not only does Petitioner's reading of the First Step Act align with the Commission's interpretation,

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[7] *Id.* (emphasis added); *see also* U.S. Sentencing Comm'n, Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment 2 (2018), https://bit.ly/3jWv7et ("[U]sing the new drug quantities established by the [Fair Sentencing Act], offenses involving 28 grams or more of crack cocaine were assigned a Base Offense Level of 26, offenses involving 280 grams or more of crack cocaine were assigned a Base Offense Level of 32. The offense levels for other quantities were established by extrapolating upward and downward as appropriate.").

[8] U.S. Sentencing Comm'n, Impact, *supra* note 6, at 10.

it also best reflects Congress' bipartisan intent in enacting the law. These goals include reducing the unnecessarily harsh punishments for low-level, non-violent drug crimes and mass incarceration.

A. Petitioner's Reading Aligns with Congress' Goal to Reduce Over Sentencing.

There is an increasing consensus across the ideological spectrum that federal law suffers a "pathology" of "overcriminalization and excessive punishment." *Yates v. United States*, 574 U.S. 528, 569–70 (2015) (Kagan, J., dissenting); *see also* Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J. L. & PUB. POL'Y 715, 720 (2013) (observing that overcriminalization has "becom[e] an increasingly important issue in modern-day criminal law"). This pathology causes the criminal justice system to "vastly exceed[] the scope of what [it] may legitimately seek to address while routinely using force against peaceful people in morally indefensible ways."[9]

Despite this emerging consensus against overcriminalization, the number of federal crimes on the books has continued to grow. The United States Code contains 27,000 pages of federal crimes. Michael Pierce, *The Court and Overcriminalization*, 68 STAN. L. REV. ONLINE 50, 59 (2015). From 2000 to 2007, Congress enacted 450 additional federal criminal

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[9] Clark Neily, *America's Criminal Justice System Is Rotten to the Core*, CATO AT LIBERTY (June 7, 2020), https://bit.ly/3aUCwHc.

laws—about one new crime *per week*.[10] Scholars and commenters cannot even pin down the total number of federal crimes—estimates range from approximately 3,000 to as many as 4,500.[11]

And these estimates account only for *statutory* crimes. When regulations enforceable in criminal prosecutions are included, estimates swell to *300,000* separate federal crimes.[12] The body of criminal law grows ever more bloated with directives that are "poorly defined in ways that exacerbate their already considerable breadth and punitiveness, maximize prosecutorial power, and undermine the goal of

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[10] *See* John-Michael Seibler & Jonathan M. Zalewski, Heritage Found. Legal Memo. No. 242, *Overcriminalization in the 115th Congress*, HERITAGE FOUNDATION (Mar. 1 2019), https://herit.ag/3rTUPCY.

[11] *See*, *e.g.*, Glenn Harlan Reynolds, *Reynolds: You Are Probably Breaking the Law Right Now*, USA TODAY (Mar. 29, 2015), https://bit.ly/3aVdk35 (noting estimates range from 3,600 to approximately 4,500); Edwin Meese III, *Too Many Laws Turn Innocents into Criminals*, HERITAGE FOUNDATION (May 26, 2010), https://herit.ag/3tX8ECP (discussing ABA estimates of 3,000 to over 4,000); Harvey A. Silverglate, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT xxxvii (2009) (estimating at least 4,450); *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 7 (2009) (statement of Rep. Sheila Jackson Lee, Member, Subcomm. on Crime, Terrorism, & Homeland Security) (estimating "over 4,000" criminal offenses as of 2003).

[12] *See* Larkin, *Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y at 729; *see also* John-Michael Seibler, *The Trump Administration Should Crack Down on Silly Rules That Carry Criminal Penalties*, DAILY SIGNAL (Dec. 2, 2016), https://dailysign.al/2N7ySBO.

providing fair warning of the acts that can lead to criminal liability." Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 565 (2012).

The current era of overcriminalization highlights the importance of the First Step Act and its role in reducing crack-cocaine sentences for *all* defendants. Congress enacted the Fair Sentencing Act and First Step Act with the express aim of addressing the profoundly unfair disparity between crack-and-powder-cocaine sentences. After the 1986 Drug Act, the Sentencing Commission issued four reports to Congress that stated that the 100-to-one ratio was "too high and unjustified" and that requested "new legislation embodying a lower crack-to-powder ratio." *Dorsey*, 567 U.S. at 268–69. In its 2007 report to Congress, the Commission noted 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." U.S. Sentencing Comm'n, Report to the Congress: Cocaine and Federal Sentencing Policy 2 (2007).

Congress' enactment of both the 2010 Fair Sentencing Act and the 2018 First Step Act were its responses to this and other criticism about harsh sentences, meted out against a backdrop of overcriminalization. Congress simply cannot have

wanted defendants whose crimes' severity merits mandatory minimum sentences to be eligible for the First Step Act's retroactive relief, but not low-level offenders. This Court should reject Respondent's reading, which "would lead to absurd results [and] would thwart the obvious purpose of the statute." *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978) (quoting *Commissioner v. Brown*, 380 U.S. 563, 571 (1965)). Indeed, Respondent's contrary interpretation flies in the face of the statute's remedial purpose and would deny relief to the defendants most plainly harmed by the pernicious over sentencing of crack-cocaine offenses.

B. Interpreting the First Step Act to Apply to All Crack-Cocaine Sentences Combats the Mass Incarceration Epidemic.

When Congress enacted the First Step Act, it was also concerned about the mass incarceration epidemic in the United States—an epidemic whose primary driver has been sentences for federal drug offenders.[13] Since 1972, the rate of incarceration in the United States has more than *quadrupled* from 161 per 100,000 residents to more than 700 per 100,000

[13] 164 Cong. Rec. S7744 (daily ed. Dec. 18, 2018) (statement of Sen. Blumenthal) ("The human and financial costs of mass incarceration simply are not worth the costs. This legislation sets a marker that it is time to make a change."); *id.* at S7762 (statement of Sen. Booker) ("I want to return to the fact that we are poised to pass this bill because of the deeply, savagely broken criminal justice system that we have. Since 1980 alone, our Federal prison population has exploded by 800[] percent.… This is because of failed policies by this body that created harsh sentencing [and] harsh mandatory minimum penalties ….").

residents. *See* Jeremy Travis et al., Nat'l Research Council, The Growth of Incarceration in the United States: Exploring Causes and Consequences 33 (2014). The number of individuals on parole has also grown dramatically, jumping from 1.84 million people in 1980 to 6.47 million in 2000. *See* Loic Wacquant, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 133 (2009).

Those who have studied the root causes of these numbers have not concluded that Americans are three or four times more likely to be criminals as they were in 1972, or that law enforcement has gotten three or four times better at its job than it was in 1972. Rather, this fourfold increase incarceration is due to overcriminalization and ever-harsher sentences.[14]

Congress knew that federally sentenced drug offenders are the "biggest driver" of this rapid growth.[15] Congress was also aware that the economic and social costs of the mass incarceration epidemic are

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[14] *See, e.g.*, Travis, The Growth of Incarceration, *supra* at 3 ("In the 1960s and 1970s, a changed political climate provided the context for a series of policy choices. Across all branches and levels of government, criminal processing and sentencing expanded the use of incarceration in a number of ways: prison time was increasingly required for lesser offenses; time served was significantly increased for violent crimes and for repeat offenders; and drug crimes, particularly street dealing in urban areas, became more severely policed and punished. These changes in punishment policy were the main and proximate drivers of the growth in incarceration.").

[15] Charles Colson Task Force on Fed. Corr., Drivers of Growth in the Federal Prison Population 1 (2015), https://urbn.is/3aTuOwZ.

enormous. "The Bureau of Justice Statistics reports that the combined total of federal, state and local expenditures on corrections — which includes prisons, jails, juvenile facilities, probation and parole, and immigration detention was $80.7 billion in 2012." *See* Peter Wagner & Bernadette Rabuy, Prison Policy Initiative, Following the Money of Mass Incarceration (2017), https://bit.ly/3ar0VVA. When the costs of policing, the court system, and familial support are included, the total cost swells to over $180 billion per year. *Id.* In 2014, the average annual cost of incarcerating a single federal prisoner was a staggering $30,620.[16] (That same year, median U.S. household income was about $54,000.)

Congress also understood how these economic costs extend to convicted prisoners themselves. Former prisoners face significant "restrictions on occupational licensing and employment opportunities." Gordon Bazemore & Jeanne B. Stinchcomb, *Civic Engagement and Reintegration: Toward a Community-Focused Theory and Practice*, 36 COLUM. HUM. RTS. L. REV. 241, 242 (2004). As a result, approximately half of former prisoners remain unemployed a year after release. Travis, The Growth of Incarceration, *supra* at 233. If one sought to create a permanent underclass in American society, one could scarcely design a more effective system.

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[16] Charles Colson Task Force on Fed. Corr., Transforming Prisons, Restoring Lives 14 n.xii (2016), https://urbn.is/3prNHMM.

In enacting the Fair Sentencing Act, Congress intended to ameliorate that issue and other social costs of mass incarceration that, although harder to quantify, are no less devastating. Incarcerating parents tears families apart. *See, e.g.*, Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671 (2003). Children of incarcerated parents spend years without parental and financial support, placing them at risk for negative behavioral, academic, and emotional outcomes. Colson Task Force, Transforming Prisons, *supra* note 16, at 15. Long sentences strengthen "deviant bonds within prison" and weaken "social bonds with family and community on the outside." Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1055 (2008).[17] And the loss of ties to family and community in turn is a leading cause of recidivism. An initial prison sentence is thus often only the first step in an ever-worsening and self-reinforcing downward spiral for the convicted defendant.

Minority communities in general and Black communities in particular shoulder a wildly disproportionate share of these social and economic costs. According to one study, one in *nine* Black men

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[17] *See also* Jeffrey D. Morenoff & David J. Harding, *Incarceration, Prisoner Reentry, and Communities*, 40 ANN. REV. OF SOC. 411 (2014), https://bit.ly/3b0RLhw ("[M]ass incarceration could undermine the structure and social organization of some communities, thus creating more criminogenic environments for returning prisoners that further diminish their prospects for successful reentry.")

age 20–34 is in prison on any given day. Morenoff & Harding, *Incarceration*, *supra* note 17. Among those with less than a high school degree, the number is approximately one in *three*. *Id.* One out of every fourteen Black children nationwide had at least one parent in prison in 1999. Genty, *Damage to Family Relationships*, 30 FORDHAM URB. L.J. at 1672.

In enacting the First Step Act to apply to all crack offenses, Congress understood that these disparities are especially pronounced in the context of crack-cocaine defendants. "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 the Congress: Cocaine and Federal Sentencing Policy 103 (2002)). In 1995, the Sentencing 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." U.S. Sentencing Comm'n, Special Report to the Congress: Cocaine and Federal Sentencing Policy 154 (1995) (emphasis added).

In enacting the First Step Act, Congress well understood that the economic and social costs of mass incarceration in general, and the racial disparity between crack- and powder-cocaine sentences in particular, are not limited only to those defendants sentenced to mandatory minimums under subparagraphs (A) and (B). Congress understood that the disparity affects low-level offenders sentenced

under subparagraph (C) equally. And so it made the First Step Act applicable to all those convicted of violating § 841(a), regardless of whether their offense involved enough cocaine to trigger a mandatory sentence. Nothing suggests that low-level offenders sentenced under subparagraph (C) are undeserving of the retroactive relief afforded to other crack-cocaine offenders. Both the text of the First Step Act and the public policy informing it mandate reversal.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Eleventh Circuit.

Respectfully submitted,

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