No. 21-____

In The

Supreme Court of the United States

EDDIE HOUSTON, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a sentencing court must consider applicable sentencing factors codified in 18 U.S.C. § 3553(a) when deciding whether to impose a reduced sentence under § 404(b) of the First Step Act.

RELATED PROCEEDINGS

United States v. Houston, No. 2:07-cr-00109, ECF 80 (E.D. Cal. Aug. 4, 2008);

United States v. Houston, No. 2:07-cr-00109, ECF 85 (E.D. Cal. Nov. 4, 2015);

United States v. Houston, 2020 WL 264362 (E.D. Cal. Jan 17, 2020);

United States v. Houston, 805 F. App'x 546 (9th Cir. 2020);

United States v. Houston, 980 F.3d 745 (9th Cir. 2020).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Eddie Houston, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the Ninth Circuit is reported at 805 F. App'x 546, and reprinted in the Appendix to the Petition ("Pet. App.") at 1a. The denial of rehearing and dissent from denial of rehearing is reported at 980 F.3d 745, and reprinted at Pet. App. 13a. The decision of the district court is available at 2020 WL 264362, and reprinted at Pet. App. 5a.

JURISDICTIONAL STATEMENT

The decision of the court of appeals was issued on May 22, 2020. Pet. App. 1a. The court of appeals denied rehearing and rehearing en banc on November 20, 2020. Pet. App. 13a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 404 of the First Step Act of 2018 provides:

> (a) DEFINITION OF COVERED OFFENSE.—In this section, the term "covered offense" means 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 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010.

> (b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) were in effect at the time the covered offense was committed.
>
> (c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (2018). Other relevant statutes are reproduced in the Petition Appendix.

INTRODUCTION

Until 2010, federal law imposed upon an offender convicted of distributing crack cocaine the same mandatory penalties as an offender convicted of distributing 100 times that amount of powder cocaine. Congress enacted the Fair Sentencing Act of 2010 to

address that fundamental inequity, reducing the crack-to-powder disparity from 100-to-1 to 18-to-1. But the Fair Sentencing Act did not make those changes retroactive to offenders sentenced under the prior regime.

In 2018, Congress passed the First Step Act to fix that continuing disparity. The Act authorizes district courts to resentence drug offenders in light of the changes in the Fair Sentencing Act. Specifically, § 404(b) provides that "[a] court that imposed a sentence" for a covered drug offense "may … impose a reduced sentence as if" the relevant provisions of the Fair Sentencing Act were in effect at the time the covered offense was committed.

This case presents a recurring question about the interpretation of the First Step Act, on which the courts of appeals are openly divided: May district courts deny an eligible defendant's motion for a reduced sentence under the First Step Act without considering applicable sentencing factors codified in § 3553(a)? The answer to this question is critical. First Step Act motions are currently being adjudicated around the country. Section 3553(a) establishes the basic framework for federal sentencing proceedings. If, as some circuits hold, the First Step Act does not require district courts to consider the § 3553(a) factors, then First Step Act proceedings will be divorced from any familiar framework and vulnerable to arbitrary decisionmaking. And the disparities Congress enacted the First Step Act to eradicate will persist.

STATEMENT OF THE CASE

A. Statutory Framework

1. The crack/powder disparity originated in the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. The 1986 Act created a three-tiered scheme of mandatory penalties for drug manufacturing and distribution offenses. The tiers are pegged to the type and quantity of drugs involved in an offense.

Subparagraph A governs the largest drug quantities, listing different thresholds for different drugs. For such quantities, defendants "shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life" and to a "term of supervised release of at least 5 years in addition to such term of imprisonment." 21 U.S.C. § 841(b)(1)(A). Subparagraph B governs intermediate drug quantities (again, differing by drug). For such quantities, defendants "shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years" and to a "term of supervised release of at least 4 years in addition to such term of imprisonment." *Id.* § 841(b)(1)(B). Subparagraph C establishes a residual penalty range applicable to violations that do not trigger subparagraph A or B. *Id.* § 841(b)(1)(C).

Under the 1986 Act, subparagraph A applied to "50 grams or more of" crack cocaine and subparagraph B applied to "5 grams or more" of crack cocaine. 21 U.S.C. § 841(b)(1)(A)(iii), 841(b)(1)(B)(iii) (effective Oct. 27, 1986). By contrast, the 1986 Act required 100 times more powder cocaine to trigger the

same penalties—yielding the now-infamous "100-to-1 ratio." *Kimbrough v. United States*, 552 U.S. 85, 96 (2007).

"[T]he severe sentences required by the 100-to-1 ratio are imposed primarily upon [B]lack offenders." *Kimbrough*, 552 U.S. at 98. In fact, "[a]pproximately 85 percent of defendants" convicted during this period "of crack offenses in federal court [we]re [B]lack." *Id.* By 2004, Black defendants spent nearly as long in prison for non-violent drug offenses (58.7 months) as white defendants for violent offenses (61.7 months). *See* Bureau of Justice Stat., U.S. Dep't of Justice, Compendium of Federal Justice Statistics, 2003, Table 7.16, at 112 (2005), https://www.bjs.gov/content/pub/pdf/cfjs03.pdf.

2. Congress enacted the Fair Sentencing Act of 2010 to "restore fairness to Federal cocaine sentencing." Pub. L. No. 111-220, 124 Stat. 2372. Recognizing the "100-to-1 ratio" was "too high and unjustified," *Dorsey v. United States*, 567 U.S. 260, 268 (2012), Congress increased the crack-cocaine threshold required to trigger the mandatory penalties in 21 U.S.C. § 841(b)(1)(A) from 50 grams to 280 grams, Fair Sentencing Act of 2010, § 2, 124 Stat. 2372, 2372. Congress similarly amended 21 U.S.C. § 841(b)(1)(B) by increasing the associated crack-cocaine threshold from 5 grams to 28 grams. *See id.*

The Fair Sentencing Act, however, did not apply retroactively to defendants sentenced before its August 3, 2010 effective date. Offenders sentenced under the 1986 Act thus remained subject to their old, higher sentences and the now-rejected 100-to-1 crack/powder disparity.

3. In 2018, to address this continuing inequity, Congress passed § 404 of the First Step Act. The Act "allow[ed] prisoners sentenced before the Fair Sentencing Act … to petition the court for an individualized review of their case" and to "bring sentences imposed prior to 2010 in line with sentences imposed after the Fair Sentencing Act was passed." S. 3649, 115th Cong. (as introduced by S. Comm. on the Judiciary, Nov. 15, 2018). Enacted with broad bipartisan support, the "retroactive application of the Fair Sentencing Act" was regarded as an "historic achievement." 164 Cong. Rec. S7749 (daily ed. Dec. 18, 2018) (statement of Sen. Leahy).

Specifically, the First Step Act provides that "a 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 of 2010 … were in effect at the time the covered offense was committed." Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222 (2018). The Act defines "covered offense" to mean "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act … that was committed before August 3, 2010." *Id.* § 404(a).

B. Proceedings Below

1. *Initial Sentencing*. Petitioner Eddie Houston, Jr., is one of thousands of crack-cocaine defendants sentenced under the 1986 Act who are now eligible for resentencing under the First Step Act.

In 2007, the United States charged petitioner with, among other things, conspiracy to possess with intent to distribute at least 50 grams of cocaine base,

in violation of 21 U.S.C. §§ 841(a)(1) and 846. Pet. App. 5a. On March 3, 2008, petitioner pleaded guilty to that charge, triggering the mandatory minimums set forth in 21 U.S.C. § 841(b)(1)(A). *Id.*

The presentence report determined petitioner's base offense level was 36, attributing to him 2,831.69 grams of cocaine base and 750.3 grams of cocaine. Pet. App. 5a-6a. The presentence report added two levels for petitioner's role in the offense and subtracted three levels for his acceptance of responsibility, leaving petitioner with a total offense level of 35. Pet. App. 6a. With a criminal history category of IV, the applicable guideline range was 235-293 months. *Id.*

The district court imposed a sentence below the guideline range, varying downward to an offense level of 33 and a guideline range of 188-235 months based on issues of representation regarding petitioner's prior attorney. Pet. App. 6a. The court selected a mid-range sentence of 200 months of imprisonment, and imposed a supervised release term of 120 months. *Id.*

2. *Drugs-Minus-Two Proceedings.* In 2015, the parties filed a stipulation to reduce petitioner's sentence pursuant to Amendment 782 to the Federal Sentencing Guideline Manual, 79 Fed. Reg. 44,973, known as the "Drugs-Minus-Two Amendment." Pet. App. 6a. That amendment reduced petitioner's total offense level from 35 to 33, establishing an amended guideline range of 188-235 months. *Id.* Because a guideline policy statement prohibited a downward variance from the amended guideline range, *see* U.S.S.G. § 1B1.10(b)(2)(A) (2015), the parties urged the court to reduce petitioner's term of imprisonment to the bottom of the amended range. Pet. App. 6a. On

November 4, 2015, the new judge assigned to the case adopted the stipulation and resentenced petitioner to 188 months' imprisonment. *Id.*

3. *First Step Act Proceedings*. On November 25, 2019, petitioner moved for resentencing under the First Step Act. Pet. App. 7a. Petitioner first explained why he was eligible for relief: He was convicted for violating 21 U.S.C. § 841 before August 3, 2010, and Section 2 of the Fair Sentencing Act modified the statutory penalties for his crack-cocaine conviction. Mot. to Reduce Sentence, ECF 89, at 6-7.

The remainder of petitioner's motion explained why the court should reduce his sentence to 169 months' imprisonment and 48 months' supervised release. Petitioner presented substantial evidence that the 18 U.S.C. § 3553(a) factors weighed heavily in favor of this proposed reduction, including evidence regarding his (i) extraordinary rehabilitation record; (ii) age, which made him statistically unlikely to recidivate; (iii) realistic release plan; and (iv) abusive childhood and adolescence. Mot. to Reduce Sentence, ECF 89, at 8-12. Petitioner also explained that these terms would reflect a variance comparable to his initial sentencing. *Id.* at 8.

The government agreed petitioner was eligible for a sentence reduction under the First Step Act, and the court should consider the § 3553(a) factors in adjudicating petitioner's motion. U.S. Opp., ECF 92, at 4-5. But the government urged the court to decline to reduce petitioner's term of imprisonment because the First Step Act did not change the applicable guideline range. *Id.* at 5-7. The government did not object to reducing petitioner's term of supervised

release to 48 months because "[i]t is consistent with the purpose of the First Step Act." *Id*. at 8.

The district court denied the motion in its entirety, "declin[ing] to reduce a well-supported sentence that falls within the modified statutory penalty range and at the low end of the applicable guideline range." Pet. App. 11a. The district court did not address any of the § 3553(a) factors.

The Ninth Circuit affirmed, holding that the district court did not abuse its discretion in denying petitioner's motion. In so holding, the panel squarely rejected petitioner's argument that the district court legally erred (and thus necessarily abused its discretion) by refusing to consider the applicable § 3553(a) factors. The panel held that there is no "requirement that courts consider section 3553(a) factors" in adjudicating motions under the First Step Act and "[t]hus, the district court was not required to consider the section 3553(a) factors here." Pet. App. 3a-4a.

The court of appeals denied rehearing and rehearing en banc. Pet. App. 14a. Judge Chhabria authored a published dissent from the denial of panel rehearing. "I would grant rehearing," he wrote, "because of the possibility that we erred in resting our ruling on the conclusion that the district court was not required to consider the sentencing factors." Pet. App. 15a. Judge Chhabria noted that the courts of appeals are divided on this question—specifically, the Third, Fourth, and Sixth Circuits require consideration of the § 3553(a) factors in this context, while several other Circuits do not. *Id.*

REASONS FOR GRANTING THE WRIT

The courts of appeals are openly divided over whether a district court must consider applicable § 3553(a) sentencing factors in deciding whether to reduce an eligible defendant's sentence under the First Step Act. The Court should resolve the conflict now. This case squarely presents the issue, and the Ninth Circuit's crabbed construction of the First Step Act is incorrect. The most natural reading of the First Step Act is that a district court deciding whether to "impose a reduced sentence" must consider the § 3553(a) factors—the basic framework that governs any "imposi[tion]" of a sentence. A contrary reading would deprive the First Step Act of much of its force and invite continuing, arbitrary sentence disparities—directly contrary to Congress's objective in enacting the First Step Act.

I. The courts of appeals are intractably divided over whether a district court must consider the § 3553(a) factors in a First Step Act resentencing.

1. In this case, the Ninth Circuit held that the district court did not err by failing to consider applicable § 3553(a) factors before denying an eligible defendant's First Step Act motion. The Ninth Circuit reasoned that the sentencing finality exception applicable to First Step Act motions, 18 U.S.C. § 3582(c)(1)(B), "omits the requirement that courts consider section 3553(a) factors in modifying sentences." Pet. App. 3a. And the court found that omission dispositive, observing that other provisions in § 3582(c) specifically reference the § 3553(a) factors. Pet. App. 3a-4a. Accordingly, the panel

concluded, there is no "requirement that courts consider section 3553(a) factors" when deciding whether to impose a reduced sentence under the First Step Act. *Id.*

The Ninth Circuit's interpretation of the First Step Act accords with decisions of the First, Eighth, and Tenth Circuits. In *United States v. Moore*, 963 F.3d 725 (8th Cir. 2020), the defendant argued that "a district court—before deciding whether to impose a reduced sentence under the First Step Act—*must* consider the factors in 18 U.S.C. § 3553(a)." *Id.* at 727. The Eighth Circuit rejected that argument, explaining, "[w]hen Congress intends to mandate consideration of the section 3553 factors, it says so." *Id.* Because the First Step Act "does not mention the section 3553 factors," "[w]hen reviewing a section 404 petition, a district court may, but need not, consider the section 3553 factors." *Id.* The Eighth Circuit recently re-affirmed that holding. *See United States v. Hoskins*, 973 F.3d 918, 921 (8th Cir. 2020) ("The First Step Act 'does not mandate that district courts analyze the section 3553 factors for a permissive reduction in sentence.'") (quoting *Moore*, 963 F.3d at 727).

Agreeing with the Eighth Circuit, the Tenth Circuit has likewise held that district courts need not consider the § 3553(a) factors when ruling on a First Step Act motion. In *United States v. Mannie*, 971 F.3d 1145 (10th Cir. 2020), the Tenth Circuit reasoned that "neither [§ 404] nor § 3582(c)(1)(B) reference the 18 U.S.C. § 3553(a) factors." *Id.* at 1158, n.18. Accordingly, the court held, "they are permissible,

although not required, considerations when ruling on a [First Step Act] motion." *Id.*

Just this past month, the First Circuit joined these courts, "endors[ing]" the position "that 'a district court may, but need not, consider section 3553 factors' in a reduction in sentence." *United States v. Concepcion*, __ F.3d __, 2021 WL 960386, at *8 (1st Cir. Mar. 15, 2021) (citing *Moore*, 963 F.3d at 727). As in the Eighth and Tenth Circuits, a district court's failure to address applicable § 3553(a) factors in a First Step Act proceeding is not reversible error in the First Circuit.

2. In contrast, the Third, Fourth, and Sixth Circuits have each held that the First Step Act requires district courts to consider applicable § 3553(a) factors when adjudicating an eligible defendant's First Step Act motion.

The Fourth Circuit adopted this position in *United States v. Chambers*, 956 F.3d 667 (4th Cir. 2020). The Fourth Circuit observed, "[d]istrict courts across the country are applying the § 3553(a) factors in these First Step Act cases." *Id.* at 674. Those courts, the Fourth Circuit explained, relied on the plain language of the statute: the First Step Act "uses the verb 'impose'" and § 3553(a) "is triggered whenever a district court imposes a sentence." *Id.* (internal citations and alterations omitted). The Fourth Circuit "agree[d]," and "h[e]ld that" the factors "must apply." *Id.*

Not long after, the Sixth Circuit arrived at the same conclusion in *United States v. Smith*, 959 F.3d 701 (6th Cir. 2020) (per curiam). There, the district

court denied the defendant's motion for a sentence reduction under the First Step Act without considering several applicable § 3553(a) factors. *Id.* at 702. The Sixth Circuit vacated the order, holding that a district court "must consider the factors in § 3553(a)" when "decid[ing] whether a prisoner who is eligible for a sentence reduction" under the First Step Act "merits one." *Id.* at 702-03. The Sixth Circuit thus remanded for the district court to determine whether a sentence reduction "is appropriate *after* considering the § 3553(a) factors with reference to the purposes of the First Step Act and Fair Sentencing Act." *Id.* at 704 (emphasis added); *accord United States v. Boulding*, 960 F.3d 774, 784 (6th Cir. 2020) ("[T]he language of § 404 and our cases that interpret it[] stand for the proposition that the necessary review—at a minimum—includes … thorough renewed consideration of the § 3553(a) factors").

Most recently, the Third Circuit joined the Fourth and Sixth Circuits in *United States v. Easter*, 975 F.3d 318 (3d Cir. 2020). The district court there denied the defendant's motion for resentencing, holding that "the applicable mandatory minimum" as reduced by the First Step Act "has no effect on Easter's sentence." *Id.* at 322. The Third Circuit vacated and remanded for further consideration because the "District Court failed … to consider the § 3553(a) factors" including, for example, the defendant's post-sentence rehabilitation. *Id.*

The Third Circuit expressly noted "our sister circuits are divided" on whether such consideration is required. *Easter*, 975 F.3d at 323. But the panel "decline[d] to follow" those circuits that had "held that

consideration of § 3553(a) factors is permissive," instead endorsing the same rule as the Fourth and Sixth Circuits. *Id.* at 324. "Nothing in the First Step Act," the court explained, "directs district courts to deviate from § 3553(a)'s mandate that '[t]he court, in determining the particular sentence to be imposed, shall consider' the § 3553(a) factors." *Id.* at 320. Accordingly, "when deciding whether to exercise its discretion under § 404(b) of the First Step Act to reduce a defendant's sentence, including the term of supervised release, the district court *must* consider all of the § 3553(a) factors to the extent they are applicable." *Id.* at 326.

3. This issue has sufficiently percolated in the courts of appeals, and the split will not abate without this Court's intervention. There is an entrenched split, and the arguments on both sides of the conflict have been fully vetted; courts are now just choosing sides. *See, e.g.*, *Easter*, 975 F.3d at 323-27 (describing the conflict in detail).[1] Indeed, in dissenting from

[1] The Second, Fifth, Seventh, Eleventh, and D.C. Circuits have not yet staked out positions on the question presented. *See, e.g.*, *United States v. Jackson*, 945 F.3d 315, 322 n.8 (5th Cir. 2019) (declining to hold "the court must consider the factors in 18 U.S.C. § 3553(a)," "reserv[ing] the issue for another day"); *United States v. Shaw*, 957 F.3d 734, 742 n.2 (7th Cir. 2020) ("We leave for another day whether a court is required to take § 3553(a) factors into consideration."); *United States v. Razz*, 837 F. App'x 712, 716 (11th Cir. 2020) ("[T]his Court has not yet decided in a published opinion whether district courts are *required* to consider all of the 3553(a) sentencing factors when deciding whether and to what extent to grant a sentence reduction under the First Step Act."). But the Seventh Circuit has repeatedly encouraged district courts to consider applicable § 3553(a) factors, emphasizing that "utilizing 18 U.S.C.

denial of rehearing in this case, Judge Chhabria emphasized the sharp conflict on the question presented. Pet. App. 15a. Only this Court can establish a uniform meaning of the First Step Act.

II. The question presented is extremely important.

Whether a district court must consider the § 3553(a) sentencing factors when adjudicating a First Step Act motion is an oft-recurring question of federal law. In less than three years, courts of appeals that have addressed the issue have divided 4-3, and many more district courts have taken sides. *See supra* at 10-14. Meanwhile, thousands of defendants are eligible for First Step Act relief.[2] But because of the entrenched conflict, defendants across the country will receive materially different consideration under the same federal law solely because of geography.

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§ 3553(a)'s familiar framework in considering a motion under the First Step Act 'makes good sense.'" *United States v. Hudson*, 967 F.3d 605, 612 (7th Cir. 2020) (quoting *Shaw*, 957 F.3d at 741). The D.C. Circuit has likewise emphasized that in cases with "complex[]" records, "it is especially important that the District Court consider the section 3553(a) sentencing factors when passing on a motion for relief under section 404." *United States v. White*, 984 F.3d 76, 90-91 (D.C. Cir. 2020). And district courts in the Second Circuit have recognized the conflict and followed the approach taken by the Third, Fourth, and Sixth Circuits. *See, e.g.*, *United States v. Rose*, 379 F. Supp. 3d 223, 234 (S.D.N.Y. 2019).

[2] *See, e.g.*, U.S. Sentencing Comm'n, Sentence and Prison Impact Estimate Summary S. 756, The First Step Act of 2018 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/December_2018_Impact_Analysis.pdf.

This disparity has profound real-world import. Naturally, where a district court is not required to consider the § 3553(a) factors, it will often decline to consider them—just as the district court did here. But for the overwhelming majority of defendants eligible for resentencing under the First Step Act, that omission will be outcome dispositive.

Defendants eligible to file First Step Act motions were necessarily sentenced before August 3, 2010, and have therefore served, at minimum, 10 years of their sentences—but often much longer. *See*, *e.g.*, *United States v. Warren*, 2020 WL 3036011, at *2 (S.D. W.V. June 5, 2020) (defendant sentenced to life in 1996). They will frequently introduce compelling evidence that would need to be considered if the § 3553(a) factors apply—for instance, an extraordinary prison record and realistic release plan. *See Pepper v. United States*, 562 U.S. 476, 491-93 (2011) (explaining postsentence rehabilitation is "highly relevant to several of the § 3553(a) factors[,] … clearly relevant to the selection of an appropriate sentence … [and] may also critically inform a sentencing judge's overarching duty under § 3553(a) to 'impose a sentence sufficient, but not greater than necessary'"); 18 U.S.C. § 3553(a)(1) (courts must consider "the history and characteristics of the defendant"); *id.* § 3553(a)(2)(B)-(D) (courts must consider "the need for the sentence imposed" to "protect the public from further crimes of the defendant," and "provide the defendant with needed ... training ... or other correctional treatment"). Indeed, district courts that have granted First Step Act motions often cite the defendant's rehabilitation

and viable release plans.[3] *See*, *e.g.*, *United States v. Dorsey*, 2020 U.S. Dist. LEXIS 48536, at *6 (M.D. Fla. Mar. 20, 2020). Yet, absent this Court's intervention, a defendant's ability to benefit from such critical evidence will turn on happenstance of geography.

Ensuring even-handed application of § 404 is particularly vital given the objectives of the First Step and Fair Sentencing Acts. Congress passed these Acts to remedy the longstanding disparities in the nation's racially discriminatory crack sentencing laws. Yet absent this Court's intervention, disparate treatment of crack-cocaine offenders will continue—directly contrary to Congress's intent.

The Court should not wait to resolve this conflict. First Step Act motions are currently underway in district courts nationwide. If this Court ultimately holds that district courts must consider applicable § 3553(a) factors in resolving such motions, the government will likely argue that § 404(c) prevents defendants from bringing successive First Step Act motions, even if they were previously denied relief without any § 3553(a) consideration. *See* Pub. L. No. 115-391, § 404(c) (courts cannot conduct a First Step Act resentencing "if a previous motion made under this section to reduce the sentence was … denied after a complete review of the motion on the merits"). Timely resolution of this conflict is thus imperative,

[3] Likewise, courts denying a First Step Act motion often rely on a defendant's serious prison disciplinary record and lack of release plans. *See*, *e.g.*, *United States v. Sarraulte*, 2020 U.S. Dist. LEXIS 73019, at *10-12 (S.D. Fla. Apr. 24, 2020) (weighing defendant's 40 disciplinary violations accumulated over 24 years in prison alongside his demonstrated progress).

before the window closes on any more eligible defendants.[4]

III. This case is the right vehicle for resolving the conflict.

This case is an excellent vehicle for resolving whether the First Step Act requires district courts to consider applicable § 3553(a) factors. The district court unquestionably refused to address those factors in denying petitioner's motion for a sentence reduction. And the Ninth Circuit was able to affirm that denial only by holding that the district court had no obligation to consider those factors. Pet. App. 3a-4a. If the construction of the First Step Act adopted by the Third, Fourth, and Sixth Circuits is correct, then the judgment below must be vacated and petitioner's case remanded for resentencing.

Moreover, petitioner would have had a strong prospect of obtaining relief had the district court considered the § 3553(a) factors here. As petitioner explained in his First Step Act motion, he had an

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[4] The question presented here is distinct from the First Step Act question on which the Court granted certiorari in *Terry v. United States*, No. 20-5904: it concerns the relevant framework for resentencing eligible defendants, not the threshold question of eligibility, and it affects *all* resentencing motions under the First Step Act, not just those brought by offenders sentenced under 21 U.S.C. § 841(b)(1)(C). In fact, the grant of certiorari in *Terry* only underscores the need for review here: If the Court rules (as the United States has urged, *see* Mar. 31, 2021 Motion and Brief in *Terry*) that defendants convicted of violating 21 U.S.C. § 841(b)(1)(C) are eligible for resentencing under the First Step Act, that will only increase the number of defendants who will be subject to disparate First Step Act proceedings based on geography.

outstanding record of post-conviction rehabilitation. He received zero incident reports in prison despite being incarcerated for 13 years; he completed his GED and 37 classes; he was elevated to the lead role for his job placement; and he took part in a prison impact program to educate troubled youth in the surrounding communities. Mot. to Reduce Sentence, ECF 89, at 11-12. Petitioner further outlined his realistic release plan to live with his niece until he could find a job and afford to pay rent and bills. *Id.* at 12. And petitioner identified statistics compiled by the Sentencing Commission demonstrating at his then-age of 46, he was less likely to recidivate than younger inmates. *Id.* at 11 n.4. The government disputed none of this. Had the district court considered petitioner's "history and characteristics," 18 U.S.C. § 3553(a)(1), and "the need for the sentence imposed … to afford adequate deterrence," "protect the public," and provide "needed educational" or "correctional treatment," *id.* § 3553(a)(2)—as the Third, Fourth, and Sixth Circuits require—it would have most likely reached a different conclusion.

IV. The Ninth Circuit's decision is wrong.

The entrenched conflict over how to construe the First Step Act provides ample reason to grant certiorari regardless of which circuits have the better reading of the statute. But review is all the more warranted because the Ninth Circuit's interpretation is untenable. The Ninth Circuit—like three other courts of appeals—pronounced that a district court need not consider the § 3553(a) factors when conducting a First Step Act resentencing. That is not

even a plausible reading of the First Step Act, let alone the best reading.

1. Section 404(b) of the First Step Act provides that a "court that imposed a sentence for a covered offense may," on motion, "*impose* a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act … were in effect." (emphasis added). "Impose" is a term of art in the sentencing context: § 3553(a) is triggered whenever a district court "impos[es]" a sentence. Specifically, § 3553 governs "*Imposition* of a sentence," and subsection (a) is titled "Factors to be considered in *imposing* a sentence." 18 U.S.C. § 3553 (emphasis added). And that corresponds to the statute's substantive mandate: a "court, in determining the particular sentence to be *imposed*, shall consider" the factors enumerated therein. *Id.* § 3553(a) (emphasis added); *see also id.* ("The court shall *impose* a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.") (emphasis added). The term "shall" indicates that the statutory obligation to consider the § 3553(a) factors is "mandatory." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 661 (2007); *see* Black's Law Dictionary 1375 (6th ed. 1990) ("As used in statutes" the word "shall" "is generally imperative or mandatory.").

This Court has thus repeatedly recognized that a district court instructed to "impos[e]" a sentence must consider the § 3553(a) sentencing factors. *See, e.g.*, *Chavez-Meza v. United States*, 138 S. Ct. 1959, 1963 (2018) (a sentencing judge "must always take account of certain statutory factors," i.e., those in § 3553(a));

accord Pepper, 562 U.S. at 491. That is no less true in the First Step Act context. Had Congress intended a different result, it could easily have said so—most obviously, by providing in the First Step Act that a court may "reduce" a defendant's sentence, *see, e.g.*, 18 U.S.C. § 3582(c)(2), rather than "impose a reduced sentence," thereby triggering § 3553(a).

That Congress used the verb "impose" *twice* in the single sentence that forms § 404(b) reinforces this straightforward conclusion. Section 404(b) provides: a court "that *imposed* a sentence for a covered offense" may "*impose* a reduced sentence." Pub. L. No. 115-391 (emphases added). In the first instance, "imposed" unquestionably refers to imposition of the defendant's original sentence, when the court necessarily sentenced the defendant after considering the § 3553(a) sentencing factors. *See Chavez-Meza*, 138 S.Ct. at 1963. "[I]dentical words" used in "close proximity" "are intended to have the same meaning," *Comm'r v. Lundy*, 516 U.S. 235, 250 (1996)—and given the immediate proximity of the repetition here, the strength of that interpretative principle is at its zenith. The Ninth Circuit's reading of the second "impose" as exempt from § 3553(a)'s command—attributing different meanings to two instances of the same word within the same sentence—runs afoul of this basic rule.

What is more, a contrary reading would render the First Step Act an anomaly. Federal sentencing statutes use the verb "impose," expressly and repeatedly, to mean a sentencing proceeding that includes consideration of the 18 U.S.C. § 3553(a) factors. *See, e.g.*, 18 U.S.C. § 3582(a) ("The court, in

determining whether to *impose* a term of imprisonment … shall consider the factors set forth in § 3553(a) to the extent they are applicable.") (emphasis added); 18 U.S.C. § 3661 ("No limitation may be placed on the information concerning the background, character, and conduct of a person … which a court … may receive and consider for the purpose of *imposing an appropriate sentence*.") (emphasis added). Given this context, Congress's use of the verb "impose" in the First Step Act is particularly telling. *See Sorenson v. Sec'y of Treasury of U.S.*, 475 U.S. 851, 860 (1986) ("[I]dentical words used in different parts of the same act are intended to have the same meaning.") (internal quotation marks omitted).

2. The Ninth Circuit did not even attempt to account for Congress's use of the word "impose" in the First Step Act. Indeed, the Ninth Circuit did not consider the language of § 404 at all.

Other courts have tried to downplay the import of the term "impose" by suggesting that word in other sentencing contexts is merely "coincidental with the mandate" to consider the § 3553(a) factors, "not its cause." *Moore*, 963 F.3d at 727-28. But that ignores the operation of § 3553(a), which *requires* that district courts "shall consider" the factors set forth therein whenever "imposing a sentence." The word "impose" in § 3553(a) does not just "coincid[e]" with the mandate to consider the statutory sentencing factors; "imposing a sentence" is the very trigger for that obligation.

As to the Ninth Circuit, that court's contrary conclusion rested entirely on a three-step syllogism:

first, First Step Act resentencings are authorized by the sentence-finality exception in 18 U.S.C. § 3582(c)(1)(B); *second*, § 3582(c)(1)(B) does not expressly require courts to consider the § 3553(a) factors in modifying sentences, unlike two neighboring subsections of § 3582(c); so, *third*, the district court "was not required to consider the section 3553(a) factors here." Pet. App. 3a-4a. That analysis is flawed several times over.

To start, the language of § 3582(c)(1)(B) has no bearing here. While § 3582(c)(1)(B) generally authorizes courts to modify sentences "to the extent otherwise expressly permitted by statute" or rule, the First Step Act itself expressly authorizes a specific type of sentence reduction, with no reference to § 3582(c)(1)(B). Such an independent congressional enactment is interpreted on its own terms; it is in no sense limited by the language of a general authorization elsewhere. *See Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled ... by a general one.").

In any event, the Ninth Circuit's negative inference from the language of § 3582(c)(1)(B) is incorrect. The other sentence-finality exceptions in § 3582(c) specifically mandate consideration of the § 3553(a) factors because those provisions themselves provide substantive sources of authority for sentence modifications, along with the frameworks to use for proceedings under those provisions. *See* 18 U.S.C. § 3582(c)(1)(A); *id.* § 3582(c)(2). By contrast, § 3582(c)(1)(B) merely redirects courts to Rule 35 and any other sources of authority that may exist, without

providing any substantive standard of its own. Section 3582(c)(1)(B) thus does no more than point the district court back to the authorizing statute, here, the First Step Act, to determine what procedures are appropriate.

3. The Ninth Circuit's cramped approach likewise cannot be reconciled with the First Step Act's broad objectives. Congress enacted the First Step Act to provide a remedy for certain defendants who bore the brunt of a racially disparate sentencing scheme. *See supra* at 6, 17. Consideration of the § 3553(a) factors is the existing baseline framework for sentencing proceedings, designed to impose a modicum of consistency on inherently discretionary proceedings. *See Shaw*, 957 F.3d at 741 ("Familiarity fosters manageability, and courts are well versed in using § 3553 as an analytical tool for making discretionary decisions."). Absent that familiar framework, sentencing proceedings under the First Step Act will be unpredictable and uneven. *Rose*, 379 F. Supp. 3d at 235 ("[I]f § 3553(a) did not apply, then courts would have to develop new and untried standards to limit judicial discretion."). Sentencing courts may ignore the § 3553(a) factors entirely for some defendants and not others, inviting unwarranted disparities among similarly situated defendants.

It defies credulity that, in enacting the Fair Sentencing and First Step Acts to "restore fairness to Federal cocaine sentencing" and to permit prisoners to obtain "individualized review of their case," *see supra* at 5-6, Congress intended to authorize such arbitrary sentencing and permit district courts to willfully blind themselves to more than a decade of

the defendant's prison conduct. *Contra Pepper*, 562 U.S. at 492 ("[A] court's duty is *always* to sentence the defendant as he stands before the court on the day of sentencing.").[5]

4. Underscoring the error in the Ninth Circuit's approach, both the federal government and the Sentencing Commission have taken the opposite position, treating the § 3553(a) factors as integral to First Step Act proceedings.

As multiple courts of appeals have recognized, the federal government has several times "conceded that the § 3553(a) sentencing factors apply in the § 404(b) resentencing context." *Chambers*, 956 F.3d at 674; *see also, e.g.*, *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019) ("The government … argues that the ordinary Section 3553(a) considerations apply to determine whether to reduce the defendant's sentence."); *White*, 984 F.3d at 92-93 ("[T]he parties agree that the District Court should give proper consideration to the sentencing factors outlined in 18 U.S.C. § 3553(a) in assessing Appellants' motions for reduced sentences."); Br. in Opp. at 15, *Bates v. United States*, No. 20-535 (U.S. Jan. 22, 2021) (describing "Section 404's requirement to consider the

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[5] *See* Hailey Fuchs, *Law to Reduce Crack Cocaine Sentences Leaves Some Imprisoned*, N.Y. Times (Aug. 1, 2020) (after analyzing hundreds of First Step Act resentencing outcomes, scholar warned that sentence reductions are "not supposed to come down to who your judge is[,] [i]t's supposed to come down to the law"—but here, "[i]t's like the luck of the draw"), https://www.nytimes.com/2020/08/01/us/politics/law-to-reduce-crack-cocaine-sentences-leaves-some-imprisoned.html?smid+em-share.

Section 3553(a) factors"). Indeed, the federal government urged the district court to consider the applicable § 3553(a) factors in this very case. U.S. Opp., ECF 92, at 5 ("In exercising this discretion [under the First Step Act], the Court should consider the familiar factors in 18 U.S.C. § 3553(a).").

The Sentencing Commission has likewise instructed district courts confronting First Step Act motions to consider the § 3553(a) factors. *See* U.S. Sentencing Comm'n, Office of Educ. & Sentencing Practice, *ESP Insider Express Special Edition, First Step Act* 8 (Feb. 2019) (stating that § 404 of the First Step Act "made no changes to 18 U.S.C. § 3553(a), so the courts should consider the Guidelines and policy statements, along with the other 3553(a) factors, during the resentencing"). That reading of the First Step Act is correct—and this Court should grant review to ensure the courts of appeals uniformly apply the statute Congress wrote.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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