No. 20-1650

In the Supreme Court of the United States

CARLOS CONCEPCION,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether, when deciding if it should "impose a reduced sentence" on an individual under section 404(b) of the First Step Act of 2018, 21 U.S.C. § 841 note, a district court must or may consider intervening legal and factual developments.

PARTIES TO THE PROCEEDING

Petitioner, Carlos Concepcion, was the defendant-appellant below.

Respondent, United States of America, was the plaintiff-appellee below.

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OPINIONS BELOW

The court of appeals' opinion (Pet.App.1a-67a) is reported and available at 991 F.3d 279. The district court's opinion (Pet.App.68a-78a) is unreported and available at 2019 WL 4804780.

JURISDICTION

The court of appeals entered judgment on March 15, 2021. Pet.App.2a. The petition for certiorari was filed on May 24, 2021, and granted on September 30, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, codified at 21 U.S.C. § 841 note, 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.

STATEMENT

For nearly a quarter century, federal drug laws treated one gram of crack cocaine as equivalent to 100 grams of powder cocaine when setting statutory minimum and maximum sentences. That ratio changed in 2010 when Congress passed the Fair Sentencing Act. Section 2 of the Fair Sentencing Act substantially increased the quantity of crack cocaine needed to trigger a mandatory-minimum sentence. *See Terry v. United States*, 141 S. Ct. 1858, 1860 (2021).

The First Step Act of 2018 builds on Congress' efforts to change the laws governing crack-cocaine offenses by making the reforms of the Fair Sentencing Act retroactive for defendants sentenced before its enactment. Section 404 of the First Step Act permits defendants previously convicted of certain "covered offense[s]" involving crack cocaine to seek a sentence reduction. First Step Act of 2018, § 404(a), Pub. L. No. 115-391, 132 Stat. 5194, 5222. A district court "may," but is not required to, "impose a reduced sentence" "as if" the revised penalties for crack cocaine contained in section 2 of the Fair Sentencing Act were "in effect at the time the covered offense was committed." *Id.* § 404(b). Relief under section 404(b) is categorically unavailable in only two circumstances: if a defendant's sentence was already imposed or reduced under the Fair Sentencing Act, or if a motion under the First Step Act has previously been denied on the merits. *Id.* § 404(c).

All agree that, for any defendant convicted of a covered offense, the First Step Act at a minimum requires district courts to calculate how the reduced penalties from the Fair Sentencing Act would affect the defendant's sentence. And all agree that Congress left the decision whether to impose a reduced sentence (and if so, how

much to reduce) to the discretion of the district court. The only question here is whether, when exercising that discretion, district courts are barred by the First Step Act from considering factual changes in the defendant's circumstances, or developments in the legal landscape aside from those related to the Fair Sentencing Act.

The text of the First Step Act supplies a straightforward answer: No. Section 404(b) tasks district courts with deciding whether to "*impose* a reduced sentence" on eligible defendants. (emphasis added). By using the term "impose," Congress channeled courts' discretion through 18 U.S.C. § 3553(a), which contains the "[f]actors to be considered in *imposing* a sentence." (emphasis added). Courts are therefore required to consider the section 3553(a) factors when imposing a sentence under section 404(b). Several of the section 3553(a) factors, in turn, mandate an assessment of current facts and law by, among other things, requiring courts to account for "the history and characteristics of the defendant," and "the sentencing range established" under the Sentencing Guidelines as it exists "on the date the defendant is sentenced." *Id.* § 3553(a)(1), (4).

Even if courts are not *required* to consider the section 3553(a) factors under section 404(b), nothing in the First Step Act's text *prohibits* them from taking intervening developments into account. To the contrary, by twice stating that sentencing decisions under the First Step Act are discretionary, Congress underscored the importance of considering current facts and law. Without taking current law and facts into consideration, district courts cannot accurately perform the kind of individualized assessment that Congress called for when courts "impose" a sentence. Nor can courts sensibly or fairly exercise the sentencing

discretion vested in them without some standards to guide that discretion.

Allowing courts to consider current facts and law at the time of the sentencing proceeding also vindicates a key aim of the First Step Act: to give a second chance to individuals like petitioner Carlos Concepcion who were sentenced under the old system. And background principles of sentencing similarly support petitioner. In both initial sentencing and resentencing, courts have discretion to consider a wide range of relevant information. Nothing in the First Step Act suggests that Congress tied the hands of district courts and prevented them from exercising their traditional authority to account for current law and facts.

The First Circuit denied Mr. Concepcion relief based on its erroneous view that, after an initial determination of eligibility, the First Step Act's inquiry involves two steps: (1) an initial decision about *whether* to impose a reduced sentence, where courts can consider only the changes to a defendant's Guidelines range caused by the Fair Sentencing Act, and (2) a further decision about *how much* of a reduction is appropriate, where courts have discretion to consider current facts and law. No other court of appeals has adopted this overly complicated, multi-step approach, and it bears no resemblance to the First Step Act's text. Section 404(c) contains two—and only two—express restrictions on district courts' authority to impose reduced sentences on eligible defendants. Courts should not layer on new, atextual limitations.

Barring consideration of current law and facts when deciding whether to impose a reduced sentence would also lead to odd and unpredictable outcomes. The upshot of the First Circuit's rule is unfairness from a law intended to produce the opposite result.

A. Statutory Background

1. In 1986, Congress passed and President Reagan signed the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. The Act prescribed enhanced penalties for controlled substance offenses criminalized under 21 U.S.C. § 841(a). Congress imposed a mandatory-minimum sentence of ten years (and a maximum sentence of life) for offenses involving 5,000 grams or more of powder cocaine, and a mandatory-minimum sentence of five years for offenses involving 500 grams or more of powder cocaine. *See* Pub. L. No. 99-570, § 1002, 100 Stat. at 3207-2, to -3. By contrast, Congress required only *fifty* grams of crack cocaine to trigger a ten-year mandatory-minimum sentence, and just *five* grams of crack to trigger a mandatory-minimum five-year sentence. *Id.*

In the ensuing years, the 100-to-1 disparity between powder and crack-cocaine sentencing prompted frequent and harsh criticism. In 1995, the Sentencing Commission reported that the 100-to-1 ratio was "too great" and "create[d] anomalous results." U.S. Sent'g Comm'n, *Special Report to Congress: Cocaine & Federal Sentencing Policy*, at i (Feb. 1995). The Sentencing Commission issued three subsequent reports advising Congress that the ratio was too high, and warning that "the public had come to understand sentences embodying the 100-to-1 ratio as reflecting unjustified race-based differences." *Dorsey v. United States*, 567 U.S. 260, 268 (2012).

Congress ultimately rejected the 100-to-1 ratio in the Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2372 (2010). That Act sought "[t]o restore fairness to Federal cocaine sentencing" by substantially increasing the quantity of crack cocaine needed to trigger the mandatory-minimum sentences under 21 U.S.C. § 841(b)(1). Section 2 of the Act raised the quantities of crack cocaine necessary to

trigger the mandatory-minimum sentence from fifty grams to 280 grams and from five grams to twenty-eight grams. Section 3 eliminated the mandatory-minimum sentence for simple possession of crack cocaine.

2. The Fair Sentencing Act dramatically decreased the average sentence for crack-cocaine offenses. *See* U.S. Sent'g Comm'n, *Report to Congress: Impact of the Fair Sentencing Act of 2010*, at 23 (Aug. 2015). But Defendants previously sentenced under the old regime could not benefit. Courts held that the Fair Sentencing Act applied only to individuals sentenced after its enactment on August 3, 2010. This conclusion rested on 1 U.S.C. § 109, the federal saving statute, which provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute."

In 2011, the Sentencing Commission retroactively amended the sentencing guidelines to lower the punishment for crack-cocaine offenses. *See* U.S.S.G. Suppl. to App. C, amend. 750 (2011), made retroactive by amend. 759 (2011). The retroactive amendment allowed some defendants to move for a sentence reduction under 18 U.S.C. § 3582(c)(2), which permits courts to "reduce the term of imprisonment," when a defendant was sentenced "based on" a sentencing range that the Commission subsequently lowered. But application of the retroactive Guidelines did not help all individuals who had been sentenced under the 100-to-1 regime.

To start, even after the retroactive Guidelines amendments, "[c]ourts were still constrained . . . by the statutory minimums in place before 2010." *Terry*, 141 S. Ct. at 1861. "Many offenders thus remained sentenced to terms above what the Guidelines recommended" for crack-cocaine offenses following the Fair Sentencing Act. *Id.*

In addition, the Sentencing Commission's policy statement regarding retroactive Guidelines amendments prohibited courts from reducing a defendant's sentence "to a term that is less than the minimum of the amended guideline range." *See* U.S.S.G. § 1B1.10(b)(2)(A). The policy statement thus "severely limit[ed] the number of defendants . . . who w[ould] be able to obtain relief under § 3582(c)(2) in light of the crack-cocaine guideline amendments" by precluding reductions for most defendants who had originally received below-Guidelines sentences. *United States v. Hogan*, 722 F.3d 55, 63 (1st Cir. 2013).

Further, the Guidelines do not authorize a sentence reduction if the retroactive amendment "does not have the effect of lowering the defendant's applicable guideline range because of the operation of *another guideline or statutory provisions* (*e.g.*, a statutory mandatory minimum term of imprisonment)." U.S.S.G. § 1B1.10 cmt. n.1(A) (emphasis added). This restriction meant that defendants deemed career offenders at their original sentencing, like Mr. Concepcion, were categorically ineligible for relief if their original sentences were "based on" the career-offender Guideline, not based on the retroactive crack-cocaine Guideline. *See, e.g.*, *United States v. Caraballo*, 552 F.3d 6, 7, 12 (1st Cir. 2008).

3. The First Step Act allows thousands of additional crack-cocaine offenders to benefit from the reforms of the Fair Sentencing Act. *See Terry*, 141 S. Ct. at 1861-62. Section 404 of the First Step Act makes the Fair Sentencing Act's reforms retroactive for individuals convicted of certain "covered offense[s]." Section 404(a) defines a "covered offense" as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act . . . that was committed before August 3, 2010."

Section 404(b) permits defendants to petition the court 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." The choice to impose a reduced sentence is entirely discretionary. *See* § 404(c) ("Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.").

Section 404(c) of the Act places only two limitations on courts' authority to impose a reduced sentence. First, a sentence cannot be reduced "if the sentence was previously imposed or previously reduced in accordance with" the Fair Sentencing Act. *Id.* Second, "if a previous motion made under [section 404(b)] was . . . denied after a complete review of the motion on the merits," a defendant cannot get relief either. *Id.*

B. Procedural History

1. In 2008, Mr. Concepcion pleaded guilty to a single count of possession with intent to distribute, and distribution of, at least five grams of crack cocaine. Pet.App.3a-4a; *see* 21 U.S.C. § 841(a). Sentencing occurred in May 2009—just over a year before the Fair Sentencing Act's passage. Pet.App.4a-5a.

The district court treated Mr. Concepcion as a "career offender" under U.S.S.G. § 4B1.1(a) (2008). Pet.App.4a. The court determined that Mr. Concepcion qualified for that Guideline based on prior state convictions for two controlled-substance offenses, carjacking, robbery, and assault. *Id.*

The career-offender Guideline, then as now, ties the defendant's offense level to the statutory maximum sentence. At the time of Mr. Concepcion's offense, a defendant who possessed five grams of crack cocaine with intent to distribute and had a prior felony drug conviction faced

up to life imprisonment. 21 U.S.C. § 841(b)(1)(B)(iii) (2006). The career-offender Guideline therefore set Mr. Concepcion's offense level at 37. After a three-level adjustment for acceptance of responsibility, *see* U.S.S.G. § 3E1.1(b) (2008), the district court determined Mr. Concepcion's offense level was 34, resulting in a Guidelines range of 262 to 327 months. Pet.App.4a; BIO 4. The district court sentenced Mr. Concepcion to a below-Guidelines sentence of nineteen years (228 months) in prison. Pet.App.4a-5a; *see* C.A. J.A. 87.

2. In April 2019, Mr. Concepcion sought relief under section 404(b) of the First Step Act.[1]

Mr. Concepcion argued, and the government agreed, that he was eligible for relief because the Fair Sentencing Act modified the statutory penalties for his crack-cocaine offense. C.A. J.A. 52-53. The government also agreed that Mr. Concepcion's career-offender range was correspondingly reduced to 188 to 235 months. C.A. J.A. 56-57. Specifically, section 2 of the Fair Sentencing Act reduced the statutory maximum sentence applicable to Mr. Concepcion's offense from life to thirty years, and thereby reduced his career-offender Guidelines range from 262 to 327 months to 188 to 235 months. *Id.*; U.S. C.A. Br. 6-7.

Mr. Concepcion further argued that under current law he lacked the requisite convictions to be a career offender, and thus his accurate Guidelines range was 57 to 71 months. C.A. J.A. 97-98. This argument had two parts: First, Mr. Concepcion noted that one of the state-court drug convictions on which his career-offender status was

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[1] Mr. Concepcion initially filed his petition pro se. He later filed a reply with the aid of appointed counsel.

based had been vacated and a notice of nolle prosequi entered. C.A. J.A. 97, 103-08. Second, Mr. Concepcion contended that his convictions for carjacking, robbery, and assault no longer qualified as "crimes of violence" under the Guidelines. After *Johnson v. United States*, 576 U.S. 591 (2015), held unconstitutional the Armed Career Criminal Act's residual definition of "violent felony," the Sentencing Commission amended the career-offender Guideline's identical residual clause defining "crime of violence." U.S.S.G. Suppl. to App. C, amend. 798 (2016). Mr. Concepcion argued that his convictions did not fall within this revised definition. C.A. J.A. 97-98; *see United States v. Kennedy*, 881 F.3d 14, 24 (1st Cir. 2018) (assault); *United States v. Starks*, 861 F.3d 306, 314-15 (1st Cir. 2017) (robbery); *Beazer v. United States*, 360 F. Supp. 3d 1, 16 (D. Mass. 2019) (carjacking).

Finally, Mr. Concepcion, citing 18 U.S.C. § 3553(a), urged the district court to consider his post-offense rehabilitation, as evidenced by his pursuit of education, job training, and drug treatment while in prison. C.A. J.A. 101. He highlighted the support of a Bureau of Prisons chaplain, who detailed Mr. Concepcion's positive leadership in prison. C.A. J.A. 100. And he emphasized his ongoing, supportive relationship with his teenage daughter, who has special needs. C.A. J.A. 101.

The government "agree[d] that the analysis of the § 3553 factors, including Concepcion's post-sentencing conduct, should shape the district court's discretionary determination whether to reduce Concepcion's sentence." U.S. C.A. Br. 19. But the government argued that the court should continue to treat Mr. Concepcion as a career offender, in which case his 228-month sentence would fall within the 188-235 month Guidelines range produced by

the First Step Act's modifications. C.A. J.A. 60. The government also emphasized other "post-offense conduct," including prison disciplinary records, that purportedly undercut sentencing relief. *Id.*

3. In October 2019, the district court denied Mr. Concepcion's motion. The court held that it could not consider any intervening developments other than the changes made to the statutory mandatory-minimum sentences by the Fair Sentencing Act. Pet.App.73a-75a. The district court did not consider any post-sentencing factual developments or analyze an appropriate sentence under section 3553(a).

4. A divided First Circuit panel affirmed. Pet.App.1a-67a. The court held that, for those individuals eligible for relief, section 404(b) proceedings must occur in two stages. First, the district court must decide "whether a defendant should be resentenced." Pet.App.18a. On that question, "the district court's discretion is cabined." *Id.* The court "must place itself at the time of the original sentencing" and make the decision to permit or deny a modification "based solely on the changes that sections 2 and 3 of the Fair Sentencing Act require to be made with respect to the defendant's original" Guidelines range. Pet.App.18a-19a.

Only then, if the court in its discretion determines that a new sentence is warranted, may the district court move to the second step and determine what reduction is appropriate. At that stage, the First Circuit held, the court may "consider other factors relevant to fashioning a new sentence," including "conduct that occurred between the date of the original sentencing and the date of resentencing" and "guideline changes, whether or not made retroactive." Pet.App.19a-20a.

In dissent, Judge Barron criticized the panel majority for bifurcating the sentencing process under the First Step Act and "limiting district courts' ability to take account of intervening developments." Pet.App.26a. In his view, the Guidelines as modified by the Fair Sentencing Act provide the baseline range. Pet.App.43a. But a district court may "account for post-sentencing developments (whether factual or legal)" both "in deciding whether to reduce the defendant's original sentence" and "in deciding by how much to reduce that sentence." Pet.App.44a-45a.

SUMMARY OF ARGUMENT

I. The First Step Act does not bar district courts from considering current facts and law when deciding whether to impose a reduced sentence under section 404(b).

A. Section 404(b) makes the decision to "impose a reduced sentence" discretionary. Whenever courts are charged with exercising their discretion to "impose" a sentence, they must look to the "[f]actors to be considered in imposing a sentence" contained in 18 U.S.C. § 3553(a). *See* 18 U.S.C. §§ 3551(a)-(b), 3553(a). The First Step Act does not deviate from that rule. Thus, when courts are deciding whether to "impose" a reduced sentence under section 404(b), they must apply the section 3553(a) factors. Several of those factors specifically call for consideration of current facts and law by, for example, directing courts to consider "the history and characteristics" of the defendant and the Guidelines range applicable at the time of sentencing.

Other textual clues demonstrate that, at a minimum, courts may consider current facts and law. The First Step Act repeatedly refers to courts' discretion in choosing

whether and how much to reduce a sentence. The Act contains two limitations on that discretion: courts cannot grant relief if (1) a defendant already had the benefit of the Fair Sentencing Act, or (2) if a previous First Step Act motion was denied on the merits. Neither limitation prohibits courts from considering current facts and law when deciding whether to impose a reduced sentence.

Section 404(b)'s directive that courts can impose a reduced sentence "as if" the Fair Sentencing Act "were in effect at the time the covered offense was committed" does not change the result. The "as if" clause is necessary to overcome 1 U.S.C. § 109, which creates an interpretive presumption that Congress does not repeal federal criminal penalties already "incurred" unless it does so "expressly." This Court has long recognized that penalties are "incurred" at the time the offense is committed. Thus, by instructing courts to impose a reduced sentence "as if" the Fair Sentencing Act were in effect "at the time the covered offense was *committed*," Congress made clear its intention to overcome section 109's anti-retroactivity presumption by applying the Fair Sentencing Act to those who committed their offense before that Act became law.

The First Step Act's eligibility criteria further illustrate the breadth of district courts' discretion. Section 404(a) permits sentencing reductions even for those defendants, like Mr. Concepcion, whose original sentence already falls within the Guidelines range as modified by the Fair Sentencing Act. If the only relevant consideration is whether the Fair Sentencing Act changed the applicable Guidelines range, as the First Circuit concluded, Congress would have no reason to make such defendants eligible for relief under section 404(b).

B. The First Step Act's history and statutory design confirm that district courts are not barred from considering current facts and law. The Act's supporters emphasized that it would provide individualized relief to those most affected by the 100-to-1 ratio. Prohibiting consideration of current facts and law would undermine this goal. Such a restrictive view would also prevent judges from accounting for the anchoring effect of the prior, overly harsh penalties for crack cocaine, and the attendant consequences of those penalties on the rest of sentencing.

C. Considering current facts and law aligns with longstanding sentencing principles. In both initial sentencing and resentencing, courts are either required to consider current facts and law, or have substantial discretion to do so. Those principles dovetail with the background rule that when courts render a decision, they apply the law and the facts as they exist at the time of the decision. The First Step Act does not contravene this settled principle by mandating ignorance of present reality.

D. If any ambiguity exists, the rule of lenity favors allowing courts to consider current law and facts.

II. Arguments for cabining district courts' discretion to consider current facts and law when deciding whether to impose a reduced sentence lack merit.

A. The First Step Act does not limit courts to considering *only* the changes to defendants' statutory sentencing ranges caused by the Fair Sentencing Act. The First Circuit reached the contrary result by interpreting section 404(b)'s "as if" clause as requiring courts to place themselves back at the time of the original sentencing. In this counterfactual scenario, courts simply apply the new drug quantity ratios from the Fair Sentencing Act, but keep every other fact and legal principle frozen in amber. In

other words, the First Circuit atextually reads the word "only" into the start of the "as if" clause. The First Circuit's interpretation also fails to explain why section 404(b) focuses on the time the covered offense was "committed." Were the First Circuit correct that judges are required to mentally transport themselves backwards in time to the date of the original sentencing, section 404(b) should focus on when the defendant was "*sentenced*," not when the offense was "committed."

The First Circuit's interpretation is also internally inconsistent. The First Circuit reads the Act to forbid consideration of current facts and law in deciding whether to impose a reduced sentence. But the First Circuit allows consideration of the same information when a court is deciding how much of a reduction to grant. The First Step Act offers no textual support for this novel bifurcation.

B. Requiring courts to ignore current facts and law when deciding whether to impose a reduced sentence would produce untenable results. Under the First Circuit's view, some defendants could find themselves unable to get relief from section 404(b) depending on whether their original sentence was within or below the Guidelines range. Other defendants would be treated worse under the First Step Act than under the retroactive crack-cocaine Guidelines amendments, even though the First Step Act was intended to offer *broader* relief. And courts would in many cases have to leave in place sentences that would not be imposed if the defendant were prosecuted today.

C. The government incorrectly analogizes to *Dillon v. United States*, 560 U.S. 817 (2010). *Dillon* interpreted 18 U.S.C. § 3582(c)(2), which does not direct courts to "impose" a sentence, and which expressly restricts courts' ability to consider current law. Section 404(b), by con-

trast, lacks such textual limitations on the scope of information a court may consider when it "imposes a reduced sentence."

III. The district court in Mr. Concepcion's case did not understand that it must, or could, consider current facts and law. This failure to understand and apply the correct legal standard was accordingly an abuse of discretion.

ARGUMENT

I. Courts Are Not Prohibited from Considering Current Facts and Law When Deciding Whether to Impose a Reduced Sentence Under Section 404(b)

District courts in section 404 proceedings must—and at minimum, may—consider current facts and law when deciding both whether, and by how much, to reduce a defendant's sentence.

A. The Text of the First Step Act Does Not Prohibit Consideration of Current Facts and Law

Section 404 of the First Step Act accomplishes three objectives: It first sets out *who* is eligible for relief by defining, in section 404(a), the "covered offense[s]" that are subject to the Act. The Act next explains, in section 404(b), *what* relief is available—the opportunity for a court to "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." And the third part, section 404(c), creates "[l]imitations" on *when* relief can be granted: no relief is available when a defendant's sentence "was previously imposed or previously reduced" under sections 2 and 3 of the Fair Sentencing Act, or where a defendant's prior section 404 motion has been

"denied after a complete review of the motion on the merits." But the First Step Act does not restrict *how* courts go about exercising their traditional discretion to impose a reduced sentence.

1. The text of section 404(b) is best interpreted to require courts to consider current facts and law when deciding whether to "impose a reduced sentence."

Impose. The First Step Act gives district courts discretion to "*impose* a reduced sentence" on eligible defendants. § 404(b) (emphasis added). This Court presumes that when Congress "uses the same terminology . . . in the very same field . . . , 'it is reasonable to believe that the terminology bears a consistent meaning.'" *Tanzin v. Tanvir*, 141 S. Ct. 486, 490-91 (2020) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law* 323 (2012)). In the sentencing context, the word "impose" has a settled meaning that points district courts to 18 U.S.C. § 3553(a), entitled "factors to be considered in imposing a sentence" (capitalization altered).

Section 3553(a) dictates that "[t]he court, in determining the particular sentence to be imposed, *shall* consider" each of seven listed factors. 18 U.S.C. § 3553(a) (emphasis added). Congress doubled down on this obligation by providing in 18 U.S.C. § 3551(a)-(b) that, when a court imposes a sentence for "an offense described in any Federal statute," the "individual found guilty . . . *shall* be sentenced, in accordance with the provisions of section 3553." *Id.* § 3551(a)-(b) (emphasis added). The "[m]andatory 'shall' . . . normally creates an obligation impervious to judicial discretion." *Shapiro v. McManus*, 136 S. Ct. 450, 454 (2015) (citation omitted).

By the time of the First Step Act's enactment, this Court had repeatedly recognized that section 3553 represents a "congressional mandate[]," *Rita v. United States*, 551 U.S. 338, 357 (2007), requiring sentencing courts to consider the listed factors when imposing a sentence. *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007). Section 404(b)'s authorization for district courts to "impose a reduced sentence" invokes this mandate. Thus, "[w]hen a court 'imposes' a sentence [under section 404(b)], the text of § 3553(a)—i.e., 'Factors to be considered in *imposing* a sentence'—mandates that a district court 'shall consider' the factors set forth therein." *United States v. Easter*, 975 F.3d 318, 324 (3d Cir. 2020).

When Congress intends to restrict district courts' ability to account for certain considerations when imposing a sentence, Congress does so explicitly. For example, courts cannot consider all the section 3553(a) factors when determining whether to impose or revoke a term of supervised release. 18 U.S.C. § 3583(c) (district courts "shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)" when imposing supervised release); *id.* § 3583(e) (similar for revocation). The First Step Act does not similarly subtract from the scope of district courts' discretionary authority. The section 3553(a) factors thus must be considered when deciding whether to "impose a reduced sentence" under that Act.

The structure of section 404(b) confirms that Congress used the word "impose" intentionally to refer to the traditional sentencing criteria under section 3553(a). Section 404(b) provides that "[a] court that *imposed* a sentenced for a covered offense may . . . *impose* a reduced sentence." There is no dispute that the first use of the term "impose" refers to the initial sentencing at which the

district court considered the full panoply of section 3553(a) factors. Interpreting the second use of the word "impose" to mean something different would violate the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Pereira v. Sessions*, 138 S. Ct. 2105, 2115 (2018) (citation omitted). And that canon has special force where, as here, the words were "inserted" into the statute at the same time. *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 232 (2007). The most obvious conclusion, therefore, is that both times Congress used the word "impose," it meant the act of imposing a sentence consistent with section 3553(a).

Section 3553(a), in turn, requires a district court to consider current facts and law when imposing a sentence.

As to current facts: "[A] court's duty is always to sentence the defendant as he stands before the court on the day of sentencing." *United States v. Bryson*, 229 F.3d 425, 426 (2d Cir. 2000). This Court has recognized that "highly relevant—if not essential—to the selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." *Pepper v. United States*, 562 U.S. 476, 480 (2011) (cleaned up). In a resentencing proceeding, a judge cannot accurately account for the defendant's "history and characteristics" without considering "evidence of post-sentencing rehabilitation," which this Court in *Pepper* recognized is crucial to determining the "most up-to-date picture" of a defendant's life. *Id.* at 491-92.

As to current law: Section 3553(a) mandates consideration of "the sentencing range established" under the Sentencing Guidelines as it exists "on the date the defendant is sentenced." 18 U.S.C. § 3553(a)(4). The statute includes just one "except[ion]," for sentencing upon remand

after a direct appeal. *Id.* § 3553(a)(4)(A)(ii); *see id.* § 3742(g). But the norm for imposition of a sentence is to consider current law. Indeed, "a district court should begin *all* sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall*, 552 U.S. at 49 (emphasis added). "'[W]here Congress explicitly enumerates certain exceptions . . . additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.'" *Hillman v. Maretta*, 569 U.S. 483, 496 (2013) (citation omitted).

Considering current law in section 404 proceedings also implements other section 3553(a) factors because current Guidelines "may reflect updated views about the seriousness of a defendant's offense or criminal history." *United States v. Murphy*, 998 F.3d 549, 556 (3d Cir. 2021) (citation omitted). Without considering current Guidelines, "a district court potentially could impose a sentence 'greater than necessary,' in violation of 3553(a)." *Id.* at 557.

2. For the reasons given above, the best interpretation of section 404 is that courts are required to consider current law and facts when deciding whether to impose a reduced sentence. But other features of section 404's text show that, at a minimum, courts are not *barred* from considering factual and legal developments when deciding whether to impose a reduced sentence.

Discretion. Section 404 twice states that a district court's decision to impose a reduced sentence is discretionary. First, section 404(b) provides that a district court "may" impose a reduced sentence. Second, section 404(c) provides that "[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section."

The only limitations on a district court's discretion appear in section 404(c). That provision prevents district courts from granting relief to a defendant who already received it, or whose previous 404(b) motion was denied after review on the merits. Neither of those restrictions bars courts from considering current facts and law when deciding whether to impose a reduced sentence for otherwise-eligible defendants.

Some courts have interpreted the First Step Act to contain a third limitation on courts' discretion. This argument rests on section 404(b)'s statement that courts may impose a reduced sentence "*as if* sections 2 and 3 of the Fair Sentencing Act . . . were in effect at the time the covered offense was committed." § 404(b) (emphasis added). According to these courts, the "as if" clause means courts have "no authority" to consider any "changes in law other than sections 2 and 3 of the Fair Sentencing Act" at any point in the section 404(b) proceeding. *Kelley v. United States*, 962 F.3d 470, 476 (9th Cir. 2020).

That interpretation misreads the "as if" clause, which simply effectuates Congress' intent to "make[] th[e] changes [from the Fair Sentencing Act] retroactive." *Terry*, 141 S. Ct. at 1860. The need to include explicit statutory language making the Fair Sentencing Act retroactive stems from the federal saving statute, 1 U.S.C. § 109, which establishes a default rule that, "[u]nless Congress provides otherwise, diminished penalties in criminal statutes do not apply retroactively." *United States v. Waite*, 12 F.4th 204, 215 (2d Cir. 2021). In other words, if Congress wants to allow an already-sentenced defendant to take advantage of a later enactment reducing statutory penalties, it must say so expressly or through the later act's "plain import." *Dorsey*, 567 U.S. at 274-75. Other-

wise a defendant remains subject to the statutory sentencing range that existed when he "commit[ed] the underlying conduct that makes the offender liable." *Id*. at 272.

This Court recognized in *Dorsey* that the 2010 Fair Sentencing Act did not displace section 109's default rule for those defendants, like Mr. Concepcion, who committed their offenses and were sentenced before the Act became effective on August 3, 2010. *Id*. at 273. Thus, for those defendants, the applicable statutory penalties remained those in place at the time the underlying crack-cocaine offense was committed. Had the First Step Act simply directed courts to "impose a reduced sentence," courts might question whether Congress had met "the demanding standard for repeal by implication" of all the statutory penalties in effect as of the offense date (in Mr. Concepcion's case, 2007). *Id.* at 290 (Scalia, J., dissenting). Absent repeal, those statutory penalties, including the mandatory-minimum sentences, would still control.

The "as if" clause's explicit reference to the time the offense was "committed" "is a clear attempt by Congress to avoid th[e] default rule" at issue in *Dorsey*. *United States v. Collington*, 995 F.3d 347, 357 (4th Cir. 2021). The clause allows a court to deviate from even the mandatory-minimum sentences that applied to defendants like Mr. Concepcion. The clause does not, however, limit the extent of the district court's discretion to consider information other than the changes made by the Fair Sentencing Act.

Covered offenses. Section 404(a) identifies the class of eligible defendants by defining "covered offense" as a violation of any federal law whose "statutory penalties . . . were modified by section 2 or 3 of the Fair Sentencing Act." By defining "covered offense[s]" based on the mere modification of statutory penalties, Congress

swept into the First Step Act even those defendants for whom the Guidelines range remains the same after application of the Fair Sentencing Act. If Congress intended for section 404 proceedings to be mechanical exercises, it could easily have specified that only defendants whose modified Guidelines range was lower than their original sentence could receive relief. Yet Congress took a different path, broadly calling for district courts to consider requests for sentencing reductions from any defendant who *might have been* affected by the disparity between crack and powder cocaine. It makes no sense for Congress to have created such a system if Congress intended the Fair Sentencing Act's changes, and those changes alone, to drive the decision whether to impose a reduced sentence.

Indeed, cases involving a defendant whose modified Guidelines range and original sentence overlap illustrate well why courts cannot meaningfully exercise their discretion to "impose a reduced sentence" *without* considering the full picture of current facts and law. Take Mr. Concepcion's case. As noted, *supra* p.10, Mr. Concepcion's original sentence was 228 months, and the First Step Act concededly modifies both his statutory range (from 10 years to life, to 0-30 years) and his career-offender Guidelines range (from 262 to 327 months down to 188 to 235 months). How is a court presented with these bare facts, and nothing else, to decide whether to impose a reduced sentence, and by how much? Should the court ask whether the difference between the original sentence (228 months) and the bottom of the new statutory range feels big enough to warrant a change? Or look at how close the original sentence is to the top of the modified statutory range? Or something else entirely?

The most natural approach is the one courts follow when making other decisions about what sentence to "impose," that is, to allow judges to exercise their judgment after looking to intervening developments, like post-sentencing rehabilitation, the defendant's health status, or changes in the law like a difference in career-offender status. Any other result would rob district courts of the ability to make informed decisions about whether to impose a reduced sentence on the limited class of defendants covered by the First Step Act.

B. The First Step Act's History and Statutory Design Confirm that Current Facts and Law Can Be Considered

The Act's history and design support permitting district courts to consider current facts and law.

1. In 1986, Congress "set the crack-to-powder mandatory minimum ratio at 100 to 1." *Dorsey*, 567 U.S. at 268. "During the next two decades, the [Sentencing] Commission and others in the law enforcement community strongly criticized" that sentencing regime and attempted to rectify it. *Id.* The Commission issued four reports imploring Congress to reduce the 100-to-1 crack/powder ratio, calling it ineffective, unjustified, and inconsistent with congressional objectives. *See id.*

In 2010, Congress passed the Fair Sentencing Act and reduced the mandatory-minimum ratio to 18-to-1 among other measures. Pub. L. No. 111-220, § 2, 124 Stat. at 2372. The First Step Act made those reforms retroactive. Congress passed the First Step Act to relieve "individuals sentenced unjustly as a result of the disparity between crack cocaine and powder cocaine." 164 Cong. Rec. H10363 (daily ed. Dec. 20, 2018) (statement of Rep. Jeffries). The task was left to "not legislators but judges who

sit and see the totality of the facts." 164 Cong. Rec. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Booker). Judges were charged with providing an "individualized review based on the particular facts of the[] case" and given "tools to better see that justice is done." 164 Cong. Rec. S7748 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar).

"[I]t makes sense that Congress would grant district courts greater sentencing authority to determine whether and how to reform individual sentences," including the authority to consider current law and facts. *Collington*, 995 F.3d at 355. Indeed, it is difficult to understand how courts could exercise their responsibility to "look at an individualized case and decide what is best for public safety and what is best for the community" without considering the most up-to-date facts and law. *See* 164 Cong. Rec. S7748 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar). Suppose a defendant engages in repeated acts of violence in prison. Is a district court vested with discretion required to ignore that fact when deciding whether to impose a reduced sentence? The government certainly does not think so. *See infra* pp.38-39.

Moreover, Congress would have understood the special importance of post-sentencing developments for First Step Act defendants. When Congress enacted the First Step Act in December 2018, the class of individuals who could benefit from its retroactive reforms were sentenced *at least* eight-and-a-half years earlier—before the Fair Sentencing Act of 2010 became effective on August 3, 2010. Congress surely appreciated that there would be changes in these defendants' circumstances, and very likely changes in sentencing law and practice, by the time the section 404 proceeding occurred.

Consider career offenders. Since 2010, the number of offenses that qualify a defendant for career offender status has decreased significantly. *See* U.S.S.G. Suppl. to App. C, amend. 798 (2016). District courts' assessments of the severity of the career-offender designation have also evolved. Today, imposing a within-Guidelines sentence on a defendant designated a career offender is the exception, not the rule. *See* U.S. Sent'g Comm'n, *Quick Facts—Career Offenders FY 2020*, at 2 (reporting that just 19.6% of career offenders received a within-Guidelines sentence).

Or take the case of a defendant who was originally sentenced before this Court held in *United States v. Booker*, 543 U.S. 220 (2005), that the Guidelines are advisory. Mandatory Guidelines were certainly part of the "applicable legal landscape" at pre-*Booker* sentencings. Pet.App.18a. But Congress enacted the Fair Sentencing Act after *Booker*, so a "district court imposing a retroactive sentence as if the Fair Sentencing Act were in effect is also operating in a world in which the Guidelines are no longer mandatory and Section 3553(a) guides sentencing decisions." *United States v. Moyhernandez*, 5 F.4th 195, 212 (2d Cir. 2021) (Pooler, J., dissenting).

If Congress wanted courts to ignore these kinds of intervening developments, it would have said so. Ignoring legal changes between the initial sentencing and the Fair Sentencing Act's enactment "requires imagining an alternate reality" that never existed. *See id.* Congress did not require courts to evaluate section 404(b) motions through the looking-glass.

2. The decision below concluded that the First Step Act's goal to "correct the unequal treatment of crack cocaine offenses" would be frustrated if district courts could impose a reduced sentence based on present-day law and facts that would not apply to defendants who are ineligible

for First Step Act relief. Pet.App.15a. But Congress *wanted* to single out those like Mr. Concepcion for retroactive relief because they were subjected to overly harsh crack-cocaine sentences. *E.g.*, 164 Cong. Rec. S7021-22 (daily ed. Nov. 15, 2018) (statement of Sen. Durbin).

The First Circuit's objection also defines too narrowly the problem Congress was attempting to fix. Defendants sentenced under the 100-to-1 ratio were affected not just by the disparity itself, but by the cascading consequences that disparity had on sentencing and defendants' Guidelines ranges. For example, many defendants were subject to mandatory-minimum sentences, which in turn substantially inflated the applicable Guidelines ranges. The anchoring effect that these increased Guidelines would have had is "real and pervasive." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016). In *Molina-Martinez*, the Court recognized that when a district court "mistakenly [applies] an incorrect, higher Guidelines range," there will be, "[i]n most cases," "a reasonable probability of a different outcome" under the correct Guidelines range. *Id.* That is true even where the "correct sentencing range overlaps with [the] incorrect range," because the Guidelines establish "the essential framework . . . for sentencing proceedings." *Id.* at 1344-45.

The same principle holds true here. Simply adjusting the statutory penalties to match those in effect due to the Fair Sentencing Act does not account for the myriad other ways in which the 100-to-1 ratio affected "the essential framework" of the original sentencing. As the government has acknowledged, the same anchoring effect that affected crack defendants' original sentencings "could have infected the sentence-reduction proceedings," even for offenders facing the same statutory penalties. U.S. Br. 42, *Terry*, 141 S. Ct. 1858. Nothing in the First Step Act's

text or history suggests that Congress wanted to preclude courts from considering, and correcting for, those spillover effects.

In any event, it is the First Circuit's approach that would exacerbate sentencing disparities. Congress adopted the section 3553(a) factors to promote uniformity in sentencing by rectifying "the absence of general legislative guidance concerning the factors to be considered in imposing sentence." S. Rep. No. 98-225, at 74-75 (1983). Requiring or permitting district courts to consider current facts and law through the lens of the section 3553(a) factors furthers that goal by "(1) mak[ing] sentencing proceedings under the First Step Act more predictable to the parties, (2) more straightforward for district courts, and (3) more consistently reviewable on appeal." *Easter*, 975 F.3d at 325 (internal quotation marks omitted); *see also United States v. Shaw*, 957 F.3d 734, 741 (7th Cir. 2020) ("Familiarity fosters manageability, and courts are well versed in using § 3553 as an analytical tool for making discretionary decisions.").

But if district courts are barred from considering the 3553(a) factors when deciding whether to "impose a reduced sentence," these familiar standards go out the window. Parties will have no idea how the district court will exercise its discretion, or whether the sentencing court will even hear their arguments. Likewise, appellate courts reviewing such sentences have no standards to say whether and when a district court erred in its consideration of arguments the district court was not obligated to consider in the first place. The upshot is the same standardless discretion the Sentencing Reform Act and section 3553 were designed to constrain.

C. Established Principles of Sentencing Law and Judicial Decisionmaking Support Allowing Consideration of Current Facts and Law

Interpreting section 404(b) to permit consideration of current facts and law aligns with basic federal sentencing principles and comports with the longstanding rule that courts consider current law when deciding cases.

1. Congress has given courts discretion to consider any and all information concerning a defendant when they impose an initial sentence, directing that "[n]o limitation shall be placed on the information concerning the background, character, and conduct" of a defendant that a district court may "receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661. This directive encompasses the most up-to-date facts concerning a defendant. *See Pepper*, 562 U.S. at 491-92.

Courts routinely exercise the broad authority granted by Congress to consider current facts. For example, in *United States v. Smith*, then-Judge Gorsuch noted that section 3661 precludes "willful[] blind[ness]" to other sentences the defendant will be serving. 756 F.3d 1179, 1181-82 (10th Cir. 2014). Any other result would transform sentencing "from a searching and fact-sensitive inquiry aimed at finding a fitting punishment into an enterprise built on a fiction, even a suspension of disbelief." *Id.* at 1182.

Congress has spoken with similar clarity on consideration of law, mandating that a district court "shall consider" the "sentencing range . . . in effect on the date the defendant is sentenced." 18 U.S.C. § 3553(a)(4)(A)(ii). This range must be "correctly calculate[ed]," *Peugh v. United States*, 569 U.S. 530, 536 (2013) (quoting *Gall*, 552 U.S. at 49), which inherently requires using the most up-to-date case law impacting the Guidelines. A district court

imposing an initial sentence would consider the Guidelines and case law in effect *on that day* when determining whether a defendant qualified as a career offender for sentencing purposes. *See id.* at 537-38. A defendant's qualification as a career offender can increase the applicable Guidelines range many years. Here, for instance, career-offender status increased Mr. Concepcion's original Guideline range by well over a decade.

The default rule requiring use of current Guidelines and case law is superseded only when new Guidelines—not in place at the time of the crime—would operate to *increase* the sentencing range in violation of the *Ex Post Facto* Clause. *See Peugh*, 569 U.S. at 544; *see* U.S.S.G. § 1B1.11. Thus, absent a constitutional directive, consideration of new Guidelines and case law is the norm in the sentencing framework.

2. As with initial sentencings, consideration of current facts and law is also the baseline any time a court *re*-sentences a defendant.

During resentencing following direct appeal, circuits often default to plenary resentencing. *E.g.*, *United States v. West*, 646 F.3d 745, 749 (10th Cir. 2011); *see also United States v. Campbell*, 168 F.3d 263, 265-66 (6th Cir. 1999) (collecting cases). Under this rule, "unless the district court's discretion is *specifically cabined*, it may exercise discretion on what may be heard." *West*, 646 F.3d at 749 (emphasis added). That discretion necessarily includes consideration of current facts. *Pepper*, 562 U.S. at 505-06. On law, Congress has explicitly limited courts to consideration of Guidelines "in effect on the date of the previous sentencing." 18 U.S.C. § 3742(g)(1). But, courts must still consider current legal precedent. *See, e.g.*, *United States v. Steward*, 598 F.3d 960, 962 (8th Cir. 2010).

Even if a resentencing is not plenary, consideration of current law and facts is the norm. Under a "limited remand," courts may still consider "new arguments" made relevant by the appellate decision or "facts that did not exist at the time of the original sentencing," such as rehabilitation. *United States v. Hunter*, 809 F.3d 677, 681 (D.C. Cir. 2016) (citation omitted). And, though the law of the case doctrine may restrict a court's discretion by precluding arguments not raised on appeal, *United States v. Adams*, 746 F.3d 734, 744 (7th Cir. 2014), it does not limit authority to consider new law or evidence that make a prior decision "'clearly erroneous'" and "'manifest[ly] injust[].'" *See Pepper*, 562 U.S. at 506-07 (citation omitted); *United States v. Garcia-Ortiz*, 904 F.3d 102, 106 (1st Cir. 2018) (considering issue not previously raised because "controlling law materially change[d] after the case [was] remanded"). Thus, a baseline principle is that courts can review critical updates in facts or law, regardless of the scope of resentencing.

District courts possess similar latitude when resentencing after a successful post-conviction motion. Section 2255 authorizes district courts to "resentence" a defendant entitled to relief. 28 U.S.C. § 2255(b). Section 2255 does not restrict the word "resentence," and thus grants "'broad and flexible power'" to consider facts and issues beyond those challenged in the section 2255 motion. *See United States v. Handa*, 122 F.3d 690, 691 (9th Cir. 1997) (citation omitted). These powers include applying current Guidelines. *E.g.*, *United States v. Fluker*, 891 F.3d 541, 549 (4th Cir. 2018).

"[W]hen Congress enacts statutes, it is aware of relevant judicial precedent." *Ryan v. Gonzales*, 568 U.S. 57, 66 (2013) (quoting *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010)). Against the backdrop of expansive sentencing

authority, Congress would expect courts to exercise the same authority absent contrary instruction. No such limiting instruction appears in the First Step Act.

3. Congress was also presumably aware of the settled notion that courts "decide cases before them based upon their best current understanding of the law." *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991) (opinion of Souter, J.).

This Court has long recognized that judges "must 'decide according to existing laws.'" *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995) (quoting *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801) (Marshall, C.J.)). Courts thus do not impose "selective temporal barriers" when resolving a case. *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 97 (1993). That rule reflects the "basic norm[] of constitutional adjudication" that courts apply law to controversies. *Id.* (citation omitted). To ignore a new enactment would "be a direct infraction of that law, and of consequence, improper." *Schooner Peggy*, 5 U.S. (1 Cranch) at 110.

These general rules form part of the "'backdrop'" of "unexpressed presumptions" against which Congress enacted the First Step Act. *See Bond v. United States*, 572 U.S. 844, 857 (2014) (citation omitted). Congress does not override such background rules by implication. *See Kimbrough v. United States*, 552 U.S. 85, 103 (2007).

D. The Rule of Lenity Supports Mr. Concepcion's Interpretation of Section 404(b)

To the extent doubt remains, "where text, structure, and history fail to establish that the Government's position is unambiguously correct," this Court should "apply the rule of lenity" and resolve any lingering ambiguity in Mr. Concepcion's favor. *United States v. Granderson*, 511

U.S. 39, 54 (1994); *see United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). That rule applies to substantive criminal statutes and "sentencing provisions" alike. *Taylor v. United States*, 495 U.S. 575, 596 (1990).

"[I]nterpretive asymmetries" lend lenity "special force" here. *See Dean v. United States*, 556 U.S. 568, 585 (2009) (Breyer, J., dissenting). All Mr. Concepcion asks is that the district court, at minimum, have the opportunity to consider new developments when deciding whether to impose a reduced sentence. Nothing "require[s]" the court to impose a reduced sentence. First Step Act § 404(c). Conversely, even in the most "unusual case" where new information clearly would affect the court's exercise of discretion, the First Circuit's rule categorically bars district courts from considering that information in deciding whether to impose a new sentence. *Cf. Dean*, 556 U.S. at 585-86 (Breyer, J., dissenting).

People should not "languish[] in prison unless the lawmaker has clearly said they should." *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *Benchmarks* 196, 209 (1967)). Here, Congress has clearly said the opposite.

II. Arguments Against Consideration of Current Facts and Law When Deciding Whether to Impose a Reduced Sentence Are Meritless

The First Circuit prescribed a novel, two-step approach that forbids consideration of current facts and law when a district court decides *whether* to impose a reduced sentence under the First Step Act, before allowing such consideration when determining *what* new sentence to impose. This argument contorts the statutory text, and also produces bizarre and unworkable consequences. For its

part, the government (at BIO 12-13, 15) analogizes the "as if" clause to the statutory language at issue in *Dillon*, 560 U.S. 817. That argument likewise does not withstand scrutiny.

A. The First Circuit's Two-Step Approach Is Inconsistent with the Statutory Text

1. The First Circuit's argument for bifurcating the inquiry under section 404(b) rests on a misreading of the language permitting courts 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." § 404(b) (emphasis added). As explained above, *supra* pp.22-23, the most natural interpretation of that clause is that it effectuates Congress' intent of making sections 2 and 3 of the Fair Sentencing Act retroactive. The First Circuit's competing interpretation rewrites the First Step Act by adding the word "only" to the statute, such that a district court may impose a reduced sentence *only* as if sections 2 and 3 of the Fair Sentencing Act were in effect when the offense was committed. This limitation transforms section 404(b) into a time-traveling thought experiment that, as the First Circuit put it, "place[s]" a district court "back at the date of the offense, altering the legal landscape *only* by resort to sections 2 and 3 of the Fair Sentencing Act." Pet.App.17a (emphasis added). But Congress did not use the word "only" in section 404(b).

Nor would it make sense to read the "as if" clause to mandate that a district court "imagine itself to be inhabiting an earlier point in time in all respects." Pet. App.45a n.9 (Barron, J., dissenting). "[T]he only time frame referenced in the 'as if' clause is the time of the commission of the offense." *Id.* "Congress could not have intended to direct a district court in a § 404(b) proceeding to imagine what sentence it would make sense to impose at a time

when even the original sentencing proceeding had not yet occurred." *Id.* Had Congress actually intended to lock district courts into a past time frame, it would have said that courts could sentence defendants "as if" the Fair Sentencing Act were in effect at the time the defendant *was sentenced* for the covered offense.

The First Circuit's interpretation thus fails to give effect to Congress' deliberate reference to the time "the covered offense was committed." By contrast, under petitioner's interpretation, Congress' focus on the time "the covered offense was committed" makes sense because that is the point in time relevant to the retroactivity analysis under 1 U.S.C § 109. It would be perverse to read the "as if" clause as a *prohibition* against reduction when it was meant to *allow* for retroactive application of the First Step Act and thereby benefit defendants whose offenses were committed prior to its enactment.

The First Circuit compounded its error by misreading the "as if" clause as focusing on "the changes that sections 2 and 3 of the Fair Sentencing Act require to be made with respect to the defendant's original *GSR*," or Guidelines sentencing range. Pet.App.19a (emphasis added). Under section 404(a), a defendant's eligibility for sentencing reduction does not depend on changes to his *Guidelines* range, but rather on "whether the Fair Sentencing Act modified *the statutory penalties* for petitioner's offense." *Terry*, 141 S. Ct. at 1862 (emphasis added). Not every change to a defendant's statutory penalties will produce a change in the Guidelines.[2] Were the First Circuit correct

[2] For example, before the Fair Sentencing Act, defendants with a prior felony drug conviction under 21 U.S.C. § 841(b)(1)(A) faced a statutory range of twenty years to life. After the Fair Sentencing Act, defendants convicted of fifty grams of crack with a prior felony drug conviction face a statutory range of ten years to life under section

that the decision whether to impose a reduced sentence turns *exclusively* on the changes made to a defendant's Guidelines range by the Fair Sentencing Act, it is hard to see why Congress would have defined "covered offense[s]"—and therefore covered offenders—so broadly. Despite recognizing that the First Step Act's text "vests great discretion in the district court," Pet.App.18a, the First Circuit nullified that discretion in a wide swath of cases through its errant focus on the Fair Sentencing Act's effects on Guidelines ranges.

Textual problems aside, the First Circuit's interpretation is also internally inconsistent. Far from dictating that section 404 proceedings must take place "only as if" the Fair Sentencing Act had been in effect when the offense was committed, the First Circuit allows district courts, once they decide to impose a reduced sentence, to "consider other factors relevant to fashioning a new sentence." Pet.App.19a. Such discretionary consideration of present-day law and facts could not be possible if the "as if" clause limited the First Step Act to a mechanical application of Fair Sentencing Act adjustments only.

2. The Sentencing Commission and the government have not embraced the First Circuit's bifurcated approach, either.

The Sentencing Commission has recommended that courts applying section 404(b) "consider the guidelines

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841(b)(1)(B). These defendants are eligible for relief under section 404(b) because section 2 of the Fair Sentencing Act modified the statutory penalties for their offenses. *See Terry*, 141 S. Ct. at 1863. But for career offenders who come within this group, because the statutory maximum sentence remains life, the career-offender Guideline range does not change, even though the statutory range has been "modified." *See* U.S.S.G. § 4B1.1

and policy statements, along with the other 3553(a) factors, during the resentencing," without drawing any distinction between the "whether" and "how much" questions. U.S. Sent'g Comm'n, *ESP Insider Express Special Edition: First Step Act* 8 (Feb. 2019).

Similarly, the government has repeatedly recognized—including in this case—that the section 3553(a) factors bear on both the amount of sentence reduction under section 404(b) *and* whether to impose a reduced sentence in the first place.

It was the government that first introduced post-sentencing developments to Mr. Concepcion's section 404 proceedings. Mr. Concepcion's pro se motion focused only on his eligibility for a reduced sentence. C.A. J.A. 46-53. The government then told the district court that it "may consider post-offense conduct, either positive or negative, in assessing whether to impose a previously imposed sentence," and asked the court to consider Mr. Concepcion's prison disciplinary record. C.A. J.A. 60. The government adhered to this view in the First Circuit: "both the government and the defendant agree that the analysis of the § 3553 factors, *including Concepcion's post-sentencing conduct*, should shape the district court's discretionary determination *whether* to reduce Concepcion's sentence." U.S. C.A. Br. 19 (emphases added); *see also id.* at 20-21.

Across the circuits, the government has consistently articulated the view that courts may consider the section 3553(a) factors, and with them, current facts, when deciding whether to impose a reduced sentence. The government told the Fifth Circuit that "the ordinary Section 3553(a) considerations apply to determine whether to reduce the defendant's sentence." *United States v. Hegwood*, 934 F.3d 414, 418 (2019). It told the Fourth Circuit that "[i]n exercising its discretion under the First Step

Act, a district court should consider the sentencing factors described in 18 U.S.C. § 3553(a)." U.S. Br. 24, *United States v. Foster*, No. 20-7745 (Mar. 15, 2021). It told the Eleventh Circuit that "post-sentencing conduct could be properly considered by the district court in determining whether to reduce Denson's sentence under the First Step Act." U.S. Br. 20, *United States v. Denson*, 963 F.3d 1080 (2020). Other examples abound.[3]

Likewise, the government has recognized that district courts may consider legal developments as well. As the government told the Eighth Circuit:

> While the career offender guideline calculation cannot be reconsidered under the First Step Act, the district court may take into account the fact that the defendant would not qualify as a career offender if sentenced today as part of the consideration of sentencing factors pursuant to 18 U.S.C. § 3553(a).

U.S. Br. 28, *United States v. Harris*, 960 F.3d 1103 (8th Cir. 2020). These consistent, contrary readings of the First Step Act demonstrate the implausibility of the First Circuit's two-step approach.

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[3] *E.g.*, U.S. Br. 11-12, *United States v. Sutton*, 962 F.3d 979 (7th Cir. 2020) ("When exercising its discretion whether to grant relief to a defendant . . . , a district court should also consider the sentencing factors set forth in 18 U.S.C. § 3553(a)."); U.S. Br. 8, *United States v. Phillips*, 797 F. App'x 516 (11th Cir. 2020) ("[T]he district court should decide in its discretion whether to reduce the movant's sentence as if § 2 and § 3 of the Fair Sentencing Act applied and after considering the § 3553(a) factors."); *see also* U.S. Br. 25, *United States v. Gee*, 843 F. App'x 215 (11th Cir. 2021) ("Nothing in Section 404 establishes a rigid line between 'eligibility' and 'merits' considerations.").

B. The First Circuit's Approach Would Produce Arbitrary and Unpredictable Outcomes

The First Circuit's bifurcated approach also produces anomalous outcomes. This Court should not lightly infer that Congress intended to create "new anomalies" in the already disproportionate world of crack-cocaine sentencing. *See Dorsey*, 567 U.S. at 278.

Unequal opportunities for reduction. By narrowing the relevant considerations only at step one, the First Circuit renders defendants who initially received below-Guidelines sentences, like Mr. Concepcion, worse off than defendants who received higher sentences to start.

At his 2009 sentencing, Mr. Concepcion's Guidelines range was 262 to 327 months. Pet.App.68a. The district court imposed a below-Guidelines 228-month sentence. Pet.App.4a-5a. As all agree, the Fair Sentencing Act modified Mr. Concepcion's Guidelines range by reducing his statutory penalties; even under the career-offender Guideline, his recalculated range is now 188 to 235 months. BIO 7. Because the original 228-month sentence fell within that new, modified range, the district court declined to impose a new sentence. Pet.App.71a. Under the First Circuit's two-step approach, the district court was therefore correct to refuse to consider legal and factual developments.

But suppose Mr. Concepcion originally received a within-Guidelines sentence, say 320 months. A district court considering only the changes made by the Fair Sentencing Act might well decide to impose a reduced sentence. After all, 320 months is now a seven-year upward variance from the range dictated by the Fair Sentencing Act, even under the career-offender Guideline.

Having decided to impose a new sentence, the district court, in the First Circuit's view, could then freely consider the section 3553(a) factors including legal and factual developments. Pet.App.19a-20a. Taking into account the lower Guidelines range today (57 to 71 months) and Mr. Concepcion's rehabilitation, the district court might well decide that a sentence far lower than 228 months was appropriate. Thus, the district court's 2009 decision to vary downwards limited the pool of information it could consider in 2019 and left Mr. Concepcion worse off than if he had initially received a within-Guidelines sentence.

That distinction makes no sense. A defendant's initial sentence of course bears on whether a district court should impose a yet-lower new sentence, and how much lower it should be. But the initial sentence has nothing to do with the *information* the district court should be allowed to consider in deciding whether to impose a lower sentence. The opportunity to have current facts and law considered should not turn on the happenstance of whether the original sentence was above, within, or below the Guidelines.

The First Circuit's approach also treats defendants who move for relief under section 404(b) worse than those who obtained relief under 18 U.S.C. § 3582(c)(2). As explained above, *supra* p.7, section 3582(c)(2) allows defendants to seek a "reduce[d]" sentence when a Guidelines range has been subsequently lowered. After the Fair Sentencing Act, retroactive Guidelines changes allowed some but not all crack-cocaine offenders to seek relief under this provision. Section 3582(c)(2)'s limitations were one of the factors spurring Congress to pass the First Step Act. *Terry*, 141 S. Ct. at 1861-62; *id.* at 1866-67 (Sotomayor, J., concurring in part).

In a section 3582(c)(2) proceeding, the Sentencing Commission directs courts to consider "post-sentencing conduct" in determining both "whether a reduction" is warranted and "the extent of such reduction." U.S.S.G. § 1B1.10 cmt. n.1(B)(iii). So in the First Circuit, defendants proceeding under section 3582(c)(2) may ask district courts to consider their post-sentencing conduct on the "whether" question, but those defendants proceeding under section 404(b) may not. Given that Congress intended the First Step Act to surpass the relief available under section 3582(c)(2), it makes no sense for Congress to make section 404(b) *more* restrictive than section 3582(c)(2). Congress surely did not intend "for people who were relying on the Commission's response to a disparity to be better off than people relying on Congress's own response to that disparity." Pet.App.55a (Barron, J., dissenting); *see* Pet.App.50a-51a.

Perpetuating incorrect sentences. Excluding consideration of subsequent judicial decisions when deciding whether to impose a reduced sentence raises additional problems by forcing district courts to leave in place even sentences that indisputably could not be imposed today. It is "'the province and duty of the judicial department to say what the law *is*,'—not what the law *shall be*." *Harper*, 509 U.S. at 107 (Scalia, J., concurring) (citation omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Courts do not "decree[]" new rules of law. *James B. Beam*, 501 U.S. at 549 (Scalia, J., concurring in the judgment). When the Court articulates a legal rule, "the underlying right necessarily pre-exists [the Court's] articulation of the new rule." *Danforth v. Minnesota*, 552 U.S. 264, 271 (2008). In other words, overruled interpretations

do not become "*bad law*," they were "*not law*." *See Harper*, 509 U.S. at 107 (Scalia, J., concurring) (quoting 1 William Blackstone, *Commentaries* *70).

The First Step Act does not tacitly instruct courts to act as though they are bound by decisions that were never law. But under the First Circuit's interpretation of the Act, district courts deciding whether to impose a reduced sentence would be required to perpetuate a legal error "that was an error even at the time of initial sentencing." *United States v. Chambers*, 956 F.3d 667, 674 (4th Cir. 2020). The Court should "decline to read Congress's intent as directing a district court to impose a sentence possibly predicated on a legal error." *United States v. Brown*, 974 F.3d 1137, 1146 (10th Cir. 2020).

C. *Dillon* Does Not Support Limiting District Courts' Authority Under Section 404(b)

This Court held in *Dillon v. United States*, 560 U.S. 817, 836 (2010), that 18 U.S.C. § 3582(c)(2) "authorize[s] only a limited adjustment to an otherwise final sentence." The government maintains that section 3582(c)(2) is analogous to section 404(b), and, as such, courts possess only the same narrow authority to adjust a sentence under the First Step Act. BIO 15-16, 18. But there is no basis for grafting onto section 404(b) the unique textual limitations this Court relied on in *Dillon*.

Dillon does not control, first of all, because section 404(b) motions are typically considered by way of 18 U.S.C. § 3582(c)(1)(B), which allows courts to "modify an imposed term of imprisonment" when "expressly permitted by statute." *See*, *e.g.*, *Murphy*, 998 F.3d at 558; *Chambers*, 956 F.3d at 671; *Brown*, 974 F.3d at 1144. The government, too, contends that section 404 proceedings are carried out under section 3582(c)(1)(B). BIO 12.

Section 3582(c)(1)(B) is at most "a finality exception that does not itself impose substantive limits." Pet.App.46a-47a (Barron, J., dissenting). Section (c)(1)(B) is a "safety valve" that "*simply notes* the authority to modify a sentence *if modification is permitted by statute*." *United States v. Triestman*, 178 F.3d 624, 629 (2d Cir. 1999) (Sotomayor, J.) (quoting S. Rep. No. 98-225, at 121) (first emphasis added). In other words, section 3582(c)(1)(B) does not impose any independent limitations on a court's ability to "modify" a sentence that do not already exist in the provision giving rise to the right to seek modification.

Section 3582(c)(2), the statute at issue in *Dillon*, contains precisely the kind of explicit limitations that are missing from section 3582(c)(1)(B) and section 404(b). Section 3582(c)(2) allows courts to "reduce" a "term of imprisonment" when the original sentence was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." But such reduction is permitted only if it "is consistent with applicable policy statements issued by the Sentencing Commission." The policy statement at issue in *Dillon* limited any reduction to the low end of the amended Guidelines range (barring a previous substantial assistance departure). Citing these restrictions, *Dillon* concluded that section 3582(c)(2) "does not impose a new sentence in the usual sense," 560 U.S. at 827. Instead, section 3582(c)(2) instructed courts "to determin[e] simply whether to reduce a sentence within a predetermined range." *Collington*, 995 F.3d at 360.

Section 404(b) operates differently. There is no "predetermined range" of sentencing options in a section 404 proceeding; courts that decide to impose a reduced sentence are free to go below the advisory Guidelines range

as calculated based on the Fair Sentencing Act. Had Congress wanted to include the limitations of section 3582(c)(2) in the First Step Act, it could have funneled section 404 proceedings through that provision. Or it could have mirrored the text of section 3582(c)(2), directing courts simply to "reduce" a sentence subject to some restriction from the Sentencing Commission. But Congress took a different approach, broadly directing courts to decide whether to "impose" a reduced sentence. And Congress did so without any additional constraints on the information that could be considered during that process. These differences in language counsel against reading any of section 3582(c)(2)'s limitations into section (c)(1)(B) or section 404.

III. Whether Consideration of Current Facts and Law Is Mandatory or Permissive, Vacatur Is Required

Although the district court in this case ultimately had discretion over whether to impose a reduced sentence on Mr. Concepcion, it failed to exercise that discretion based on the mistaken view that it lacked the authority to consider current facts and law. That was error whether this Court concludes that district courts must consider current facts and law or only that they may consider such information. *See Koon v. United States*, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.").

To start, the district court failed to consider post-sentencing facts regarding Mr. Concepcion's rehabilitation. While in prison, Mr. Concepcion completed drug treatment and regularly attended AA meetings. C.A. J.A. 101. The prison chaplain wrote a letter supporting Mr. Concepcion, noting that he is "dedicated to personal spiritual growth," "leads his faith community by being a positive in-

fluence," and "encourages other individuals at the institution." C.A. J.A. 110. This "evidence of . . . postsentencing rehabilitation bears directly on the District Court's overarching duty to 'impose a sentence sufficient, but not greater than necessary,' to serve the purposes of sentencing." *See Pepper*, 562 U.S. at 493 (quoting 18 U.S.C. § 3553(a)).

Despite the clear and crucial importance of post-sentencing facts, the district court's only consideration of *any* facts was a reference to the section 3553(a) factors from Mr. Concepcion's "*original* sentencing." Pet.App.72a (emphasis added). Without considering Mr. Concepcion's positive post-sentencing record, the court stated that the sentence imposed then "remained [fair and just] today." *Id.* But that statement demonstrates *no* consideration of post-sentencing facts, let alone the "adequate consideration" of the 3553(a) factors required by this Court. *See Holguin-Hernandez v. United States*, 140 S. Ct. 762, 766 (2020); *Rita*, 551 U.S. at 356.

Making matters worse, the district court applied stale Guidelines and refused to consider whether Mr. Concepcion still qualified as a career offender. The district court improperly cabined its authority to consider *only* legal changes explicitly made by the Fair Sentencing Act. Pet.App.72a (Barron, J., dissenting). Making that sole, limited modification, Mr. Concepcion's Guideline range was 188 to 235 months.

The district court's failure to consider current Guidelines and case law caused it to overlook critical changes in how career-offender status is determined. Had the district court considered Mr. Concepcion's career-offender status, it would have reached the conclusion that he no longer qualified under current Guidelines and case law. As a result, Mr. Concepcion's Guidelines range would have

been 57 to 71 months. The upper limit of this range is *thirteen years below* Mr. Concepcion's still-standing sentence of 228 months.

Ultimately, the decision whether to impose a reduced sentence on Mr. Concepcion remains in the district court's discretion. Mr. Concepcion asks only that the district court, at minimum, have the opportunity to consider the world as it exists today when the court makes that decision. The First Circuit's approach dooms Mr. Concepcion to another seven years in prison based on the world as it existed in 2009—a world controlled by a sentencing regime Congress has specifically rejected.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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NOVEMBER 15, 2021