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 OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC also works to ensure that courts remain faithful to the text and history of important federal statutes like the First Step Act. Accordingly, CAC has an interest in ensuring that the First Step Act is understood, in accordance with its text and Congress's plan in passing it, to require courts to consider the current legal and factual landscape when imposing a new sentence pursuant to § 404(b) of the First Step Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

In June 2007, Petitioner Carlos Concepcion was charged with possessing with the intent to distribute at least 5 grams of crack cocaine, in violation of 21 U.S.C. § 841. Pet. App. 69a. In May 2009, the district court sentenced Concepcion to nineteen years of imprisonment. Pet. App. 4a-6a. At the time of Concepcion's sentencing, federal law punished crimes involving crack cocaine significantly more harshly than crimes involving powder cocaine. *See Kimbrough v. United States*, 552 U.S. 85, 96 (2007) (describing the 100-to-1 crack-to-powder sentencing disparity). But in

[1] The parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

August 2010, just one year after Concepcion's sentencing hearing, Congress passed the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, in light of the widespread consensus that sentences for crack offenses were "unjustified," *Dorsey v. United States*, 567 U.S. 260, 268 (2012), particularly when compared to sentences for powder cocaine, *id.* at 263-64, and produced unwarranted "race-based differences" in punishment, *id.* at 268.

The Fair Sentencing Act reduced the penalties for offenses involving crack cocaine by increasing the threshold quantities of the drug triggering the penalties set forth in 21 U.S.C. § 841(b)(1). It also reduced the statutory penalties for offenses committed by defendants with a prior felony drug conviction. *See* 21 U.S.C. §§ 841(b)(1)(C), 851. As a result, Concepcion's conviction no longer triggered a mandatory minimum sentence of ten years. Pet. App. 69a-70a. Congress did not, however, apply the Fair Sentencing Act's changes retroactively. *See id.* at 282 (noting that the Act's new minimums applied only to defendants sentenced after August 3, 2010).

In the years after the Act's passage, the average sentence for crack cocaine decreased, becoming closer to the average sentence for powder cocaine. U.S. Sentencing Commission, Report to Congress: Impact of the Fair Sentencing Act of 2010, at 23 (Aug. 2015), *available at* https://www.ussc.gov/research/congressional-reports/2015-report-congress-impact-fair-sentencing-act-2010. Concepcion, however, remained subject to the "high and unjustified" penalties that predated the Fair Sentencing Act. *See Dorsey*, 567 U.S. at 268.

In 2018, in an overwhelmingly bipartisan effort, Congress passed the First Step Act, which made the Fair Sentencing Act retroactive. Specifically, § 404(b)

of the First Step Act provided district courts with the authority 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." Pub. L. No. 115-391, § 404(b), 132 Stat. 5194, 5222 (2018).

In April 2019, Concepcion filed a motion, asking the district court to impose a reduced sentence pursuant to the First Step Act. Pet. Br. 10. Like many individuals seeking imposition of a reduced sentence under the First Step Act, Concepcion urged the district court to consider his age, pursuit of education, job training, and drug treatment while in prison. *Id.* at 11. More specifically, while Concepcion was in prison, he attended drug treatment programming, maintained a relationship with his young daughter, and, according to the Supervisory Chaplain at the prison where he was incarcerated, became "dedicated to personal spiritual growth" and "lead[ing] his faith community," C.A. J.A. 110. In his motion, he cited 18 U.S.C. § 3553(a), which requires judges to consider a number of factors, including "the nature and circumstances of the offense" and the defendant's "history and characteristics," when imposing a sentence under "any federal statute." 18 U.S.C. § 3553(a).

Because § 3553(a) requires consideration of the Sentencing Guidelines "in effect on the date the defendant is sentenced," *id.* § 3553(a)(4)(A)(ii), Concepcion also urged the court to consider the fact that the U.S. Sentencing Commission, after a "multi-year study," had changed its recommendations for sentencing people with previous convictions, U.S.S.G. App. C Supp., Amend. 798, and that the New Bedford District Court had vacated one of his prior convictions, Pet. App. 9a. If the district court had taken into account

those changes, his recommended sentencing range would have been 57-71 months—not the 262-327 months that it was at the time of his original sentencing. Pet. 9.

The district court agreed that Concepcion was eligible for a reduced sentence under the First Step Act because the First Step Act had decreased the mandatory minimum and maximum sentences applicable to his crime of conviction. Pet. App. 69a-70a. The court, however, declined to impose a reduced sentence, reasoning that the legal changes that Concepcion described were "beyond the scope" of the Act. *Id.* at 74a. The court also did not consider any intervening factual developments or reference its obligations under § 3553(a). *Id.* at 70a-78a. The court below affirmed, concluding that the Act "does not undo the sentencing court's original calibration of the section 3553(a) factors," *id.* at 22a, nor allow a defendant to "demand the benefits of emerging legal developments," *id.* at 14a.

The decision of the court below is at odds with the text and history of the First Step Act. As that text and history make clear, sentencing judges must consider the § 3553(a) factors, including the current Sentencing Guidelines, when imposing a reduced sentence under the First Step Act to ensure that the resulting sentence is "sufficient, but not greater than necessary." 18 U.S.C. § 3553(a).

1. The First Step Act instructs courts to "impose a reduced sentence as if" the Fair Sentencing Act were in effect when the covered offense was committed. In doing so, it directs courts to follow the same procedures and apply the same substantive laws that they would have applied if the defendant's original sentencing had taken place after enactment of the Fair Sentencing Act. And every defendant sentenced for the first time

after the enactment of the Fair Sentencing Act has been entitled to the sentencing court's mandatory consideration of the § 3553(a) factors and the Sentencing Guidelines in place at the time of the sentencing. *See* 18 U.S.C. § 3553(a); *id.* § 3553(a)(4)(A)(ii). Further, as this Court has recognized, § 3553(a) imposes a duty on the court to "sentence the defendant as he stands before the court on the day of sentencing" and to consider all present-day law and facts. *Pepper v. United States*, 562 U.S. 476, 492 (2011) (citing *United States v. Bryson*, 229 F. 3d 425, 426 (2d Cir. 2000)); *id.* at 491 (courts must consider present-day conditions to the extent that they "critically inform" the § 3553(a) calculus).

Indeed, ever since the passage of the Sentencing Reform Act of 1984, consideration of the § 3553(a) factors has been mandatory whenever a court imposes a sentence for "an offense described in *any* Federal statute." 18 U.S.C. § 3551(a) (emphasis added). Congress codified the § 3553(a) factors as part of a comprehensive overhaul of the federal sentencing scheme to guide the discretion of sentencing judges and ensure that sentences would be "sufficient, but not greater than necessary," to comply with the four purposes of sentencing—retribution, deterrence, incapacitation, and rehabilitation—set out in § 3553(a)(2). *Id.* § 3553(a).

The First Step Act's use of the term "impose" when authorizing courts to "*impose* a reduced sentence" for all "covered offense[s]" further supports this reading. First Step Act § 404(b) (emphasis added). As noted, consideration of the § 3553(a) factors is required whenever a court "imposes" a sentence, *see* 18 U.S.C. § 3553(a) ("The court, in determining the particular sentence to be *imposed*, shall consider [the following factors]." (emphasis added)), and that requirement applies in the context of the First Step Act no less than

any other time when a sentence is "imposed." Even as other statutory provisions permitting sentence modifications explicitly direct sentencing courts to ignore intervening changes, nothing in the text of the First Step Act suggests that courts should do so.

2. The history of the First Step Act squarely supports what the plain text of the law requires: judges must consider the § 3553(a) factors, including intervening legal and factual changes, whenever imposing a new sentence pursuant to § 404(b). In passing the First Step Act, Congress's plan was to leave resentencing proceedings to "judges who sit and see the totality of the facts." 164 Cong. Rec. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Booker). The § 3553(a) factors guide this holistic inquiry, ensuring that sentencing judges adequately take account of those facts and have a complete picture of the individual being sentenced, helping judges "avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary," *United States v. Booker*, 543 U.S. 220, 264-65 (2005). It would defy logic to conclude that the obligations of § 3553(a)—including its instruction that judges apply the guidelines "in effect on the date the defendant is sentenced," 18 U.S.C. § 3553(a)(4)(A)(ii)—do not apply to sentences imposed under the First Step Act, a law so intently focused on reducing disparities in sentencing.

3. Finally, the decision of the court below rests on an outsized concern that interpreting the First Step Act in accordance with its plain text would result in unfairness to defendants who are ineligible for resentencing under § 404(b). As this Court has recognized, concerns about alleged disparities cannot supplant "Congress' express directives," *Pepper*, 562 U.S. at 480, including its clear instruction that courts should impose a reduced sentence for eligible defendants just as

they would impose any other sentence. Indeed, concerns like these have never stopped courts from considering intervening legal and factual developments in analogous contexts. This Court should not contort the text of the First Step Act to allay any such concerns here either.

I. The Text of the First Step Act Makes Clear that Judges Are Required to Consider Intervening Legal and Factual Developments in § 404(b) Proceedings.

Under the First Step Act, a court that "imposed a sentence" for certain drug offenses "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." First Step Act § 404(b). This text requires courts to take account of the § 3553(a) factors whenever they impose a reduced sentence under the Act.

A. To start, by instructing courts to "impose a reduced sentence as if" the Fair Sentencing Act were in effect when the covered offense was committed, § 404(b) directs courts to follow the same procedures and apply the same substantive laws that would have applied if the court imposed a sentence after the Fair Sentencing Act's passage.

The phrase "as if" means "[i]n the same way that it would be if" a different situation had occurred. *See As*, American Heritage Dictionary, https://www.ahdictionary.com/word/search.html?q=as+if (last visited Nov. 2, 2021); *see also, e.g.*, *As*, Oxford English Dictionary Online, https://www-oed-com (defining "as if" as "as would be the case if"). Thus, the Act directs sentencing courts to "impose" a reduced sentence *in the same way that they would if* the applicable sections of the Fair Sentencing Act had been in effect when the

offense was committed. And ever since the Fair Sentencing Act has been in effect, district courts conducting sentencing proceedings governed by statutory provisions that were modified by that Act have been required to consider the present-day legal and factual landscape, as part of their compulsory consideration of the § 3553(a) factors.

In 1984, Congress passed the Sentencing Reform Act, which "revolutionized the manner in which district courts sentence persons convicted of federal crimes," *Burns v. United States*, 501 U.S. 129, 132 (1991), making consideration of the § 3553(a) factors mandatory whenever a court imposes a sentence for "an offense described in *any* Federal statute," 18 U.S.C. § 3551(a) (emphasis added); *see id.* § 3551(b) ("An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553."); *id.* § 3553(a) ("[I]n determining the particular sentence to be imposed," a district court "shall consider [the listed factors]."); *Chavez-Meza v. United States*, 138 S. Ct. 1959, 1963 (2018) (noting that sentencing courts "must always take account of certain statutory factors" and citing § 3553(a)); *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007) (explaining that "[s]ection 3553(a) lists seven factors that a sentencing court *must* consider" (emphasis added)); *Rita v. United States*, 551 U.S. 338, 357 (2007) (describing § 3553(a) as a "congressional mandate[]"); *see also* Fed. R. Crim. P. 32(d)(2)(G) (requiring the submission of a presentence report that includes "information relevant to the factors under 18 U.S.C. § 3553(a)" before a court "imposes a sentence").

In passing the Sentencing Reform Act, Congress recognized that "one of the most glaring defects in current sentencing law" was "the absence of general legislative guidance concerning the factors to be

considered in imposing sentence[s]." S. Rep. No. 98-225, at 74-75 (1984). The § 3553(a) factors were central to the Sentencing Reform Act's effort to prevent arbitrariness in federal sentencing, *Pepper*, 562 U.S. at 489-90, and ensure that courts uniformly consider important individualized factors, such as "the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1). As the text of § 3551 makes clear, legislators envisioned that the § 3553(a) factors would apply in "each case," S. Rep. No. 98-225, at 77 (1984); *see* 130 Cong. Rec. 840 (1984) (statement of Sen. Laxalt) ("Section 3553 requires the judge to consider the kinds of available sentences . . . and to state the reasons for each sentence."); *see also* 18 U.S.C. § 3551(a), (b) ("a defendant who has been found guilty of an offense described in any Federal statute . . . shall be sentenced, in accordance with the provisions of section 3553").

This is why a sentencing court's failure to consider the § 3553(a) factors in an initial sentencing proceeding constitutes procedural error. *See Gall*, 552 U.S. at 51 ("[T]he appellate court must . . . ensure that the district court committed no significant procedural error, such as . . . failing to consider the § 3553(a) factors."); *Probation*, 49 Geo. L.J. Ann. Rev. Crim. Proc. 909, 910 n.2275 (2020) (collecting cases in which sentencing courts' failure to consider § 3553(a) factors amounted to procedural error). Indeed, consideration of the § 3553(a) factors is integral to the section's "overarching instruction to 'impose a sentence sufficient, but not greater than necessary,'" to serve the purposes of sentencing. *Kimbrough*, 552 U.S. at 111 (quoting 18 U.S.C. § 3553(a)).

Section 3553(a) requires courts to consider the Sentencing Guidelines "in effect on the date the defendant is sentenced," *id.* at § 3553(a)(4)(A)(ii), as well as the present-day legal and factual landscape. This

is the case even if the court is imposing a sentence long after the original sentencing proceeding. As this Court has explained, § 3553(a) requires courts to consider anything that is "relevant to several of the sentencing factors that Congress has specifically instructed district courts to consider," *Pepper*, 562 U.S. at 500, including factual and legal developments that occurred after a defendant's original sentencing, *id.* at 492 (when imposing a sentence on remand, evidence of post-sentencing conduct "provides the most up-to-date picture" of the defendant's history and characteristics); *see Gall*, 522 U.S. at 49 (when re-sentencing, courts must make a new calculation of the "applicable Guidelines range" and apply existing law). After all, these considerations "bear[] directly on the sentencing judge's overarching duty under § 3553(a) to 'impose a sentence sufficient, but not greater than necessary,'" *Pepper*, 562 U.S. at 493 (citing § 3553(a)(2)).

For example, when resentencing defendants whose convictions have been vacated under 28 U.S.C. § 2255, courts must reconsider the § 3553(a) factors, including the guidelines in effect at the resentencing proceeding and any intervening developments, and "determin[e] anew what the sentence should be." *United States v. Flack*, 941 F.3d 238, 241 (6th Cir. 2019); *see also, e.g.*, *United States v. Brown*, 879 F.3d 1231, 1241 (11th Cir. 2018) (instructing the court on remand to impose a new sentence "[o]nly [after] having considered the factors set forth in § 3553(a)"). Section 3553 further requires these courts to consider present-day law, including the current Sentencing Guidelines. *See United States v. Tidwell*, 827 F.3d 761, 764 (8th Cir. 2016) (citing 18 U.S.C. § 3553(a)(4)(A)(ii) and concluding that it was "clearly correct" for the district court to apply "the guidelines in effect at the time of resentencing, not at the time of the original

sentencing"); *Brown*, 879 F.3d at 1240 (noting that the court "was required to resentence [the defendant] . . . with a new sentencing guidelines range"); *United States v. Maldonado*, 242 F.3d 1, 5 (1st Cir. 2001) (noting that resentencing courts "ordinarily employ the guidelines in effect at sentencing," barring any ex post facto concerns).

In short, district courts sentencing individuals after the Fair Sentencing Act's passage must consider the § 3553(a) factors, as well as the present-day law, facts, and Sentencing Guidelines, and it necessarily follows that district courts "impos[ing] 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" must do so as well.

B. Congress's use of the word "impose" in § 404(b) bolsters the conclusion that courts must consider the current legal and factual landscape in a First Step Act resentencing. Section 404(b) provides that the "court that imposed a sentence for a covered offense may," on motion, "impose a reduced sentence." Section 3553(a) uses this same language, mandating that "[t]he court, in determining the particular sentence to be *imposed*, shall consider [the following delineated factors]." 18 U.S.C. § 3553(a) (emphasis added). The title of § 3553(a), which refers to "factors to be considered in *imposing* a sentence," provides an additional "cue[] as to what Congress intended," *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) (citations omitted) (internal quotation marks omitted), reinforcing that courts are required to consider the § 3553(a) factors when *imposing* a sentence—whether under the First Step Act or any other law.

Moreover, that Congress used the word "impose" to describe both sentencing and resentencing procedures in § 404(b) also demonstrates that courts must

consider the current legal and factual landscape in a First Step Act resentencing. Section 404(b) provides that the "court that imposed a sentence for a covered offense may," on motion, "impose a reduced sentence." The first use of the word "impose" refers to the act of imposing the original sentence for a drug offense, in which the court would have undoubtedly been required to consider the § 3553(a) factors in light of current law and facts. *See, e.g.*, *Kimbrough*, 552 U.S. at 93 (explaining that when sentencing a defendant for a crack cocaine offense, the district court appropriately accounted for various factors "as required by § 3553(a)"); *Booker*, 543 U.S. at 259 (concluding, when reviewing a sentence imposed under 21 U.S.C. § 841, that the law "requires judges to take account of the Guidelines together with [18 U.S.C. § 3553(a)]").

If the decision of the court below were correct, the verb "impose" would have two different meanings within the same sentence. That cannot be right. After all, "identical words and phrases within the same statute should normally be given the same meaning," *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 232 (2007), and the presumption of consistent usage is "doubly appropriate" where, as here, the identical phrases were "inserted" into a statute at the same time. *Id.*; *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 169-70 (2012).

C. Furthermore, nothing in the text of § 404(b), including the phrase "as if," directs courts to ignore the present day legal and factual landscape. The court below reasoned that Congress's use of "as if" in § 404(b) was a "stipulat[ion] that a new sentence shall be meted out 'as if' those sections (and only those sections) were in effect when the defendant committed the covered

offense." Pet. App. 11a. But that is not what § 404(b) says.

Section 404(b) instructs courts to impose a reduced sentence "as if" the Fair Sentencing Act were "in effect at the time the covered offense was committed." First Step Act § 404(b). As discussed above, the ordinary meaning of the phrase "as if" is "in the same way that it would be if." The phrase, then, does nothing more than instruct courts to "impose" a reduced sentence in the same way they would if imposing a sentence after the Fair Sentencing Act's passage. That should end the matter. "Drawing meaning from silence is particularly inappropriate in sentencing cases," given that "Congress has shown that it knows how to direct sentencing practices in express terms." *Kimbrough*, 552 U.S. at 103; *see generally* Scalia & Garner, *supra*, at 99 (2012) ("[W]hat a text does not provide is unprovided."). This Court should not read additional restrictions into the First Step Act's text.

Notably, Congress has, in other contexts, *explicitly* imposed limitations on a district court's resentencing authority, including one of the exact limitations that the court below improperly implied in § 404(b). Since 2003, 18 U.S.C. § 3742(g) has specified that a court determining a defendant's sentence on remand after an appeal "shall apply the guidelines . . . that were in effect on the date of the previous sentencing of the defendant[.]" *See* Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified at 18 U.S.C. § 3742(g)). And since 1984, § 3582(c)—which allows courts to resentence for "extraordinary and compelling reasons," 18 U.S.C. § 3582(c)(1)(A)(i), and when the applicable sentencing range was "subsequently . . . lowered by the Sentencing Commission," *id.* § 3582(c)(2)—has required such modifications to be "consistent with" the Sentencing Commission's policy statements, Pub. L. 98-473, 98

Stat. 2019 (1984) (codified 18 U.S.C. § 3582(c)), which themselves require the application of the guidelines applied at the original sentencing proceeding, *see* U.S.S.G. § 1B1.10(b)(1) (instructing courts to apply only retroactive amendments and "leave all other guideline application decisions unaffected").[2]

These provisions make clear that if Congress wanted courts imposing sentences under the First Step Act to use the law in effect at the time of the original sentencing, it would have said so explicitly. When Congress has previously used clear language to make its intent "explicit," its failure to use the same language in another provision suggests that the two provisions mean different things. *Dean v. United States*,

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[2] Some courts, including the court below, *see* Pet. App. 40a, have drawn a parallel between First Step Act proceedings and the sentence modifications authorized by 18 U.S.C. § 3582(c)(2). *See, e.g.*, *United States v. Kelley*, 962 F.3d 470, 478 (9th Cir. 2020); *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019). But these courts ignore clear distinctions between § 3582(c)(2) and § 404(b). As this Court explained in *Dillon*, § 3582(c)(2)'s authority to "reduce [a defendant's] term of imprisonment" must be read in a manner that is consistent with its explicit reference to Sentencing Commission policy statements, which make clear that the provision authorizes only a limited "sentence modification" rather than "further sentencing." *Dillon v. United States*, 560 U.S. 817, 825-26 (2010). For this reason, district courts proceeding under § 3582(c)(2) do not "impose a new sentence in the usual sense," *Dillon*, 560 U.S. at 827, whereas the First Step Act authorizes district courts to do exactly that, *see supra* at 7-13; *see also United States v. Collington*, 995 F.3d 347, 355 (4th Cir. 2021) (in resentencing under the First Step Act, "the court must consider the § 3553(a) factors to determine what sentence is appropriate[, u]nlike sentence modification proceedings under § 3582(c)(2)—which limit use of the § 3553(a) factors to determining simply whether to reduce a sentence to within a predetermined range"); *see generally* Pet. Br. 43-44 (explaining that "there is no basis for grafting onto section 404(b) the unique textual limitations this Court relied on in *Dillon*").

137 S. Ct. 1170, 1177 (2017) (rejecting the argument that 18 U.S.C. § 924(c) implicitly prevented the court from considering an applicable mandatory minimum, because the explicit prohibition of such a consideration in another sentencing statute "confirm[ed] that it would have been easy enough to make explicit what the Government argues is implicit in § 924(c)"); *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979) ("Obviously, then, when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly."). This Court should not "lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply." *Jama v. I.C.E.*, 543 U. S. 335, 341 (2005).

II. Interpreting § 404(b) to Require Consideration of Intervening Factual and Legal Changes Accords with Congress's Plan to Reduce Disparities in Sentencing and Provide for Individualized Sentencing Review.

The history of the First Step Act only reinforces what the plain text of the statute makes clear: judges imposing sentences pursuant to § 404(b) must, consistent with their obligations under § 3553(a), consider the present legal and factual landscape. Congress's decision to enact the First Step Act was driven by its longstanding interest in providing the opportunity for individualized, case-by-case review of sentences imposed under the "unjustified" 100-to-1 ratio. *Dorsey*, 567 U.S. at 268. To permit district courts to ignore the obligations of § 3553(a) would result in less individualized sentencing and frustrate Congress's plan to align sentences for crack offenses that occurred before 2010 with those imposed after the Fair Sentencing Act, gutting the central purposes of the First Step Act.

As discussed earlier, the First Step Act extended the reforms of the Fair Sentencing Act of 2010, which was designed to "restore fairness to Federal cocaine sentencing." 124 Stat. at 2372. Having determined that the 100-to-1 crack-to-powder sentencing disparity was unjustified and had a disproportionate effect on African Americans, Congress passed the Fair Sentencing Act to bring greater uniformity to sentencing. *See Dorsey*, 567 U.S. at 268-69; 156 Cong. Rec. 14393 (2010) (statement of Rep. Jackson Lee) ("The unwarranted sentencing disparity not only overstates the relative harmfulness of the two forms of the drug and diverts federal resources from high-level drug traffickers, but it also disproportionately affects the African-American community.").

But even after the enactment of the Fair Sentencing Act, a major disparity remained: individuals sentenced for crack cocaine crimes prior to enactment of the Fair Sentencing Act were still serving lengthy sentences imposed under the old unjust statutory regime. As Senator Booker explained, "there are people sitting in jail right now for selling an amount of drugs equal to the size of a candy bar who have watched people come in and leave jail for selling enough drugs to fill a suitcase." 164 Cong. Rec. S7764 (daily ed. Dec. 18, 2018); *see also* 164 Cong. Rec. S7645 (daily ed. Dec. 17, 2018) (statement of Sen. Durbin) (explaining why it was important to give a "chance [for a reduced sentence] to thousands of people still serving sentences for nonviolent offenses involving crack cocaine under the 100-to-1 standard" even after passage of the Fair Sentencing Act).

Congress sought to remedy these lingering disparities by making the Fair Sentencing Act retroactive. It did so through the First Step Act—the product of a

lengthy process of bipartisan negotiations, driven by the common goal of reducing disparities in the criminal justice system. Indeed, legislators heralded § 404 of the First Step Act as an embodiment of the broad remedial purpose of reducing disparities—including racial disparities—in the criminal justice system. *See, e.g.*, 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Feinstein) (applauding the First Step Act for "help[ing] address some of the racial disparities in our criminal justice system" by "finally mak[ing] the Fair Sentencing Act retroactive"). Significantly, members of Congress hoped that § 404 "would bring sentences imposed prior to 2010 in line with sentences imposed after the Fair Sentencing Act was passed." *The First Step Act of 2018 (S. 3649)*, S. Comm. Jud., 115th Cong. (Nov. 15, 2018), *available at* https://www.judiciary.senate.gov/imo/media/doc/S.%203649%20First%20Step%20Act%20Summary%20-%20As%20Introduced.pdf.

In debates on the First Step Act, members of Congress repeatedly emphasized that the law, by reducing default statutory penalties for certain people convicted of crack crimes, would help restore the fundamental concept of individualized sentencing embodied in § 3553(a)—a process that is driven "not [by] 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). Legislators conceived of an "individualized review based on the particular facts of [a defendant's] case." 164 Cong. Rec. S7748 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar); 164 Cong. Rec. S7756 (daily ed. Dec. 18, 2018) (statement of Sen. Nelson) ("This legislation will allow judges to do the job that they were appointed to do—to use their

discretion to craft an appropriate sentence to fit the crime."); *see also* Pet. Br. 25-27.

Members of Congress were aware that these individualized proceedings might address inequities driven by the intersection of career offender determinations and crack cocaine penalties. Senator Durbin, a lead sponsor of both the Fair Sentencing Act and the First Step Act, repeatedly spoke about Eugenia Jennings, whose 262-month career-offender sentence was an example of "injustice" that "made no sense." 161 Cong. Rec. S7061 (daily ed. Oct. 1, 2015); *see also United States v. Jennings*, No. 00-30122-01GPM, 2009 WL 1851038, at *1 (S.D. Ill. June 26, 2009) (describing Jennings' case). Section 404 of the First Step Act, he said, would give defendants like Jennings "a chance to petition for reconsideration of their sentence on an individual basis, so they can be judged by judges." 161 Cong. Rec. S7061 (daily ed. Oct. 1, 2015).

When lawmakers explained that individuals would be "judged by judges," *id.*, they underscored that proceedings under § 404(b) would be just like any other sentencing proceeding, where judges consider the § 3553(a) factors with reference to the legal and factual circumstances that exist at the time of sentencing. *See, e.g.*, *United States v. Shaw*, 957 F.3d 734, 741 (7th Cir. 2020) ("[C]ourts are well versed in using § 3553 as an analytical tool for making discretionary decisions."); *United States v. Allen*, 956 F.3d 355, 357 (6th Cir. 2020) ("If the § 3553(a) factors did not apply to a motion for a sentence reduction under the First Step Act, then courts would have to develop new standards to guide their discretionary decision regarding the defendant's appropriate sentence.").

And by explaining that the First Step Act could redress the "injustice" of Eugenia Jennings' career-offender sentence and "bring sentences imposed prior to 2010 in line with sentences imposed after the Fair Sentencing Act was passed," *First Step Act (S. 3649)*, *supra*, at 2, lawmakers further clarified that courts would consider the law, facts, and Sentencing Guidelines in existence at the time of sentencing. Indeed, only by considering intervening legal and factual developments could courts account for the "myriad other ways" in which the previous crack sentencing scheme affected sentences imposed before the Fair Sentencing Act, including the "anchoring effect" of the 100-to-1 ratio on career-offender sentences, Pet. Br. 28, and truly align sentences imposed before and after the Fair Sentencing Act, *First Step Act (S. 3649)*, *supra*, at 2.

III. Concerns About Alleged Unfairness Have Never Superseded a Sentencing Court's Obligations Under § 3553(a).

The court below concluded that considering intervening legal and factual changes would put crack cocaine defendants "in a more advantageous position than other criminal defendants generally," Pet. App. 15a, but this is no reason to ignore the First Step Act's plain text. As this Court has recognized in analogous contexts, concerns about unfairness do not supplant a sentencing court's obligations under § 3553(a), which often require the consideration of intervening legal and factual developments. *Pepper*, 562 U.S. at 503 (rejecting the argument that consideration of post-sentencing efforts is "grossly unfair").

Indeed, courts routinely consider intervening factual developments when imposing sentences on remand. As this Court recognized in *Pepper*, when a court resentences a defendant whose sentence was set

aside on appeal, it is required to consider the factors listed in § 3553(a), which may include "evidence of [the] defendant's rehabilitation since his prior sentencing." *Id.* at 490; *see also* 5 Am. Jur. 2d *Appellate Review* § 713 (2020) ("A general remand permits the district court to redo the entire sentencing process, including considering new evidence and issues."). Like courts imposing new sentences after one has been vacated, *see supra* at 10, these courts are obligated by § 3553(a) to consider the defendant "anew," *Tidwell*, 827 F.3d at 763.

Similarly, when imposing sentences on remand, district courts often consider intervening changes in law. *See, e.g.*, Laurie Levenson, *Rule 32: Sentencing and Judgment*, *in Fed. Crim. R. Handbook* (Dec. 2020 ed.) (explaining that at resentencing "an issue may be raised if it arises as a result of events that occur after the original sentencing, or there has been a change in the law, new evidence, or a need has arisen to prevent manifest injustice"). Indeed, appeals courts often remand with instructions to do just that. *See*, *e.g.*, *United States v. Correy*, 773 F.3d 276, 280 n.5 (1st Cir. 2014) (on remand, "the district court should consider the applicability of" a recent circuit decision); *United States v. Gibbs*, 626 F.3d 344, 355-56 (6th Cir. 2010) (remanding for consideration of "subsequent changes in the law" that affected the defendant's criminal history score); *United States v. Quintana*, 793 Fed. App'x 553, 554 (9th Cir. 2020) (remanding to "reopen and review all sentencing issues and to consider the effect, if any, of" an intervening decision).

These cases make clear that courts tolerate any unfairness resulting from the consideration of intervening factual and legal developments when doing so is necessary to give a statute its natural meaning. Indeed, as this Court explained in *Pepper*, while

considering this evidence "may result in disparate treatment," this disparity does not stem from "arbitrary or random sentencing practices," but from the "ordinary operation of appellate sentencing review." *Pepper*, 562 U.S. at 502; *Maldonado*, 242 F.3d at 4 (considering changes in law on resentencing is appropriate because "[c]riminal procedure, like the rest of life, is filled with situations in which fortuities work to the benefit or disadvantage of a prosecutor or defendant").

Here, any disparity resulting from the consideration of Concepcion's post-sentencing rehabilitation, vacated conviction, and new guidelines range does not stem from the type of "arbitrary or random sentencing practices" that Congress has forbidden, *Pepper*, 562 U.S. at 502, but rather from Congress's explicit decision to pass a law that permits only certain defendants to seek the imposition of a reduced sentence. By focusing on the so-called "advantage" the First Step Act provides to eligible defendants, the court below ignored the clear text and history of the law.

* * *

The text of the First Step Act requires judges to consider the § 3553(a) factors, including intervening factual and legal changes affecting the defendant, when imposing a reduced sentence pursuant to § 404(b). The law's history supports this plain reading because it makes clear that Congress intended these sentences to be individualized and consistent with those imposed after the Fair Sentencing Act's passage. To account for a misguided concern about alleged unfairness, the court below disregarded this "long parade of textual and contextual clues" about § 404(b)'s ordinary meaning. *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1484 (2021). This Court should give effect to

that ordinary meaning and reverse the decision of the court below.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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