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

REPLY BRIEF FOR PETITIONER

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This Court granted certiorari to resolve a deeply entrenched circuit split over the interpretation of section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5222. In the decision below, the First Circuit held that, in deciding whether to impose a reduced sentence under section 404, a district court *must not* consider current law and facts, but *may* consider such developments if the court chooses to impose a reduced sentence. Pet.App.18a-20a. The government no longer defends that rule. Instead, the government embraces Petitioner's fallback position, advocating that courts may, but are not required to,

consider intervening facts and law throughout the process of deciding a section 404 motion.

The government's position is preferable to the First Circuit's bifurcated approach. But the best answer is that courts *must* consider the current legal and factual landscape. "Must consider" gives full effect to section 404(b)'s directive that courts have discretion to "impose a reduced sentence." And "must consider" aligns with the bedrock rule that courts consider current facts and law during sentencing.

To hold that courts must *consider* current circumstances does not mean that courts must *apply* those circumstances. Section 404 makes pellucid that the ultimate decision to impose a reduced sentence lies in the district court's discretion. But a "must consider" rule makes section 404 proceedings more consistent, and more consistently reviewable on appeal, by ensuring that courts do not disregard information that everyone agrees is relevant.

The government offers an alternative ground for affirmance: even though the court of appeals erred, the district court understood that it could consider current facts and law, and simply declined to do so. The record plainly shows otherwise; the district court repeatedly made clear its belief that it could "consider[] only the changes in law that the Fair Sentencing Act enacted." Pet.App.71a.

The judgment of the First Circuit should be vacated.

I. Courts Must Consider Current Law and Facts in Section 404 Proceedings

A. Section 404's Text Requires Consideration of Current Law and Facts

Courts in section 404 proceedings must consider, but need not be persuaded by, intervening legal and factual developments that occurred after the original sentencing proceeding. Br. 18-21, 24-25, 30-33.

1. a. Congress made consideration of current law and facts mandatory when it gave district courts discretion to "*impose* a reduced sentence" on eligible defendants. § 404(b) (emphasis added); *see* Br. 18-21. Statutes "must be read in their context." *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 778 (2020) (citation omitted). In the sentencing context, multiple federal statutes mandate that when courts "impose" a sentence, they must apply the "factors to be considered in imposing a sentence" from section 3553(a). *See* 18 U.S.C. §§ 3551, 3553(a) (capitalization altered), 3582(a). Those factors, in turn, require consideration of current law and facts. Br. 20-21; Swanson Br. 12.

The government ignores the settled meaning of "imposing a sentence" in the sentencing context. According to the government, Congress in section 404(b) really meant to authorize district courts to "reduce a sentence," but used the phrase "impose a reduced sentence" instead because a different formulation "would have been odd." U.S. Br. 31-32. But there would be nothing "odd" about authorizing courts to "reduce" a defendant's sentence. Congress has used just that phrase in other provisions. *E.g.*, 18 U.S.C. § 3582(c)(1)(A), (c)(2). In section 404(b), however, Congress used the phrase "impose a . . . sen-

tence." And it did so twice, stating that a court "that imposed a sentence for a covered offense"—that is, a court that indisputably considered the section 3553(a) factors—could "impose a reduced sentence." The government's interpretation not only erases the word "impose" from the statute, it fails to follow the "normal rule of statutory construction" that both references to imposing a sentence should have the same meaning. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2115 (2018) (citation omitted); CAC Br. 11-12.

The government (at 23-24, 33) notes that other provisions, like 18 U.S.C. § 3582(c)(1)(A) and (c)(2), contain explicit cross-references to section 3553(a). But those provisions do not direct courts to "impose" a sentence and therefore need that additional reference to invoke the section 3553(a) factors. Section 404 needs no such citation because the phrase "impose a . . . sentence" "[t]extual[ly] cross-reference[s]" the section 3553(a) factors. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994); *cf. United States v. Briggs*, 141 S. Ct. 467, 470 (2020) (recognizing that the "natural referent" for a phrase in the Uniform Code of Military Justice is other law in that Code).

The government (at 32) also speculates that Congress may have used "impose a reduced sentence" to clarify that courts could reduce a "sentencing package" imposed when a defendant was simultaneously sentenced for both crack-cocaine and other offenses. The government does not explain how "impose" might accomplish that result. Instead, the government's own authority allows "sentence package" reductions because nothing in section 404 "bar[s] a court from reducing a non-covered offense." *United States v. Hudson*, 967 F.3d 605, 610 (7th Cir. 2020).

The government (at 31) further claims that if Congress wanted to give significance to "impose a reduced

sentence," it would have used that phrase throughout section 404. Petitioner's reading, the government says, therefore creates tension with section 404(c), which describes the result of a section 404 motion as "reduc[ing] a sentence." There is no tension. Section 404(b) also describes the result as a "reduced sentence." Section 404(c) says nothing about the procedures for deciding whether to impose a reduced sentence—the issue presented here—"much less about what information a court may consider in determining the sentence." *See Dean v. United States*, 137 S. Ct. 1170, 1177 (2017). Those issues are addressed in section 404(b), which makes clear that courts are tasked with deciding to "impose a reduced sentence."

The government (at 32) also contends that incorporation of the section 3553(a) factors into section 404(b) would create "inconsisten[cy]," because section 404 "only permits reductions," even though a district court could conclude that the section 3553(a) factors point toward an increased sentence. But there is nothing inconsistent about that result. Every day, district courts apply the section 3553(a) factors within the bounds Congress sets. Mandatory minimums and maximums do not stop district courts from applying section 3553(a) to exercise their discretion within those ranges. Section 404 works the same way: districts court can impose a new sentence no lower than any new mandatory minimum and no higher than the current sentence.

The government (at 33) notes that 18 U.S.C. § 3582(c)(1)(A) and (c)(2) incorporate the section 3553(a) factors only "to the extent they are applicable." But the same "to the extent they are applicable" language appears in section 3582(a) with respect to full-blown initial sentencings. Thus, district courts routinely recognize their authority to disregard inapplicable factors in all manner

of sentencing proceedings. *E.g.*, *United States v. Saddler*, 538 F.3d 879, 890 (8th Cir. 2008); *United States v. Husein*, 478 F.3d 318, 330-31 (6th Cir. 2007). There is no "incongruit[y]" if district courts do the same in section 404 proceedings. *Contra* U.S. Br. 33.

b. Congress also made consideration of current circumstances mandatory by vesting district courts with wide discretion. Section 404's text makes clear three times over that section 404 proceedings are not mechanical reductions. Br. 21-25. Section 404(a) defines "covered offense" broadly to permit relief even for defendants whose Guidelines ranges remain unchanged. Section 404(b) says that district courts "may" impose a reduced sentence. And section 404(c) concludes that nothing "require[s] a court to reduce any sentence pursuant to this section."

When, as here, district courts are given sentencing discretion, Congress channels that discretion through the section 3553(a) factors. Br. 30-33; *infra* pp. 12-13. The government offers no indication of how district courts could possibly "guide the decisionmaking process" other than by applying the section 3553(a) factors. U.S. Br. 41. Congress did not silently buck forty years of sentencing law and create a system of unfettered discretion.

c. Recognizing that district courts that "impose a reduced sentence" must consider all relevant factors would not convert a section 404 proceeding into a plenary resentencing. *Contra* U.S. Br. 33-34. The First Step Act does not require courts to act as though the defendant's initial sentencing never happened. The law-of-the-case doctrine precludes attempts to relitigate sentencing issues for which the facts and law have not changed at all, just as it does when an appellate court issues a limited remand after an initial sentencing. *See Pepper v. United States*, 562

U.S. 476, 506 (2011). Forfeiture and waiver, moreover, prevent defendants from raising arguments that were available but never made at the initial sentencing.

Accordingly, defendants would not be entitled to relitigate old facts about their offense conduct, or to take a second bite at the apple regarding the application of Guidelines enhancements for which the law has not changed. Rather, "the scope of the analysis is defined by the gaps left from the original sentencing to enable the court to determine what sentence it would have imposed under the Fair Sentencing Act in light of intervening circumstances." *United States v. Lancaster*, 997 F.3d 171, 175 (4th Cir. 2021).

Defendants bringing First Step Act motions likewise have limited procedural rights. Rule 43 establishes that the right to presence and allocution does not apply to proceedings under 18 U.S.C. § 3582(c), including section 404 resentencings. *See* Fed. R. Crim. P. 43(b)(4); *United States v. Lawrence*, 1 F.4th 40, 48 (D.C. Cir. 2021). Likewise, First Step Act defendants have no right to new presentence reports or appointed counsel. *See United States v. Johnson*, 351 F. App'x 948, 950 (5th Cir. 2009) (no new presentence report for resentencing); *United States v. Conhaim*, 160 F.3d 893, 896 (2d Cir. 1998) (same); *United States v. Fleming*, 5 F.4th 189, 193 & n.3 (2d Cir. 2021) (no right to appointed counsel in section 3582(c) proceedings; collecting cases). The other procedural rights the government (at 33-34) cites are also inapplicable. *See United States v. Woodside*, 895 F.3d 894, 900-01 (6th Cir. 2018) (no right to sentence pronouncement "in open court" for resentencing on limited remand); 18 U.S.C. § 3771(a)(4) (crime victim has right to presence only if a district court holds a "public proceeding").

2. Section 404(b)'s "as if" clause allows district courts 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." This text serves only to make sections 2 and 3 of the Fair Sentencing Act retroactive in light of 1 U.S.C. § 109 and its saving of the statutory penalties in effect at the time an offense is committed. Br. 22-23. The government (at 35) agrees that this text was "the most natural and clearest way to describe the retroactive application of Sections 2 and 3 of the Fair Sentencing Act." But the government (at 26-27) goes further, claiming the "as if" clause also bars mandatory consideration of intervening factual and legal developments.

The problem for the government is that it never squares its restrictive reading of the "as if" clause with its concession that courts *can* (and in many cases, should) consider changes other than those caused by the Fair Sentencing Act. By agreeing that district courts may consider current circumstances, the government necessarily agrees that this information is relevant. But then the government turns around and says that district courts have discretion to not consider this information altogether. The government's position thus transforms the First Step Act into a sentencing unicorn. We know of no other context (and the government does not point to any) where sentencing courts can ignore relevant information when imposing a sentence. To the contrary, district courts presumptively abuse their discretion if they refuse to consider relevant information, just as when they consider irrelevant information. *See Gall v. United States*, 552 U.S. 38, 51-52 (2007); *Koon v. United States*, 518 U.S. 81, 106 (1996). The government offers no explanation for why section 404 should be an exception to these rules.

In any event, the government's arguments regarding the "as if" clause are mistaken on their own terms.

To start, the only way the government can get to its preferred reading is to "add words to the law." *See EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015). Specifically, the government says the clause "mandates *only* consideration of the changes stemming from sections 2 and 3 of the Fair Sentencing Act'" and "instructs the court to place itself in the time frame of the *original sentencing*." U.S. Br. 26-27 (emphases added) (cleaned up). Yet the words "only" and "original sentencing" never appear in the text.

Nor would a focus on "only" the time of the "original sentencing" make sense. While a section 404 proceeding "is inherently backward looking," "[c]ourts are not time machines which can alter the past and see how a case would have played out had the Fair Sentencing Act been in effect." *United States v. Broadway*, 1 F.4th 1206, 1212 (10th Cir. 2021). If Congress nevertheless intended district judges to play the "futile role" of counterfactual time traveler, *id.*, it would have said so in plain terms.

The government (at 27-28) contends that omission of the word "only" is irrelevant under the *expressio unius* canon. In the government's telling, the "as if" clause on its own "limit[s] the mandatory scope of Section 404 motions to the expressly referenced section of the Fair Sentencing Act." U.S. Br. 27. That argument mixes apples and oranges. The "as if" clause is not a limitation on courts' authority—those appear in section 404(c), "Limitations"—and it does not purport to restrict courts' authority to consider other legal or factual changes. The government itself concedes the point by agreeing that section 404 courts "may consider" post-sentencing developments, notwithstanding the "as if" clause. *See* U.S. Br. 40.

For similar reasons, the government's insistence (at 27) that the "as if" clause sets a "baseline of process" does not support the conclusion that the clause "excluded any additional mandatory requirement to account for postsentencing developments." Even were the government correct that the "as if" clause sets the baseline, a baseline is not a ceiling. Recognizing that district courts must begin their analysis by accounting for the effects of the Fair Sentencing Act does not mean other changes cannot be considered.

The government says that Petitioner's interpretation of the "as if" clause would "*require* the court to give an offender the benefit of other legal or factual developments since the original sentencing." U.S. Br. 27 (emphasis added). False. Petitioner's point—a modest one at that—is that in exercising their discretion, courts are bound to *consider* relevant intervening developments. But after considering those developments, courts retain discretion *not* to impose a reduced sentence. *See* Br. 3-4, 9, 13, 21-22.

The government (at 28-29) contends that Petitioner's interpretation would effectively render retroactive sections 401 and 403 of the First Step Act, which prospectively amended provisions unrelated to the crack/powder cocaine disparity. *See* § 401(c), 132 Stat. 5221; § 403(b), 132 Stat. 5222. That misunderstands Petitioner's position. Courts in section 404 proceedings must consider current law. That includes the Guidelines in effect on the date of sentencing. 18 U.S.C. § 3553(a)(4)(A)(ii). But current law also includes Congress' decision to make provisions like sections 401 and 403 nonretroactive. Defendants are free to argue that these amendments reflect updated views about the seriousness of their offense, and courts must consider those arguments. *See* 18 U.S.C. § 3553(a)(2)(A)

(requiring consideration of the "seriousness of the offense"). But nothing requires courts to impose a reduced sentence based on law that by its own terms does not apply to these defendants.

Regardless, the government's concern about retroactivity is misguided. When a court imposes a reduced sentence under section 404, it is not making intervening legal developments retroactive. It is creating a new sentence considering the law as it stands today. That result respects Congress' deliberate decision to treat the First Step Act as imposing a new sentence.

B. A Mandatory Rule Fosters Coherent Results

Mandatory consideration of current law and facts leads to consistent outcomes and best effectuates the "discretionary relief from the now-discredited 100-to-1 ratio" the government agrees the First Step Act provides. U.S. Br. 29-30. The government (at 37-39) argues that Petitioner's approach will lead to unwarranted sentencing disparities by allowing covered offenders to unfairly benefit from post-sentencing developments. Those concerns are both overstated and worse under the government's interpretation.

1. For defendants, mandatory consideration avoids "unnecessary sentencing disparities." *United States v. Easter*, 975 F.3d 318, 325 (3d Cir. 2020). Consider Mr. Concepcion's case. His original sentence is *thirteen years* above the top of his current Guidelines range. Nothing requires the district court to impose a new sentence under any rule. But under a mandatory approach, a person in Mr. Concepcion's shoes knows the district court will at least examine that shift, along with any rehabilitation evidence.

By contrast, if district courts have unbounded discretion whether or not to consider intervening legal and factual developments, that predictability disappears. One judge could account for updated information, while another judge down the hall could refuse to read the defendant's brief, with years in prison on the line. Or a judge could decide to consider intervening developments that favor the government but ignore those that favor the defendant, or vice versa.

A mandatory approach is also "more manageable for district courts." *United States v. Allen*, 956 F.3d 355, 358 (6th Cir. 2020); *see* Scholars Br. 8. The government (at 18) agrees that the section 3553(a) factors "provide a useful and familiar framework" that "district courts will frequently find . . . helpful in the Section 404 context." Without the section 3553(a) factors, district courts "would have to develop new standards to guide their discretionary decision regarding the defendant's appropriate sentence." *Allen*, 956 F.3d at 357. The government never says what those new standards might be if not the section 3553(a) factors. *See* U.S. Br. 40-42.

Mandatory consideration also facilitates appellate review. Appellate courts review sentencing decisions for abuse of discretion. *Gall*, 552 U.S. at 51. If courts must apply the section 3553(a) factors in section 404 proceedings, they must also articulate a "reasoned basis" for whether or not to impose a new sentence. *See Rita v. United States*, 551 U.S. 338, 356 (2007). A district court abuses its discretion when it ignores relevant new evidence, *e.g.*, *United States v. White*, 984 F.3d 76, 91-92 (D.C. Cir. 2020), fails to calculate the correct Guidelines range, *e.g.*, *United States v. Murphy*, 998 F.3d 549, 556 (3d Cir. 2021), does not adequately explain its reasoning, *e.g.*, *United States v. Smith*, 959 F.3d 701, 703 (6th Cir. 2020),

or imposes a substantively unreasonable sentence, *e.g.*, *United States v. Harris*, 960 F.3d 1103, 1106 (8th Cir. 2020). That familiar framework "fosters manageability." *United States v. Shaw*, 957 F.3d 734, 741 (7th Cir. 2020).

But under the government's approach, "it is unclear how the district court's exercise of discretion would be reviewable on appeal." *See Easter*, 975 F.3d at 324. The government (at 42) offers no meaningful guidance, suggesting only that appellate courts can reverse when district courts go "too far." That "we know it when we see it" approach is not an administrable standard of review.

To be sure, recognizing that judges have discretion to consider intervening legal and factual developments is undoubtedly preferable to the Fifth, Ninth, and Eleventh Circuits' view that courts may *never* account for such developments in section 404 proceedings. *See* Pet. 16-18. But the government's position still risks returning to an era of an "unjustifiably wide range of sentences [for] offenders with similar histories, convicted of similar crimes, committed under similar circumstances." *See Koon*, 518 U.S. at 92 (citation omitted).

2. The government (at 29-30, 37-39) argues that a "must consider" rule would create a "windfall" for pre-2010 crack-cocaine offenders. But under both sides' view, district courts can consider intervening legal and factual developments and decide to reduce a defendant's sentence on those grounds. Every "windfall" that is possible under Petitioner's interpretation is possible under the government's interpretation as well. And again, even if district courts must consider intervening developments, they can still decline to impose reduced sentences.

Regardless, any sentence reductions for First Step Act defendants are hardly "windfalls." Congress purpose-

fully singled out pre-2010 crack offenders to rectify a statutory scheme that Congress acknowledged led to unfairness and racial disparities in federal sentencing. *See* DPA Br. 3-8; D.C. Br. 20; Howard Br. 23-28. In 2010, the median crack-cocaine defendant received eight years in prison—significantly more than for any other drug. U.S. Sent'g Comm'n, *2010 Sourcebook of Federal Sentencing Statistics* fig. J. Consequently, few other pre-2010 drug offenders remain in federal prison. There is nothing anomalous about Congress giving special relief to those subject to an unduly harsh regime. CAC Br. 15-19.

The government (at 30, 37) complains that if district courts must consider intervening legal and factual developments under section 404, pre-2010 crack offenders would be better off than post-2010 crack offenders. Not so. In the decade since the Fair Sentencing Act, average crack sentences have fallen by over three years. *Compare 2010 Sourcebook*, *supra* fig. J (mean of 111 months), *with* U.S. Sent'g Comm'n, *Quick Facts: Crack Cocaine Trafficking Offenses* (2020) (mean of 74 months). Post-2010 offenders *automatically* win the benefit of that change; it would be unlawful to sentence a post-2010 crack defendant to a term above the ranges specified by the Fair Sentencing Act. *See* FAMM Br. 28. By contrast, many pre-2010 offenders served full sentences under a repudiated regime that for decades has "created a perception of unfairness." *See Terry v. United States*, 141 S. Ct. 1858, 1861 (2021) (internal quotation marks omitted). For those pre-2010 offenders who remain in prison, relief rests entirely in the district court's hands under any interpretation.

Moreover, the date of sentencing always produces discrepancies. *See Pepper*, 562 U.S. at 503. Because courts use the facts and Guidelines from the date of sentencing, not the offense, Br. 30-31, defendants swiftly convicted

and sentenced will always have less opportunity to show rehabilitation and gain favorable legal changes than defendants whose cases linger for years. So in any sentencing regime, the information the district court can consider depends on timing.

Any anomalies are also worse under the government's interpretation. If district courts *must* consider the section 3553(a) factors, they must consider "unwarranted sentence disparities." 18 U.S.C. § 3553(a)(6). For example, courts must take into account arguments like the government's contention that "circumvent[ing]" collateral relief could produce "discrepanc[ies]." U.S. Br. 38 (quoting *United States v. Chambers*, 956 F.3d 667, 677 (4th Cir. 2020) (Rushing, J., dissenting)). The government, by contrast, would let district courts ignore section 3553(a)(6)'s mandate to consider disparities.

The government's practical concerns are further belied by the government's seeming embrace (at 40 n.*) of a "must consider" approach for pre-2010 legal changes like *United States v. Booker*, 543 U.S. 220 (2005), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). According to the government, "Congress presumably expected courts" to apply those changes in section 404 proceedings. U.S. Br. 40 n.*. But non-crack defendants whose sentences became final before *Booker* and *Apprendi* do not benefit from those decisions.

C. Background Principles of Sentencing Law Require Consideration of Current Circumstances

1. Sentencing courts already use current law and facts. Br. 30-33; ACUF Br. 9-11; AFPF Br. 5-6; DPI Br. 6-8. That norm flows both from sentencing courts' general duty to consider "highly relevant" information, *Pepper*, 562 U.S. at 480 (citation omitted), and the settled principle

that courts ought to operate in the here and now "based upon their best current understanding of the law," *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991) (opinion of Souter, J.).

The government (at 34-35) does not dispute this "background principle of sentencing law" when it comes to "plenary sentencing or resentencing proceedings." It just argues those background rules do not apply to section 404. That is so, the government says, because section 404 proceedings are mere "sentencing reduction[s]" where the general presumption of finality applies. U.S Br. 35; *see id.* at 20-21.

That oversimplifies matters. Congress has created a range of sentencing procedures, from plenary initial sentencings at one end to the technical corrections permitted by Rule 35(a) at the other. Section 404 proceedings fit comfortably on the "less final" side of that spectrum. More than a mechanical sentence reduction, a section 404 proceeding is an opportunity for the court to use its discretion to choose a different sentence, or leave the current sentence standing. Disrupting finality is a feature of that scheme, not a flaw. That sets section 404 apart from collateral attacks on existing sentences, where Congress has erected multiple procedural and substantive barriers to relief specifically to preserve the finality of convictions and *prevent* courts from discretionarily "impos[ing] a reduced sentence." *Contra* U.S. Br. 38-39.

The government notes that 18 U.S.C. § 3582(c)'s introductory language refers to all proceedings under that subsection (including section 404 proceedings) as "modify[ing] a term of imprisonment." U.S. Br. 22-23 (citation omitted). And it suggests that a sentencing "modification" must necessarily be more limited than a plenary resen-

tencing. But again, no one disputes that point. The question here is what set of less-than-plenary procedures courts should follow when deciding whether to "impose a reduced sentence." Section 3582(c)(1)(B) does not answer that question; it merely opens the door to "modification[s]" that are permitted by another statute. *See United States v. Triestman*, 178 F.3d 624, 629 (2d Cir. 1999) (Sotomayor, J.). And here, that statute is section 404, which allows courts to "impose a reduced sentence" subject only to limited restrictions. Br. 18-21; *supra* pp. 3-6. Given the First Step Act's broad sweep, there is no reason to treat section 404 proceedings differently than any other sentencing where the norm of considering current facts and law applies.

2. As in the brief in opposition, the government relies on *Dillon v. United States*, 560 U.S. 817 (2010), and its interpretation of 18 U.S.C. § 3582(c)(2). This reliance is misplaced because *Dillon* turned on explicit textual limitations in section 3582(c)(2) that made proceedings under that provision "readily distinguishable from other sentencing proceedings." 560 U.S. at 831; *see* Br. 43-45; FAMM Br. 29-33. Specifically, section 3582(c)(2) "requires" district courts "to follow the [Sentencing] Commission's instructions" in any applicable policy statement. *Dillon*, 560 U.S. at 827. The policy statement in question barred courts from considering any changes other than the retroactive Guidelines amendment. *Id.* No corresponding restrictions appear in section 3582(c)(1)(B) or section 404.

The government suggests that section 404 is akin to section 3582(c)(2) because both provisions apply only to a "limited class of prisoners." U.S. Br. 22-23 (quoting *Dillon*, 560 U.S. at 825-26). But the government never explains why the number of defendants affected by section

404 should impact the *information* a section 404 court must consider. And again, the government agrees that—whatever the number of affected prisoners—district courts can consider intervening developments if they so choose.

The government also overlooks the reason *Dillon* focused on the scope of the affected population. *Dillon* examined the Sentencing Commission's authority to limit relief for retroactive Guidelines modifications in light of this Court's decision in *Booker*. *Dillon*, 560 U.S. at 819. The Court's noting of "the limited scope and purpose of § 3582(c)(2)" was in service of its ultimate holding that application of the Commission's policy statement in section 3582(c)(2) proceedings "d[id] not implicate the interests identified in *Booker*." *Id.* at 828. That holding has no bearing in this case, which turns on statutory interpretation, not Sixth Amendment principles.

D. The Rule of Lenity Applies

Any ambiguity after exhausting the ordinary tools of statutory interpretation triggers lenity. *See* DPI Br. 14-16. But even if grievous ambiguity is required, U.S. Br. 36, any lingering doubt about section 404's meaning should be resolved in Mr. Concepcion's favor. Br. 33-34; DPI Br. 12-17; AFPF Br. 19-22. The government claims that lenity "applies *only* to 'interpretations of the substantive ambit of criminal prohibitions, [and] to the penalties they impose,'" not to someone already sentenced. U.S. Br. 36 (emphasis added) (quoting *Bifulco v. United States*, 447 U.S. 381, 387 (1980)).

That rewrites precedent. The actual quote is: Lenity "applies *not only* to interpretations of the substantive ambit of criminal prohibitions, *but also* to the penalties they impose." *Bifulco*, 447 U.S. at 387 (emphases added). The

Court never suggested that those were the *only* applications of lenity. Elsewhere, the Court has made clear that lenity applies generally to "criminal statutes, including sentencing provisions." *Taylor v. United States*, 495 U.S. 575, 596 (1990); *accord United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (plurality opinion). That includes proceedings after initial sentencing. *E.g.*, *United States v. Granderson*, 511 U.S. 39, 56-57 (1994) (probation revocation).

Refusing to apply lenity here turns that "venerable principle" on its head. *See Moskal v. United States*, 498 U.S. 103, 131 (1990) (Scalia, J., dissenting). The First Step Act is a "congressional act of lenity." *United States v. Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020) (quoting *Dillon*, 560 U.S. at 828). If lenity applies when Congress acts punitively, then lenity applies when Congress acts leniently.

Applying lenity here furthers the doctrine's ends. *Contra* U.S. Br. 36. Congress passed the First Step Act to correct a "grave error." Howard Br. 23; *see* D.C. Br. 1. Giving that relief full effect prevents "courts from making criminal law in Congress's stead." *See United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). And requiring consideration of current circumstances "minimize[s] the risk of selective or arbitrary enforcement." *See United States v. Kozminski*, 487 U.S. 931, 952 (1988); *supra* pp. 11-13. If there is any case for lenity, this is it.

II. Vacatur Is Required

Whether this Court holds that district courts must or may consider intervening developments, the judgment below should be vacated. Br. 45-47.

1. As the government (at 43) agrees, the court of appeals "limit[ed] the factors that may inform a threshold determination of whether to grant a reduction." At that

first step—which is as far as the district court here got—the First Circuit held that "the district court's discretion is cabined" to only considering "the changes specifically authorized by sections 2 and 3 of the Fair Sentencing Act." Pet.App.18a. If the Guidelines range remains unchanged by the Fair Sentencing Act, the First Circuit does not permit resentencing. Pet.App.19a. If the Guidelines range changes and the district court decides to impose a reduced sentence, only *then* does the First Circuit allow the district court to "consider other factors relevant to fashioning a new sentence." *Id.*

The government does not defend that "unwarranted theoretical distinction," which it agrees is "difficult" to draw in practice and not supported by the statutory text. U.S. Br. 43. And the government does not even address the First Circuit's novel requirement that the Guidelines range must change for the defendant to receive a reduced sentence. *See* Br. 36-37. Instead the government offers the unusual criticism in a merits brief that Mr. Concepcion "focuses much of his criticism on the court of appeals' decision" from which he seeks review, "rather than the district court's." U.S. Br. 43. As an alternative ground for affirmance, the government argues that the district court correctly understood its authority even if the court of appeals did not. *Id.*

The government is wrong.

As the government does not dispute, the district court did not actually consider current law or facts. U.S. Br. 43-45. If the Court holds that district courts must consider those developments, the district court clearly abused its discretion. *See Koon*, 518 U.S. at 100.

The district court also erred if consideration of new law and facts is permissive. On law, the court emphasized that it could "consider[] only the changes in law that the Fair Sentencing Act enacted." Pet.App.71a. Applying that standard, the district court concluded that Mr. Concepcion's request to reconsider his career-offender status was "unavailing" because "Section 404 does not authorize such relief." Pet.App.72a. The court buttressed this conclusion by extensively citing the Fifth Circuit's view that district courts have "limited authority to consider reducing a sentence previously imposed." Pet.App.73a (quoting *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019)).

On appeal, the government then defended the district court's interpretation, arguing that it had been correct to hold that the First Step Act "does not authorize the district court to consider other legal changes that may have occurred after the defendant committed the offense." U.S. C.A. Br. 23 (quoting *United States v. Kelley*, 962 F.3d 470, 475 (9th Cir. 2020)). The government understood the district court's opinion correctly the first time.

The government (at 44) points to the final portion of the district court's opinion where the court determined that the career-offender amendment did not apply retroactively via 18 U.S.C. § 3582(c)(2) or circuit precedent applying Guidelines amendments to cases pending on direct appeal. Pet.App.75a-78a. But the fact that the court went on to consider *other* potential mechanisms for recognizing the change in Mr. Concepcion's career-offender status only underscores that the court thought it lacked discretion to consider the change under section 404.

The district court also never indicated that it could consider current facts. The court simply asserted that the

"*original* sentence was carefully crafted to apply the factors in section 3553(a)" and that sentence remains "fair and just" "today." Pet.App.72a (emphasis added). That statement evinces no recognition that the court could actually consider the facts and the law as they stand "today," when Mr. Concepcion is rehabilitated and no longer considered a career offender.

The government (at 44-45) argues that the district court must have known that it could consider current facts because both sides put forward such facts below. But the required level of explanation "depends upon circumstances." *Rita*, 551 U.S. at 356. Sometimes, given "context and the parties' prior arguments," a simple explanation may suffice. *Id.* But here, the scope of section 404 proceedings in the First Circuit was unclear. *See* Pet.App.73a. In those "circumstances," a one-line assertion that the "original sentence" remains "fair and just" cannot provide the required assurance that the judge "considered the parties' arguments and ha[d] a reasoned basis for exercising his own legal decisionmaking authority." *See Rita*, 551 U.S. at 356; Pet.App.70a.

2. In any event, the proper course is to allow the court of appeals to address the issue under the correct standard.

When the respondent defends the judgment but not the reasoning below, this Court's usual practice is to answer the question presented and leave the respondent's new arguments for remand. *E.g.*, *Rodriguez v. FDIC*, 140 S. Ct. 713, 718 (2020); *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 455-56 (2007); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 194 (2007). The Court should follow that practice here. The First Circuit majority did not weigh in on whether the district court properly

understood its authority under a "must" or "may consider" rule. And the only appellate judge who *did* consider that issue concluded that the district court did not realize that it could consider new law and thus committed "a classic abuse of discretion." Pet.App.25a, 64a-65a (Barron, J., dissenting). The panel should resolve this "case-specific determination" in the first instance. *See* U.S. Br. 19.

CONCLUSION

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

Respectfully submitted,

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