No. ____

IN THE

Supreme Court of the United States

TARAHRICK TERRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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SEPTEMBER 28th, 2020

QUESTION PRESENTED

Section 404 of the First Step Act of 2018 made the Fair Sentencing Act of 2010 retroactive. Section 404 authorized federal district courts to impose a reduced sentence for anyone with a "covered offense." Pub. L. No. 115-391, 132 Stat. 5194, § 404(b). Congress defined 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 of 2010 . . . that was committed before August 3, 2010." § 404(a).

Section 2 of the Fair Sentencing Act of 2010 modified 21 U.S.C. § 841 by raising the crack-cocaine quantities that determine three tiers of penalties in 21 U.S.C. § 841(b)(1). For the top-tier range of 10-years-to-life in § 841(b)(1)(A), Section 2 raised the threshold from 50 to 280 grams of crack. And, for the mid-tier range of 5-to-40-years in § 841(b)(1)(B), Section 2 raised the threshold from 5 to 28 grams of crack.

The bottom-tier range of 0-to-20-years in § 841(b)(1)(C) applies to offenses not subject to the top- or mid-tier ranges in §§ 841(b)(1)(A) or (b)(1)(B). Section 2 of the Fair Sentencing Act did not modify the text of § 841(b)(1)(C). But by raising the quantity threshold in § 841(b)(1)(B)(iii) from 5 grams to 28 grams of crack, it had the effect of increasing § 841(b)(1)(C)'s upper boundary from 5 grams to 28 grams of crack.

The question presented is:

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

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[1] This question is also presented in *Birt v. United States*, Sup. Ct. No. 20-291 (pet. for cert. filed Sept. 1, 2020).

PARTIES TO THE PROCEEDINGS

The caption contains the names of all of the parties to the proceedings.

RELATED PROCEEDINGS

United States v. Terry, No. 20-10482 (11th Cir. Sept. 22, 2020) (decision below)

United States v. Terry, No. 16-cr-60054 (S.D. Fla. Jan. 27, 2020) (criminal case)

Terry v. United States, No. 09-cv-23095 (S.D. Fla. Nov. 1, 2011) (§ 2255 case)

Terry v. United States, No.11-15430 (11th Cir. June 14, 2012) (COA denial)

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

CASES

STATUTES

U.S. SENTENCING GUIDELINES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit decision under review is reported at __ F. App'x __, 2020 WL 5640801, and is reproduced as Appendix ("App.") A. The district court's order is unreported, but is reproduced as App. B.

JURISDICTION

The Eleventh Circuit issued its decision on September 22, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

A. THE FIRST STEP ACT OF 2018

Entitled "Application of the Fair Sentencing Act," Section 404 of the First Step Act of 2018 provides in full:

> (a) DEFINITION OF COVERED OFFENSE.—In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.
>
> (b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.
>
> (c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by

> sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

Pub L. No. 115-391, 132 Stat. 5194, § 404.

B. THE FAIR SENTENCING ACT OF 2010

Entitled "Cocaine Sentencing Disparity Reduction," Section 2 of the Fair Sentencing Act of 2010 provides, in relevant part:

> (a) CSA.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended—
>
> > (1) in subparagraph (A)(iii), by striking "50 grams" and inserting "280 grams"; and
> >
> > (2) in subparagraph (B)(iii), by striking "5 grams" and inserting "28 grams".

Pub. L. No. 111-220, 124 Stat. 2372, § 2(a).

C. SECTION 841, TITLE 21 OF THE U.S. CODE

As amended by the Fair Sentencing Act of 2010, 21 U.S.C. § 841 provides, in pertinent part:

> **(a) Unlawful acts** Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;
> >
> > * * *
>
> **(b) Penalties** Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)

(A) In the case of a violation of subsection (a) of this section involving—

* * *

(iii) 280 grams or more of a mixture or substance described in clause (ii) [*i.e.*, cocaine] which contains cocaine base;

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life . . . . If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment . . . . If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years . . . . Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. . . .

* * *

(B) In the case of a violation of subsection (a) of this section involving—

* * *

(iii) 28 grams or more of a mixture or substance described in clause (ii) [*i.e.*, cocaine] which contains cocaine base;

* * *

> such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life . . . If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment . . . Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment . . . .
>
> **(C)** In the case of a controlled substance in schedule I or II . . . , except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life . . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment . . . . Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. . . .

21 U.S.C. §§ 841(a)(1), (b)(1)(A)–(C).

INTRODUCTION

Enacted with overwhelming bipartisan support, the First Step Act of 2018 sought to make the criminal justice system a bit more just. Section 404 was a centerpiece provision. It made Section 2 of the Fair Sentencing Act of 2010 retroactive. Section 2 reduced the infamous 100-to-1 crack-to-powder cocaine sentencing disparity by raising the amount of crack determining the statutory penalties in 21 U.S.C. § 841(b)(1). For the top-tier penalties in § 841(b)(1)(A)(iii), Section 2 increased the threshold from 50 to 280 grams. And, for the mid-tier penalties in § 841(b)(1)(B)(iii), Section 2 increased the threshold from 5 to 28 grams.

The bottom-tier penalties in § 841(b)(1)(C) apply to anyone not subject to the higher penalties in §§ 841(b)(1)(A) or (b)(1)(B). Section 2 of the Fair Sentencing Act did not amend the text of § 841(b)(1)(C). But by raising the drug-quantity thresholds for §§ 841(b)(1)(A)(iii) and (b)(1)(B)(iii), it had the effect of raising § 841(b)(1)(C)'s upper boundary from 5 to 28 grams of crack. Before the Fair Sentencing Act, § 841(b)(1)(C) applied to crack offenders with up to 5 grams of crack; after the Fair Sentencing Act, § 841(b)(1)(C) applies to crack offenders with up to 28 grams of crack.

Section 404 of the First Step Act made Section 2 of the Fair Sentencing Act retroactive by granting district courts discretion to impose a reduced sentence for those with a "covered offense." In Section 404(a), Congress defined the term "covered offense" as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section[ ] 2 . . . of the Fair Sentencing Act of 2010, that was committed before August 3, 2010." The question presented here is: do the lowest-level crack offenders sentenced under § 841(b)(1)(C) have a "covered offense?"

The First and Fourth Circuits have held that they do. As a result, district courts in those two circuits now have discretion to reduce sentences for low-level crack offenders sentenced before the Fair Sentencing Act. However, the Third and Eleventh Circuits have held in published opinions that those § 841(b)(1)(C) offenders do not have a "covered offense." The Sixth and Tenth Circuits have reached the same result in unpublished opinions. As a result, district courts in those four circuits lack authority to grant those offenders a sentencing reduction under Section 404.

This circuit split is untenable. There are countless pre-Fair Sentencing Act § 841(b)(1)(C) crack offenders who are still serving their sentences. But geography alone now determines whether they are even for eligible for relief. And although relief is discretionary, district courts have granted significant relief to eligible crack offenders—an average sentencing reduction of 26% or 71 months. Moreover, because many § 841(b)(1)(C) offenders are nearing the end of their sentences, this Court should intervene now. Otherwise, time may obviate a large swath of available relief.

This is an ideal vehicle to intervene. Petitioner fully preserved his "covered offense" arguments in the district court and on appeal. Both the district court and the Eleventh Circuit denied relief on the sole ground that § 841(b)(1)(C) was not a "covered offense." And Petitioner is a true low-level § 841(b)(1)(C) offender, caught with only 3.9 grams of crack. He is precisely the sort of offender that Congress wanted to help. Yet four circuits have turned Section 404 on its head, allowing crack kingpins (but not low-level dealers) to seek relief. This Court should grant review, correct those circuits, and hold that § 841(b)(1)(C) offenders are eligible for Section 404 relief.

STATEMENT

A. STATUTORY BACKGROUND

1. In the Anti-Drug Abuse Act of 1986, Congress enacted criminal prohibitions and penalties for various drug offenses, including those involving crack and powder cocaine. Those prohibitions and penalties are codified at 21 U.S.C. § 841.

Entitled "Unlawful Acts," § 841(a)(1) prohibits any person from knowingly or intentionally manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense a "controlled substance." That includes cocaine.

Entitled "Penalties," § 841(b) prescribes three tiers of sentencing ranges for "any person who violates subsection (a)." These tiers depend on the type and weight of the drug. Under the 1986 Act, there was a 100-to-1 disparity between crack and powder cocaine. *See Kimbrough v. United States*, 552 U.S. 85, 95–96 (2007).

Section 841(b)(1)(A) prescribed an unenhanced statutory range of 10-years-to-life for crack offenses involving 50 grams of more and powder offenses involving 5,000 grams or more. Section 841(b)(1)(B) prescribed an unenhanced statutory range of 5-to-40 years for crack offenses involving 5 grams or more and powder offenses involving 50 grams of more. Section 841(b)(1)(C) served as a residual provision, prescribing an unenhanced statutory range of 0-to-20 years for all offenses, "except as provided in subparagraphs (A), (B)," and another provision not relevant here.

2. "During the next two decades, the [Sentencing] Commission and others in the law enforcement community strongly criticized Congress' decision to set the crack-to-powder mandatory minimum ratio at 100-to-1." *Dorsey v. United States*, 567

U.S. 260, 268 (2010). "The Commission issued four separate reports telling Congress that the ratio was too high and unjustified because, for example, research showed the relative harm between crack and powder cocaine less severe than 100-to-1, because sentences embodying that ratio could not achieve the Sentencing Reform Act's 'uniformity' goal of treating like offenders alike, because they could not achieve the 'proportionality' goal of treating different offenders (*e.g.*, major drug traffickers and low-level dealers) differently, and because the public had come to understand sentences embodying the 100-to-1 ratio as reflecting unjustified race-based differences." *Id*. Ultimately, the Sentencing Commission "asked Congress for new legislation embodying a lower crack-to-powder ratio." *Id*. at 269.

"In 2010, Congress accepted the Commission's recommendations and enacted the Fair Sentencing Act into law." *Id*. Section 2(a) of the Fair Sentencing Act amended the text of §§ 841(b)(1)(A)(iii) and (b)(1)(B)(iii). Specifically, Section 2(a) "increased the drug amounts triggering mandatory minimums for crack trafficking offenses from 5 grams to 28 grams in respect to the 5-year minimum [in § 841(b)(1)(B)(iii)] and from 50 grams to 280 grams in respect to the 10-year minimum" in § 841(b)(1)(A)(iii). *Id*.; *see* Pub. L. No. 111-220, 124 Stat. 2372, § 2(a). "The change had the effect of lowering the 100-to-1 crack-to-powder ratio to 18-to-1." *Dorsey*, 567 U.S. at 269. And, although Section 2(a) did not amend the text of § 841(b)(1)(C), its amendments to §§ (b)(1)(A)(iii) and (b)(1)(B)(iii) also had the effect of raising § (b)(1)(C)'s upper boundary. However, these amendments applied only to those sentenced after their effective date of August 3, 2010. *Id*. at 264, 281.

Pursuant to the Fair Sentencing Act, the Sentencing Commission made retroactive amendments to the Drug Quantity Table in the Sentencing Guidelines, which effectively lowered base offense levels for crack offenses. U.S.S.G., App. C., amends. 750, 759 (2011). However, relief under this amendment was circumscribed. Offenders sentenced before August 3, 2010 "remained subject to the *statutory* penalty in effect at the time they were sentenced. Thus, those offenders who had been sentenced at the mandatory minimum penalty could not receive any reduction, and defendants who were sentenced above a mandatory minimum penalty could receive smaller reductions that would otherwise be available." U.S. Sentencing Comm'n, The First Step Act of 2018: One Year of Implementation 42 (Aug. 2020).[2]

Moreover, offenders like Petitioner who were sentenced as "career offenders" "were not eligible for the guideline reduction" at all, because their guideline range was based on the career-offender guideline rather than the retroactively-amended Drug Quantity Table. *Id.* "As a result, several thousand offenders"—Petitioner included—"were ineligible for some or all of the sentence reduction that would have resulted from the retroactive application of the lowered sentencing guideline." *Id.*

3. Enacted with overwhelming bipartisan support, Section 404 of the First Step Act sought remedy that injustice. Pub. L. No. 115-391, 132 Stat. 5194. It did so by making the Fair Sentencing Act retroactive. Specifically, Section 404(b) provides that a district "court that imposed a sentence for a *covered offense* may . . . impose a

[2] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf

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." § 404(b) (emphasis added; internal citation omitted). Thus, eligibility for relief is keyed to a "covered offense." In Section 404(a), Congress defined that term to "mean[ ] a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 . . . that was committed before August 3, 2010."

In Section 404(c), Congress clarified that "[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section." Thus, eligibility merely permits, but does not require, district courts to impose a reduced sentence for anyone with a "covered offense."

Although discretionary, Section 404 has had a major impact thus far. After only one year, district "courts have granted 2,387 reductions in sentence pursuant to section 404 of the Act." U.S. Sentencing Comm'n, One Year of Implementation, *supra*, at 43. "The average length of sentence reduction for these offenders was 71 months, or 26 percent—from 258 months to 187 months," which is "more than twice as long as the sentence reductions offenders received pursuant to the Commission's Fair Sentencing Act retroactive guideline amendment." *Id*. More than 90% of those who have obtained relief thus far have been African American men, "and more than half (57.4%) were originally sentenced as career offenders." *Id*. at 44–45. Although Petitioner shares those characteristics, he was deemed ineligible. The district court could not even consider whether to grant him a reduction. Perversely, the only reason for that result was that he was a low-level offender sentenced under § 841(b)(1)(C).

B. PROCEEDINGS BELOW

1. In 2008, a federal grand jury in the Southern District of Florid charged Petitioner with, *inter alia*, possession with intent to distribute a controlled substance, in violation of 21 U.S.C. § 841(a)(1). Dist. Ct. Dkt. Entry 7. Citing 21 U.S.C § 841(b)(1)(C), the indictment further alleged that "this violation involved a mixture and substance containing a detectible amount of cocaine base." *Id*. at 2. Petitioner ultimately pled guilty to that count of the indictment, and the government dismissed the remaining counts. Dist. Ct. Dkt. Entry 33 at 1; Dist. Ct. Dkt. Entry 37 at 14.

Although § 841(b)(1)(C) produced an unenhanced statutory range of 0 to 20 years, Petitioner had a prior drug conviction, increasing the high end of the statutory range to 30 years. Dist. Ct. Dkt. Entry 25; PSI ¶ 80 (citing § 841(b)(1)(C)). At sentencing, the district court found Petitioner accountable for 3.9 grams of crack cocaine. PSI ¶¶ 14, 18; Dist. Ct. Dkt. Entry 37 at 4–5. As a career offender, he was subject to an enhanced advisory guideline range of 188–235 months. PSI ¶¶ 34, 39, 81. The district court sentenced him to the low-end of that range. Dist. Ct. Dkt. Entry 33 at 2; Dist. Ct. Dkt. Entry 37 at 12. The district court's final judgment listed § 841(a)(1) alone as the statute of conviction. Dist. Ct. Dkt. Entry 33 at 1.

2. In 2019, Petitioner filed a motion for a reduced sentence, pursuant to Section 404 of the First Step Act. He asserted that he had a "covered offense" and was therefore eligible for relief. Dist. Ct. Dkt. Entry 47 at 3–6. On that point, he first argued that Section 2 of the Fair Sentencing Act "modified the statutory penalties under § 841(b) for violations of 21 U.S.C. § 841(a) . . . that involved crack cocaine,"

and Petitioner committed the § 841(a)(1) offense before August 3, 2010. *Id*. at 4. He said that he had a "covered offense" for that reason alone. Alternatively, he argued that, even focusing on § 841(b)(1)(C) instead of § 841(a)(1), that penalty provision after the Fair Sentencing Act "now provides for [an unenhanced] sentencing range of up to 20 years if the offense involved less than 28 grams," as opposed to 5 grams of crack. *Id*. at 3. After arguing that he had a "covered offense," Petitioner sought a reduction to time served, emphasizing the small amount of crack, the fact that his unenhanced guideline range would be lower today than it was at sentencing, and the substantial post-sentencing rehabilitation he had demonstrated. *See id*. at 6–9.

The government responded that Petitioner did not have a "covered offense," "because Section 2 of the Fair Sentencing Act only modified the statutory penalties under 21 U.S.C. §§ 841(b)(1)(A) and (b)(1)(B)," and it "did not change the statutory penalties for a violation of § 841(b)(1)(C)." Dist. Ct. Dkt. Entry 52 at 3–4. Petitioner replied by reiterating his arguments. *See* Dist. Ct. Dkt. Entry 55.

The district court denied Petitioner's motion, concluding that he did not have a "covered offense." After summarizing the parties' competing arguments, the court "agree[d] with the Government—Defendant is not entitled to relief under the First Step Act because he did not commit a 'covered offense' as that term is defined by the First Step Act." App. 12a–13a. The court reasoned that "[n]either Section 2 nor Section 3 of the Fair Sentencing Act modified the statutory penalties under 21 U.S.C. § 841(b)(1)(C)." App. 13a. (citing *United States v. Foley*, 798 F. App'x 534 (11th Cir. 2020)). As a result, the court concluded that Petitioner "was not convicted and

sentenced for a 'covered offense' within the meaning of the First Step Act, and he is therefore not entitled to a reduction of sentence under the Act." *Id.*

3. On appeal, the parties reiterated their "covered offense" arguments. Relying on the intervening decision in *United States v. Smith*, 954 F.3d 446 (1st Cir. 2020), Petitioner first argued that his "conviction for a violation of 21 U.S.C. § 841(a)(1) . . . is a 'Covered Offense' because the Fair Sentencing Act modified the penalties for all § 841(a)(1)" offenses. Pet. C.A. Br. 6, 11–14. Relying on *Smith* and the intervening decision in *United States v. Woodson*, 962 F.3d 812 (4th Cir. 2020), Petitioner alternatively argued that, even if the district court correctly focused on § 841(b)(1)(C), that too was a "covered offense" because the Fair Sentencing Act's "amendments to §§ 841(b)(1)(A) and (B) necessarily amended § 841(b)(1)(C)," as "§ 841(b)(1)(C) is defined in part by what § 841(b)(1)(A) and § 841(b)(1)(B)" cover. Pet. C.A. Br. 6–7, 15–18; Pet. C.A. Reply Br. 1–3; Pet. C.A. Rule 28(j) Ltr. of June 26, 2020.

The government repeated its argument that Petitioner did not have a "covered offense" because "neither section 2 nor 3 of the Fair Sentencing Act modified § 841(b)(1)(C)'s statutory penalties." U.S. C.A. Br. 5. It argued that the First Circuit's decision in *Smith* and the Fourth Circuit's decision in *Woodson* were unpersuasive, and that the Eleventh Circuit's recent decision in *United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020) had held that the Fair Sentencing Act modified only §§ (b)(1)(A) and (B), but not § 841(b)(1)(C). *Id.* at 9; U.S. Rule 28(j) Ltrs. of June 26, 2020. After briefing was complete, the government also relied on the Third Circuit's decision in

United States v. Birt, 966 F.3d 257 (3d Cir. 2020), which embraced the government's position and rejected *Smith* and *Woodson*. U.S. C.A. Rule 28(j) Ltr. of July 22, 2020.

The court of appeals affirmed. The Eleventh Circuit squarely held that § 841(b)(1)(C) was not a "covered offense." The court applied its precedential decision in *Jones*, which held that §§ 841(b)(1)(A)(iii) and (b)(1)(B)(iiii) are "covered offenses," but that "'those provisions are the only provisions [in § 841(b)] that the Fair Sentencing Act modified.'" App. 4a (quoting *Jones*, 962 F.3d at 1300) (brackets and ellipsis omitted). In this case, the court observed, Petitioner "pled guilty to one count of possession with intent to distribute a substance containing a 'detectable' amount of cocaine base (which the district court found at sentencing to be 3.9 grams of cocaine base), thus triggering the penalties found in § 841(b)(1)(C)." App. 5a. And, the court reasoned, "[t]he Fair Sentencing Act did not expressly amend § 841(b)(1)(C); as *Jones* made clear, §§ 841(b)(1)(A) and 841(b)(1)(B) were the only provisions modified." *Id*. "Accordingly," the court concluded, Petitioner's "offense under § 841(b)(1)(C) is not a 'covered offense,'" and so he "was not eligible for relief under the First Step Act." *Id*.

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE SPLIT

The circuits are now openly divided on whether pre-August 3, 2010 crack offenders convicted under § 841(a)(1) and sentenced under § 841(b)(1)(C) have a "covered offense," and are therefore eligible for relief under Section 404 of the First Step Act. The First and Fourth Circuits have held that they do have a "covered offense." The Third, Sixth, Tenth, and Eleventh Circuits have held that they do not.

A. Two Circuits Hold that Crack Offenders Convicted Under § 841(a) and Sentenced Under § 841(b)(1)(C) Have a "Covered Offense"

1. In *United States v. Smith*, 954 F.3d 446 (1st Cir. 2020), the First Circuit squarely held that a crack offender who was convicted under § 841(a)(1) and sentenced under § 841(b)(1)(C) has a "covered offense." *Id*. at 446, 448, 452.

As a threshold matter, the court observed that every circuit to address the issue had agreed, and the government did not dispute, that the phrase "statutory penalties for which were modified" in Section 404 qualified the term "Federal criminal statute" (*i.e.*, the statute of conviction), and not the term "violation" (*i.e.*, the defendant's particular conduct). *Id*. at 448–49 (citing cases).

Proceeding on that assumption, the court then addressed whether the "Federal criminal statute" here was § 841, § 841(a), or §§ 841(a) and (b)(1)(C). The court agreed with the defendant that the "'Federal criminal statute' is § 841(a)(1), and that 'the statutory penalties' for that subsection are set out in § 841(b)(1)." *Id*. at 449. "The headings of these subsections bolster this argument—§ 841(a) is labeled 'unlawful acts' and § 841(b) is labeled 'penalties.'" *Id*. (brackets omitted). And "[t]he body of the statute also bolsters [that] argument—§ 841(a) lists the acts that violate the law (manufacturing, distributing, etc.), whereas § 841(b) correlates increasing penalties to the quantities associated with the acts that violate § 841(a)." *Id*.

The court rejected that government's argument that, because the drug quantities in § 841(b)(1) are elements of the offense under *Alleyne v. United States*, 570 U.S. 99 (2013), the "Federal criminal statute" of conviction included the governing penalty provision in § 841(b)(1). *Id*. at 449–50. The court explained that

"we are not trying to determine which section or sections set forth the elements of a crime," but rather "what Congress meant by the phrase 'Federal criminal statute, the statutory penalties for which were modified by . . . the Fair Sentencing Act." *Id.* at 450. And the court saw "no reason to believe that Congress would have thought the holding in *Alleyne* concerning criminal procedure and the elements of a crime informed the meaning of the phrase 'Federal criminal statute.'" *Id.*

Having determined that § 841(a)(1) was the "Federal criminal statute" of conviction, the court found it "obvious" that Section 2 of the Fair Sentencing Act modified § 841(a)(1)'s statutory penalties. *Id.* It explained: "Section 2 of the Fair Sentencing Act raised, and hence 'modified,' the thresholds for crack-cocaine offenses under § 841(b)(1). Since § 841(b)(1) was 'modified' as to crack cocaine, and § 841(b)(1) sets forth all the 'statutory penalties' for § 841(a)(1), the violation in this case is a 'covered offense' under Section 404." *Id.*

Alternatively, the court held that, even if § 841(b)(1)(C) was the "Federal criminal statute," as the government argued, it would still be a "covered offense." *Id.* The court explained that, although Section 2 "did not literally change the text of § 841(b)(1)(C)," that provision "is defined in part by what § 841(b)(1)(A) and § 841(b)(1)(B) do not cover," and so Section 2's "modification to the latter subsections also modifies the former by incorporation." *Id.* "In effect, § 841(b)(1)(C) set forth the penalties for quantities between zero and five grams of crack cocaine prior to the Fair Sentencing Act, and between zero and twenty-eight grams after. This is a modification." *Id.* And it did not matter that "the sentencing range . . . under

§ 841(b)(1)(C) did not change," since "the Fair Sentencing Act did not change the mandatory minimum or maximum for violations of § 841(b)(1)(A) or § 841(b)(1)(B), either, only the threshold quantities." *Id.*

As a policy matter, the court further observed that "[t]he change in § 841(b)(1)(C)'s upper bound is no small point, even for defendants guilty of distributing less than five grams of crack, because the statutory benchmarks likely have an anchoring effect on a sentencing judge's decision making." *Id.* at 451. In that particular case, the defendant's conduct "looks less significant and thus perhaps less worthy of as long of a sentence under § 841 as the statute exists now than as it existed at the time of his sentencing. Under the old version of § 841, 1.69 grams of crack was 34% of a quantity mandating a five-year minimum. Now it is only 6% of that threshold." *Id. see also United States v. Hudson*, 967 F.3d 605, 612 (7th Cir. 2020) (employing similar reasoning and quoting *Smith* with approval).

Finally, *Smith* acknowledged that there were "several other circuit court opinions holding that defendants sentenced under § 841(b)(1)(C) were not convicted for a 'covered offense' under Section 404." 954 F.3d at 451 (citing *United States v. Foley*, 798 F. App'x 534, 535 (11th Cir. 2020) and *United States v. Martinez*, 777 F. App'x 946, 947 (10th Cir. 2019)). But the court did not find them "persuasive." *Id.*

2. In *United States v. Woodson*, 962 F.3d 812 (4th Cir. 2020), the Fourth Circuit expressly joined the First Circuit in concluding that crack offenders sentenced under § 841(b)(1)(C) have a "covered offense." *Id.* at 813, 817.

Although "[t]he Fair Sentencing Act did not change the text of Subsection 841(b)(1)(C)," the Fourth Circuit explained that its "amendments to Subsections 841(b)(1)(A)(iii) and (B)(iii) shifted all three brackets upward." *Id.* at 815. Thus, just as the Fair Sentencing Act "modified" §§ 841(b)(1)(A)(iii) and 841(b)(1)(B)(iii), it also "'modified' Subsection 841(b)(1)(C) by altering the crack cocaine quantities to which its penalties applies. Before the Fair Sentencing Act, Subsection 841(b)(1)(C)'s penalty applied only to offenses involving less than 5 grams of crack cocaine (or an unspecified amount). But because of the changes rendered by Section 2 of the Fair Sentencing Act, the penalty in Subsection 841(b)(1)(C) now covers offenses involving between 5 and 28 grams of crack cocaine as well." *Id.* at 816.

The court clarified that "Congress did not need to amend the text of Subsection 841(b)(1)(C) to make this change," since "the scope of Subsection 841(b)(1)(C)'s penalty for crack cocaine trafficking is defined by reference to Subsections 841(b)(1)(A)(iii) and (B)(iii)." *Id.* "Thus, by increasing the drug weights to which the penalties in Subsection 841(b)(1)(A)(iii) and (B)(iii) applied, Congress also increased the crack cocaine weights to which Subsection 841(b)(1)(C) applied and thereby modified the statutory penalty for crack cocaine offenses in Subsection 841(b)(1)(C) in the same way that Congress modified the statutory penalties in Subsections 841(b)(1)(A)(iii) and (B)(iii)." Because "the ordinary meaning of the term 'modified' . . . includes any change, however slight," increasing the upper boundary of § 841(b)(1)(C) from 5 grams to 28 grams was a "modification." *Id.* (citations omitted).

The court agreed with the First Circuit that, because "Section 2 of the Fair Sentencing Act shifted the entire sentencing scale for crack cocaine trafficking offenses," "even defendants whose are offense remain within the same subsection after Section 2's amendments are eligible for relief, and modification of the range of drug weights to which the relevant subsection applies may have an anchoring effect on their sentence." *Id.* at 817. In that case, the defendant had "distribut[ed] 0.41 grams of crack cocaine, which is 8.2% of 5 grams, the previous upper end of Subsection 841(b)(1)(C)'s range, but only 1.5% of 28 grams, the new upper end. A district court may find this shift relevant to determining the appropriate sentence." *Id.*

B. Four Circuits Hold that Crack Offenders Convicted Under § 841(a) and Sentenced Under § 841(b)(1)(C) Don't Have a "Covered Offense"

1. In *United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020), the Eleventh Circuit held that "the district court must determine whether the movant's offense triggered the higher penalties in § 841(b)(1A)(iii) or (B)(iii). If so, the movant committed a covered offense." *Id.* at 1301. The court rejected the First Circuit's contrary approach in *Smith* that § 841(a) alone was a "covered offense," for that "would mean that a movant with *any* drug-trafficking offense—even, say, a heroin offense—would have a 'covered offense.'" *Id.* at 1300. Instead, to determine whether there is a "covered offense," the Eleventh Circuit looked only to whether the crack offender was sentenced under §§ 841(b)(1)(A)(iii) or 841(b)(1)(B)(iii). *Id.* at 1300–01. It reasoned that "[t]hose provisions are two of the statutory penalty provisions that apply to violations of section 841(a), and they are the *only* provisions that the Fair Sentencing Act modified." *Id.* at 1300 (emphasis added).

As this case illustrates, the Eleventh Circuit has interpreted *Jones* as holding that defendants sentenced under § 841(b)(1)(C) do not have a "covered offense." *See* App. 5a ("as *Jones* made clear, §§ 841(b)(1)(A) and 841(b)(1)(B) were the only provisions modified. Accordingly, Terry's offense under § 841(b)(1)(C) is not a 'covered offense'") (internal citation omitted); *United States v. Cunningham*, __ F. App'x __, 2020 WL 4932285, at *2 (11th Cir. Aug. 24, 2020) ("Cunningham was convicted under section 841(b)(1)(C), which is not a covered offense as defined in the First Step Act. Section two of the Fair Sentencing Act modified the statutory penalties for sections 841(b)(1)(A)(iii) and (b)(1)(B)(iii), but not for section (b)(1)(C)."); *see also United States v. Foley*, 798 F. App'x 534, 535–36 (11th Cir. Jan. 9, 2020) (holding, before *Jones*, that "Sections 2 and 3 of the Fair Sentencing Act modified 21 U.S.C. §§ 841(b)(1)(A)(iii) [and] 841(b)(1)(B)(iii) . . . —but, importantly here, *not* § 841(b)(1)(C).").

2. In *United States v. Birt*, 966 F.3d 257 (3d Cir. 2020), *cert. pending* (No. 20-291), the Third Circuit employed the same reasoning and reached the same result.

Relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Alleyne*, the court first determined that, because drug quantities are elements of the offense, "21 U.S.C. § 841(b)(1)(A), § 841(b)(1)(B), and § 841(b)(1)(C) are each distinct crimes." *Id.* at 262 (quotation omitted). Therefore, for purposes of the "covered offense" determination, the court concluded that the "crime of conviction is defined by a combination of § 841(a)(1) and § 841(b)(1)(C)." *Id.* In so holding, the court expressly disagreed with the First Circuit's contrary approach in *Smith* that § 841(a) alone was a "covered offense." Although the court admitted that this "reasoning [wa]s not implausible,"

the court disagreed because it presumed that Congress was aware of *Alleyne*, and because *Smith*'s reasoning would mean that "a defendant convicted of a crime entirely unrelated to crack cocaine would be entitled to resentencing." *Id.* at 261–63 & n.6.

The court next held that § 841(b)(1)(C) was not "modified by the Fair Sentencing Act and thus, in conjunction with § 841(a)(1), [does not] qualif[y] as a 'covered offense' under the First Step Act." *Id.* at 263. The court acknowledged the view "that subparagraph (C) incorporated by reference the penalty triggers in (A) and (B), and thus that all three were modified even though only (A) and (B) were actually changed." *Id.* at 264. Although the Fourth Circuit had adopted that view in *Woodson*, and it "ha[d] some surface appeal," the Third Circuit expressly "disagree[d]" with it because there is no "circumstance under which someone convicted under (b)(1)(C) would have faced different penalties before and after the passage of the Fair Sentencing Act." *Id.* at 264 & n.9. In its view, "the text and effect of § 841(b)(1)(C) are the same now as before," and it was therefore not a "covered offense." *Id.* at 264–65. In reaching that result, the Third Circuit joined "many courts around the country [that] have concluded that § 841(b)(1)(C) was not 'modified' by the Fair Sentencing Act, within the meaning of the First Step Act." *Id.* at 265 & n.11 (citing, *inter alia*, the Eleventh Circuit's decision in *Foley* and the Tenth Circuit's decision in *Martinez*).

3. In *United States v. Willis*, No. 19-1723 (6th Cir. Feb. 11, 2020), the Sixth Circuit held that a crack offender sentenced under § 841(b)(1)(C) "was not eligible for a sentence reduction under the First Step Act because he was not sentenced for a 'covered offense.'" *Id.* at 3. The court reasoned that "[t]he Fair Sentencing Act did

not modify the statutory penalties set forth in 21 U.S.C. § 841(b)(1)(C)." *Id.* "The statutory penalties under 21 U.S.C. § 841(b)(1)(C) remained the same" both before and after the Fair Sentencing Act. *Id.* at 3–4. Although *Willis* was an unreported order, district courts in the Sixth Circuit have reached the same result. *See, e.g.*, *United States v. Berry*, 2020 WL 674340, at *2 (E.D. Mich. Feb. 11, 2020).

4. In *United States v. Martinez*, 777 F. App'x 946 (10th Cir. 2019), the Tenth Circuit reached the same conclusion. After explaining that Section 2 amended only §§ 841(b)(1)(A)(iii) and 841(b)(1)(B)(iii), the court reasoned that "[t]he Fair Sentencing Act had no effect on § 841(b)(1)(C) and, thus, Martinez's crime of conviction is not a 'covered offense' under the [First Step] Act." *Id.* at 947. Although unpublished, courts in the Tenth Circuit have followed *Martinez*. *See, e.g.*, *United States v. Robinson*, 2020 WL 2572408, at *2 (D. Kan. May 21, 2020).

II. THE QUESTION PRESENTED WARRANTS REVIEW

The question presented has "significant implications for many federal prisoners." *Birt*, 966 F.3d at 258. Indeed, it affects whether every pre-August 3, 2010 crack offender sentenced under § 841(b)(1)(C) will be eligible for relief under Section 404 of the First Step Act. Section 841(b)(1)(C)'s unenhanced range permits a prison sentence of 20 years and mandates 3 years of supervised release; the enhanced range to which Petitioner was subject permits a prison sentence of 30 years and mandates 6 years of supervised release; and another enhanced range mandates a life sentence. Thus, there are many pre-August 3, 2010 § 841(b)(1)(C) crack offenders who could

benefit from Section 404. That reality is reflected by the many appellate decisions already addressing the issue after less than two years of the Act being in effect.

Yet the availability of Section 404 relief for those numerous offenders currently depends on geography. Those, like Petitioner, who were sentenced in Miami, Philadelphia, Detroit, or Denver are ineligible for a sentence reduction. Federal courts cannot even consider whether a reduction would be appropriate as a matter of discretion. Yet crack offenders fortunate enough to have been sentenced in Boston, Baltimore, and Charleston are not only having their sentences reconsidered but reduced. As explained above, over two thousand crack offenders have obtained significant relief, with an average sentencing reduction of 71 months or 26%. U.S. Sent. Comm'n, One Year of Implementation, *supra*, at 43. Eligibility for such significant relief cannot depend on the happenstance of geography. *Cf.* 18 U.S.C. § 3553(a)(6) (directing courts to "avoid unwarranted sentence disparities").

Finally, the Court should resolve this issue now because many § 841(b)(1)(C) offenders are nearing the end of their sentences. Thus, many of those offenders could receive a reduction to time served. And, for those already out of custody, they could receive a reduction in their term of supervised release. *See United States v. Sutton*, 962 F.3d 979, 982–83 (7th Cir. 2020); *United States v. Holloway*, 956 F.3d 660, 664–65 (2d Cir. 2020); *United States v. Venable*, 943 F.3d 187, 192–95 (4th Cir. 2019). Were this Court to agree to with the First and Fourth Circuits, waiting until next Term to resolve the circuit split would have the practical effect of delaying, and thus

perhaps denying, meaningful sentencing relief for many eligible crack offenders. To avoid that unjust result, this Court should resolve the circuit conflict promptly.

III. THIS IS AN IDEAL VEHICLE

This case is an ideal vehicle to do so. Procedurally, Petitioner argued below that he has a "covered offense"—both because § 841(a)(1) is a "covered offense," and, alternatively, because § 841(b)(1)(C) was modified by way of the amendments to §§ 841(b)(1)(A) and (b)(1)(B). He made these arguments at every available opportunity. He did so in the district court. Dist. Ct. Dkt. Entry 47 at 3–6; Dist. Ct. Dkt. Entry 55 at 1–3. And he did so on appeal, expressly relying on the First Circuit's decision in *Smith* and the Fourth Circuit's decision in *Woodson* after they issued. Pet. C.A. Br. 6–7, 11–18; Pet. C.A. Reply Br. 1–3; Pet. C.A. Rule 28(j) Ltr. of June 26, 2020.

Moreover, both the district court and the court of appeals denied relief on the sole ground that Petitioner did not have a "covered offense." Analyzing his offense as one under § 841(b)(1)(C), the district court summarized the parties' competing "covered offense" positions; and it expressly "agree[d] with the Government" that Petitioner "was not convicted and sentenced for a 'covered offense,'" reasoning that "[n]either Section 2 nor Section 3 of the Fair Sentencing Act modified the statutory penalties under 21 U.S.C. § 841(b)(1)(C)." App. 12a–13a. The district court did not indicate that it would have denied Petitioner even if it had the authority to do so.

On appeal, the Eleventh Circuit denied relief for that same and sole reason. Applying its precedential decision in *Jones*, the court of appeals explained that "a movant has a 'covered offense' if he was sentenced for an offense that triggered one

of the statutory penalties 'provided in subsections 841(b)(1)(A)(iii) and (B)(iii)," and that "those provisions are the only provisions in [§ 841(b)] that the Fair Sentencing Act modified.'" App. 4a (quoting *Jones*, 962 F.3d at 1298, 1300). Because "*Jones* made clear" that "§§ 841(b)(1)(A) and (b)(1)(B) were the only provisions modified," Petitioner's "offense under § 841(b)(1)(C) [was] not a 'covered offense.'" App. 5a. Like the district court, the Eleventh Circuit denied relief on that exclusive basis.

Factually too, Petitioner's case presents a clean vehicle. This was a § 841(b)(1)(C) case from start to finish. The indictment charged Petitioner with violating § 841(a)(1) and, citing § 841(b)(1)(C), alleged that this violation was based on a "detectible amount" of crack. Dist. Ct. Dkt. Entry 7 at 2. After pleading guilty to that count, § 841(b)(1)(C) set his statutory range at 0-to-30 years. PSI ¶ 80 (citing § 841(b)(1)(C)). And, at sentencing, the court found him responsible for 3.9 grams of crack. App. 5a, 8a & n.3; PSI ¶¶ 14, 18; Dist. Ct. Dkt. Entry 37 at 4–5. Thus, the record is clear that he was charged and sentenced under § 841(b)(1)(C). App. 5a, 13a.

Moreover, Petitioner was truly a low-level crack offender, possessing only 3.9 grams of crack, "less than the weight of four paperclips." Dist. Ct. Dkt. Entry 55 at 5. That makes him similarly situated to the defendant in *Smith* (who possessed 1.69 grams), 954 F.3d at 451, and the defendant in *Woodson* (who possessed 0.41 grams), 962 F.3d at 817. Like those defendants, Petitioner's possession of 3.9 grams of crack "looks less significant and thus perhaps less worthy of as long a sentence under § 841 as the statute exists now." *Smith*, 954 F.3d at 451. "Under the old version of § 841, [3.9] grams of crack was [78%] of the quantity mandating a five-year sentence. Now

it is only [14%] of that threshold." *Id.*; *see Woodson*, 962 F.3d at 817. Thus, the same considerations motivating the First and Fourth Circuits are present here as well.

IV. THE DECISION BELOW IS WRONG

This Court's intervention is necessary because the Eleventh Circuit was wrong. Petitioner has a Section 404 "covered offense" for not one but two reasons.

1. First, before August 3, 2010, Petitioner committed a "violation of a Federal criminal statute"—namely, § 841(a)(1)—"for which the statutory penalties were modified by section 2 . . . of the Fair Sentencing Act of 2010." § 404(a). Indeed, Section 2 of the Fair Sentencing Act "modified" § 841(b), and § 841(b) prescribes the statutory penalties for violations of § 841(a). The First Circuit embraced this straightforward interpretation in *Smith*. It explained that "§ 841(a) is labeled 'unlawful acts,' and § 841(b) is labeled 'penalties.'" *Smith*, 954 F.3d at 449. And "§ 841(a) lists the acts that violate the law (manufacturing, distributing, etc.), whereas § 841(b) correlates increasing penalties to the quantities associated with the facts that violate § 841(a)." *Id.* Meanwhile, it would make scant sense to say that Petitioner "violated" not only § 841(a) but also § 841(b)(1), since the latter provision contains no prohibition for one to violate. By its own terms, it merely supplies the "penalties" for "violations" of the unlawful acts prohibited by § 841(a). *See* §§ 841(b)(1)(A)&(B) (prescribing "penalties" for "a violation of subsection (a)").

Interpreting "Federal criminal statute" to refer to both §§ 841(a) and (b)(1) would also give rise to a redundancy. On that view, eligible offenders commit a "violation of [§§ 841(a) and (b)(1)], for which the statutory penalties were modified by

sections 2 and 3 . . . ." § 404(a). But the "statutory penalties" for that "violation" are already in § 841(b)(1). And sections 2 and 3 modified only statutory penalties. So the "statutory penalties" phrase would be unnecessary. Reading the statute instead to track § 841's structure replaces that superfluidity with congruity: "violation of a Federal criminal statute" refers to § 841(a); "statutory penalties" refer to § 841(b)(1).

The Eleventh and Third Circuits disagreed with that interpretation for two reasons, but neither is persuasive. First, the Third Circuit believed that the "Federal criminal statute" must refer to both §§ 841(a) and (b)(1) because, under this Court's Sixth Amendment decisions in *Apprendi* and *Alleyne*, the drug quantities in § 841(b)(1) are elements of the offense. *Birt*, 966 F.3d at 261–63. But the Third Circuit did not explain how that supported its interpretation of the "covered offense" definition in § 404(a). Again, that definition refers to a "violation of a Federal criminal statute." Congress did not refer to the elements of an offense, even though it easily could have done so. Thus, there is "no reason to believe that Congress would have thought the holding in *Alleyne* concerning criminal procedure and the elements of a crime informed the meaning of the phrase 'Federal criminal statute.'" *Smith*, 954 F.3d at 450. To the contrary, "Congress more likely intended to refer to § 841(a) . . . as the 'Federal criminal statute' in question." *Id.*

The Eleventh and Third Circuits also expressed concern that, if § 841(a) alone was the "Federal criminal statute," then *all* drug offenders—not just crack offenders—would be eligible for relief, an implausible result. *Birt*, 966 F.3d at 253; *Jones*, 962 F.3d at 1300. But that argument overlooks Section 404(b), which

authorizes district courts to impose a reduced sentence only "as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed." Because Section 2 of the Fair Sentencing Act modified only the penalties relating to crack cocaine, courts have no authority to grant a reduction to other drug offenders. After all, § 841(b) will be exactly the same for them both before and after application of the Fair Sentencing Act; it is different only for crack offenders. Thus, it is unsurprising that crack offenders alone are obtaining relief under Section 404. Despite the concerns expressed by the Eleventh and Third Circuits, other drug offenders are routinely denied relief, including in the First Circuit post-*Smith*. *See, e.g.*, *United States v. Ortiz-Islas*, 2020 WL 2564670, at *1 (D. Maine May 20, 2020) ("The First Step Act does not provide a basis to reduce Defendant's sentence because his crime involved [powder] cocaine, not cocaine base. The Fair Sentencing Act and the First Step Act did not retroactively change the penalties applicable to defendants whose conduct did not involve cocaine base.").

2. Even if the "Federal criminal statute" refers to §§ 841(a) *and* 841(b)(1)(C), Petitioner still has a "covered offense" because Section 2 of the Fair Sentencing Act "modified" § 841(b)(1)(C) by virtue of its amendments to §§ 841(b)(1)(A)(iii) and (b)(1)(B)(iii). While the Eleventh Circuit has emphasized that Section 2 did not amend the text of § 841(b)(1)(C), App. 4a–5a (citing *Jones*, 962 F.3d at 1298, 1300), the First and Fourth Circuits have correctly explained that "the scope of Subsection 841(b)(1)(C)'s penalty for crack cocaine trafficking is defined by reference to Subsections 841(b)(1)(A)(iii) and (B)(iii): Subsection 841(b)(1)(C) imposes

a penalty of not more than 20 years' imprisonment for crack cocaine trafficking offenses 'except as provided in subparagraphs (A) [and] (B).'" *Woodson*, 962 F.3d at 816 (quoting § 841(b)(1)(C)); *see Smith*, 954 F.3d at 450. "Subsection 841(b)(1)(C) sets forth the penalty for quantities of crack cocaine between zero and 5 grams (or an unspecified amount) before the Fair Sentencing Act, and between zero and 28 grams (or an unspecified amount) after. This is a modification." *Woodson*, 962 F.3d at 816.

Despite that effect on § 841(b)(1)(C), the Third Circuit emphasized that the statutory range would remain the same for all § 841(b)(1)(C) offenders both before and after application of the Fair sentencing Act. *Birt*, 966 F.3d at 264. But §§ 841(b)(1)(A)(iii) and (b)(1)(B)(iii) offenders with more than 280/28 grams of crack have "covered offenses," even if they would remain subject to the same statutory range after application of the Fair Sentencing Act. Those eligible offenders are no different than § 841(b)(1)(C) offenders: their statutory range remains the same, but the framework is different because the drug-quantity thresholds have shifted upward. As explained, raising § 841(b)(1)(C)'s upper boundary is "no small point," because "the statutory benchmarks likely have an anchoring effect on a sentencing judge's decision making." *Smith*, 954 F.3d at 451; *see Woodson*, 962 F.3d at 817.

Finally, construing Section 404 to exclude § 841(b)(1)(C) crack offenders would turn the statute's remedial purpose on its head. There is no discernible reason why Congress would have wanted all §§ 841(b)(1)(A) and (b)(1)(B) crack offenders—including kingpins engaged in major trafficking—to be eligible for relief, but at the same time categorically exclude low-level crack offenders. To the contrary, the

legislative history of the Fair Sentencing Act and the First Step Act confirms that Congress was concerned most with harsh penalties imposed on "low-level" offenders, not big-time traffickers. *See, e.g.*, 164 Cong. Rec. S7645 (Dec. 17, 2018) (statement of Sen. Durbin); 156 Cong. Rec. E1666 (Sept. 16, 2010) (statement of Rep. Inglis); 156 Cong. Rec. S1683 (Mar. 17, 2010) (statement of Sen. Leahy). None of the circuits on the wrong side of the split have reckoned with the counterintuitive result that their interpretation produces. Preventing district courts from revisiting sentences imposed on street-level crack offenders like Petitioner—while ensuring that crack-dealing kingpins are eligible for Section 404 relief—makes a mockery of the statute's purpose. It is therefore unsurprising that this interpretation is contrary to the statute's text. Crack offenders sentenced under § 841(b)(1)(C) are eligible for Section 404 relief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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