No. 20-5904

IN THE

Supreme Court of the United States

TARAHRICK TERRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

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.

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BRIEF FOR PETITIONER

Petitioner Tarahrick Terry respectfully requests that the Court reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion (Pet. App. 1a–5a) is not published in the Federal Reporter but is reprinted at 828 F. App'x 563. The district court's order denying Petitioner's motion for a sentence reduction under Section 404 of the First Step Act (Pet. App. 6a–14a) is reprinted at 2020 WL 8022235.

JURISDICTION

The Eleventh Circuit entered judgment on September 22, 2020. Pet. App. 1a. Petitioner filed a petition for a writ of certiorari on September 28, 2020, which this Court granted on January 8, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are set out in the Appendix to this Brief.

INTRODUCTION

Section 404 of the First Step Act of 2018 made Section 2 of the Fair Sentencing Act of 2010 retroactive. The question presented is whether the lowest-level crack offenders sentenced before the Fair Sentencing Act under 21 U.S.C. § 841(b)(1)(C) have a Section 404 "covered offense," permitting them to seek a reduced sentence. Under Section 404(a), they do because the "statutory penalties" in Section 841(b)(1)(C) were "modified" by Section 2(a) of the Fair Sentencing Act.

Section 2(a) reduced the 100-to-1 sentencing disparity in Section 841(b) between crack and powder cocaine. To do so, it raised the crack amounts necessary to trigger the enhanced penalties in Sections 841(b)(1)(A)(iii) and (B)(iii). That, in turn, changed the default penalties for crack in Section 841(b)(1)(C).

Before Section 2(a), the three statutory penalty tiers for crack were as follows:

Tier 1: 50 grams or more, § 841(b)(1)(A)(iii);

Tier 2: 5 to <50 grams, § 841(b)(1)(B)(iii); and

Tier 3: less than 5 grams, § 841(b)(1)(C).

After Section 2(a), the three tiers for crack became:

Tier 1: 280 grams or more, § 841(b)(1)(A)(iii);

Tier 2: 28 to <280 grams, § 841(b)(1)(B)(iii); and

Tier 3: less than 28 grams, § 841(b)(1)(C).

By shifting all three tiers upward, Section 2(a) "modified" the penalties in Sections 841(b)(1)(A)(iii), (b)(1)(B)(iii), *and* (b)(1)(C). This case is that simple.

The government agrees that Section 2(a) "modified" the statutory penalties in Sections 841(b)(1)(A)(iii) and (B)(iii). BIO 11. Thus, there is no dispute that the most serious crack offenders subject to those enhanced penalties have a "covered offense" under Section 404(a). However, the government argues that the lowest-level crack offenders subject to the default penalties in Section 841(b)(1)(C) do not have a "covered offense" and are ineligible for Section 404 relief. That position is not only peculiar; it is textually untenable.

Section 841(b)(1)(C) provides the penalties for all violations of Section 841(a), "except as provided in subparagraphs A [and] B." 21 U.S.C. § 841(b)(1)(C). Thus, in crack cases, Section 841(b)(1)(B)(iii)'s floor also acts as Section 841(b)(1)(C)'s ceiling. So when Section 2(a) raised Section 841(b)(1)(B)(iii)'s floor from 5 to 28 grams, Section 2(a) also raised Section 841(b)(1)(C)'s ceiling by the same amount. Before Section 2(a), Section 841(b)(1)(C) applied to crack offenses involving less than 5 grams; after Section 2(a), it applied to crack offenses involving less than 28 grams. By altering Section 841(b)(1)(C)'s scope in that way, Section 2(a) "modified" its statutory penalties.

Embracing the government's contrary position, the court of appeals concluded that Section 404 does not cover Section 841(b)(1)(C) because Section 2(a) "expressly amend[ed]" only Sections 841(b)(1)(A)(iii) and (B)(iii). But Section 404(a) used the word "modified," not "amended." And Congress knew that Section 2(a) had "amended" Sections 841(b)(1)(A)(iii) and (B)(iii). Indeed, Congress specifically referred to Section 2's "amendments" elsewhere in Section 404. Had Congress sought to limit a "covered offense" to one for

which the statutory penalties were textually altered by Section 2, it would have used the word "amended."

Instead, Congress chose to define a "covered offense" in Section 404(a) as one for which the statutory penalties were "modified." And the only discernible reason for selecting that broader term would be to cover statutes like Section 841(b)(1)(C), which Section 2 "modified" without "amending." The government disregards that deliberate textual choice.

Congress also chose to include express "[l]imitations" in Section 404(c). That would have been the perfect place for Congress to exclude the lowest-level crack offenders had it sought to do so. But it did not. The government seeks to smuggle in that major additional limitation through Section 404(a) by striking the word "modified" and replacing it with "amended." That flagrant statutory revision is particularly improper here because denying the lowest-level crack offenders the benefit of Section 2—while extending that same benefit to crack kingpins—would upend Congress's long-standing objective to punish major drug traffickers more severely than low-level dealers.

Between 1986 and 2010, the 100-to-1 crack-to-powder ratio produced severe sentences disproportionately affecting African Americans. In making Section 2 retroactive, Section 404 sought to ameliorate that harm by permitting crack offenders sentenced under the old 100-to-1 regime to seek relief. There is no basis in the statutory text, history, or purpose to narrow that commendable effort by excluding the lowest-level crack offenders sentenced under Section 841(b)(1)(C). They were sentenced for a "covered offense," and they are eligible for Section 404 relief.

STATEMENT

A. Legal Background

To explain why Section 404 of the First Step Act covers Section 841(b)(1)(C) crack offenders, a brief overview of federal cocaine sentencing policy is necessary.

1. The 1986 Act and the 100-to-1 Disparity

The Anti-Drug Abuse Act of 1986, Pub. L. No. 99–570, 100 Stat. 3207, created a three-tier penalty structure for drug offenses criminalized by 21 U.S.C. § 841(a) and other provisions in Title 21. Section 841(b)(1)(A) prescribes the top-tier penalties, including a 10-year mandatory minimum, for the most serious traffickers. Section 841(b)(1)(B) prescribes the mid-tier penalties, including a 5-year mandatory minimum, for less serious traffickers. And Section 841(b)(1)(C) serves as a default provision, prescribing the bottom-tier penalties (and no mandatory minimum) for the lowest-level offenders. Each tier also provides for enhanced penalties where the defendant has certain prior convictions, or where death or serious bodily injury results. *See* 21 U.S.C. § 851.

Within that structure, Congress penalized powder and crack cocaine differently. While Congress required 5,000 grams of powder to trigger the enhanced penalties in Section 841(b)(1)(A)(ii), it required just 50 grams of crack to trigger the same penalties in Section 841(b)(1)(A)(iii). Likewise, while Congress required 500 grams of powder to trigger the enhanced penalties in Section 841(b)(1)(B)(ii), it required just 5 grams of crack to trigger the same penalties in Section 841(b)(1)(B)(iii). The result was a 100-to-1 statutory disparity between powder and crack cocaine.

As the default penalty, Section 841(b)(1)(C) applies except where Sections 841(b)(1)(A), (b)(1)(B), or a marijuana-related provision apply. *See* 21 U.S.C. § 841(b)(1)(C) (prescribing penalties for Section 841(a) violations "except as provided in subparagraphs (A), (B), and (D)"). Thus, Section 841(b)(1)(C)'s scope for crack is tied to Sections 841(b)(1)(A)(iii) and (B)(iii).

2. The Commission Opposes the Disparity

To comply with the Sentencing Reform Act's proportionality objective, the Sentencing Commission incorporated the 100-to-1 ratio into the Sentencing Guidelines. It created a Drug Quantity Table to determine base offense levels. U.S.S.G. § 2D1.1(c) (1987). For a first-time offender with 50 grams of crack, the Table assigned a base offense level producing a guideline range just above the 10-year mandatory minimum. And for a first-time offender with 5 grams of crack, the Commission assigned a base offense level producing a guideline range just above the 5-year mandatory minimum. The Commission then used those statutory drug amounts "as reference points," "extrapolating from those two amounts upward and downward to set proportional offense levels for other drug amounts." *Dorsey v. United States*, 567 U.S. 260, 268 (2012).

By 1995, the Commission reported to Congress that the 100-to-1 ratio was "too great" and "create[d] anomalous results." U.S. Sentencing Comm'n, Special Report to Congress: Cocaine & Fed. Sentencing Policy iii–iv (Feb. 1995) (1995 Report). Accordingly, the Commission proposed eliminating the disparity from the Guidelines. 60 Fed. Reg. 25,074-01, 25,076–77 (May 10, 1995) (reason for amend.). In a unique occurrence, Congress invoked its authority under 28

U.S.C. § 994(p) and "disapproved" the amendment, preventing it from taking effect. Pub. L. No. 104–38, 109 Stat. 334, § 1 (1995). In that 1995 legislation, Congress expressed its view that "high-level wholesale cocaine traffickers . . . should generally receive longer sentences than low-level retail cocaine traffickers." *Id*. § 2(a)(1)(B). And it maintained that crack sentences should "generally exceed" sentences for the same quantity of powder. *Id*. § 2(a)(1)(A). Accordingly, it asked the Commission to prepare revised recommendations for a new statutory ratio. *Id*. § 2(a)(2).

The Commission issued Reports in 1997 and 2002, proposing a 5-to-1 and a 20-to-1 ratio, respectively. *See* U.S. Sentencing Comm'n, Report to Congress: Cocaine & Fed. Sentencing Policy v–ix (May 2002) (2002 Report); U.S. Sentencing Comm'n, Special Report to Congress: Cocaine & Fed. Sentencing Policy 2, 9 (Apr. 1997); *see also Kimbrough v. United States*, 552 U.S. 85, 95–100 (2007) (summarizing the Reports).

By 2007, Congress still had not acted. But after this Court declared the Guidelines advisory in *United States v. Booker*, 543 U.S. 220 (2005), courts began varying downward from the guideline range in crack cases based on a disagreement with the 100-to-1 disparity. In 2007, the Commission also promulgated an amendment reducing base offense levels for crack so that the resulting guideline ranges straddled (rather than exceeded) the mandatory minimums. U.S.S.G., App. C, vol. III, amends. 706, 711 (Nov. 1, 2007). The Commission proportionally applied that change, reducing all base offense levels for crack by two. The Commission later made that change retroactive. U.S.S.G., App. C, vol. III, amend. 713 (Nov. 1, 2008).

Despite those developments, the Commission still urged Congress to act. The Commission explained that Amendment 706 was intended to serve as only a "partial remedy," and that Congress, not the Judiciary, was best suited to "remedy . . . the problems created by the 100-to-1 drug quantity ratio." U.S. Sentencing Comm'n, Report to Congress: Cocaine & Fed. Sentencing Policy 1–2, 10 (May 2007).

3. The Fair Sentencing Act & its Aftermath

Congress responded by enacting the Fair Sentencing Act of 2010, which took effect on August 3, 2010. Pub. L. No. 111–220, 124 Stat. 2372. The Preamble described the Act's purpose as "restor[ing] fairness to Federal cocaine sentencing." *Id*. The bipartisan law received support from the Justice Department, the Judicial Conference, and law-enforcement groups. It passed the House of Representatives by voice vote and the Senate by unanimous consent.

Entitled "Cocaine Sentencing Disparity Reduction," Section 2 reduced the 100-to-1 ratio to 18-to-1. To do so, Section 2(a) amended Sections 841(b)(1)(A)(iii) and (b)(1)(B)(iii) by raising the crack quantities necessary to trigger their enhanced sentencing ranges. Specifically, Section 2(a) raised the former quantity from 50 to 280 grams and raised the latter quantity from 5 to 28 grams. Section 2(b) did the same for the analogous enhanced penalties in 21 U.S.C. §§ 960(b)(1)(C) and (b)(2)(C) for import/export crack offenses. And Section 3 eliminated a 5-year mandatory minimum in 21 U.S.C. § 844(a) that had applied to the simple possession of crack but no other drugs.

Section 8 gave the Commission emergency authority to make conforming amendments to the Guidelines.

The Commission quickly promulgated a temporary amendment incorporating the new 18-to-1 ratio. U.S.S.G., App. C, vol. III, amend. 748 (Nov. 1, 2010). As it did after the 1986 Act, the Commission used the new crack quantities in the statute as reference points and "reduc[ed] the base offense levels for all crack amounts proportionally (using the new 18-to-1 ratio), including the offense levels governing small amounts of crack that did not fall within the scope of the mandatory minimum provisions." *Dorsey*, 567 U.S. at 276.

A year later, the Commission proposed making that temporary amendment permanent and retroactive. U.S.S.G., App. C, vol. III, amends. 750, 759 (Nov. 1, 2011). The Commission recognized that Section 2 itself was prospective, but it believed that Amendment 750 should apply retroactively given "the purpose of the underlying statutory changes made by the Act." *Id*., amend. 759 (reason for amend.). Unlike in 1995, Congress let Amendments 750 and 759 take effect.

Section 10 of the Fair Sentencing Act had directed the Commission to report back in five years. In accordance with that directive, the Commission reported in 2015 that the reforms had successfully "reduced the disparity between crack and powder cocaine sentences, reduced the federal prison population, and . . . resulted in fewer federal prosecutions for crack." U.S. Sentencing Comm'n, Report to Congress: Impact of the Fair Sentencing Act of 2010 3, 38 (Aug. 2015) (2015 Report). There were no reported downsides.

4. The First Step Act of 2018

On December 21, 2018, President Trump signed into law the First Step Act of 2018. Pub. L. No. 115–391, 132 Stat. 5194. The Act resulted from a broad-based

effort to reform various aspects of the criminal justice system. It passed the House of Representatives by a vote of 358–36 and the Senate by a vote of 87–12.

At issue here is Section 404. Entitled "Application of the Fair Sentencing Act," Section 404 contained just three short provisions.

Section 404(b) provided that "[a] court that imposed a sentence for a covered offense may . . . impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed."

Section 404(a) defined "covered offense" to "mean[ ] a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 . . . , that was committed before August 3, 2010."

Section 404(c) set out "[l]imitations." It prevented courts from entertaining a motion for relief "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," "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." Section 404(c) concluded by clarifying: "Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section."

B. Proceedings Below

1. In 2008, Petitioner pleaded guilty to one count of possession with intent to distribute a controlled substance, in violation of 21 U.S.C. § 841(a)(1). Citing 21 U.S.C. § 841(b)(1)(C), the indictment separately as-

serted that "this violation involved a mixture and substance containing a detectible amount of cocaine base" (*i.e.*, crack cocaine). Although Section 841(b)(1)(C) normally carries an unenhanced statutory maximum of 20 years, Petitioner had a prior drug conviction enhancing the statutory maximum to 30 years.

At sentencing, the district court adopted the factual statements and guideline calculations in the presentence investigation report (PSR). The PSR found Petitioner responsible for 3.9 grams of crack cocaine. PSR ¶¶ 14, 18. At the time of sentencing, that quantity would have produced a base offense level of 20 under the Drug Quantity Table. PSR ¶ 18; *see* U.S.S.G. § 2D1.1(c)(10) (2008). However, the district court classified Petitioner as a career offender under U.S.S.G. § 4B1.1 based on two prior drug convictions when he was 16 and 17 years old, for which he was jointly sentenced to 120 days in jail. PSR ¶¶ 24, 32, 34.

The career offender enhancement increased Petitioner's base offense level from 20 to 34. And although Petitioner had a criminal history category of III, career offenders automatically receive the highest criminal history category of VI. U.S.S.G. § 4B1.1(b). Without the career offender enhancement, Petitioner's advisory guideline range would have been 37–46 months. With it, his range skyrocketed to 188–235 months. The court imposed a sentence of 188 months.

2. In 2014, Petitioner moved for a sentence reduction under 18 U.S.C. § 3582(c)(2) based on Amendment 782 to the Guidelines, which retroactively reduced all offense levels in the Drug Quantity Table by two. After Amendment 750, Petitioner's base offense level would have fallen from 20 to 16. U.S.S.G. § 2D1.1(c)(12)

(2011). And, after Amendment 782, it would have fallen from 16 to 14. U.S.S.G. § 2D.1.1(c)(13) (2014). However, because Petitioner's guideline range was ultimately based on the career offender guideline in § 4B1.1 rather than the Drug Quantity Table in § 2D1.1(c), Amendment 782 did not retroactively lower the guideline range on which his sentence was based. He was therefore ineligible for relief, and the district court denied his motion.

3. The First Step Act opened the courthouse doors. In 2019, Petitioner moved for a sentence reduction under Section 404, asserting that he had a "covered offense" and was eligible for relief. He explained that Section 2 of the Fair Sentencing Act had "modified" the statutory penalties in Section 841(b)(1)(C), which now applied to crack offenses with less than 28 grams as opposed to less than 5 grams. Petitioner argued that a modest reduction to time served was warranted given his small amount of crack, his rehabilitation, and the fact that his non-career offender guideline range was lower than it was at sentencing. The government responded that he did not have a "covered offense" because Section 2 "did not change the statutory penalties for a violation of § 841(b)(1)(C)."

The district court denied Petitioner's motion. Pet. App. 6a–14a. The court "agree[d] with the Government" that Petitioner was "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." Pet. App. 13a. Without further explanation, the court stated 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)." *Id.*

4. On appeal, the parties reiterated their "covered offense" arguments. Petitioner relied on the intervening decisions in *United States v. Smith*, 954 F.3d 446 (1st Cir. 2020) and *United States v. Woodson*, 962 F.3d 812 (4th Cir. 2020). The government relied on *United States v. Jones*, 962 F.3d 1290 (11th Cir. 2020), as well as *United States v. Birt*, 966 F.3d 257 (3d Cir. 2020), which disagreed with *Smith* and *Woodson*.

The Eleventh Circuit affirmed. Pet. App. 1a–5a. The court held that Sections 841(b)(1)(A)(iii) and (b)(1)(B)(iiii) are "covered offenses," but that "'those provisions are the only provisions [in Section 841(b)] that the Fair Sentencing Act modified.'" Pet. App. 4a (quoting *Jones*, 962 F.3d at 1300) (brackets and ellipsis omitted). The court observed that Petitioner was sentenced under Section 841(b)(1)(C). Pet. 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 he "was not eligible for relief under the First Step Act." *Id*.

This Court granted certiorari. __ S. Ct. __, 2021 WL 77246 (Mem) (Jan. 8, 2021).

SUMMARY OF ARGUMENT

Petitioner was sentenced for a "covered offense" under Section 404(a) of the First Step Act of 2018.

I. Section 404(a) defines a "covered offense" as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 . . . , that was committed before August 3, 2010." Petitioner "committed a violation of a Federal criminal statute," 21 U.S.C. § 841(a), when he possessed crack cocaine with intent to distribute. And he did so before August 3, 2010. The question here is whether the "statutory penalties" set forth in 21 U.S.C. § 841(b)(1)(C) were "modified" by Sections 2 or 3 of the Fair Sentencing Act. They were as a matter of plain statutory text.

To reduce the 100-to-1 crack-to-powder ratio, Section 2(a) raised the crack quantities necessary to trigger the enhanced penalties in Section 841(b). It raised the crack quantity for Section 841(b)(1)(A)(iii) from 50 to 280 grams. And it raised the crack quantity for Section 841(b)(1)(B)(iii) from 5 to 28 grams. Those amendments also altered Section 841(b)(1)(C)'s scope.

That is so because Section 841(b)(1)(C) is a default provision. By its terms, it applies "except" where Section 841(b)(1)(A) or (B) apply. So when Section 2(a) raised Section 841(b)(1)(B)(iii)'s threshold from 5 to 28 grams of crack, Section 2(a) also raised Section 841(b)(1)(C)'s upper limit by the same amount. Before Section 2(a), Section 841(b)(1)(C) covered crack offenses with up to 5 grams; after Section 2(a), Section 841(b)(1)(C) covered crack offenses with up to 28 grams. By altering Section 841(b)(1)(C)'s scope for

crack, Section 2(a) plainly "modified" its statutory penalties. Thus, Petitioner has a "covered offense."

Agreeing with the government, the Eleventh Circuit reached the contrary conclusion because Section 2(a) did not "expressly amend § 841(b)(1)(C)." Pet. App. 5a. But that is not the standard. Despite referring to Section 2's "amendments" elsewhere in Section 404, Congress used the broader term "modified" in Section 404(a). That covers statutory provisions like Section 841(b)(1)(C), which were "modified" but not "amended" by Section 2. Had Congress sought to limit a "covered offense" to one triggering an enhanced penalty provision that Section 2 textually altered, Congress would have used the term "amended." It did not.

Congress *did* see fit to include express "[l]imitations" in Section 404(c). Yet those limitations also did not exclude Section 841(b)(1)(C) crack offenders. And that would have been the easy and obvious way to do so. The Court should reject the government's effort to insert that major limitation through a tortured reading of Section's 404(a)'s "covered offense" definition.

II. Interpreting Section 404 to cover Section 841(b)(1)(C) crack offenders accords with Section 404's history. Excluding them would not.

Congress knew that the Sentencing Commission had always regulated crack offenders as one cohesive group vis-à-vis the crack-to-powder ratio. In 1987, 2007, 2010, and 2011, the Commission set or adjusted base offense levels based on the statutory ratio. And each time it did so in a proportional manner affecting crack offenders in all three penalty tiers, including Section 841(b)(1)(C). The Commission never singled out Section 841(b)(1)(C) crack offenders for different

treatment. Excluding them from Section 404 would represent a sudden and marked departure from that three-decade regulatory framework.

Indeed, the Commission specifically implemented Section 2's new ratio by retroactively reducing base offense levels for crack in all three tiers, including Section 841(b)(1)(C). Unlike with the 1995 amendment, Congress allowed Amendments 750/759 to take effect, "tacit[ly] accept[ing]" that policy. *Kimbrough*, 552 U.S. at 106. And that policy was based on the Commission's stated views that Section 2 affected Section 841(b)(1)(C) offenders, and that retroactively applying Section 2 to those offenders effectuated Congress's purposes. By later re-incorporating Section 2 in Section 404, Congress is presumed to have adopted those views. *Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978).

By 2018, Congress had learned that Section 2 and Amendments 750/759 were successful policy. But Section 2 only applied prospectively. And Amendment 750, while retroactive, did not reach all crack offenders and afforded limited relief to those it did reach. Section 404 made Section 2 wholly retroactive so that all crack offenders could fully benefit. Nothing in history would have supported a policy categorically excluding all Section 841(b)(1)(C) crack offenders.

III. Interpreting Section 404 to cover Section 841(b)(1)(C) crack offenders also accords with Congress's stated purposes. Excluding them would not.

Entitled "Cocaine Sentencing Disparity Reduction," Section 2's sole purpose was to reduce the crack-to-powder ratio. And its reduced 18-to-1 ratio benefitted all post-August 3, 2010 crack offenders by raising the benchmarks sentencing courts must consider. Section

841(b)(1)(C) crack offenders benefitted from those new benchmarks: their crack amounts appeared smaller at sentencing in relation to the new 28-gram ceiling than they did in relation to the old 5-gram ceiling.

Section 404's purpose was simply to make Section 2 retroactive. Section 404(b) did so by allowing courts to sentence pre-Fair Sentencing Act crack offenders "as if" Section 2 had been in effect. And because Section 2 prospectively benefitted *all* crack offenders, Section 404 retroactively applied Section 2 to *all* crack offenders. That placed pre-Fair Sentencing Act crack offenders in the same position as post-Fair Sentencing Act crack offenders. Excluding Section 841(b)(1)(C) crack offenders from Section 404's coverage would be incongruous because their post-Fair Sentencing Act counterparts benefitted from Section 2.

Finally, it would be anomalous for Section 404 to cover the most serious crack traffickers sentenced under Section 841(b)(1)(A)(iii) but not the lowest-level crack dealers sentenced under Section 841(b)(1)(C). That would contravene Congress's stated intent that major cocaine traffickers be punished more severely than low-level cocaine dealers. Pub. L. No. 104–38, 109 Stat. 334, § 2(a)(1)(B) (1995). Indeed, Congress enacted Section 2 in part because the 100-to-1 crack-to-powder ratio was frustrating that objective: powder wholesalers were receiving shorter sentences than the crack retailers purchasing the powder. Here, there would be even less justification for treating *crack* kingpins better than low-level *crack* dealers. Yet interpreting Section 404 to cover the former but exclude the latter, as the government proposes, would create that striking new anomaly. Unsurprisingly, such a perverse result finds no support in the statutory text.

ARGUMENT

The statutory text compels the conclusion that pre-Fair Sentencing Act Section 841(b)(1)(C) crack offenders have a "covered offense" under Section 404(a). That result aligns with Section 404's history and Congress's stated purposes. The government's contrary position, accepted by the court of appeals, cannot be squared with the statutory text, history, or purpose.

I. The Statutory Text Makes Plain That Crack Offenders Sentenced Under Section 841(b)(1)(C) Have a "Covered Offense"

Section 404(a) of the First Step Act defines "covered offense" to "mean[ ] a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 . . . , that was committed before August 3, 2010."

Section 841(a) makes it "unlawful" to possess with intent to distribute a controlled substance. Petitioner violated that "Federal criminal statute" by possessing with intent to distribute crack cocaine. He did so before August 3, 2010. And the "statutory penalties" were set forth in Section 841(b)(1)(C). *See* 21 U.S.C. § 841(b) (prescribing the "penalties" for any person who "violates subsection (a)").

Section 2(a) of the Fair Sentencing Act raised the crack quantities for the enhanced statutory penalties in Sections 841(b)(1)(A)(iii) and (B)(iii). Thus, there is no dispute that Section 2(a) "modified" those penalty provisions governing the most serious crack offenders. BIO 11. Rather, the question here is whether Section 2(a) also "modified" the default penalty provision in Section 841(b)(1)(C) governing the lowest-level crack offenders. The statutory text makes plain that it did.

A. Section 2(a) "Modified" the Statutory Penalties for Crack in Section 841(b)(1)(C)

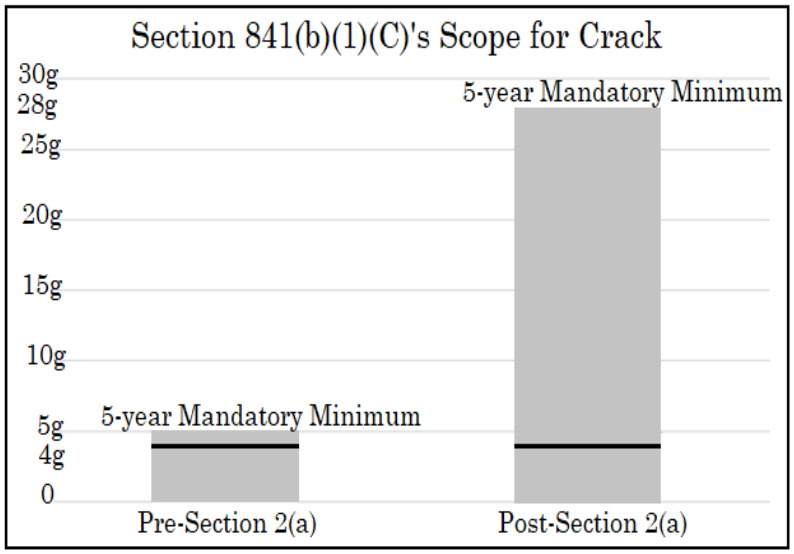
To reduce the 100-to-1 crack-to-powder ratio, Section 2(a) of the Fair Sentencing Act increased the crack amounts necessary to trigger the enhanced penalty provisions in Section 841(b). Specifically, Section 2(a) increased Section 841(b)(1)(A)(iii)'s threshold from 50 to 280 grams of crack. And Section 2(a) increased Section 841(b)(1)(B)(iii)'s threshold from 5 to 28 grams of crack. But Section 2(a)'s amendments to Sections 841(b)(1)(A)(iii) and (B)(iii) also changed the scope of Section 841(b)(1)(C)'s penalties for crack.

That is so because the scope of the former provisions determine the scope of the latter. Section 841(b)(1)(C) provides the default penalties for all violations of Section 841(a), "except as provided in subparagraphs (A) [and] (B)." 21 U.S.C. § 841(b)(1)(C). Thus, when Section 2(a) raised Section 841(b)(1)(B)(iii)'s *floor* from 5 to 28 grams of crack, Section 2(a) also raised Section 841(b)(1)(C)'s *ceiling* for crack by the same amount.

As Judge Rushing put it: before Section 2, Section "841(b)(1)(C)'s penalty applied only to offenses involving less than 5 grams of crack cocaine . . . . 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." *Woodson*, 962 F.3d at 816; *accord United States v. Hogsett*, 982 F.3d 463, 467 (7th Cir. 2020) (same); *Smith*, 954 F.3d at 450 (same).

The before-and-after chart below illustrates how Section 2(a) changed Section 841(b)(1)(C)'s scope for crack. It shows that the ceiling went from 5 to 28 grams. And it shows how that higher ceiling would

benefit a Section 841(b)(1)(C) offender with, say, 4 grams of crack. Before Section 2(a), his offense was 1 gram shy of the 5-year mandatory minimum. After Section 2(a), his offense was far below that threshold, making his offense appear less serious at sentencing.



The chart makes clear that Section 2(a) "modified" Section 841(b)(1)(C). After all, to "modify" simply means to partially change or alter. *See, e.g.*, 9 Oxford English Dictionary 952 (2d ed. 2004) ("[t]o make partial changes in"); Black's Law Dictionary 1025 (8th ed. 2004) ("[a] change to something; an alteration"); Webster's Third New International Dictionary 1452 (2002) ("to make minor changes in the form or structure of: alter without transforming"); Random House Dictionary of the English Language 1236 (2d ed. 1987) ("to change somewhat the form or qualities of; alter partially"); *see also MCI Telecomms., Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994) ("'Modify,' in our view, connotes moderate change.").

By raising Section 841(b)(1)(C)'s upper boundary from 5 to 28 grams of crack, Section 2(a) partially "changed" or "altered" the scope of Section 841(b)(1)(C). In doing so, Section 2(a) "modified" the statutory penalties for crack in Section 841(b)(1)(C). Thus, as a matter of plain statutory text, Petitioner has a "covered offense" under Section 404(a).

B. The Government Replaces "Modified" with "Amended" in Section 404(a)

The government argued below, and the court of appeals agreed, that because Section 2(a) "expressly amend[ed]" only Sections 841(b)(1)(A)(iii) and (B)(iii), those were the only provisions it "modified." Pet. App. 5a. But Section 404(a) used the word "modified," not "amended." The former is broader than the latter, and it covers Section 841(b)(1)(C) crack offenders.

"Amend" is a legal term of art in the context of legislative drafting. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 73 (2012) ("[W]hen the law is the subject, ordinary legal meaning is to be expected, which often differs from common meaning"). In that technical sense, to "amend" a statute means "[t]o change the wording of," or "to formally alter" it "by striking out, inserting, or substituting words." Black's Law Dictionary 89 (8th ed. 2004). In other words, a legislative "amendment" is a "formal revision or addition . . . made to a statute"—"a change made by addition, deletion, or correction," especially "an alteration in wording." *Id*.

As the Nation's lawmaker, Congress is familiar with that term of art. Indeed, Congress routinely uses the term "amend" to revise statutes. And that is precisely

what Congress did in Sections 2 and 3 of the Fair Sentencing Act. In Section 2(a), Congress "amended" Section 841(b)(1)(A)(iii) "by striking '50 grams' and inserting '280 grams.'" Congress likewise "amended" Section 841(b)(1)(B)(iii) "by striking '5 grams' and inserting '28 grams.'" Section 2(b) did the same to "amend" Sections 960(b)(1)(C) and (2)(C). And Section 3 "amended" Section 844(a) by "striking" the mandatory minimum for simple crack possession.

Critically, however, Congress defined a "covered offense" in Section 404(a) as one for which the statutory penalties were "modified" by Sections 2 or 3 of the Fair Sentencing Act. That conspicuous word choice confirms that Section 404's coverage extends beyond the penalty provisions that were textually altered by Sections 2 and 3. The broader term "modify" encompasses provisions like Section 841(b)(1)(C) that are defined by, or incorporate, the provisions that Section 2 "amended." Due to their interdependent relationship, Section 841(b)(1)(C) was "modified" when Sections 841(b)(1)(A)(iii) and (B)(iii) were "amended."

Had Congress sought to limit a "covered offense" to one for which the statutory penalties were textually altered by the Fair Sentencing Act, Congress would have simply used the term "amended" in Section 404(a). That would have included Sections 841(b)(1)(A)(iii) and (B)(iii). And it would have excluded Section 841(b)(1)(C) (and its analogue in Section 960(b)(3)), since Section 2 did not "amend" those default penalty provisions. But Section 404(a) instead used the word "modified," sweeping in crack offenders who were sentenced under a statute that Section 2 altered without "amending." That describes Section 841(b)(1)(C) perfectly.

Section 404(c) confirms that Congress deliberately chose the word "modified" over "amended." In setting out "[l]imitations" on relief, Section 404(c) expressly referred to "the *amendments* made by sections 2 and 3 of the Fair Sentencing Act." § 404(c) (emphasis added). Thus, when enacting Section 404, Congress understood that Sections 2 and 3 of the Fair Sentencing Act had made "amendments." And Congress knew how to use "amend" in Section 404 when it so desired. Yet Congress defined a "covered offense" as one for which the statutory penalties "were *modified* by section 2 or 3 of the Fair Sentencing Act." § 404(a) (emphasis added). Because Congress used "modified" in Section 404(a) but "amendments" in Section 404(c)—two provisions in the same Section of the same Act referring to the very same law—the Court must "ascribe significance to such a decision." *Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)).

"It would [have] be[en] easy enough for Congress" to limit Section 404 to crack offenders sentenced under a penalty provision that was textually "amended" by Sections 2 or 3, "[b]ut Congress has not done so, and it is not the proper role of the courts to rewrite the laws passed by Congress and signed by the President." *Nasrallah v. Barr*, 140 S. Ct. 1683, 1692 (2020).

C. Section 404(c)'s "Limitations" Could Have Easily Excluded Section 841(b)(1)(C) Crack Offenders But Did Not

Section 404(c)'s "[l]imitations" further bolster the conclusion that Section 841(b)(1)(C) crack offenders are covered. Section 404(c) prevented courts from entertaining a motion where the movant was already

sentenced in accordance with Section 2, or where a Section 404 motion was denied after a complete review on the merits. It also made relief discretionary rather than mandatory. Yet it did not carve out Section 841(b)(1)(C) crack offenders from Section 404.

Had Congress sought to exclude them, it would have done so right there in Section 404(c). Congress could have simply added another "limitation" excluding anyone sentenced under Section 841(b)(1)(C) (or Section 960(b)(3)). That would have been the obvious way to exclude the lowest-level crack offenders. Congress would not accomplish that counterintuitive and consequential result through the government's convoluted "covered offense" interpretation. After all, Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 468 (2001). And, again, if Congress *had* sought to exclude Section 841(b)(1)(C) crack offenders through Section 404(a), it would have simply used "amended" rather than "modified." Or Congress would have crafted the "covered offense" definition in an entirely different manner.

"To supply omissions [from a statute] transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926). Doing so would be particularly unwarranted here given how significant that purported limitation would be and how easily Congress could have included it. The Court should reject the government's invitation to add a limitation that Congress itself did not. *See Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989) ("[W]e are not at liberty to create an exception where Congress has declined to do so").

* * *

In sum, pre-Fair Sentencing Act crack offenders sentenced under Section 841(b)(1)(C) have a "covered offense" under Section 404(a). Because the statutory text is plain, the Court need go no further.

II. Covering Section 841(b)(1)(C) Crack Offenders Accords with Section 404's History

The plain meaning of the statutory text accords with the history leading up to Section 404's enactment. The government's contrary interpretation does not.

A. Crack Offenders Have Always Been Regulated as One Cohesive Group

When Congress enacted Section 404, it knew that crack offenders had always been regulated as a single group vis-à-vis the crack-to-powder disparity. When the Commission promulgated the original Drug Quantity Table in 1987, it used the crack amounts from the statute to set base offense levels for *all* crack offenders. *Dorsey*, 567 U.S. at 267–68. When the Commission reduced base offense levels in Amendment 706, it did so for *all* crack offenders. *Kimbrough*, 552 U.S. at 99–100. And when the Commission implemented Section 2 in Amendments 748 and 750, it reduced the levels for crack offenders in *all* three penalty tiers, including Section 841(b)(1)(C). *Dorsey*, 567 U.S. at 276.

In 2015, the Commission reminded Congress that Amendments 748/750 had applied to crack offenders in all three tiers, including Section 841(b)(1)(C). The Commission reported that, although Section 2 itself "only changed the two mandatory minimum penalties for crack" offenses, the Commission incorporated the new 18-to-1 ratio into the Guidelines, which applied to crack offenders "regardless of whether a mandatory

minimum applied." 2015 Report 10. As a result, the Commission advised that it had to "study[ ] all crack cocaine offenders" to analyze Section 2's impact. *Id*.

Because Congress knew that the Commission had always regulated all crack offenders as one group vis-à-vis the crack-to-powder disparity, interpreting Section 404 to cover all crack offenders aligns with that history. Excluding Section 841(b)(1)(C) crack offenders from Section 404 would be a radical departure from that 30-year old regulatory framework.

B. Congress Adopted the Commission's View that Section 2 Should Apply to Section 841(b)(1)(C) Crack Offenders

When Congress enacted Section 404, it had previously approved guideline amendments that implemented Section 2 by retroactively reducing base offense levels for crack offenders in all three tiers, including Section 841(b)(1)(C). And Congress adopted the Commission's stated view that those amendments were consistent with Sections 2's text and purpose.

As explained, Amendment 748 implemented Section 2 of the Fair Sentencing Act by "reduc[ing] the base offense levels for all crack amounts proportionally (using the new 18-to-1 ratio), including the offense levels governing small amounts of crack that did not fall within the scope of the mandatory minimum provisions." *Dorsey*, 567 U.S. at 276. A year later, the Commission sought to make that temporary amendment both permanent and retroactive. Under 28 U.S.C. § 994(p), Congress had 180 days to disapprove Amendments 750 and 759, but it let them take effect.

That is significant because, in what remains an isolated occurrence, Congress *did* formally disapprove

the Commission's proposed 1995 amendment addressing the crack-to-powder ratio. In the context of Amendment 706, this Court in *Kimbrough* explained that, while it ordinarily "resist[s] reading congressional intent into congressional inaction," "Congress failed to act on a proposed amendment to the Guidelines in a high-profile area in which it had previously exercised its disapproval authority," signaling "tacit acceptance" of Amendment 706. 552 U.S. at 106. So too here: Congress tacitly accepted Amendments 750 and 759, which retroactively applied Section 2 to crack offenders in every tier, including Section 841(b)(1)(C).

Moreover, those congressionally accepted Amendments were based on the Commission's understanding of Section 2's text and purpose. In summarizing Section 2, the Commission repeatedly cited Sections 841(b)(1)(A), (b)(1)(B), *and* (b)(1)(C) (and the import/export counterparts in Sections 960(b)(1), (2), *and* (3)). Amends. 748, 750 (reason for amend.). The Commission thus recognized that Section 2 had affected Section 841(b)(1)(C)'s penalties for crack. And Congress knew that, in "consider[ing] whether to give Amendment 750 retroactive effect, the Commission also considered the purpose of the underlying statutory changes made by the Act" and Section 2 to "'restore fairness to Federal cocaine sentencing'" by providing a "'cocaine sentencing disparity reduction.'" Amend. 759 (reason for amend.) (quoting the statute).

By re-incorporating Section 2 in Section 404, Congress is presumed to have adopted the Commission's view that Section 2 should apply to pre-Fair Sentencing Act Section 841(b)(1)(C) crack offenders. *See Lorillard*, 434 U.S. at 580–81 ("Congress is presumed to be aware of an administrative . . . interpretation of a

statute and to adopt that interpretation when" it "adopts a new law incorporating sections of [that] prior law). Indeed, given Congress's "prolonged and acute awareness" of the Commission's regulation in this high-profile policy area, *Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983), the Court should require a clear statement from Congress before excluding the lowest-level crack offenders from Section 404's coverage. No such statement exists.

C. Section 2 and Amendments 750/759 Were Successful Policy, But Some Crack Offenders Were Unable to Benefit

When Congress enacted Section 404, it also knew that Section 2 and Amendments 750/759 were good policy, but that not all crack offenders could benefit.

Specifically, the Commission informed Congress that only 63% of crack offenders would benefit from Amendments 750/759. Amend. 750 (reason for amend.). Thus, when Congress enacted Section 404, it knew that many crack offenders had been unable to benefit from the retroactive guideline amendments. Notably, among those who could not benefit were career offenders serving long sentences, *id*., which would include Section 841(b)(1)(C) offenders like Petitioner. The same was true for those with less than 500 milligrams of crack, who were also Section 841(b)(1)(C) offenders. *Id*. Even for crack offenders who *were* eligible, relief was limited—both by the old statutory penalties and by the low end of the amended guideline range. *Id*.; *see* U.S.S.G. § 1B1.10(b)(2)(A).

Congress also knew that, although they afforded incomplete relief, Section 2 and Amendments 750/759

had proven to be successful policy. In 2015, the Commission reported to Congress that those reforms had "reduced the disparity between crack and powder sentences, reduced the federal prison population," and "resulted in fewer federal prosecutions for crack cocaine." 2015 Report 3, 38. Meanwhile, "crack cocaine use continued to decline," there had been no "substantial change in the seriousness of crack cocaine offenders," and "cooperation with law enforcement did not change despite the change in penalties." *Id*. at 38.

Shortly before Section 404's enactment, the Commission released another study "find[ing] no difference between the recidivism rates for [the nearly 8,000 crack] offenders who were released early due to [Amendments 750/759] and offenders who had served their full sentences." U.S. Sentencing Comm'n, Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: 2011 Fair Sentencing Act Guideline Amendment 1, 14 (2018). That finding was "consistent with the Commission's other recent studies of federal crack cocaine offenders." *Id*. at 14.

In short, when Congress enacted Section 404, it knew that Section 2 and Amendments 750/759 were sound policy. But it also knew that Section 2 was prospective only, and that Amendments 750/759 were limited in scope and afforded limited relief. That experience supported making Section 2 wholly retroactive so that all, not just some, crack offenders could benefit—and benefit fully. By contrast, nothing would have supported categorically denying all Section 841(b)(1)(C) offenders the benefit of Section 2.

III. Covering Section 841(b)(1)(C) Crack Offenders Accords with Congress's Purposes

Interpreting Section 404 to cover Section 841(b)(1)(C) crack offenders also accords with Congress's stated purposes: to reduce the crack-to-powder disparity (Section 2), and to make that reduction retroactive (Section 404). By contrast, excluding those lowest-level crack offenders from Section 404 would contravene Congress's objective to punish major drug traffickers more severely than low-level drug dealers.

A. Section 2 Reduced the Crack-to-Powder Disparity for All Crack Offenders

The sole purpose of Section 2 was to reduce the crack-to-powder disparity. Entitled "Cocaine Sentencing Disparity Reduction," Section 2's amendments had the effect of reducing the 100-to-1 ratio down to 18-to-1. Section 2 accomplished nothing else. And Section 2 imposed no limitations on which crack offenders could benefit from the new ratio.

Once enacted, Section 2 prospectively benefitted all crack offenders by raising the statutory benchmarks at sentencing. This Court has directed that district courts "must take account of . . . the 'cliffs' resulting from the statutory mandatory minimum" penalties when deciding where to sentence a defendant. *Kimbrough*, 552 U.S. at 108. By raising the "cliffs" in Section 841(b), Section 2 benefitted all crack offenders at sentencing, including Section 841(b)(1)(C) offenders.

The chart on page 20 above illustrates that dynamic. After the Fair Sentencing Act, a Section 841(b)(1)(C) offender's crack quantity appeared smaller in relation to the new 28-gram "cliff" than it appeared in relation

to the old 5-gram "cliff." Before Section 2(a), a 4-gram crack offender was only 1 gram short of a mandatory minimum sentence; after Section 2(a), he was far below the new 28-gram cliff. As a result, his offense "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" before. *Smith*, 954 F.3d at 451; *see Woodson*, 962 F.3d at 817 (explaining that Section 2's "modification of the range of drug weights . . . may have an anchoring effect on . . . sentence[s]" because the "court may find this shift relevant to determining the appropriate sentence for a particular offender").

B. Section 404 Made Section 2 Retroactive for All Crack Offenders

Entitled "Application of Fair Sentencing Act," Section 404's purpose was simply to make Section 2 retroactive. Section 404(b) achieved that objective by authorizing district courts to reduce the sentence for a covered offense "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). The "as if" clause extended the benefit of Section 2 to pre-Fair Sentencing Act crack offenders, even though they were sentenced before Section 2 took effect.

Interpreting Section 404 to cover all such crack offenders accords with that purpose. Because Section 2's 18-to-1 ratio prospectively benefitted *all* crack offenders, Section 404 retroactively applied Section 2 to *all* crack offenders. That placed pre-Fair Sentencing Act crack offenders in the same position as post-Fair Sentencing Act crack offenders. By contrast, excluding Section 841(b)(1)(C) crack offenders from Section 404's coverage would be incongruous. It would

deny that sub-group the benefit of Section 2 that their post-Fair Sentencing Act counterparts received.

Section 404(c) reinforced that crack offenders should receive one (and only one) opportunity to be sentenced in accordance with the Fair Sentencing Act. Had Congress sought to prevent a large swath of crack offenders from receiving *any* such opportunity, there would be a clear statement from Congress. There isn't.

C. Excluding the Lowest-Level Crack Offenders Would Be Anomalous

Excluding Section 841(b)(1)(C) crack offenders from Section 404 would also be highly anomalous. They are the lowest-level crack offenders. Yet all agree that the most serious crack offenders—*i.e.*, major traffickers sentenced under Section 841(b)(1)(A)(iii)—have a "covered offense." Nothing in the statutory text or history would support such a topsy-turvy regime. *Cf. Nielsen v. Preap*, 139 S. Ct. 954, 970 (2019) (rejecting as "anomal[ous]" an interpretation of an immigration detention statute because it "would be gentler on terrorists than it is on garden-variety offenders").

To the contrary, the government's proposed regime would contravene a core purpose of Section 841(b). "When Congress set mandatory minimum penalties for drug trafficking offenses in 1986, one of its primary objectives sought to ensure that major and serious drug traffickers received harsher, more certain punishment," since they "inflict[ed] greater societal harms due to increased availability of the drug to more people." 1995 Report 193; *see* 2002 Report 4–10 (summarizing history of the 1986 Act). With respect to cocaine in particular, Congress expressed its intent in 1995 legislation that "high-level wholesale cocaine

traffickers . . . should generally receive longer sentences than low-level retail cocaine traffickers." Pub. L. No. 104–38, 109 Stat. 334, § 2(a)(1)(B) (1995).

The 100-to-1 disparity frustrated that stated objective. Due to the disparity, "low-level crack retailers receive[d] higher sentences than the wholesale-level [powder] cocaine dealer from whom the crack sellers originally purchased the powder to make the crack." 1995 Report 193–94 (discussing actual cases). And Congress knew about these "anomalous effects of the 100-to-1 quantity ratio" when it enacted the Fair Sentencing Act. *Id*. at 194; *see* 2002 Report App. E-3 ("street-level crack cocaine dealers are punished more severely than major traffickers in wholesale quantities of powder cocaine"); *Kimbrough*, 552 U.S. at 95, 98 (referencing this specific anomaly twice).

Interpreting Section 404 to cover Section 841(b)(1)(A)(iii)'s major crack traffickers but exclude Section 841(b)(1)(C)'s low-level crack dealers "would create new anomalies" even more striking than before. *Dorsey*, 567 U.S. at 278. While low-level crack dealers had received longer sentences than powder wholesalers before the Fair Sentencing Act, there was at least a countervailing consideration: Congress wanted to punish *crack* more severely than *powder*. But where, as here, the universe is limited to crack offenders, there is no plausible justification for treating *crack* kingpins better than the lowest-level *crack* dealers. Doing so would flout Congress's long-held objective to punish major drug traffickers more severely than low-level drug dealers. The government's interpretation of Section 404 would turn that sensible policy upside down. The Court should reject it.

* * *

Were there any doubt remaining about whether Section 404 covers Section 841(b)(1)(C) crack offenders, the rule of lenity would require its resolution in Petitioner's favor. *See Bifulco v. United States*, 447 U.S. 381, 387 (1980) (clarifying that the rule "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose"). But there is no doubt. The statutory text is plain. And the history and purpose of Section 404 confirm the meaning of the text. The lowest-level crack offenders sentenced under Section 841(b)(1)(C) before the Fair Sentencing Act have a "covered offense" under Section 404(a) of the First Step Act. They are eligible for a sentence reduction—just like the more serious crack offenders sentenced under Sections 841(b)(1)(A)(iii) and (B)(iii).

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

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APPENDIX: STATUTORY PROVISIONS

Index of Excerpted Statutes

A. SECTION 404 OF THE FIRST STEP ACT OF 2018

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

SEC. 404 APPLICATION OF FAIR SENTENCING ACT.

(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.

B. THE FAIR SENTENCING ACT OF 2010

(Pub. L. No. 111-220, 124 Stat. 2372, §§ 2, 3, 8, 10)

An Act

To restore fairness to Federal cocaine sentencing.

* * *

SEC. 2 COCAINE SENTENCING DISPARITY REDUCTION.

(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".

(b) IMPORT AND EXPORT ACT.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

(1) in paragraph (1)(C), by striking "50 grams" and inserting "280 grams"; and

(2) in paragraph (2)(C), by striking "5 grams" and inserting "28 grams".

SEC. 3 ELIMINATION OF MANDATORY MINIMUM SENTENCE FOR SIMPLE POSSESSION.

Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by striking the sentence beginning "Notwithstanding the preceding sentence,".

* * *

SEC. 8. EMERGENCY AUTHORITY FOR UNITED STATES SENTENCING COMMISSION.

The United Stated States Sentencing Commission shall—

(1) promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act, in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987 (28 U.S.C. 994 note), as though the authority under that Act had not expired; and

(2) pursuant to the emergency authority provided under paragraph (1), make such conforming amendments to the Federal sentencing guideline as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.

* * *

SEC. 10. UNITED STATES SENTENCING COMMISSION REPORT ON IMPACT OF CHANGES TO FEDERAL COCAINE SENTENCING LAW.

Not later than 5 years after the date of enactment of this Act, the United States Sentencing Commission, pursuant to the authority under sections 994 and 995 of title 28, United States Code, and the responsibility of the United States Sentencing Commission to advise Congress on sentencing policy under section 995(a)(20) of title 28, United States Code, shall study and submit to Congress a report regarding the impact of the changes in Federal sentencing law under this Act and the amendments made by this Act.

C. SECTION 841, TITLE 21 OF THE U.S. CODE
(as amended by Section 2(a) of the Fair Sentencing Act)

(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; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit 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—

* * *

(ii) 5 kilograms or more of a mixture of substance containing a detectable amount of [powder cocaine];

(iii) ~~50 grams~~ 280 grams or more of a mixture or substance described in clause (ii) 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—

* * *

(ii) 500 grams or more of a mixture or substance containing a detectable amount of [powder cocaine];

(iii) ~~5 grams~~ 28 grams or more of a mixture or substance described in clause (ii) 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. . . .

D. SECTION 960, TITLE 21 OF THE U.S. CODE
(as amended by Section 2(b) of the Fair Sentencing Act)

(a) UNLAWFUL ACTS

Any person who—

(1) contrary to section 825, 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

(2) contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 959 of this title, manufactures, possesses with intent to distribute, or distributes a controlled substance,

shall be punished as provided in subsection (b).

(b) PENALTIES

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

* * *

(B) 5 kilograms or more of a mixture or substance containing a detectable amount of [powder cocaine];

(C) ~~50 grams~~ 280 grams or more of a mixture or substance described in subparagraph (B) which contains cocaine base;

* * *

the person committing such violation shall be sentenced to a term of imprisonment of not less than 10 years and not more than life 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 20 years and not 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 . . . . Notwithstanding section 3583 of title 18, any sentence under this paragraph 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. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this paragraph. No person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein.

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

* * *

(B) 500grams or more of a mixture or substance containing a detectable amount of [powder cocaine];

(C) ~~5 grams~~ 28 grams or more of a mixture or substance described in subparagraph (B) which contains cocaine base;

* * *

the person committing such violation shall be sentenced to a term of imprisonment of not 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 sentenced to a term of imprisonment of not less than twenty years and not 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 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 paragraph 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. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this paragraph. No person sentenced under this paragraph shall be eligible for parole during the term of imprisonment imposed therein.

(3) In the case of a violation under subsection (a) of this section involving a controlled substance in schedule I or II . . . , the person committing such violation

shall, except as provided in paragraphs (1), (2), and (4), 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 and not 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. Notwithstanding the prior sentence, and notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this paragraph which provide for a mandatory term of imprisonment if death or serious bodily injury results.

E. SECTION 844(a), TITLE 21 OF U.S. CODE
(as amended by Section 3 of the Fair Sentencing Act)

(a) UNLAWFUL ACTS; PENALTIES

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner,

while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II. . . . Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. ~~Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of~~

~~such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram~~. . . . The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.