No. 20-5904

In the Supreme Court of the United States

TARAHRICK TERRY, PETITIONER

v.

UNITED STATES OF AMERICA

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

MOTION OF THE UNITED STATES FOR LEAVE TO FILE OUT OF TIME AND BRIEF FOR THE UNITED STATES

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Pursuant to Rule 21 of the Rules of this Court, the Acting Solicitor General, on behalf of the United States, respectfully moves for leave to file an out-of-time brief for the respondent in support of petitioner. The government's proposed brief is attached to this motion. Counsel for petitioner consents. The amicus appointed by this Court to defend the judgment below has requested that we include the following verbatim statement of his position: "Court-appointed amicus counsel can neither support nor oppose this motion, because counsel does not know what good cause the Government is proffering."

1. This case presents the question whether petitioner's conviction for possessing an unspecified amount of cocaine base (crack cocaine) with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), for which he was sentenced before August 3, 2010, is a "covered

offense" under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222. The district court concluded that petitioner's conviction was not a "covered offense" and that he is therefore ineligible to seek a reduced sentence for the offense under Section 404 of the First Step Act. Pet. App. 6a-14a. The court of appeals affirmed, holding that a violation of Section 841(a)(1) and (b)(1)(C) does not qualify as a "covered offense" under Section 404(a) of the First Step Act. *Id.* at 1a-5a.

2. On January 8, 2021, this Court granted a petition for a writ of certiorari to review the judgment of the court of appeals. Under Rule 25.1 of the Rules of this Court, a brief by the respondent in support of petitioner was due on February 22, 2021. (Petitioner's opening brief was due that same day; he filed it ten days earlier than required.)

In the proceedings below and in its brief in opposition to certiorari, filed on December 4, 2020, the government argued that petitioner lacks a "covered offense" as defined in the First Step Act. Following the change in Administration on January 20, 2021, however, the government began a process of reviewing its interpretation of the First Step Act, including Section 404. On March 15, 2021, the government notified this Court that, as a result of its review, the Department of Justice had concluded that petitioner's conviction is a "covered offense" under Section 404, and that the court of appeals erred in concluding otherwise.

The government submitted that notification as promptly as possible, without further delay, following a final decision by the Department on that issue. Regretfully, the timing of the final decision allowed for the fil-

ing of the notification only on the date that a brief supporting the government's prior position would have been due. It also precluded the timely filing of a brief by the respondent in support of petitioner.

The government's notification suggested that the Court might wish to appoint an amicus curiae to defend the judgment below. On March 19, 2021, the Court invited Adam K. Mortara, Esq., to brief and argue in support of the judgment below as amicus curiae. The Court also removed the case from the April argument calendar. On March 25, 2021, the Court set a deadline of April 13, 2021, for the court-appointed amicus's brief to be filed, and scheduled the case for oral argument on May 4, 2021.

3. The government respectfully submits that good cause exists to grant leave to file an out-of-time brief for the respondent in support of petitioner under the particular circumstances of this case.

The United States has a strong and unique interest in the resolution of this case. The government is a party to this case and to every case in which the question presented arises. Indeed, the First Step Act affords the United States—acting through the Director of the Federal Bureau of Prisons or a federal prosecutor—the right to invoke the very same procedure that petitioner invoked here, to request that a district court reduce the sentence of any defendant with a "covered offense" within the meaning of the Act. § 404(b), 132 Stat. 5222. The necessity of the government's participation in every sentence-reduction motion filed by any defendant anywhere in the Nation gives the United States a strong interest in the question presented. The government also has a unique perspective on that question. Although petitioner has also filed a brief urging reversal of

the court of appeals' judgment, the government does not wholly agree with petitioner's rationale for reversal. See Gov't Br. 24-26, 29-31.

Only the government can provide the Court with the perspective of a party to every sentencing-related proceeding, rather than just petitioner's. The government has been closely involved in the federal sentencing regime for drug-distribution offenses, including crack cocaine, which gave rise to the issues in this case. See Gov't Br. 9-13 (describing the history of the First Step Act). The government has participated in numerous cases before this Court presenting related issues concerning that regime. See, *e.g.*, *Dorsey* v. *United States*, 567 U.S. 260 (2012) (argument by the United States as respondent supporting the petitioner); *Dillon* v. *United States*, 560 U.S. 817 (2010); *Kimbrough* v. *United States*, 552 U.S. 85 (2007). The government has specific and extensive experience litigating issues surrounding the meaning of Section 404 of the First Step Act since its enactment in 2018. Particularly because the parties' interpretations of Section 404 are not entirely aligned, the government's participation in this case would provide the Court with a distinct and valuable perspective.

The government recognizes—and regrets—that the untimeliness of the proposed filing resulted from the timing of the Department's final determination about its interpretation of Section 404. Having determined not to defend the judgment below, the government has prepared and finalized a brief in support of petitioner less than one week after the Court entered a further briefing schedule in the case. We are submitting the government's proposed brief with this motion so that it will be available to the Court-appointed amicus nearly two weeks before the due date of his brief on April 13.

Given the significant interest of the United States in the case, and the government's unique perspective, the government respectfully requests that the Court accept its submission and permit its continuing participation in the case.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General

MARCH 2021

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QUESTION PRESENTED

Whether petitioner is eligible for a reduced sentence under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222, because his prior conviction for possessing cocaine base (crack cocaine) with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), is a "covered offense" as defined in Section 404(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is reprinted at 828 Fed. Appx. 563. The order of the district court (Pet. App. 6a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 2020. The petition for a writ of certiorari was filed on September 28, 2020, and granted on January 8, 2021. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222, provides:

> (a) DEFINITION OF COVERED OFFENSE.—In this section, the term "covered offense" means a violation

of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.

(b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.

(c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

132 Stat. 5222.

Sections 2 and 3 of the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, provide:

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,".

124 Stat. 2372. Additional pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-15a.

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing an unspecified amount of cocaine base (crack cocaine) with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Judgment 1. The district court sentenced petitioner to 188 months of imprisonment, to be followed by six years of supervised release. Judgment 2-3. He did not appeal.

Petitioner later filed a motion for a sentence reduction under Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222. The district court denied the motion. Pet. App. 6a-14a. The court of appeals affirmed. *Id.* at 1a-5a.

A. Legal Background

1. The Anti-Drug Abuse Act of 1986

a. In the Anti-Drug Abuse Act of 1986 (1986 Act), Pub. L. No. 99-570, 100 Stat. 3207, Congress enacted a scheme of penalties for drug-trafficking offenses that distinguished sharply between two different forms of cocaine: "[p]owder cocaine" and "[c]rack cocaine, a type of cocaine base." *Kimbrough* v. *United States*, 552 U.S. 85, 94 (2007). In particular, Congress treated crack-cocaine offenses 100 times more harshly than corresponding powder-cocaine offenses.

The 100-to-1 differential was embedded in the penalty scheme set forth in 21 U.S.C. 841(b), which applies to the standard and often-charged federal drug-trafficking prohibition, 21 U.S.C. 841(a), and which is incorporated into other drug statutes, see, *e.g.*, 21 U.S.C. 846, 859, 860. Section 841(a) makes it unlawful to knowingly or intentionally "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance," except as authorized by federal law. 21 U.S.C. 841(a)(1); see 21 U.S.C. 802(6) (defining "controlled substance"); 21 U.S.C. 812 (schedules of controlled substances). Section 841(b) creates a tiered scheme of overlapping statutory sentencing ranges for "violat[ions] [of] subsection (a)" based on the type and quantity of drugs involved. 21 U.S.C. 841(b).

At the threshold, any violation of Section 841(a) involving a controlled substance on Schedule I or II—

including both forms of cocaine—is punishable under Section 841(b)(1)(C). That provision specifies a penalty of "not more than 20 years" of imprisonment, or "not more than 30 years" for certain recidivists. 21 U.S.C. 841(b)(1)(C). If "death or serious bodily injury results" from the drug's use, the penalty range is increased to "not less than 20 years or more than life," or "life imprisonment" for recidivists. *Ibid.* Those penalties, however, are subject to an exception that cross-references other subparagraphs of Section 841(b)(1). Specifically, the penalties in Subparagraph (C) apply "except as provided in subparagraphs (A), (B), and (D)." *Ibid.*

Subparagraph (B) authorizes enhanced penalties with a statutory-minimum term of imprisonment of "not * * * less than 5 years," and a higher statutory maximum of "not more than 40 years," for offenses involving certain minimum quantities of particular Schedule I and II controlled substances. 21 U.S.C. 841(b)(1)(B). Subparagraph (A) then authorizes further enhanced penalties—that carry a higher statutory-minimum term of imprisonment, as well as a higher statutory-maximum term—for offenses involving greater minimum quantities of the same Schedule I and II controlled substances: generally, ten years to life. 21 U.S.C. 841(b)(1)(A). And both provisions authorize additional enhanced penalties for recidivists and for violations that result in death or serious bodily injury. 21 U.S.C. 841(b)(1)(A) and (B). Subparagraph (D), in turn, provides for lesser statutory penalties for certain marijuana offenses. 21 U.S.C. 841(b)(1)(D); cf. 21 U.S.C. 960(b)(1)-(4) (analogous tiered penalty structure for offenses involving the unlawful importation or exportation of Schedule I or II controlled substances).

When Congress initially set the drug quantities necessary to trigger enhanced penalties under Subparagraphs (A) and (B), it treated one gram of crack cocaine as the equivalent of 100 grams of powder cocaine. See *Kimbrough*, 552 U.S. at 96; 1986 Act § 1002(2), 100 Stat. 3207-2. For example, the 1986 Act provided in Subparagraph (A) for a statutory-minimum term of ten years of imprisonment, and a maximum term of life, for offenses by non-recidivists involving 5000 grams or more of powder cocaine, but required only 50 grams of crack cocaine to trigger the same penalties. 21 U.S.C. 841(b)(1)(A)(ii) and (iii) (1988). Likewise, the 1986 Act provided in Subparagraph (B) for a statutory-minimum term of five years of imprisonment, and a maximum term of 40 years, for offenses by non-recidivists involving 500 grams or more of powder cocaine, but required only 5 grams of crack cocaine to trigger those penalties. 21 U.S.C. 841(b)(1)(B)(ii) and (iii) (1988).

b. In 1987, the United States Sentencing Commission issued the first edition of the Sentencing Guidelines and incorporated the 100-to-1 disparity in the treatment of crack and powder cocaine. See *Kimbrough*, 552 U.S. at 96-97 & n.7. "In the main, the Commission developed Guidelines sentences using an empirical approach based on data about past sentencing practices, including 10,000 presentence investigation reports." *Id.* at 96. For controlled-substance offenses (other than those that result in death or serious bodily injury), however, the Guidelines deviated from that approach, and instead "use[d] a drug quantity table based on drug type and weight to set base offense levels." *Ibid.*; see Sentencing Guidelines § 2D1.1(a)(1)-(3) (1987).

Using the statutory drug quantities and corresponding minimum penalties in Section 841(b)(1) as "reference points," the Commission "extrapolat[ed] * * * upward and downward to set proportional offense levels for other drug amounts." *Dorsey* v. *United States*, 567 U.S. 260, 268 (2012). For example, the Guidelines specified a base offense level of 24 for offenses involving either 400 grams of powder cocaine or just 4 grams of crack cocaine, see Sentencing Guidelines § 2D1.1 (1987), "which for a first-time offender meant a sentencing range of 51 to 63 months," a range designed to fall just below the five-year statutory-minimum penalty for Section 841 offenses involving either 500 grams or more of powder cocaine or 5 grams or more of crack cocaine. *Dorsey*, 567 U.S. at 267. The Commission thus "set sentences for the full range of possible drug quantities using the same 100-to-1 quantity ratio" that Congress had used in the 1986 Act. *Kimbrough*, 552 U.S. at 97 (quoting U.S. Sent. Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 1 (Feb. 1995) (1995 Report)); see 1995 Report 126 (explaining that "[t]he 100-to-1 quantity ratio was maintained throughout the offense levels" for all crack- and powder-cocaine offenses).

c. The sentencing disparities created by the 100-to-1 ratio in the 1986 Act generated a chorus of criticism, including from "the law enforcement community." *Dorsey*, 567 U.S. at 268. Over the next two decades, the Commission itself issued four separate reports to Congress describing the 100-to-1 ratio as "too high and unjustified." *Ibid.* In 2002, for example, the Commission explained that the ratio was "established based on a number of beliefs about the relative harmfulness of the

two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution that more recent research and data no longer support." U.S. Sent. Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 91 (May 2002) (2002 Report). The Commission noted that the debates surrounding the 1986 Act involved concern about the "devastating effects" of prenatal exposure to crack cocaine, but that "research indicate[d] that the negative effects" were "significantly less severe than believed" in 1986 and, in fact, "identical to the negative effects of prenatal powder cocaine exposure." *Id.* at 94-95. The Commission also noted that, while the 1986 Congress was "understandabl[y]" concerned that crack cocaine's low cost and potency could lead to an epidemic of use by young people, that concern "never materialized"; survey data indicated that the rate of powder-cocaine use among young adults was up to "*seven times as high* as the rate of use of crack cocaine." *Id.* at 96.

The Commission emphasized that the consequences of treating crack cocaine 100 times more harshly than the equivalent amount of powder cocaine created significant racial disparities in the criminal justice system. Those consequences fell "primarily upon black offenders," because "[t]he overwhelming majority of offenders subject to the heightened crack cocaine penalties are black, about 85 percent in 2000." 2002 Report 102-103. In the Commission's view, the starkly different treatment of crack and powder cocaine undermined public confidence in the justice system by fostering a "widely-held perception that the current penalty structure for federal cocaine offenses promotes unwarranted disparity based on race." *Id.* at 103.

The Commission repeatedly requested that Congress recalibrate federal penalties for crack- and powder-cocaine offenses. *Dorsey*, 567 U.S. at 268. In particular, the Commission asked Congress to reduce the 100-to-1 ratio by increasing the amounts of crack cocaine necessary to trigger enhanced penalties under Subparagraphs (A) and (B) of Section 841(b)(1), which would decrease the number of offenders who could be subject to those penalties. 2002 Report viii. In advocating those changes, the Commission observed that the sentencing disparities created by the 100-to-1 ratio were "inappropriate especially for [the] category of least culpable offenders," *i.e.*, those who were convicted of trafficking in "the lowest drug quantities and [who had] the least criminal history." *Id.* at 99 (emphasis omitted).

2. The Fair Sentencing Act of 2010

In 2010, Congress "accepted the Commission's recommendations," *Dorsey*, 567 U.S. at 269, by enacting the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372. The Fair Sentencing Act "reduced the statutory penalties for crack cocaine offenses," U.S. Sent. Comm'n, *Report to the Congress: Impact of the Fair Sentencing Act of 2010*, at 3 (Aug. 2015) (2015 Report), by increasing the drug quantities necessary to trigger enhanced penalties for crack-cocaine distribution offenses, while leaving the corresponding powder-cocaine amounts unchanged, and by eliminating any statutory-minimum penalty for simple possession of crack cocaine. Fair Sentencing Act §§ 2-3, 124 Stat. 2372; see *Dorsey*, 567 U.S. at 272-273 (describing the Fair Sentencing Act's "more lenient penalties").

Specifically, Section 2(a)(1) of the Fair Sentencing Act amended Section 841(b)(1)(A)(iii) by striking the words "50 grams" and replacing them with "280 grams."

§ 2(a)(1), 124 Stat. 2372. Section 2(a)(2) amended Section 841(b)(1)(B)(iii) by striking the words "5 grams" and replacing them with "28 grams." § 2(a)(2), 124 Stat. 2372. And Section 2(b) modified the analogous thresholds in 21 U.S.C. 960(b), which applies to export/import offenses. See Fair Sentencing Act § 2(b)(1) and (2), 124 Stat. 2372. Those changes "had the effect of lowering the 100-to-1 crack-to-powder ratio to 18 to 1." *Dorsey*, 567 U.S. at 269. Section 3 then separately eliminated the independent statutory minimum for simple possession of crack cocaine, in violation of 21 U.S.C. 844(a). Fair Sentencing Act § 3, 124 Stat. 2372. Sections 2 and 3 applied only prospectively, to offenses for which the defendant was sentenced after the Fair Sentencing Act's effective date of August 3, 2010. *Dorsey*, 567 U.S. at 273.

In Section 8 of the Fair Sentencing Act, Congress directed the Sentencing Commission to revise the Guidelines on an emergency basis within 90 days to "achieve consistency with other guidelines provisions and applicable law." § 8(2), 124 Stat. 2374. The Commission responded by promulgating Guidelines Amendment 748. See 75 Fed. Reg. 66,188, 66,189-66,191 (Oct. 27, 2010); Sentencing Guidelines App. C, Amend. 748 (Nov. 1, 2010). Amendment 748 "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; see 2015 Report 10 (stating that "the Commission conformed the drug guideline penalty structure for crack cocaine offenses to the amended statutory quantities"). The Commission subsequently made those

Guidelines changes permanent and retroactive. Sentencing Guidelines App. C, Amends. 750, 759 (Nov. 1, 2011); see Sentencing Guidelines § 1B1.10.

The net effect of making prospective changes to the statutory penalty scheme for crack-cocaine offenses and retroactive changes to the drug-quantity table in the Guidelines was to provide partial relief to some crack-cocaine offenders who had been sentenced before the effective date of the Fair Sentencing Act. Under 18 U.S.C. 3582(c)(2), a sentencing court may reduce a previously imposed term of imprisonment "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission," to the extent that "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." When the Commission lowered offense levels for all crack-cocaine offenses in the drug-quantity table, Section 3582(c)(2) provided an avenue for crack-cocaine offenders whose guidelines ranges had been determined under that table (and the 100-to-1 ratio previously incorporated into it) to seek a sentence reduction.

Even in those proceedings, however, the pre-Fair Sentencing Act statutory penalties continued to govern and constrained a sentencing court's discretion. See U.S. Sent. Comm'n, *The First Step Act of 2018: One Year of Implementation* 42 (Aug. 2020) (2020 Report). In some cases, where the amended guidelines range straddled the applicable pre-Fair Sentencing Act statutory minimum, the pre-Fair Sentencing Act statutory penalties directly precluded the district court from reducing the defendant's sentence as much as the Guidelines would have otherwise permitted. See *Dorsey*, 567

U.S. at 284 (comparing post-Fair Sentencing Act guidelines ranges with pre-Fair Sentencing Act statutory-minimum sentences). And in all Section 3582(c)(2) sentence-reduction proceedings, district courts were required to consider "avoid[ing] unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," 18 U.S.C. 3553(a)(6), which could include defendants who were—and remained—subject to the pre-Fair Sentencing Act statutory penalty scheme. See 18 U.S.C. 3582(c)(2) (requiring district courts to consider the Section 3553(a) factors "to the extent they are applicable").

The Commission's retroactive amendments, moreover, provided no relief at all to a defendant convicted of a crack-cocaine offense under the old penalty scheme whose guidelines range had not been determined under the drug-quantity table. That would include a career offender, see Sentencing Guidelines § 4B1.1(a), as well as a defendant whose guidelines sentence was itself dictated by a pre-Fair Sentencing Act statutory minimum, see *Koons* v. *United States*, 138 S. Ct. 1783, 1787 (2018); Sentencing Guidelines § 5G1.1(b).

3. The First Step Act of 2018

In 2018, Congress enacted the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194, which reflects "a concerted bipartisan effort to strike an effective balance to improve the fair administration of justice while keeping * * * communities safe." 164 Cong. Rec. S7747 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar). Section 404 of the First Step Act makes Sections 2 and 3 of the Fair Sentencing Act retroactive. Section 404's retroactivity provision applies to any "covered offense," defined 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), 132 Stat. 5222 (citation omitted). Under Section 404(b) of the First Step Act, a district 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 were in effect at the time the covered offense was committed." § 404(b), 132 Stat. 5222 (citation omitted).

Section 404(c) of the First Step Act provides that no court shall entertain a Section 404 motion 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," or if a prior Section 404 motion was already denied on the merits. § 404(c), 132 Stat. 5222. Section 404(c) further provides that "[n]othing in this section shall be construed to require a court to reduce any sentence." *Ibid.*

B. The Present Controversy

Petitioner was convicted and sentenced for a crack-cocaine offense, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), before August 3, 2010—*i.e.*, before the effective date of the Fair Sentencing Act. The district court and the court of appeals concluded that he is ineligible for a reduced sentence under Section 404 of the First Step Act. Pet. App. 5a.

1. On February 26, 2008, police officers in Miami, Florida, encountered petitioner driving a car with an expired temporary license tag. Presentence Investigation Report (PSR) ¶ 9. When the officers tried to stop the car, petitioner led them on a car chase before crashing into a parked car and fleeing on foot. *Ibid.* Officers saw petitioner take a gun out of his waistband and drop

it on the floor of his car before fleeing. *Ibid.* Petitioner was caught a block away from the crash with 3.9 grams of crack cocaine packaged in small bags in the pocket of his pants, and officers later recovered a handgun and ammunition from his car. PSR ¶¶ 10-11, 18.

A grand jury in the Southern District of Florida returned an indictment charging petitioner with one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1); one count of possessing an unspecified amount of crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and one count of possessing a firearm in furtherance of a drug-trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A). Indictment 1-2.

Before trial, the government gave notice of its intent to seek an enhanced penalty on the drug-distribution count. D. Ct. Doc. 25, at 1 (July 29, 2008); see 21 U.S.C. 851. Under Section 841(b)(1)(C), the maximum penalty for a Section 841 offense involving an unspecified amount of crack cocaine increases from 20 years to 30 years if the defendant commits the violation "after a prior conviction for a felony drug offense has become final." 21 U.S.C. 841(b)(1)(C). The government gave notice that petitioner had at least one prior felony drug conviction in Florida state court, for possessing cocaine with intent to manufacture or deliver. D. Ct. Doc. 25, at 1; see PSR ¶¶ 2, 31.

Petitioner pleaded guilty to the drug-distribution count in exchange for dismissal of the two gun-related charges. Pet. App. 7a. Before sentencing, the Probation Office determined that petitioner's prior drug convictions classified him as a career offender under the Sentencing Guidelines. PSR ¶ 24; see Sentencing Guidelines § 4B1.1(a). Based on the career-offender

guideline, which superseded the drug-table guidelines, the Probation Office calculated his offense level to be 34 and his advisory guidelines range to be 262 to 327 months. PSR ¶¶ 24, 38, 80.

At sentencing, the district court adopted the Probation Office's calculations and granted the parties' joint request to apply a three-level reduction for acceptance of responsibility, resulting in an adjusted offense level of 31 and a revised advisory guidelines range of 188 to 235 months. Pet. App. 8a; Sent. Tr. 3-5. In accordance with the plea agreement, both parties requested that petitioner be sentenced within that guidelines range. Sent. Tr. 5-11. The district court accepted that request and sentenced petitioner to 188 months of imprisonment, to be followed by six years of supervised release. *Id.* at 12; see Pet. App. 8a. Petitioner did not appeal.

2. In 2014, petitioner filed a pro se motion to reduce his sentence under Section 3582(c)(2), the provision that permits a district court to reduce a previously imposed term of imprisonment if the term was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2); see D. Ct. Doc. 39, at 1-2 (Dec. 2, 2014).

Petitioner's Section 3582(c)(2) sentence-reduction motion invoked a retroactive amendment adopted by the Commission in 2014, which "reduced the drug guidelines for all drugs, including crack cocaine, by two levels." 2015 Report 7; see Sentencing Guidelines App. C Supp., Amends. 782, 788 (Nov. 1, 2014); see also D. Ct. Doc. 39, at 3-4 (citing Amend. 782). The government opposed petitioner's motion, explaining that neither the amendment he had invoked nor the retroactive amendment adopted in response to the Fair Sentencing Act would have altered petitioner's advisory guidelines

range, because his range had been based on the career-offender guideline, not on the drug-quantity table that the Commission had amended. D. Ct. Doc. 42, at 2-3 (Dec. 19, 2014).

The district court denied petitioner's motion, D. Ct. Doc. 43, at 1 (Jan. 16, 2015), and petitioner did not appeal.

3. In 2019, petitioner moved for a reduction of his sentence under Section 404 of the First Step Act. Pet. App. 6a. In the proceedings below, the government argued that petitioner was ineligible for such a reduction.[*]

The district court denied petitioner's motion. Pet. App. 6a-14a. The court stated 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." *Id.* at 13a (citation omitted). The court observed that, under Section 404(a), a 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 . . . that was committed before August 3, 2010." *Ibid.* (citation omitted). And in the court's view, "[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)," the statutory penalty provision applicable to petitioner. *Ibid.* The court thus concluded that petitioner had not

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[*] In addition to opposing relief based on the issue now before this Court, the government argued in this case and others nationwide that eligibility for a reduced sentence under Section 404 turned on the amount of crack cocaine that was in fact involved in the defendant's "violation," rather than the amount that the jury's verdict alone necessarily established. See Gov't C.A. Br. 8-13. The courts of appeals uniformly rejected that reading of Section 404(a), see, *e.g.*, *United States* v. *Davis*, 961 F.3d 181, 190 (2d Cir. 2020), and the government had ceased to advance it by the time petitioner sought this Court's review. Cf. Br. in Opp. 11.

been "convicted and sentenced for a 'covered offense' within the meaning of the First Step Act" and is ineligible for a reduced sentence under Section 404. *Ibid.*

The court of appeals affirmed. Pet. App. 1a-5a. Relying on its previous decision in *United States* v. *Jones*, 962 F.3d 1290 (11th Cir. 2020), petition for cert. pending, No. 20-6841 (filed Jan. 12, 2021), the court agreed that petitioner "did not commit a 'covered offense,' and, thus, was not eligible for relief under the First Step Act." Pet. App. 5a. The court had stated in *Jones* that a "movant's offense is a covered offense if section two or three of the Fair Sentencing Act modified its statutory penalties," and that Sections 841(b)(1)(A)(iii) and (B)(iii) are "the only provisions" in Section 841 that were modified by Sections 2 or 3 of the Fair Sentencing Act. *Id.* at 4a (quoting *Jones*, 962 F.3d at 1298, 1300). In this case, the court understood *Jones* to compel the conclusion that petitioner's "offense under § 841(b)(1)(C) is not a 'covered offense,'" and it therefore affirmed the district court's refusal to consider whether, in an exercise of discretion, petitioner's sentence should be reduced under Section 404(b) of the First Step Act. *Id.* at 5a.

SUMMARY OF ARGUMENT

The court of appeals erred in determining that petitioner is ineligible to seek a discretionary reduction of his sentence under Section 404 of the First Step Act.

A. Petitioner has a "covered offense" under the text of Section 404(a), which defines a "covered offense" as a "violation of a Federal criminal statute" for which Sections 2 or 3 of the Fair Sentencing Act "modified" the "statutory penalties." Petitioner's "violation" was possession with intent to distribute an unspecified amount of crack cocaine, a violation of 21 U.S.C. 841(a) and

(b)(1)(C). Such an offender is subject to a different penalty scheme after the Fair Sentencing Act than he was before.

The text of 21 U.S.C. 841(b)(1)(C) expressly provides that the penalties specified there apply "except as provided" in Subparagraphs (A) and (B). Thus, while Subparagraph (C) is broadly applicable regardless of the amount of crack cocaine involved in the offense, it provides the exclusive penalty range only for those offenses that cannot be punished under Subparagraphs (A) and (B). When Congress altered the drug-quantity thresholds in Subparagraphs (A)(iii) and (B)(iii) to decrease the number of crack-cocaine offenses subject to their penalties, Congress also necessarily increased the range of crack-cocaine offenses for which Subparagraph (C) provides the exclusive statutory penalties. Accordingly, although petitioner errs in describing Subparagraph (C) as having a drug-quantity "ceiling," Congress's modification of the "floors" in Subparagraphs (A) and (B) for crack-cocaine offenses also modified the statutory penalties for crack-cocaine offenses under Subparagraph (C). Section 404 accordingly permits district courts to consider reducing pre-Fair Sentencing Act sentences for Section 841(b)(1)(C) crack-cocaine offenses in light of those changes.

B. The statutory design and history support petitioner's eligibility for a reduced sentence. The Fair Sentencing Act was enacted to reduce unwarranted sentencing disparities in the treatment of crack and powder cocaine—disparities that primarily affected racial minorities and low-level offenders—and Section 404 of the First Step Act was enacted to make those changes retroactive. Reading Section 404 to exclude Section 841(b)(1)(C) offenders would undermine that design by

preventing individualized review of pre-Fair Sentencing Act crack-cocaine sentences for a large class of low-level offenders.

Excluding Section 841(b)(1)(C) offenders would also produce anomalous results. First, such a reading would mean that the presumptively most culpable crack-cocaine traffickers—those sentenced under Sections 841(b)(1)(A)(iii) and (B)(iii)—are eligible for reduced sentences but the presumptively least culpable traffickers are not. Second, excluding Section 841(b)(1)(C) offenders from eligibility for individualized review would mean that two defendants whose offenses involved the exact same amount of crack cocaine would be treated differently. Subparagraph (C) can always be used—and has always been used—to prosecute defendants whose offenses involved amounts of crack cocaine that could also have been the basis for prosecution under Subparagraphs (A) or (B). Defendants in that situation who were prosecuted under Subparagraph (C) could thus now see similarly situated defendants, whose sentences were actually found by a jury to warrant an (A) or (B) enhancement, receive reduced sentences *below* their own, but have no way to ask a court to address that new unwarranted disparity.

Congress had good reason to permit district courts to consider reducing pre-Fair Sentencing Act sentences for crack-cocaine offenders sentenced under Section 841(b)(1)(C). As petitioner and his amici explain, the prior drug quantities for enhanced penalties under Subparagraphs (A) and (B) provided important context for sentences imposed under Subparagraph (C). When Congress moved the fence posts for enhanced penalties, it cast Section 841(b)(1)(C) offenses in a different light. Petitioner's own case, which involves a sentence based

on 3.9 grams of crack cocaine, provides an example. That quantity was close to the pre-Fair Sentencing Act 5-gram enhanced-penalty threshold, but is now far short of the new 28-gram threshold. Authorizing a proceeding that allows for a sentence reduction "as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the time the covered offense was committed" would naturally and sensibly include a reduction reflecting a reevaluation of the relative seriousness of a crack-cocaine offense in light of the new thresholds.

C. The courts of appeals that have rejected requests that Section 841(b)(1)(C) sentences be considered for a discretionary reduction are mistaken. Those courts have stated that Sections 2 and 3 of the Fair Sentencing Act did not alter the text or effect of Section 841(b)(1)(C), which continues to specify the same penalties for the same conduct. But Sections 841(b)(1)(A)(iii) and (B)(iii) also continue to specify the same penalties for some of the same conduct, so that cannot be the dispositive consideration. Nor can the lack of any changes to the text be dispositive, given that some violations of other textually unchanged statutes are undisputedly covered offenses. And as described above, the Fair Sentencing Act *did* modify the effect of Section 841(b)(1)(C) for crack-cocaine offenses by altering the category of such offenses for which it provides the exclusive statutory penalties.

Nor should petitioner be deemed ineligible for a discretionary sentence reduction because some Section 841(b)(1)(C) offenders who were sentenced before the effective date of the Fair Sentencing Act have already been able to take advantage of the retroactive amendments to the drug-quantity table that the Commission made in response to that Act. When Congress chose to

make the Fair Sentencing Act retroactive, it specifically excluded offenders who had already benefited from Sections 2 and 3 of the Fair Sentencing Act, but it did not exclude offenders who had benefitted from the retroactive guidelines amendments. And any sentence reduction granted as a result of the retroactive guidelines amendments necessarily occurred in the shadow of the pre-Fair Sentencing Act statutory penalty scheme and the unwarranted 100-to-1 ratio embedded in it. Section 404 allows for a proceeding in which a court, for the first time, may more freely consider a reduced sentence in the absence of that discredited scheme.

ARGUMENT

PETITIONER IS ELIGIBLE TO SEEK A REDUCED SENTENCE UNDER SECTION 404 OF THE FIRST STEP ACT BECAUSE HIS VIOLATION OF 21 U.S.C. 841(a)(1) AND (b)(1)(C) IS A "COVERED OFFENSE"

Petitioner was convicted and sentenced for possessing an unspecified amount of crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), before the effective date of the Fair Sentencing Act. At the time of his sentencing, the statutory penalty regime treated crack-cocaine distribution offenses 100 times more harshly than those involving powder cocaine. In the Fair Sentencing Act, Congress recognized that the regime produced unwarranted sentencing disparities, particularly for low-level offenders and racial minorities, and reduced the 100-to-1 ratio. The First Step Act made those changes retroactive, authorizing certain defendants to seek reduced sentences as if the Fair Sentencing Act had been in effect at the time of their offenses.

In the proceedings below and in its brief in opposition, the United States took the position that petitioner

is not eligible for a discretionary sentence reduction under the First Step Act. After this Court's grant of review and the change in Administration, the government reexamined the text, overall design, and history of the relevant statutes and concluded that petitioner's conviction qualifies as a "covered offense" under Section 404 of the First Step Act. Congress did not counterintuitively preclude only the presumptively *least* culpable crack-cocaine traffickers from seeking reduced sentences. Instead, petitioner and other crack-cocaine offenders sentenced under Section 841(b)(1)(C) before the Fair Sentencing Act are eligible under Section 404 to seek reduced sentences, which courts can and should exercise their discretion to grant only when justified by case-specific circumstances. Because petitioner was denied an opportunity even to seek a reduced sentence, the judgment below should be reversed.

A. Petitioner Has A "Covered Offense" Under The Text Of Section 404(a)

"'A judgment of conviction that includes a sentence of imprisonment constitutes a final judgment' and may not be modified by a district court except in limited circumstances." *Dillon* v. *United States*, 560 U.S. 817, 824 (2010) (quoting 18 U.S.C. 3582(b)) (brackets omitted). One of the limited exceptions to the general rule permits a district court to "modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute." 18 U.S.C. 3582(c)(1)(B). Section 404 of the First Step Act is such a statute, expressly permitting a district court that imposed a sentence for a "covered offense" to reduce that sentence "as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect" when the defendant "committed" his crime. § 404(b), 132 Stat.

5222. Section 404 defines "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), 132 Stat. 5222 (citation omitted).

Petitioner's "violation of a Federal criminal statute," First Step Act § 404(a), 132 Stat. 5222, was the offense of possessing with intent to distribute an unspecified amount of crack cocaine, in violation of 21 U.S.C. 841(a) and (b)(1)(C). Section 2 of the Fair Sentencing Act modified the statutory penalties for that violation by amending the text of Subparagraphs (A)(iii) and (B)(iii) to reduce the 100-to-1 disparity in the treatment of crack and powder cocaine. Although the amendments did not change a drug-quantity "ceiling" (Pet. Br. 3) of Subparagraph (C), which continues to allow prosecutions for any quantity of crack cocaine, the amendments changed the set of crack-cocaine offenses for which Subparagraph (C) provides the exclusive statutory penalties. The amendments thereby "modified" the "statutory penalties" for violations involving unspecified amounts of crack cocaine.

1. Petitioner's "violation" is the criminal offense defined by Sections 841(a)(1) and (b)(1)(C)

a. Whether petitioner has a "covered offense" under Section 404 "begins with the language of the statute." *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1569 (2017) (citation omitted). Section 404(a) of the First Step Act states that "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, that was committed before August 3, 2010." § 404(a), 132 Stat. 5222 (citation omitted). The plain language of the statute thus requires

determining (1) the "violation of a Federal criminal statute" that the defendant "committed" and (2) whether the Fair Sentencing Act "modified" the "statutory penalties" for that offense. *Ibid.*

Although the court of appeals erred in other respects, it correctly recognized that petitioner's relevant "violation" is the criminal offense defined by Sections 841(a)(1) and (b)(1)(C). Pet. App. 3a-4a (citing *United States* v. *Jones*, 962 F.3d 1290, 1298-1301 (11th Cir. 2020), petition for cert. pending, No. 20-6841 (filed Jan. 7, 2021)). Section 841(a)(1) criminalizes "knowingly or intentionally * * * possess[ing] with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. 841(a)(1). And Section 841(b)(1)(C) provides statutory penalties for a violation of Section 841(a) involving a Schedule I or II controlled substance, including crack cocaine. The indictment charged petitioner with "knowingly and intentionally possess[ing] with intent to distribute a controlled substance, in violation of Title 21, United States Code, Section 841(a)(1)," and further alleged that, "[p]ursuant to Title 21, United States Code, Section 841(b)(1)(C), * * * this violation involved a mixture and substance containing a detectable amount of cocaine base." Indictment 2. Petitioner pleaded guilty to that offense (as well as an enhancement based on his prior conviction for a felony drug offense). Pet. App. 7a; see Plea Tr. 7-9, 19-20; pp. 13-15, *supra*.

b. Petitioner does not appear to contend otherwise in his brief on the merits. In seeking this Court's review, however, he argued (Pet. 27) that the relevant "Federal criminal statute" that he violated was 21 U.S.C. 841(a) "alone," not Sections 841(a)(1) and (b)(1)(C) taken together. That argument lacks merit.

The pertinent question under Section 404 of the First Step Act is whether the Fair Sentencing Act modified the statutory penalties for the defendant's "violation of a Federal criminal statute," § 404(a), 132 Stat. 5222, and petitioner's "violation" is not defined by Section 841(a) alone. Section 841(a)(1) prohibits certain acts involving a "controlled substance," 21 U.S.C. 841(a)(1), but the penalties in Section 841(b)(1)(C) apply only if the government additionally proves that the controlled substance in question is one that is "in schedule I or II," 21 U.S.C. 841(b)(1)(C). Penalties for violations involving controlled substances on other schedules are set forth elsewhere in the statute. See 21 U.S.C. 841(b)(1)(E), (2), and (3).

Focusing solely on Section 841(a) would thus disregard key aspects of the crime of conviction. "Not infrequently, * * * a single criminal statute will list multiple, stand-alone offenses." *Pereida* v. *Wilkinson*, No. 19-438 (Mar. 4, 2021), slip op. 9; see, *e.g.*, *Mathis* v. *United States*, 136 S. Ct. 2243, 2249 (2016) ("A single statute may list elements in the alternative, and thereby define multiple crimes."). Treating all criminal conduct under Section 841(a) as the same, irrespective of whether some of it required additional proof beyond a reasonable doubt to trigger the applicable penalty range, would be an anomalous way to define the term "covered *offense*." First Step Act § 404(a), 132 Stat. 5222 (emphasis added); see *Mathis*, 136 S. Ct. at 2256 (explaining that offenses can be differentiated by whether "statutory alternatives carry different punishments"). Indeed, because Section 841(a)(1) does not provide for any penalties at all if viewed in complete isolation, it is questionable whether it alone could even define a complete criminal "offense." See *United States* v. *Evans*, 333 U.S.

483, 487-488 (1948); see also 1 Wayne R. LaFave, *Substantive Criminal Law* § 1.2(d), at 12 (4th ed. 2003).

The Section 841(a)-alone approach would also threaten to produce illogical and untenable results. Section 404 of the First Step Act was intended to further redress the unwarranted 100-to-1 disparity for crack- and powder-cocaine offenses. But if eligibility for a reduced sentence under Section 404 turns only on whether the Fair Sentencing Act modified the statutory penalties for Section 841(a), viewed in isolation, then presumably "[*e*]*very* defendant" convicted of a violation involving Section 841(a) would be eligible for a reduced sentence, even if the violation involved a controlled substance *other than* crack cocaine—as many Section 841(a) violations do. *United States* v. *Birt*, 966 F.3d 257, 263 (3d Cir. 2020) (emphasis added), petition for cert. pending, No. 20-291 (filed Sept. 1, 2020); see *Jones*, 962 F.3d at 1300 (observing that the Section 841(a)-alone approach "would mean that a movant with *any* drug-trafficking offense—even, say, a heroin offense—would have a 'covered offense' because the movant violated section 841 and the Fair Sentencing Act modified some of the penalties that apply to section 841, even though the Act did not alter the penalties for heroin offenses"). That cannot be correct.

2. Section 2 of the Fair Sentencing Act modified the statutory penalties for petitioner's violation

The text of Section 841(b)(1), and the manner in which Congress amended it in the Fair Sentencing Act for crack-cocaine offenses, show that Section 2 of that Act "modified" the "statutory penalties" for "a violation" involving an unspecified amount of crack cocaine under Section 841(b)(1)(C). Such a violation is therefore

a "covered offense," and petitioner may accordingly request that the district court exercise its discretion to consider whether a sentence reduction is warranted.

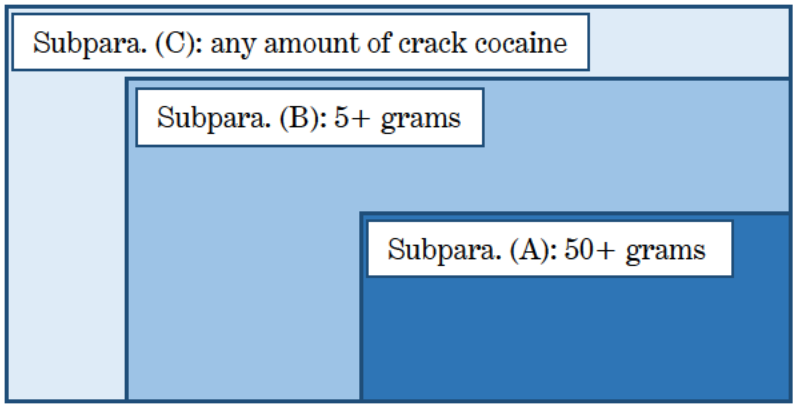
Section 841(b)(1)(C) provides the statutory sentencing range for a violation of Section 841(a) involving any unspecified amount of a Schedule I or II controlled substance—"except as provided" in Subparagraphs (A), (B), or (D). 21 U.S.C. 841(b)(1)(C). Subparagraphs (A) and (B), in turn, set forth enhanced penalties for Section 841(a) violations proven to involve certain minimum quantities of particular Schedule I or II controlled substances, such as crack cocaine, powder cocaine, or heroin. See, *e.g.*, 21 U.S.C. 841(b)(1)(A)(i) (one-kilogram threshold for heroin); see also 21 U.S.C. 841(b)(1)(D) (providing penalties for certain marijuana offenses not directly at issue here). The "except as provided" clause thus makes clear that Subparagraph (C)'s range is the *exclusive* statutory penalty only for some of the offenses that are encompassed within its catch-all scope.

As a result of Subparagraph (C)'s intertwinement with Subparagraphs (A) and (B), Congress's modification of the statutory penalties for crack-cocaine offenses under Subparagraphs (A) and (B) necessarily modified the statutory penalties for crack-cocaine offenses under Subparagraph (C). It did so not by changing the statutory ranges in any of those provisions (which remain the same), but instead by changing the crack-cocaine quantities that trigger them, which affects the statutory penalties applicable to a defendant whose offense involved an unspecified amount—and thus potentially any amount—of crack cocaine. Before the Fair Sentencing Act, trafficking offenses involving at least 50 grams of crack cocaine could be prosecuted under Sections 841(b)(1)(A), (b)(1)(B), or (b)(1)(C); offenses involving

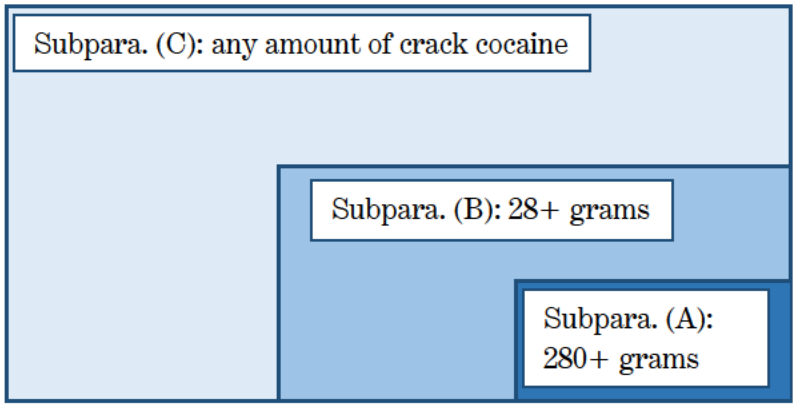
at least 5 grams of crack cocaine could be prosecuted under Sections 841(b)(1)(B) or (b)(1)(C); and offenses involving fewer than 5 grams of crack cocaine could be prosecuted only under Section 841(b)(1)(C). After the Fair Sentencing Act, only offenses involving at least 280 grams of crack cocaine could be prosecuted under Sections 841(b)(1)(A), (b)(1)(B), or (b)(1)(C); only offenses involving at least 28 grams of crack cocaine could be prosecuted under Sections 841(b)(1)(B) or (b)(1)(C); and offenses involving fewer than 28 grams of crack cocaine could be prosecuted only under Section 841(b)(1)(C).

The statutory penalties for a violation of Sections 841(a) and 841(b)(1)(C) involving an unspecified amount of crack cocaine thus changed as illustrated below.

Pre-Fair Sentencing Act



Post-Fair Sentencing Act



That is a significant change that—as a result of Section 841(b)(1)(C)'s "except as provided" clause—modifies the function of Section 841(b)(1)(A)(iii), Section 841(b)(1)(B)(iii), *and* Section 841(b)(1)(C) for violations involving crack cocaine. Although Congress did not directly change the text of Subparagraph (C), the interconnections among the three provisions meant that the "statutory penalties" for offenses involving an unspecified amount of crack cocaine—*i.e.*, offenses sentenced under Subparagraph (C)—were "modified" by the changes to the Subparagraph (A) and (B) thresholds. First Step Act § 404(a), 132 Stat. 5222. As petitioner has emphasized (Br. 20), a "modification" is simply a "change" or "alteration" "to something." *Black's Law Dictionary* 1203 (11th ed. 2019) (defining a "modification" as "[a] change to something; an alteration") (emphasis omitted). Here, there was "something"—the "statutory penalties" for a "violation" that might involve any amount of crack cocaine, First Step Act § 404(a), 132 Stat. 5222—that was "change[d]." See, *e.g.*, *Webster's Third New International Dictionary of the English Language* 1452 (2002) (defining "modify" to mean "to make minor changes in the form or structure of: alter without transforming"); see also *MCI Telecomms. Corp.* v. *Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994) ("'Modify,' in our view, connotes moderate change.").

3. Petitioner has a covered offense even though Section 841(b)(1)(C) has no drug-quantity ceiling

Petitioner has described the modification that Section 2 of the Fair Sentencing Act made to the penalty scheme for crack-cocaine offenses as raising the "floor" of Subparagraph (B) and thus also the "ceiling" of Subparagraph (C). Pet. Br. 3; see *id.* at 2-3, 19-21. That metaphor is inaccurate and inapt.

Subparagraph (C), like Subparagraphs (A) and (B), does not contain any drug-quantity "ceiling," in the sense of a maximum amount. By its plain terms, which encompass a "case of a controlled substance in schedule I or II," Section 841(b)(1)(C) specifies the penalties for a violation of Section 841(a) involving *any* unspecified amount of such a substance, including crack cocaine. 21 U.S.C. 841(b)(1)(C). Thus, like Sections 841(b)(1)(A) and (b)(1)(B), Section 841(b)(1)(C) contains no upper bound. See 21 U.S.C. 841(b)(1)(A) (establishing statutory penalties for a violation of Section 841(a) involving, *e.g.*, "280 grams or more" of crack cocaine); 21 U.S.C. 841(b)(1)(B) (establishing statutory penalties for a violation of Section 841(a) involving, *e.g.*, "28 grams or more" of crack cocaine); cf. 21 U.S.C. 841(b)(1)(D) (establishing statutory penalties for a violation of Section 841(a) involving "less than 50 kilograms of marihuana").

The government therefore can—and often does—pursue prosecutions, or enter into plea agreements, that invoke Section 841(b)(1)(C) in cases that involve drug quantities that exceed the threshold amounts that would support enhanced penalties under Subparagraphs (A) and (B). See, *e.g.*, *Birt*, 966 F.3d at 258-259 (defendant pleaded guilty, before the Fair Sentencing Act, to a violation of Sections 841(a)(1) and (b)(1)(C) for conduct involving 186 grams of crack cocaine); see also *United States* v. *Doe*, 741 F.3d 217, 234 (1st Cir. 2013) (explaining that a defendant convicted of violating Sections 841(a) and (b)(1)(C) was subject to the same statutory penalty range "regardless of whether he distributed 6.9 grams or 280 grams of crack"), cert. denied, 574 U.S. 864 (2014). A jury considering whether a defendant in such a case distributed crack cocaine in violation of Sections 841(a)(1) and (b)(1)(C) is not required to find

that the defendant distributed fewer than 28 grams (or fewer than 5 grams, under the pre-Fair Sentencing Act penalties). And a defendant pleading guilty to a violation of Sections 841(a)(1) and (b)(1)(C) need not falsely represent to the court that he did not, in fact, traffic in such amounts.

Petitioner is nevertheless correct that Congress's decision to raise the "floors" in Subparagraphs (A) and (B) for crack-cocaine offenses also modified the statutory penalties for crack-cocaine offenses under Subparagraph (C). Although increasing the amounts of crack cocaine necessary to trigger the enhanced penalties in Subparagraphs (A) and (B) did not expand the range of quantities to which Subparagraph (C) applies, it did modify the statutory penalties for crack-cocaine defendants subject to that subparagraph—namely, those whose statutory violations involve an unestablished amount of crack cocaine. A sentence under Subparagraph (C) requires neither proof nor disproof that the crack-cocaine quantity would also have allowed for sentencing under Subparagraphs (A) or (B). And thus, insofar as the statutory proof requirements are concerned, it would be a mistake to disregard the textual overlap with Subparagraphs (A) and (B) in considering the "statutory penalties" for a defendant subject to Subparagraph (C). The "statutory penalties" available for such a defendant depend on *all three* subparagraphs.

B. The Statutory Design And History Support Petitioner's Eligibility For A Reduced Sentence

The design and history of Congress's successive reforms to federal crack-cocaine sentencing support reading Section 404(a)'s definition of "covered offense" to encompass petitioner's violation. "It is a fundamental

canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Home Depot U.S.A., Inc.* v. *Jackson*, 139 S. Ct. 1743, 1748 (2019) (citation omitted); see, *e.g.*, *Abramski* v. *United States*, 573 U.S. 169, 179 (2014) (observing that statutory language is not to be interpreted "in a vacuum," and that courts should take due account of "context, 'structure, history, and purpose'") (quoting *Maracich* v. *Spears*, 570 U.S. 48, 76 (2013)).

1. The Fair Sentencing Act was designed to reduce unwarranted sentencing disparities in the treatment of crack- and powder-cocaine offenses. Those disparities "originated in" the 1986 Act, which had "adopted a '100-to-1 ratio' that treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine." *Kimbrough* v. *United States*, 552 U.S. 85, 95-96 (2007); see pp. 4-9, *supra*. Under the 100-to-1 ratio, "low-level (retail) crack dealers" were often treated "far more severely than * * * high-level (wholesale) suppliers of the powder cocaine that served as the product for conversion into crack." 1995 Report iii; cf. 2002 Report 44 (noting that, under the 100-to-1 ratio, "crack cocaine offenders consistently were held accountable for substantially lower drug quantities than powder cocaine offenders * * * yet received longer average sentences, often substantially longer").

Moreover, as of 2000, "[a]pproximately 85 percent of defendants convicted of crack offenses in federal court [were] black; thus the severe sentences required by the 100-to-1 ratio [were] imposed 'primarily upon black offenders.'" *Kimbrough*, 552 U.S. at 98 (quoting 2002 Report 103); see U.S. Sent. Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 16 (May 2007)

(2007 Report) (reporting that, as of 2006, approximately 82% of federal crack-cocaine offenders were black, while only 27% of powder-cocaine offenders were black). Indeed, the 100-to-1 ratio was the "main reason" that federal sentences for black defendants diverged substantially from sentences for white defendants after the 1986 Act. Douglas C. McDonald & Kenneth E. Carlson, Bureau of Justice Statistics, Dep't of Justice, *Sentencing in the Federal Courts: Does Race Matter?–The Transition to Sentencing Guidelines, 1986-90*, at 1 (Dec. 1993) (reporting results for a study of the period from January 1989 to June 1990, after implementation of the Guidelines).

The Sentencing Commission concluded that the differential treatment of crack and powder cocaine was threatening to undermine "confidence in the federal criminal justice system." *Kimbrough*, 552 U.S. at 98 (quoting 2002 Report 103). And the Commission repeatedly lobbied Congress to amend the 100-to-1 disparity. See, *e.g.*, 1995 Report 198-200; 2002 Report 103-107; 2007 Report 6-9. Congress responded to those concerns in the Fair Sentencing Act by reducing the ratio embedded in Section 841(b)(1) (as well as in 21 U.S.C. 960(b)) and by eliminating any statutory-minimum sentence for simple possession of crack cocaine. See *Dorsey*, 567 U.S. at 269. But those statutory changes applied only prospectively, to offenses for which a defendant was sentenced after the August 3, 2010 effective date of the Fair Sentencing Act. *Id.* at 273.

2. That disparity between defendants, depending on the precise date on which they happened to be sentenced, was addressed in the First Step Act. In Section 404 of that Act, Congress ensured that the Fair Sentencing Act's changes would also apply retroactively, providing a mechanism for district courts to reduce pre-Fair Sentencing

Act sentences for covered offenses "as if" the Fair Sentencing Act had already been in effect at the time the offenses were committed. First Step Act § 404(b), 132 Stat. 5222.

Reading Section 404 of the First Step Act to exclude Section 841(b)(1)(C) offenders would be antithetical to Congress's remedial design and would mean that Congress left a significant class of offenders out of its efforts to fully redress the now-discredited 100-to-1 ratio in federal crack-cocaine sentences. Indeed, such a reading would directly *undermine* that goal by precluding a large category of low-level crack-cocaine offenders, most of whom are racial minorities, from receiving any individualized review of their pre-Fair Sentencing Act sentences. Nothing in the text, design, or history of the First Step Act suggests that Congress intended to bar courts from erasing the ratio's legacy from nondischarged prison terms imposed on such offenders, for whom the ratio might have played a role at sentencing.

A reading of the First Step Act that precludes case-specific discretionary reductions for crack-cocaine defendants sentenced under Section 841(b)(1)(C) would be an upside-down criminal-justice reform. Relief for "low-level crack defendants" was a principal goal of the Fair Sentencing Act. 156 Cong. Rec. 14,395 (2010) (statement of Rep. Lungren). In making Sections 2 and 3 of that Act retroactive, Congress presumably did not intend to exclude low-level offenders sentenced under Section 841(b)(1)(C) from relief that is indisputably available to higher-level traffickers—perhaps in the same drug-trafficking organization—sentenced under Sections 841(b)(1)(A)(iii) and (B)(iii). Indeed, in the First Step Act, Congress also made the Fair Sentencing Act's elimination of a statutory-minimum sentence for

simple possession of crack cocaine retroactive. See First Step Act § 404(a), 132, Stat. 5222; Fair Sentencing Act § 3, 124 Stat. 2372. It would be highly anomalous to single out Section (b)(1)(C) crack-cocaine defendants as categorically ineligible for relief.

Excluding Section 841(b)(1)(C) offenders from eligibility for individualized review of their pre-Fair Sentencing Act sentences would also require differential treatment of defendants whose offenses in fact involved the same amount of crack cocaine. As already explained, Subparagraph (C) does not contain any drug-quantity ceiling and thus can be and is used to prosecute some offenses involving amounts of crack cocaine that could also have supported the enhanced penalties specified in Subparagraphs (A) and (B). See pp. 29-31, *supra*. The defendant in *United States* v. *Birt*, for example, pleaded guilty before the effective date of the Fair Sentencing Act to a violation of Sections 841(a)(1) and (b)(1)(C), after having been caught with 186.5 grams of crack cocaine. 966 F.3d at 258-259. Under the decision below, that violation would not be a "covered offense," but the same conduct sentenced under Sections 841(b)(1)(A)(iii) or (B)(iii) would be. As a result, Birt could see sentences imposed on offenders under Subparagraphs (A) and (B) lowered *below his*, based on the fact that he was convicted under Subparagraph (C).

That would be a strange and unwarranted result, given that offenders like Birt who were prosecuted under Section 841(b)(1)(C) may have been *less* culpable overall than counterparts for whom the government sought enhanced statutory penalties. The only way for Congress to ensure parity of treatment between crack-cocaine offenders whose violations involved similar drug

quantities was to include Section 841(b)(1)(C) offenses as "covered offenses."

3. Congress had good reason to permit district courts to consider reducing pre-Fair Sentencing Act sentences for crack-cocaine offenders sentenced under Section 841(b)(1)(C). As petitioner and his amici explain, before the enactment of the Fair Sentencing Act, the 5- and 50-gram thresholds for enhanced statutory penalties under Subparagraphs (A) and (B) provided important context for crack-cocaine sentences imposed under Subparagraph (C). Pet. Br. 19-20, 30-31; Retired Federal Judges et al. Amici Br. 6-9.

A sentencing judge may have reasonably viewed an offense falling just short of the 5-gram threshold as warranting a sentence just short of the 5-year statutory-minimum sentence specified in Subparagraph (B). But the same judge could reasonably view the same offense very differently for sentencing purposes when evaluated against the new 28-gram threshold for a 5-year statutory-minimum sentence. See *United States* v. *Woodson*, 962 F.3d 812, 817 (4th Cir. 2020) (observing that the threshold drug-quantity amounts for enhanced penalties "may have [had] an anchoring effect" for Section 841(b)(1)(C) offenses). Petitioner's own violation is illustrative. Petitioner's offense involved 3.9 grams of crack cocaine, Pet. App. 5a—an amount that fell just short of the 5-gram threshold for enhanced penalties before the Fair Sentencing Act, but that is now far short of the current 28-gram threshold.

In *Peugh* v. *United States*, 569 U.S. 530 (2013), this Court recognized that the Sentencing Guidelines exert a gravitational pull on decisionmaking even though the Guidelines are now advisory. See *id.* at 543-544. As the

Court explained, "considerable empirical evidence" indicates that the Guidelines "channel sentences towards the specified range, even if they do not fix them within it," *id.* at 543, 544 n.5; see *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1346 (2016). So too here, the drug-quantity thresholds for enhanced penalties provided an important benchmark in Section 841(b)(1)(C) cases, even though the enhanced penalties were not directly applicable. Separate from its consideration of the Guidelines, a district court imposing a sentence is also required to consider, *inter alia*, "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(6). The court's awareness that other defendants with similar amounts were sentenced under Subparagraphs (A) or (B) could well have influenced its sentencing decision, consciously or otherwise.

Congress thus had compelling reasons to define "covered offense" broadly enough to encompass at least the possibility of retroactive relief for crack-cocaine offenders sentenced under Section 841(b)(1)(C). By doing so, Congress authorized district courts to reevaluate those sentences in individual cases "as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the time the covered offense was committed." First Step Act § 404(b), 132 Stat. 5222. Congress thus gave district courts discretion to reconsider the relative seriousness of a given Section 841(b)(1)(C) crack-cocaine offense in light of the new 28- and 280-gram thresholds for enhanced penalties.

C. Lower Courts' Rationales For Excluding Section 841(b)(1)(C) Offenders From Section 404 Are Unsound

The courts of appeals that have reached a contrary conclusion have offered two principal justifications for viewing Section 841(b)(1)(C) offenders as ineligible for sentence reductions under the First Step Act. The government has previously endorsed both of those justifications and also proffered a third. But none provides a sound basis for categorically excluding Section 841(b)(1)(C) offenders sentenced for crack-cocaine offenses under the pre-Fair Sentencing Act statutory scheme from receiving individual review under the First Step Act as if the Fair Sentencing Act's changes had been in effect.

1. Some courts of appeals have emphasized that Section 2 of the Fair Sentencing Act did not change the text of 21 U.S.C. 841(b)(1)(C). See, *e.g.*, *Jones*, 962 F.3d at 1300 ("[S]ections 841(b)(1)(A)(iii) and (B)(iii) * * * are the only provisions that the Fair Sentencing Act modified."). Those courts have reasoned that "any defendant sentenced under § 841(b)(1)(C) prior to the enactment of the Fair Sentencing Act" would "be subject to the exact same statutory penalty of up to 20 years" today as would have applied prior to the Fair Sentencing Act's passage. *Birt*, 966 F.3d at 264 (alterations and citation omitted). They have concluded that Section 841(b)(1)(C) offenses are not covered offenses because the "text and effect" of Section 841(b)(1)(C) "are the same now as before." *Ibid.*

As explained above, however, Congress did not need to revise the text of Subparagraph (C) to modify the statutory penalty scheme applicable to defendants charged or convicted under it. Because of the inte-

grated manner in which Section 841(b)(1)'s tiered penalty scheme is structured, revising the drug-quantity thresholds for crack-cocaine offenses under Subparagraphs (A) and (B) also modified the scope of Subparagraph (C) in crack-cocaine cases. And an isolated view of Subparagraph (C) would be particularly inappropriate given its express cross-reference ("except as provided") to Subparagraphs (A) and (B), the text of which was amended. See pp. 26-29, *supra*; cf. Senators Durbin, Grassley, Booker & Lee Amici Br. 13-14.

Similar cross-references to Sections 841(b)(1)(A) and (b)(1)(B) in other criminal statutes make clear that "covered offenses" cannot be limited only to violations of the textually revised provisions. The Fair Sentencing Act, for example, plainly "modified" the penalties for at least some conspiracies or attempts to distribute crack cocaine, prohibited under 21 U.S.C. 846. Although the text of Section 846 "remains the same to the last letter," *Birt*, 966 F.3d at 260, its "statutory penalties"—which replicate the penalties of "the offense" whose commission was "the object of the attempt or conspiracy," see 21 U.S.C. 846—were indisputably modified for some violation by the Fair Sentencing Act's changes to Section 841(b)'s penalty scheme for crack-cocaine offenses. Other textually unamended provisions likewise experienced a modification to their penalties for crack-cocaine offenses. See, *e.g.*, 21 U.S.C. 848(b)(2)(A) (requiring a life sentence for leading a continuing criminal enterprise involving "at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title").

Moreover, viewing Section 841(b)(1)(C) to have the same effect both before and after the Fair Sentencing Act misses the forest for the trees in a critical way. It is

true that crack-cocaine defendants sentenced under Section 841(b)(1)(C) post-Fair Sentencing Act are exposed to the same statutory range as before, but so are many crack-cocaine defendants sentenced under Sections 841(b)(1)(A)(iii) and (b)(1)(B)(iii)—namely, all of the offenders whose offenses involved amounts (say, a kilogram) that exceeded both the old and the new thresholds. The courts of appeals have uniformly (and correctly) concluded that such offenders have a "covered offense," see, *e.g.*, *United States* v. *Davis*, 961 F.3d 181, 187-190 (2d Cir. 2020), thereby recognizing that the changes to the statutory thresholds changed the overall statutory sentencing scheme, even if they did not directly affect every defendant sentenced under that scheme. In light of the interlocking structure of Subparagraphs (A), (B), and (C)—whose relationship is defined solely by those thresholds—that same logic applies to crack-cocaine offenses punished under any of them.

2. Some courts of appeals have expressed concern that the eligibility of Section 841(b)(1)(C) crack-cocaine offenders for Section 404 sentence reductions would open the door for Section 841(b)(1)(C) offenders whose violations involved other drugs—and were "entirely unrelated to crack cocaine," *Birt*, 966 F.3d at 263—to likewise seek reductions. But that concern is misplaced with respect to the reading of the statute discussed above.

Sections 2 and 3 of the Fair Sentencing Act concerned only crack cocaine, and Section 404 makes only those provisions retroactive. See First Step Act § 404(a) and (b), 132 Stat. 5222. Although Section 841(b)(1)(C) establishes the statutory penalties for distributing any Schedule I or II drug, the Fair Sentencing

Act altered the threshold quantities required to trigger enhanced penalties *only* for crack-cocaine offenses. Subparagraph (C) thus continues to provide the exclusive statutory penalty for the exact same range of statutory violations with regard to every other type of drug. Accordingly, district courts sentencing defendants pursuant to Section 841(b)(1)(C) for the possession with intent to distribute any other type of drug considered the same three-tiered penalty scheme before and after the Fair Sentencing Act. For that reason, the Fair Sentencing Act is correctly understood to have modified the statutory penalties for only those violations of Sections 841(a) and (b)(1)(C) that involve crack cocaine.

3. Finally, in arguing against petitioner's eligibility, the government previously emphasized that some (but not all) Section 841(b)(1)(C) offenders who were sentenced before the effective date of the Fair Sentencing Act have already been able to take advantage of the retroactive amendments to the drug-quantity table that the Commission made in response to that Act. On reflection, however, that is likewise not a basis for excluding Section 841(b)(1)(C) offenders from eligibility to seek a reduction under the First Step Act.

When Congress chose to make the Fair Sentencing Act retroactive, it specifically excluded offenders who had already benefited from Sections 2 and 3 of the Fair Sentencing Act. Section 404(c) provides that "[n]o 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." First Step Act § 404(c), 132 Stat. 5222. But Section 404(c) contains no similar express limitation on re-

lief for offenders who have already benefited from retroactive guidelines amendments. Cf., *e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) (observing that "additional exceptions are not to be implied" when Congress itself "explicitly enumerates certain exceptions" to a general rule, at least "in the absence of evidence of a contrary legislative intent") (citation omitted).

Applying such a limitation would be inconsistent with Congress's treatment of crack-cocaine offenders sentenced under Subparagraphs (A) and (B). Many of those offenders were able to take advantage of the retroactive guidelines amendments. Although some Subparagraph (A) and (B) offenders' reductions were constrained by the still-applicable pre-Fair Sentencing Act statutory minimums, others' were not. Sentence reductions based on retroactive changes to the Guidelines may not go below the minimum of the amended range. See *Dillon*, 560 U.S. at 822. Thus, the sentence reductions for Subparagraph (A) and (B) defendants whose amended ranges under the revised drug-quantity table were above the still-applicable pre-Fair Sentencing Act minimums could have been effected by those minimums only indirectly, through an implicit (or possibly explicit) anchoring effect. See pp. 36-38, *supra*. And no court of appeals has found that such defendants—who were, at most, subject to that indirect influence—are precluded from seeking a reduction under Section 404.

That same anchoring effect could have infected the sentence-reduction proceedings—as well as the original sentencing proceedings—for crack-cocaine offenders sentenced under Section 841(b)(1)(C). And some Section 841(b)(1)(C) defendants, like petitioner, were precluded from guidelines-based reductions altogether.

Accordingly, no sound basis exists to presume that Congress sought to exclude any Section 841 crack-cocaine defendant from Section 404 eligibility for guidelines-based reasons. Instead, Congress authorized district courts to reevaluate pre-Fair Sentencing Act crack-cocaine sentences imposed under Section 841(b)(1)(C) "as if section[] 2 * * * of the Fair Sentencing Act of 2010" had been in effect at the time the offenses were committed, First Step Act § 404(b), 132 Stat. 5222, and to exercise their discretion to reduce such sentences in individual cases if warranted.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 2021

APPENDIX

1. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 provides in pertinent part:

* * * * *

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 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 guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.

* * * * *

2. First Step Act of 2018, § 404, Pub. L. No. 115-391, 132 Stat. 5222 provides:

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.

3. 21 U.S.C. 841 provides in pertinent part:

Prohibited acts A

(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—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl) -4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

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, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. 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, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $20,000,000 if the

defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. 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 and fined in accordance with the preceding sentence. 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. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

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

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1- (2-phenylethyl) -4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

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, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. 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, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. 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. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when

scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, 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, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. 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, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. 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 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 subparagraph which provide for a mandatory term of imprisonment if death or serious

bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. 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 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. 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 2 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 4 years in addition to such term of imprisonment.

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 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

more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,500,000 if the defendant is other than an individual, or both.

(ii) 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 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 more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 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 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. 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 10 years, a fine

not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. 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 one year 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 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. 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 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

* * * * *

4. 21 U.S.C. 841 (2006) provides in pertinent part:

Prohibited acts A

(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 or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * * * *

(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—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

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(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, 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, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if

the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. 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, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. 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 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 subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

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