NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

MACI DENON DAVIS and
JOE L. FRANKLIN,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether the Eighth Circuit Court of Appeals incorrectly found that the district court was permitted to tether itself to the United States Sentencing Guidelines as if the Sentencing Commission, rather than Congress, had authorized relief for defendants pursuant to Section 404 of the First Step Act of 2018?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

LIST OF DIRECTLY RELATED PROCEEDINGS

United States v. Davis, 834 F. App'x 296 (8th Cir. 2021)

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW ii

LIST OF PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 7

This Court should declare that the Eighth Circuit Court of Appeals incorrectly found that the district court was permitted to tether itself to the United States Sentencing Guidelines as if the Sentencing Commission, rather than Congress, had authorized relief for defendants pursuant to Section 404 of the First Step Act of 2018 7

A. The district court's process of "tethering" itself to the Guidelines is contrary to the plain text of the First Step Act and it had no discretion to adopt it . 7

B. The First Step Act does not authorize a reduction through the Guidelines 11

C. Congress did not intend for courts to treat the Guidelines as mandatory 13

D. The district court's process is contrary to Congress's remedial purposes and would perpetuate unwarranted disparities 14

CONCLUSION 16

INDEX TO APPENDIX

United States v. Davis, 834 F. App'x 296 (8th Cir. 2021) 1a

District Court Memorandum Opinion and Order 3a

District Court Opinion and Order on Motion for Reconsideration 9a

TABLE OF AUTHORITIES

Cases	Page(s)
Azar v. Allina Health Servs., 139 S. Ct. 1804 (2019)	12
Cannon v. University of Chicago, 441 U.S. 677 (1979)	13-14
Custis v. United States, 511 U.S. 485 (1994)	12
Dorsey v. United States, 567 U.S. 260 (2012)	3
Fish v. Kobach, 840 F.3d 710 (10th Cir. 2016)	12
Nichols v. United States, 136 S. Ct. 1113 (2016)	12
Rust v. Sullivan, 500 U.S. 173 (1991)	13
United States v. Billups, No. 3:00-00059, 2019 WL 3884020 (S.D. W. Va. Aug. 15, 2019)	14
United States v. Booker, 543 U.S. 220 (2005)	13-14
United States v. Boulding, 960 F.3d 774 (6th Cir. 2020)	11, 13
United States v. Copeland, No. 7:06-CR-00018, 2019 WL 2090699 (W.D. Va. May 13, 2019)	15
United States v. Davis, 834 F. App'x 296 (8th Cir. 2021)	iii, 1, 6
United States v. Dodd, 372 F. Supp. 3d 795 (S.D. Iowa 2019)	13
United States v. Easter, 975 F.3d 318 (3rd Cir. 2020)	*passim*
United States v. Johnson, No. 7:08-CR-0024, 2019 WL 1186857 (W.D. Va. Mar. 12, 2019)	15
United States v. Mack, 404 F. Supp.3d 871 (D. N.J. 2019)	14
United States v. Pride, No. 1:07CR00020-001, 2019 WL 2435685 (W.D. Va. June 11, 2019)	13
United States v. Sutton, 962 F.3d 979 (7th Cir. 2020)	9
United States v. Thompson, No. 1:05cr42, 2019 WL 4040403 (W.D. Pa. Aug. 27, 2019)	14
United States v. Williams, 402 F. Supp.3d 442 (N.D. Ill. 2019)	11
United States v. Wirsing, 943 F.3d 175 (4th Cir. 2019)	8-9

Constitutional Article

U.S. Const. art. I, § 1 12

Statutes

18 U.S.C. § 2 3
18 U.S.C. § 3231 6
18 U.S.C. § 3553(a) ..... *passim*
18 U.S.C. § 3582(c)(1)(B) 8-9
18 U.S.C. § 3582(c)(2) ..... *passim*
21 U.S.C. § 841 3
21 U.S.C. § 841(a)(1) 3
21 U.S.C. § 841(b)(1)(A)(iii) 3
21 U.S.C. § 841(b)(1)(C) 3
28 U.S.C. § 994(o) 13
28 U.S.C. § 994(u) 11, 13
28 U.S.C. § 1254 1
28 U.S.C. § 1291 5
Fair Sentencing Act of 2010 ("FSA"), Pub. L. No. 111-220, Stat. 2372 (2010) . 3, 11-12
First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194 (2018) 2-3, 10

United States Sentencing Guidelines

U.S.S.G. § 1B1.10(b)(1) 4, 8
U.S.S.G. § 1B1.10(b)(2)(A) 4, 8
U.S.S.G. § 4B1.1(a) 3

PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

On January 27, 2021, the court of appeals entered its opinion and judgment affirming the district court's decision to "opt to tether" itself to the Guidelines in determining the relief afforded to petitioners Maci Denon Davis and Joe L. Franklin pursuant to Section 404 of the First Step Act of 2018. *United States v. Davis*, 834 F. App'x 296 (8th Cir. 2021). A copy of the opinion is attached at Appendix ("App.") 1a-2a.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 2021. This petition is timely submitted. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

The Petitioners refer this Honorable Court to the following statutory provision:

Section 404 of the First Step Act of 2018:

> (a) DEFINITION OF COVERED OFFENSE.—In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.
>
> (b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.
>
> (c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222.

STATEMENT OF THE CASE

1. On May 9, 2007, Maci Denon Davis pleaded guilty to aiding and abetting the distribution of more than 50 grams of crack cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(iii), (b)(1)(C), and 18 U.S.C. § 2. On August 20, 2008, Joe L. Franklin pleaded guilty to possession with intent to distribute more than 50 grams of crack cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(iii). Both petitioners were originally sentenced to 262 months in prison after the district court determined that they were career offenders under U.S.S.G. § 4B1.1(a).

2. On August 3, 2010, Congress enacted, and the President signed into law, the Fair Sentencing Act of 2010 ("FSA"), Pub. L. No. 111-220, Stat. 2372 (2010), to address the longstanding and widespread recognition that the 1986 Anti-Drug Abuse Act's penalty scheme for crack offenses was based on false assumptions, unjustifiably punished crack offenders far more harshly than other similarly-situated drug offenders, and had a disproportionate impact on African Americans. *See Dorsey v. United States*, 567 U.S. 260, 268-69 (2012). Section 2 of the FSA modified the statutory penalties for violations of 21 U.S.C. § 841 involving crack cocaine by increasing the weight ranges to which 21 U.S.C. § 841(b)'s statutory penalties apply. However, the FSA was not made retroactive. To rectify the problem, on December 21, 2018, Section 404 of the First Step Act of 2018 was passed, making sections 2 and 3 of the FSA retroactive. Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222.

3. In their separate motions for relief under the First Step Act, Petitioners argued that Section 404 of the First Step Act permitted courts to reduce a defendant's

sentence to any length consistent with the act. Petitioners asserted that their prior convictions no longer qualified them for career-offender status and requested that the district court consider these arguments in reducing their sentences.

4. On August 15, 2019, the district court filed a memorandum opinion and order denying Petitioners' request to challenge their career-offender designations. (3a). In addressing their requests for below-guideline sentences, the court reasoned that Section 404 of the First Step Act was textually similar to 18 U.S.C. § 3582(c)(2) in that both authorized reductions of final sentences to a specific class of prisoners. (7a). The court decided that in order to avoid "arbitrary and unwarranted sentencing disparities," it should approach these cases "in a manner analogous to what would occur if the United States Sentencing Commission, rather than Congress, had authorized the sort of retroactive sentencing relief contemplated by Section 404 of the First Step Act." *Id.*

The court adopted a two-step process:

> [F]irst, this Court will recalculate each Defendant's advisory sentencing range under the United States Sentencing Guidelines, but only altering those variables which depend on the statutory penalties that were amended by the Fair Sentencing Act and made retroactive by the First Step Act. *See* U.S.S.G. § 1B1.10(b)(1). Then, the Court will decide whether to award each Defendant a reduction from his previously-imposed term of imprisonment, but in no event will the Court reduce a Defendant's term to an amount that is less than the minimum of the recalculated sentencing range.

Id. (citing U.S.S.G. § 1B1.10(b)(2)(A)). The court acknowledged that the First Step Act "says nothing about the United States Sentencing Commission." (8a). The court

then imposed reduced sentences of 188 months in prison and terms of supervised release of four years. *Id.*

5. On August 28, 2019, Petitioners filed motions to reconsider the court's Order and moved the court for a variance under 18 U.S.C. § 3553(a), considering their post-sentencing conduct and other § 3553(a) factors. On September 5, 2019, the court denied Petitioners' motions, opting, "in its discretion, to conduct these proceedings in a manner analogous to what would occur if the United States Sentencing Commission, rather than Congress, had authorized this sentencing relief, so as to avoid certain potential arbitrary sentencing disparities." (10a) (internal citation omitted).

The court recognized that information regarding Petitioners' post-prison conduct is relevant to the resentencing but used this information only to select a sentence within the guideline range. (12a). The court recognized that it was not bound to sentence Petitioners within the guideline range and that other courts had varied below in some cases. *Id.* However, the court, in seeking to avoid sentencing disparities, "opted to tether itself to the recalculated sentencing guidelines . . . out of a belief that this is the most practicable way to effectuate the policies undergirding the First Step Act in a fair and consistent manner." *Id.*

6. Petitioners appealed their sentences to the Eighth Circuit Court of Appeals. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which gives it jurisdiction over all final decisions of the district courts of the United States.

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231.

7. Petitioners argued on appeal that the district court committed procedural error by tethering itself to the Guidelines as if the Sentencing Commission, rather than Congress, had authorized retroactive sentencing relief in Section 404 of the First Step Act. The plain text requires courts to exercise discretion in imposing a reduced sentence and to conduct a complete review on the merits in each individual case, which requires consideration of all relevant § 3553(a) factors. Therefore, the court had no discretion to replace the statute Congress enacted with a Sentencing Commission policy statement applicable only to retroactive guideline amendments.

8. In its opinion, the Eighth Circuit stated that the district court did not abuse its discretion in finding "guidance in the Sentencing Commission's policy statements when, as here, the court recognizes that Section 404 of the First Step Act does not require it to do so." *United States v. Davis*, 834 F. App'x 296 (8th Cir. 2021).

This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

This Court should declare that the Eighth Circuit Court of Appeals incorrectly found that the district court was permitted to tether itself to the United States Sentencing Guidelines as if the Sentencing Commission, rather than Congress, had authorized relief for defendants pursuant to Section 404 of the First Step Act of 2018.

Petitioners Maci Denon Davis and Joe L. Franklin continue to assert that the lower courts have incorrectly determined that a district court can opt to apply Section 404 of the First Step Act of 2018 as if the United States Sentencing Commission, rather than Congress, had authorized the retroactive sentencing relief for those previously convicted of crack cocaine offenses. Petitioners maintain that the district court misunderstood the First Step Act and that their sentences may have been reduced if the district court had considered the 18 U.S.C. § 3553(a) factors in determining whether a downward variance from the Guidelines was warranted.

Petitioners assert that the plain text requires courts to exercise discretion in imposing a reduced sentence and to conduct a complete review on the merits in each individual case, which requires consideration of all relevant § 3553(a) factors. Therefore, the court had no discretion to replace the statute Congress enacted with a Sentencing Commission policy statement applicable only to retroactive guideline amendments. The court's unique approach is also contrary to Congress's remedial purpose and its intent that courts conduct an individualized review of each defendant's case on the merits.

A. The district court's process of "tethering" itself to the Guidelines is contrary to the plain text of the First Step Act and it had no discretion to adopt it.

The district court stated that it "opted, in its discretion to conduct[] these

proceedings in a manner analogous to what would occur if the United States Sentencing Commission, rather than Congress, had authorized the sort of retroactive sentencing relief contemplated by Section 404 of the First Step Act." (7a). The court explained that its process would involve two steps, each modeled on Sentencing Commission policy statement § 1B1.10. *Id.* First, it would recalculate the guideline range. *Id.* Second, it would "decide whether to award each Defendant a reduction from his previously-imposed term of imprisonment, but in no event will the Court reduce a Defendant's term to an amount that is less than the minimum of the recalculated sentencing range." *Id.*

In its initial order, the court cited § 1B1.10(b)(1), which provides that the court "shall substitute only the amendments [and] leave all other guideline application decisions unaffected" for step one, and § 1B1.10(b)(2)(A), which prohibits a sentence "less than the minimum of the amended guideline range" for step two. (*See generally* 3a). The court "opted" to treat the guideline range as mandatory "out of a belief that this is the most practical way to effectuate the policies undergirding the First Step Act in a fair and consistent manner." (12a).

Section 404 of the First Step Act provides for a much broader scope of relief than the § 3582(c)(2) procedures applicable to retroactive guideline amendments. In fact, the discretionary relief authorized under Section 404 of the First Step Act is distinctly different from the scope of relief under Section 3582(c)(2). *See United States v. Easter*, 975 F.3d 318, 323 (3rd Cir. 2020).

> First Step Act motions fall under § 3582(c)(1)(B). *See United States v. Wirsing*, 943 F.3d 175, 185 (4th Cir. 2019), *as amended* (Nov. 21, 2019)

> ("[T]he distinct language of the First Step Act compels the interpretation that motions for relief under that statute are appropriately brought under § 3582(c)(1)(B)."). That is so because the authority for such proceedings stems not from "a sentencing range that has subsequently been lowered by the Sentencing Commission," 18 U.S.C. § 3582(c)(2), but rather from a sentencing range that had been lowered by statute. We therefore look to the text of § 3582(c)(1)(B) and § 404(b) to determine the procedural requirements of First Step Act motions. *See United States v. Sutton*, 962 F.3d 979, 984 (7th Cir. 2020) (noting that the "conditions, limits, or restrictions on the relief permitted" are found in § 404(b)).

Id. Thus, the restrictions of § 3582(c)(2) and related Commission policy statements simply do not apply to the First Step Act. *See, e.g., United States v. Beamus*, 943 F.3d 789, 791-92 (6th Cir. Nov. 21, 2019) (holding that decisions that "interpreted § 3582(c)(2) . . . do not govern resentencing under the First Step Act" because the First Step Act "contains no similar language"); *Wirsing*, 943 F.3d at 185 ("[T]here is no reason to suppose that" First Step Act motions "are subject to the restrictions particular to § 3582(c)(2), which are grounded in the text of the latter statute.").

The plain text of Section 404 requires the district court to determine, in each individual case, whether and to what extent to "impose a reduced sentence as if sections 2 and 3 of the [FSA] were in effect," after a "complete review . . . on the merits." This means that courts must consider the applicable statutory limits, the *advisory* guideline range, and all relevant § 3553(a) factors, including post-sentencing conduct and the need to avoid unwarranted disparities. *See Easter*, 975 F.3d 318, 323-24. Nothing in Section 404 authorized the district court to replace the law enacted by Congress with mandatory application of the recalculated guideline range pursuant to a Sentencing Commission policy statement.

Section 404(b) provides that a "court that *imposed a sentence* for a covered

offense *may*," on motion, "*impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act were in effect*." Pub. L. No. 115-391, § 404(b) (emphasis added). As an initial matter, the phrase "as if sections 2 and 3 of the Fair Sentencing Act were in effect" requires the court to consider, at a bare minimum, the statutory range under section 2 of the FSA.

By using the word "may," Congress made clear that courts have discretion whether, and to what extent, to grant relief *within* the statutory range. For two reasons, Congress's use of the phrase "impose a reduced sentence" immediately after "imposed a sentence" means that courts must consider all relevant § 3553(a) factors in exercising that discretion, not just the recalculated guideline range. "'Factors to be considered in *imposing* a sentence'—mandates that a district court 'shall consider' the factors set forth therein." *Easter*, 975 F.3d at 324 (citing 18 U.S.C. § 3553(a) (italicized emphasis added); *see also Shall*, Merriam-Webster Abridged, https://www.merriam-webster.com/dictionary/shall (defining "shall" as an auxiliary verb "used in laws . . . to express what is mandatory").

Section 404(c) further supports the conclusion that Congress intended courts to exercise their discretion in consideration of all relevant factors, not only the guideline range. It makes clear that relief is discretionary, providing that "[n]othing in this section shall be construed to require a court to reduce any sentence pursuant to this section," and that the court may deny a motion only "after a complete review of the motion on the merits." There is no plausible basis to read "complete review of the motion on the merits" as restricting "review" to the guideline range. To the

contrary, nothing in Section 404 allows a district court to adopt a blanket policy of treating the guideline range as mandatory. Indeed, when a district court is authorized to "impose a reduced sentence," and required to conduct "a complete review of the motion on the merits," it must, at a minimum, consider all relevant § 3553(a) factors. *See United States v. Boulding*, 960 F.3d 774, 784 (6th Cir. 2020) ("the necessary [§ 404] review—at a minimum—includes an accurate calculation of the amended guidelines range at the time of resentencing and thorough renewed consideration of the § 3553(a) factors").

B. The First Step Act does not authorize a reduction through the Guidelines

The First Step Act says nothing about guideline ranges, guideline amendments, or the Sentencing Commission. It contains no reference to policy statements issued by the Sentencing Commission. *Compare* 18 U.S.C. § 3582(c)(2). Nor does it authorize the Commission to issue policy statements controlling in what circumstances or by what amount the courts may impose a reduced sentence. *Compare* 28 U.S.C. § 994(u).

Section 404(a) bases eligibility solely on whether the "statutory penalties" for a "statute" the defendant was convicted of violating "were modified by section 2 or 3 of the [FSA]." And it uses both "statute" and "statutory" in the same sentence "to make the point clearer" that it is *not* referring to the Guidelines. *United States v. Williams*, 402 F. Supp.3d 442, 445 (N.D. Ill. 2019). And while section 7 of the FSA directed the Commission to make certain ameliorating changes to the Guidelines, and section 8 directed it to make conforming amendments to U.S.S.G. § 2D1.1, Pub. L.

No. 111-220, §§ 7, 8, Congress made no mention of sections 7 or 8 of the FSA in Section 404 of the First Step Act. "Congress's choice to include a cross-reference to one [provision] but not the other . . . strongly suggests it acted intentionally and purposefully" in doing so. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1813 (2019).

If Congress had intended to restrict courts' discretion to the minimum of the recalculated guideline range, as under § 3582(c)(2) and § 1B1.10(b), it knew how to do so. For example, it could have said that the court "may," on motion, "reduce the term of imprisonment as if sections 2, 3, 7 and 8 of the Fair Sentencing Act of 2010 were in effect, if such a reduction is consistent with policy statements issued by the Sentencing Commission." "The language of" § 3582(c)(2) "shows that when Congress intended to" empower the Sentencing Commission to limit courts' discretion, "it knew how to do so," and "Congress' omission of similar language in" the First Step Act "indicates that it did not intend to" do so. *Custis v. United States*, 511 U.S. 485, 492 (1994); *see also Fish v. Kobach*, 840 F.3d 710, 740 (10th Cir. 2016) (when "Congress knows how to achieve a specific statutory effect, its failure to do so evinces an intent not to do so"). Thus, the district court had no discretion to adopt language that Congress omitted from the statute it enacted. The Constitution assigns "[a]ll legislative Powers" to Congress. U.S. Const. art. I, § 1. "To supply omissions transcends the judicial function." *Nichols v. United States*, 136 S. Ct. 1113, 1118 (2016).

Yet, the district court opted to "conduct[] these proceedings in a manner analogous to what would occur if the . . . Sentencing Commission, rather than

Congress, had authorized the sort of retroactive sentencing relief contemplated by Section 404 of the First Step Act." (7a). But, the sentencing changes wrought by the retroactive application of the FSA are not the result of the Sentencing Commission's revision to the Guidelines but Congress's enactment of a new statute. Therefore, by its plain terms, § 3582(c)(2) cannot apply. *Easter*, 975 F.3d at 323. In short, "the First Step Act does not impose any artificial or guideline limits on a reviewing court" and the "Sentencing Commission has nothing to do with it." *Boulding*, 379 F. Supp. 3d at 653; *see also*, *e.g.*, *United States v. Pride*, No. 1:07CR00020-001, 2019 WL 2435685, at *6 (W.D. Va. June 11, 2019) (Section 404 "does not establish procedures like those in § 3582(c)(2) that narrow the scope of the sentence reduction."); *United States v. Dodd*, 372 F. Supp. 3d 795, 797 (S.D. Iowa 2019) ("[T]his argument rests on a misplaced equivalency with sentence reductions under 18 U.S.C. § 3582(c)(2), a narrow avenue limited by the U.S. Sentencing Commission [pursuant to] 28 U.S.C. §§ 994(o) and 994(u) and U.S. Sentencing Guidelines § 1B1.10.").

C. Congress did not intend for courts to treat the Guidelines as mandatory

Congress could not have intended the courts to treat the guideline range as mandatory under the First Step Act because it is presumed to "legislate[] in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). When Congress enacted the First Step Act in 2018, it was well established that treating the Guidelines as mandatory violated the Constitution and the Guidelines must be treated as advisory. *See United States v. Booker*, 543 U.S. 220 (2005). "[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar

with . . . important precedent[] from [the Supreme Court]." *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979) (finding that enactment of Title IX statute was done in conformity with Supreme Court precedent).

Again, Congress authorized courts to "impose a reduced sentence as if sections 2 and 3 of the [FSA] were in effect." Section 404(b). "Such authority requires a present-day act of imposing a sentence," and "it must be assumed that Congress knew and understood the established constitutional principles that would adhere to that undertaking." *United States v. Thompson*, No. 1:05cr42, 2019 WL 4040403, at *6 (W.D. Pa. Aug. 27, 2019); *see also United States v. Billups*, No. 3:00-00059, 2019 WL 3884020, at *2 (S.D.W. Va. Aug. 15, 2019) (recognizing that "mandatory guideline ranges [are] unconstitutional" and holding that the FSA, and "its application through the First Step Act, is administered in light of the Supreme Court's decision in *U.S. v. Booker*"); *United States v. Mack*, 404 F. Supp.3d 871, 886 (D. N.J. 2019) (declining to conclude that it "lacks discretion to consider the guidelines advisory rather than mandatory" under § 404 because "put[ting] aside *Booker*'s signature holding" would run afoul of "current constitutional requirements for sentencing").

D. The district court's process is contrary to Congress's remedial purposes and would perpetuate unwarranted disparities.

Given the many ways in which defendants sentenced before the FSA received harsher sentences than similarly situated defendants sentenced thereafter, the court erred in assuming that treating the Guidelines as mandatory avoids disparities. Its approach actually perpetuates existing disparities and creates new ones.

The district court "opted" to "tether itself to the recalculated sentencing guidelines not out of a belief that the First Step Act requires such a practice, but rather out of a belief that this is the way to effectuate the policies undergirding the First Step Act in a fair and consistent manner." (12a). The First Step Act does not permit this and the district court's decision to adopt a blanket rule precluding individualized review of each defendant's case undermines Congress's purposes.

The court referred to unspecified "arbitrary disparities that [it] is seeking to avoid," and opined that other courts did "not seem to think that the potential for such disparities informs any consideration of congressional intent." (12-13a). However, the court failed to identify any specific disparity that would result from imposing a variance below the recalculated guideline range in these cases or any others. Indeed, the court recognized that other courts across the country impose below-guideline sentences under the First Step Act. (11-12a). Thus, the court's unique policy of "in no event" imposing a sentence below the minimum of the guideline range creates unwarranted disparity with respect to defendants before many other courts in the country. *See United States v. Copeland*, No. 7:06-CR-00018, 2019 WL 2090699, at *3-4 (W.D. Va. May 13, 2019) (government's position would "create unwarranted sentencing disparities between defendants whose First Step Act motions were granted"); *United States v. Johnson*, No. 7:08-CR-0024, 2019 WL 1186857, at *3 (W.D. Va. Mar. 12, 2019) ("[T]o refrain from applying the modifications in [this] case would be inconsistent with previous decisions by this court."). "Moreover, a permissive regime means that sentencing courts may ignore the § 3553(a) factors

entirely for some defendants and not others, inviting unnecessary sentencing disparities among similarly situated defendants. Such a regime is antithetical to Congress' intent and the Guidelines' purpose." *Easter*, 975 F.3d at 325.

Thus, the Eighth Circuit erroneously determined that the district court's decision to use the Sentencing Commission, rather than Congress, to determine Petitioners' revised sentences is contrary to Congress's intent and results in unwarranted disparities between similarly situated defendants. This Court should grant review to ensure consistent application of Section 404 of the First Step Act among the circuits going forward.

CONCLUSION

For the foregoing reasons, Petitioners Maci Denon Davis and Joe L. Franklin respectfully request that this Court grant the petition for a writ of certiorari and accept this case for review.

DATED: this 23rd day of April, 2021.

Respectfully submitted,

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