No. 21-____

IN THE
Supreme Court of the United States

BOBBY LEE INGRAM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented here is the same as that presented in *Concepcion* v. *United States*, No. 20-1650, on which this Court granted certiorari on September 30, 2021, and heard oral argument on January 19, 2022:

Whether, when deciding if it should "impose a reduced sentence" on an individual under Section 404(b) of the First Step Act of 2018, a district court must or may consider intervening legal developments.

PARTIES TO THE PROCEEDING

Bobby Lee Ingram, petitioner on review, was the appellant below.

The United States of America, respondent on review, was the appellee below.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Eleventh Circuit:

- *United States* v. *Ingram*, No. 19-11257 (11th Cir. Oct. 14, 2021) (reported at 831 F. App'x 454) (per curiam)

U.S. District Court for the Southern District of Georgia:

- *United States* v. *Ingram*, No. 5:94-cr-000002-2 (S.D. Ga. Mar. 28, 2019)
- *United States* v. *Ingram*, No. 5:94-cr-000002-2 (S.D. Ga. Jan. 12, 2022)

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Bobby Lee Ingram respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit's opinion is not reported but is available at 831 F. App'x 454. Pet. App. 1a-9a. The Southern District of Georgia's order denying relief under the First Step Act is not reported. *Id.* at 10a-11a, 14a-15a.

JURISDICTION

The Eleventh Circuit entered judgment on October 14, 2020. Petitioner filed a timely motion for

rehearing and rehearing en banc, which was denied on November 18, 2021. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, codified at 21 U.S.C. § 841 note, 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.

INTRODUCTION

This petition presents the same question as *Concepcion* v. *United States*, No. 20-1650, in which this Court granted certiorari on September 30, 2021, *see* 2021 WL 4464217 (U.S. Sept. 30, 2021) (mem.), and heard oral argument on January 19, 2022. Both petitions ask whether a district court must or may consider intervening legal developments when asked to "impose a reduced sentence" under Section 404(b) of the First Step Act of 2018. *See* Petition for Writ of Certiorari at I, *Concepcion* v. *United States*, No. 20-1650 (U.S. May 24, 2021) (hereinafter "*Concepcion* Petition"). This Court's answer in *Concepcion* will likely resolve the question in this case. This Court should thus hold this petition pending the disposition in *Concepcion*.

The First Step Act authorizes courts to "impose a reduced sentence" on certain defendants "as if sections 2 and 3 of the Fair Sentencing Act of 2010 * * * were in effect at the time the covered offense was committed." First Step Act § 404(b). The Eleventh Circuit reads the "as if" language to mean that courts can consider *only* the effect of the Fair Sentencing Act on the defendant's sentence—not any other intervening legal developments. And in the decision below, the Eleventh Circuit applied its strained reading of the "as if" requirement to hold that the district court could not consider the effect this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), would have on Bobby Ingram's sentence.

In 1995, Ingram was sentenced to life imprisonment based on a "judge-found" drug quantity "that triggered increased statutory penalties." Pet. App. 7a.

Five years later, this Court decided *Apprendi*, holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum"—such as drug quantity—"must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. The Eleventh Circuit nevertheless held that Ingram was "ineligible under the First Step Act for a reduced sentence," Pet. App. 7a, citing prior circuit precedent precluding district courts from taking *Apprendi* into account when considering First Step Act motions. *See United States* v. *Jones*, 962 F.3d 1290, 1302, 1303-04 (11th Cir. 2020).

The decision below implicates a recognized circuit split. In *United States* v. *Concepcion*, the First Circuit held that district courts may, but need not, consider intervening legal developments when considering a defendant's First Step Act motion. 991 F.3d 279, 289-290 (1st Cir. 2021). The Second, Sixth, Seventh, and Eighth Circuits agree. As illustrated by the decision below, the Eleventh Circuit—joined by the Fifth and Ninth Circuits—disagree: There, district courts are forbidden from considering intervening legal developments. On the other extreme are the Third, Fourth, and Tenth Circuits, which *require* district courts to consider intervening law. This Court granted certiorari in *Concepcion* to resolve this split and answer the question whether, when deciding whether to "impose a reduced sentence" on an individual under Section 404(b), a district court must or may consider intervening legal developments. *Concepcion* Petition at I; *Concepcion*, 2021 WL 4464217.

Given the identity of issues between this case and *Concepcion*, this Court should hold this petition in abeyance pending disposition of that granted case.

STATEMENT

A. Original Sentencing

In 1995, a jury found Bobby Ingram guilty of one count of conspiracy to distribute crack cocaine, in violation of 21 U.S.C. § 846, and five counts of distribution of crack cocaine, in violation of 21 U.S.C. § 841(a)(1). Pet. App. 2a. At the time, a crack-cocaine offense involving a detectable, but unspecified, amount of crack cocaine carried a statutory maximum penalty of 30 years for a defendant with a prior felony drug conviction; a crack-cocaine offense involving more than 5 grams carried a statutory penalty of 10 years to life imprisonment for a defendant with a prior felony drug conviction; and a crack-cocaine offense involving more than 50 grams carried a mandatory statutory penalty of life imprisonment for a defendant with two prior felony drug convictions. *See* 21 U.S.C. § 841(b)(1)(A)(iii), (b)(1)(B)(iii), (b)(1)(C) (1994).

The presentence investigation report concluded that Ingram was responsible for over four kilograms of crack cocaine. Pet. App. 3a. The report also "classified Ingram as a career offender." *Id.* "According to the [presentence investigation report], Ingram was subject to * * * a mandatory minimum sentence of life imprisonment" for the conspiracy count ("Count 1"), under §§ 841(b)(1)(A) and 851; "a sentence between 10 years and life imprisonment" for one of the distribution counts ("Count 14"), under §§ 841(b)(1)(B) and 851; and "a maximum sentence of 30 years" for the other four distribution counts, under §§ 841(b)(1)(C) and 851. Pet. App. 3a. The report calculated Ingram's

guidelines range as 360 months to life. *Id.* "Because of Ingram's statutory mandatory sentence of life imprisonment, however, the guideline range for Count 1 became life imprisonment under U.S.S.G. § 5G1.1(c)(2)." *Id.*

The district court adopted the report's drug quantity, and that "judge-found" drug quantity "triggered increased statutory penalties." *Id.* at 7a. The court "sentenced Ingram to concurrent sentences of life imprisonment on Count 1," under § 841(b)(1)(A); 360-months' imprisonment on Count 14, under § 841(b)(1)(B); and 360-months' imprisonment on the remaining distribution counts, under § 841(b)(1)(C). Pet. App. 3a.

The Eleventh Circuit affirmed the convictions and sentences on direct appeal. *United States* v. *Ingram*, 100 F.3d 971 (11th Cir. 1996) (unpublished table decision).

B. The Fair Sentencing Act of 2010 And The First Step Act of 2018

The statutory scheme under which Ingram was sentenced imposed penalties on crack-cocaine crimes that were "far more serious" than those imposed on the same offenses involving powder cocaine. *Dorsey* v. *United States*, 567 U.S. 260, 266 (2012). To trigger certain mandatory minimum statutory sentences, an offense would have to include 100 times more powder cocaine than crack cocaine. *Id.* at 268. Over time, "the public had come to understand" this disparity "as reflecting unjustified race-based differences." *Id.*

Congress passed the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, to address these concerns. In Section 2 of that Act, Congress reduced the disparate treatment between crack-cocaine and

powder-cocaine offenses by significantly raising the amount of crack cocaine required to trigger each escalating statutory sentencing range. *Terry* v. *United States*, 141 S. Ct. 1858, 1861 (2021); *see also id.* at 1866 (Sotomayor, J., concurring in part and concurring in the judgment). Prior to the Fair Sentencing Act, 50 grams of crack cocaine triggered a mandatory sentence of life imprisonment for career offenders. *See* 21 U.S.C. § 841(b)(1)(A)(iii) (2006). After the Act, that sentence applied only to offenses involving more than 280 grams of crack cocaine. *See* Fair Sentencing Act § 2. Likewise, prior to the Fair Sentencing Act, 5 grams of crack cocaine triggered a sentencing range of 10 years to life for career offenders. *See* 21 U.S.C. § 841(b)(1)(B)(iii) (2006). After the Act, that range applied only to offenses involving more than 28 grams of crack cocaine. *See* Fair Sentencing Act § 2. Both before and after the Fair Sentencing Act, career offenders whose offenses involved a detectable, but unspecified, amount of crack cocaine were subject to a statutory maximum sentence of 30 years. *See* 21 U.S.C. § 841(b)(1)(C) (2006); 21 U.S.C. § 841(b)(1)(C) (2012).

Had Ingram been sentenced after the passage of the Fair Sentencing Act, he could not have been sentenced to a mandatory term of life imprisonment based on a "judge-found" drug quantity where that quantity "triggered increased statutory penalties." Pet. App. 7a; *see Apprendi*, 530 U.S. at 490. But the Act was initially not made retroactive to those whose convictions were already final. *See Dorsey*, 567 U.S. at 280-281.

That changed in 2018, when Congress passed the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. Among other reforms, the Act made the

relevant provisions of the Fair Sentencing Act retroactive. *See Terry*, 141 S. Ct. at 1861-62. Defendants whose "statutory penalties * * * were modified by section 2 or 3 of the Fair Sentencing Act" were considered to have a "covered offense" under the First Step Act. First Step Act § 404(a). Section 404(b) then gave such defendants a mechanism to receive a new sentence: "A court that imposed a sentence for a covered offense may, on motion of the defendant, * * * impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the time the covered offense was committed." *Id.* § 404(b). The Act contained a few limitations: Defendants get only one shot at relief, and cannot get relief if their sentence "was previously imposed or previously reduced in accordance with * * * the Fair Sentencing Act." *Id.* § 404(c).

C. Ingram's First Step Act Motion And Appeal

1. In 2019, Ingram filed a *pro se* motion under Section 404 of the First Step Act. Pet. App. 3a. He explained that his offenses, in particular Counts 1 and 14, qualified as "covered offense[s]" under Section 404(a), and that, per Section 404(b), his statutory sentencing range would be lower had the Fair Sentencing Act been "in effect at the time" he committed these offenses. This was Ingram's first such motion, and his sentences had not previously been imposed or reduced under the Fair Sentencing Act. *See* First Step Act § 404(c).

The district court denied Ingram's motion. Pet. App. 4a, 11a. The way the district court saw it, Ingram was ineligible for resentencing because his offenses involved "280 grams or more of crack cocaine"—an amount sufficient to trigger a mandatory life sentence

even applying the Fair Sentencing Act given Ingram's career-offender status. *Id.* at 4a.

2. Ingram appealed, arguing that eligibility for relief under the First Step Act turns solely on the statute of conviction and that he was accordingly eligible for relief.

While Ingram's appeal was pending, the Eleventh Circuit issued its decision in *United States* v. *Jones*, 962 F.3d 1290 (11th Cir. 2020). *See* Pet. App. 4a. There, the Eleventh Circuit held that "a movant has a 'covered offense'" under Section 404(a) "if his offense triggered a statutory penalty that has since been modified by the Fair Sentencing Act." *Jones*, 962 F.3d at 1298. But "a movant's satisfaction of the 'covered offense' requirement does not necessarily mean that a district court can reduce his sentence." *Id.* at 1303. That is because "[a]ny reduction must be 'as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the time the covered offense was committed.'" *Id.* (quoting First Step Act § 404(b)).

The *Jones* Court perceived "two limits" in "[t]his 'as-if' requirement." *Id.* First, a court cannot reduce "a movant's sentence if he received the lowest statutory penalty that also would be available to him under the Fair Sentencing Act." *Id.* "Second, in determining what a movant's statutory penalty would be under the Fair Sentencing Act, the district court is bound by a previous finding of drug quantity that could have been used to determine the movant's statutory penalty at the time of sentencing." *Id.* As the court's application to the four defendants involved in that case illustrated, that rule in practice meant that district courts *could not* take *Apprendi* into account in Section 404 proceedings; they were required to use judge-found

drug quantities. *Id.* at 1303-04; *see also United States* v. *Russell*, 994 F.3d 1230, 1237 n.7 (11th Cir. 2021) ("Under *Jones*, if a movant was sentenced before the Supreme Court's decision in *Apprendi*, the court generally can look to a drug-quantity finding made by the sentencing judge because that determination was used to set the movant's statutory penalty range.").

After *Jones* issued, the panel assigned to Ingram's appeal concluded that "*Jones* controls this appeal." Pet. App. 4a. Applying *Jones*, the court first found that "Ingram's offenses qualify as 'covered offenses' under the First Step Act." *Id.* at 6a. But under *Jones*, the court explained, "the district court was bound by its earlier drug-quantity finding and was entitled to rely on those judge-found factual findings—made pre-*Apprendi*—that triggered increased statutory penalties." *Id.* at 7a. On that ground, the panel "affirm[ed] the district court's determination that Ingram was ineligible under the First Step Act for a reduced sentence" for Count 1, for which he is serving a mandatory life sentence. *Id.*[1]

Ingram timely filed a petition for rehearing and rehearing en banc.

While that petition was pending, this Court granted review in a strikingly similar case, *Concepcion* v. *United States*, No. 20-1650. There, the First Circuit held that district courts can, but are not required to,

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[1] The panel also held that Count 14, for which Ingram is serving a sentence of 30 years under § 841(b)(1)(B), is a "covered offense," and that the district court had "authority to reduce" that sentence. Pet. App. 6a, 7a-8a. The court accordingly vacated the part of the order and remanded for further proceedings. *Id.* at 8a-9a. In January 2022, the district court declined to exercise its discretion to reduce that sentence. *See* 1/12/22 D. Ct. Order.

consider intervening legal developments when weighing a defendant's request for relief under Section 404. 991 F.3d at 289-290. Concepcion subsequently sought, and this Court granted, review of the question whether "when deciding if it should 'impose a reduced sentence' on an individual under Section 404(b) of the First Step Act of 2018, * * * a district court must or may consider intervening legal and factual developments." *Concepcion* Petition at I; *Concepcion*, 2021 WL 4464217.

The Eleventh Circuit denied Ingram's rehearing petition on November 18, 2021. Pet. App. 12a-13a. This Court heard argument in *Concepcion* on January 19, 2022.

REASONS FOR GRANTING THE PETITION

I. THIS PETITION SHOULD BE HELD PENDING RESOLUTION OF *CONCEPCION* V. *UNITED STATES*.

This petition presents the same question as *Concepcion* v. *United States*, No. 20-1650. The same cases that form the basis for the split discussed in *Concepcion* form the basis for the split discussed in this petition. *See Concepcion* Petition at 15-18; *infra* 13-19.

If this Court rules in *Concepcion* that courts must or may take into account intervening legal developments when imposing a reduced sentence under Section 404, then the Eleventh Circuit in this case erred in failing to consider the effect *Apprendi* would have on Ingram's sentence. No matter this Court's decision in *Concepcion*, that court will need to reconsider its rule.

Other petitions pending before the Court present the same or similar questions as the question presented here. *See generally* Petition for Writ of

Certiorari at i, *Jackson* v. *United States*, No. 21-5874 (U.S. Sept. 30, 2021); Petition for Writ of Certiorari at i, *Harper* v. *United States*, No. 21-546 (U.S. Oct. 8, 2021). The United States did not file a brief in opposition in either case. Instead, the United States observed that *Jackson* and *Harper* presented a "closely related question" to *Concepcion* and that the petitions "should therefore be held pending the decision in *Concepcion*." Memorandum for the United States at 1-2, *Harper*, No. 21-546 (U.S. Dec. 13, 2021); *see also* Memorandum for the United States at 2, *Jackson*, No. 21-5874 (U.S. Dec. 3, 2021).

To ensure similar treatment of similar cases, the Court routinely holds petitions implicating the same issue as a case pending before it and, once the related case is decided, resolves the held petitions in a consistent manner. *See, e.g., Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 166 (1996) (per curiam); *see also id.* at 181 (Scalia, J., dissenting). Given the identity of issues in this case and *Concepcion*, this petition should be held pending resolution of *Concepcion* and then disposed of accordingly. *See, e.g.*, *Bettcher* v. *United States*, No. 19-5652, 2021 WL 2519034 (June 21, 2021) (mem.) and *Vickers* v. *United States*, No. 20-7280, 2021 WL 2519058 (June 21, 2021) (mem.) (GVR'ing for further consideration in light of *Borden* v. *United States*, 141 S. Ct. 1817 (2021)); *Diaz-Morales* v. *United States*, 136 S. Ct. 2540 (2016) (mem.) (GVR'ing for further consideration in light of *Mathis* v. *United States*, 136 S. Ct. 2243 (2016)); *Smith* v. *United States*, 134 S. Ct. 258 (2013) (mem.) (GVR'ing for further consideration in light of *Descamps* v. *United States*, 133 S. Ct. 2276 (2013)); *Deane* v. *United States*, 568 U.S. 1022 (2012) and *Robinson* v. *United*

States, 567 U.S. 948 (2012) (GVR'ing for further consideration in light of *Dorsey*, 567 U.S. 260).

II. THE DECISION BELOW IMPLICATES THE SAME CIRCUIT SPLIT PRESENTED IN *CONCEPCION*.

1. The petitioners in *Concepcion* drew this Court's attention to the deep division over whether courts must or may take intervening legal developments into account when resentencing under the First Step Act. *See Concepcion* Petition at 13-19. The root of the confusion is Section 404(b)'s language that "[a] court * * * may * * * impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 * * * were in effect at the time the covered offense was committed."

On one side of the split, the Eleventh, Fifth, and Ninth Circuits hold that this language *forbids* district courts from considering intervening legal developments when resentencing defendants under the First Step Act. *United States* v. *Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020) ("[T]he district court * * * is permitted to reduce a defendant's sentence only * * * 'as if' sections 2 and 3 of the Fair Sentencing Act were in effect when he committed the covered offense * * * ."); *United States* v. *Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019) (holding that a district court must "decide[ ] on a new sentence by placing itself in the time frame of the original sentencing, altering the relevant legal landscape only by the changes mandated by the 2010 Fair Sentencing Act"); *United States* v. *Kelley*, 962 F.3d 470, 475 (9th Cir. 2020) (holding that district courts must "consider the state of the law at the time the defendant committed the offense, and change only one variable: the addition of sections 2 and 3 of the

Fair Sentencing Act as part of the legal landscape"); *see also Concepcion* Petition at 17-18.

Taking the opposite position, the Third, Fourth, and Tenth Circuits *require* district courts to consider intervening law when imposing a reduced sentence under the First Step Act. *See United States* v. *Easter*, 975 F.3d 318, 325-326 (3d Cir. 2020) ("[T]he necessary [§ 404] review—at a minimum—includes an accurate calculation of the amended guidelines range at the time of resentencing * * * ."); *United States* v. *Chambers*, 956 F.3d 667, 672 (4th Cir. 2020) (holding that courts must recalculate the guidelines sentencing range in light of "intervening case law"); *United States* v. *Brown*, 974 F.3d 1137, 1144-46 (10th Cir. 2020) (similar); *see also Concepcion* Petition at 13-15.

The First, Second, Sixth, Seventh, and Eighth Circuits have charted a middle course: In those circuits, district courts may—but need not—consider intervening legal developments. *See United States* v. *Concepcion*, 991 F.3d 279, 289-290 (1st Cir. 2021) ("[A] district court may take into consideration any relevant factors (other than those specifically proscribed), including current guidelines, when deciding to what extent a defendant should be granted relief under the First Step Act."); *United States* v. *Moore*, 975 F.3d 84, 90-91, 92 n.36 (2d Cir. 2020) (holding that although "the First Step Act does not *obligate* a district court to consider post-sentencing developments," neither does it forbid such consideration (emphasis added)); *United States* v. *Maxwell*, 991 F.3d 685, 691 (6th Cir. 2021) (holding that courts can "consider subsequent developments in deciding whether to modify the original sentence and, if so, in deciding by how much"), *petition for cert. filed*, No. 20-1653 (U.S. May 24, 2021); *United*

States v. *Fowowe*, 1 F.4th 522, 524 (7th Cir. 2021) (extending *United States* v. *Shaw*, 957 F.3d 734 (7th Cir. 2020), to hold that "[Section] 404(b) authorizes but does not require district courts to apply an intervening judicial decision in evaluating First Step Act motions"); *United States* v. *Harris*, 960 F.3d 1103, 1106 (8th Cir. 2020) ("First Step Act sentencing may include consideration of the defendant's advisory range under the current guidelines."); *see also Concepcion* Petition at 15-17. This Court granted certiorari to resolve this confusion.

2. This petition implicates one important and recurring manifestation of this split: whether courts may or must take account of *Apprendi* when resentencing defendants originally sentenced before *Apprendi*.

The Eleventh Circuit holds that Section 404(b) "only" permits courts to reduce sentences "'as if' sections 2 and 3 of the Fair Sentencing Act were in effect when [the defendant] committed the covered offense." *Denson*, 963 F.3d at 1089. The *Jones* Court interpreted that language to mean that district courts *are forbidden from* taking *Apprendi* into account when considering whether to reduce the sentence of a defendant originally sentenced before *Apprendi*. *See Jones*, 962 F.3d at 1303-04. And the panel below applied the same language to conclude that "the district court was bound by its earlier drug-quantity finding and was entitled to rely on those judge-found factual findings—made pre-*Apprendi*—that triggered increased statutory penalties." Pet. App. 7a.

Other courts have applied the cases implicated in the *Concepcion* split to come out the opposite way on the question whether judge-found drug quantities that increase statutory penalties are binding at

resentencing, long after *Apprendi* found that practice unconstitutional.

In *Maxwell* (discussed in *Concepcion* Petition at 16), the Sixth Circuit explained that its rule that district courts can "consider subsequent developments in deciding whether to modify the original sentence and, if so, in deciding by how much" included the discretion to consider "the impact that *Apprendi* would have had on [the defendant's] statutory sentencing range." 991 F.3d at 691 (quoting *United States* v. *Ware*, 964 F.3d 482, 488 (6th Cir. 2020)).

In *United States* v. *Mason*, 855 F. App'x 298, 299 (7th Cir. 2021), the Seventh Circuit similarly applied *Fowowe*—which extended *Shaw* (discussed in *Conception* Petition at 16) to hold that "[Section] 404(b) authorizes but does not require district courts to apply an intervening judicial decision in evaluating First Step Act motions," 1 F.4th at 524—to the *Apprendi* context. The defendant in *Mason* had been convicted in 1998 of several drug offenses and sentenced to 360 months. 855 F. App'x at 299. He later moved for First Step Act relief, but the district court "declined to disturb the overall prison term," observing that the defendant "still would face a within-guidelines sentence even if he were sentenced today under the updated penalties that would apply to him." *Id.* On appeal, Mason argued that "the judge ran afoul of *Apprendi* by calculating the updated statutory penalties based on drug quantities that were not found by the jury." *Id.* The Seventh Circuit rejected that argument, explaining that *Fowowe* permits—but does not require—courts "to apply intervening judicial decisions." *Id.* (quoting *Fowowe*, 1 F.4th at 531-532).

In *United States* v. *White* (discussed in *Concepcion* Petition at 15), the D.C. Circuit held that "defendant-specific drug quantities" cannot be used to "deem relief categorically unavailable" under Section 404(b) of the First Step Act. 984 F.3d 76, 88 (D.C. Cir. 2020). The district court had held that "relief was not 'available' to [the defendants] under Section 404(b)" because "the Fair Sentencing Act would have had no effect on" their sentences, which were "based on [pre-*Apprendi*] judge-found quantities of crack cocaine." *Id.* at 84. That was wrong, the D.C. Circuit held. *Id.* at 86. The court explained that this sort of "availability test * * * * has no basis in the text of section 404(b)," and rejected the idea that a court even *could*—as a practical matter—"determine, using judge- or jury-found drug quantities, what effect the Fair Sentencing Act 'would have had' on a defendant's sentence." *Id.* at 86-87. Thus, while judge-found drug quantities could be used "as part of [a court's] exercise of discretion," a district court cannot "deem relief categorically unavailable due to defendant-specific drug quantities." *Id.* at 88 (citing *Ware*, 964 F.3d at 488-489).

The same is true in the Eighth Circuit. In *United States* v. *Robinson*, the court considered the case of a defendant who had been sentenced to life imprisonment based on a pre-*Apprendi* judge-found drug quantity. 9 F.4th 954, 956 (8th Cir. 2021) (per curiam). The district court concluded "that it could not reduce [the defendant]'s sentence" under Section 404(b) because the judge-found drug quantity would have triggered "the same mandatory life sentence had the Fair Sentencing Act been in effect at the time he committed the covered offense." *Id.* at 958. The Eighth Circuit rejected this approach, explaining that it is

"contrary to the principle that '[t]he First Step Act applies to offenses, not conduct.'" *Id.* (citation omitted). The court thus held that a defendant's "offense of conviction—not the underlying drug quantity—determines his applicable statutory sentencing range." *Id.* at 959. A district court can, however, take that underlying quantity "into account when deciding whether to exercise its discretion." *Id.* Both the majority opinion and the dissenting opinion recognized that this approach diverged from the Eleventh Circuit's. *See id.* at 959; *id.* at 960 (Grasz, J., dissenting).

* * *

This petition thus presents one critical and oft-recurring manifestation of the question presented in *Concepcion*. The Eleventh Circuit calculated Ingram's Fair Sentencing Act sentence by using a pre-*Apprendi* drug-found quantity, refused to apply *Apprendi*, and concluded that he was still subject to a mandatory life sentence. Pet. App. 7a. Had Ingram's case arisen in the Third, Fourth, or Tenth Circuits, the courts starkly on the other side of the split, the district court would have *had* to apply *Apprendi* and Ingram would not have remained subject to a mandatory life sentence based on "judge-found factual findings—made pre-*Apprendi*—that triggered increased statutory penalties." *Id.* Had Ingram been sentenced in the First, Second, Sixth, Seventh, or Eighth Circuits, the district court would at least have had the *option* to take into account *Apprendi*'s effect on his statutory sentencing range. But because he was sentenced in the Eleventh Circuit, the district court was required to use the same now-unconstitutional judge-found drug quantity it had used two decades before.

And so Ingram's mandatory life sentence remained unchanged.

This petition presents the same question presented on the same split as *Concepcion*, and this Court should hold this case pending the disposition in *Concepcion*.

III. THE DECISION BELOW IS WRONG.

This Court should also grant certiorari or at least hold this petition pending disposition in *Concepcion* because the Eleventh Circuit's decision is wrong.

1. Section 404(b) of the First Step Act permits courts to "*impose* a reduced sentence." (emphasis added). "Not 'modify' or 'reduce,' which might suggest a mechanical application of the Fair Sentencing Act, but 'impose.'" *Chambers*, 956 F.3d at 672. And the way Congress uses the word "impose" in other federal sentencing statutes makes two things clear. First, the word is used to broadly authorize courts to consider anything relevant to sentencing. *See, e.g.*, 18 U.S.C. § 3553(a) ("[I]n determining the particular sentence to be imposed," district courts "shall consider" a host of factors); *id.* § 3582(a) (requiring courts to consider § 3553(a) factors when a district court "determin[es] whether to impose a term of imprisonment, and, if a term of imprisonment is imposed, in determining the length of the term"); *id.* § 3661 (prohibiting any "limitation" on what a court may "consider for the purpose of imposing an appropriate sentence"). And second, the word is used when directing courts to *sentence* a defendant in the first instance. *See id.* § 3553(a). This usage aligns with the dictionary definition of "impose." *See, e.g.*, *Impose*, Merriam-Webster Dictionary (online ed. 2021) ("to establish or apply by authority"; for example, to "*impose* penalties").

When a court imposes a reduced sentence under Section 404, it should therefore follow the bedrock sentencing principle of applying the law as it stands at the time of sentencing. *See Erlenbaugh* v. *United States*, 409 U.S. 239, 243-244 (1972) (explaining that the Court presumes that Congress "uses a particular word with a consistent meaning in a given context"); 18 U.S.C. § 3553(a)(4)(A) (mandating consideration of "the sentencing range" as it exists "on the date the defendant is sentenced"). That means determining a defendant's Fair Sentencing Act sentence in light of intervening constitutional law—like *Apprendi*'s rule that only jury-found facts can increase the maximum penalty applicable to a crime.

Imposing a sentence also necessitates "*correctly* calculating the applicable Guidelines range," which this Court in *Gall* v. *United States* highlighted as the way district courts "should begin *all* sentencing proceedings." 552 U.S. 38, 49 (2007) (emphases added). A First Step Act resentencing thus must "include[] an accurate calculation of the amended guidelines range at the time of resentencing." *Easter*, 975 F.3d at 325-326; *see also Brown*, 974 F.3d at 1145 ("A correct Guideline range calculation is paramount, and the district court can use all the resources available to it to make that calculation."); *Chambers*, 956 F.3d at 673-674 (rejecting argument that "a court must perpetuate a Guidelines error that was an error even at the time of initial sentencing"). And an accurate guidelines range must account for all intervening legal developments at the time of resentencing—such as *Apprendi*, which in this case would have lowered Ingram's statutory maximum sentence and thereby his guidelines range.

Applying intervening legal developments bearing on a defendant's sentence also respects the separation of powers. As even the *Jones* Court recognized, the First Step Act was part of an effort to undo "the disparity between the penalties for crack- and powder-cocaine offenses." 962 F.3d at 1296-97. Indeed, it "represents a rare instance in which Congress has recognized the need to temper the harshness of a federal sentencing framework that is increasingly understood to be much in need of tempering." *Concepcion*, 991 F.3d at 313 (Barron, J., dissenting). But Congress did not legislate carte blanche relief; it instead granted certain federal prisoners a vehicle to request judicial relief. *See, e.g.*, *United States* v. *Wirsing*, 943 F.3d 175, 186 (4th Cir. 2019) (explaining that "[t]he First Step Act provides a vehicle for defendants sentenced under a starkly disparate regime to seek relief"). And in so doing, Congress explicitly recognized that district courts have *discretion* to grant relief. *See* First Step Act § 404(c). This recognition accords with "the remedial discretion that" courts "are accustomed to exercising when revisiting a sentence that may have been too harsh when first imposed." *Concepcion*, 991 F.3d at 313 (Barron, J., dissenting). Given this context and statutory purpose, the First Step Act should not be construed "in a way that would attribute to Congress an intent to constrain district courts from exercising" their traditional remedial discretion. *Id.* Tying judges' hands to obsolete constitutional law effectively does just that.

2. The Eleventh Circuit's approach cannot be reconciled with the text and purpose of the First Step Act. That court based its rule on Section 404(b)'s requirement that courts should impose a reduced sentence "*as if* sections 2 and 3 of the Fair Sentencing Act * * *

were in effect at the time the covered offense was committed." *Jones*, 962 F.3d at 1303 (emphasis added) (quoting First Step Act § 404(b)). In the Eleventh Circuit's view, a court that took account of *Apprendi* in a Section 404 proceeding would not be imposing a reduced sentence "as if" the Fair Sentencing Act "were in effect at the time the covered offense was committed." There are three issues with that.

First, the "as if" language tells courts to act as if the Fair Sentencing Act had been in effect "at the time the *covered offense was committed*." First Step Act § 404(b) (emphasis added). It says nothing about what courts should do with facts that existed "at the time of sentencing." *Jones*, 962 F.3d at 1303; *see Concepcion*, 991 F.3d at 302 n.9 (Barron, J., dissenting) ("[T]he only time frame referenced in the 'as if' clause is the time of the commission of the offense."). Congress's silence on that makes sense. As multiple courts have explained, it is impossible "to speculate as to how a charge, plea, and sentencing would have looked had the Fair Sentencing Act been in effect" given the vagaries of plea negotiations, the discretion of prosecutors and courts, and the limits of evidence. *White*, 984 F.3d at 87 (quoting *United States* v. *Jackson*, 964 F.3d 197, 205 (3d Cir. 2020)); *see also United States* v. *Davis*, 961 F.3d 181, 192 (2d Cir. 2020); *United States* v. *Broadway*, 1 F.4th 1206, 1211-12 (10th Cir. 2021). As the Tenth Circuit put it, "[c]ourts are not time machines which can alter the past and see how a case would have played out had the Fair Sentencing Act been in effect" at the time of sentencing. *Broadway*, 1 F.4th at 1212. So while a Section 404 proceeding "is inherently backward looking," it is doubtful that Congress imposed on courts the "futile role" of speculating that facts that existed at a pre-

Fair Sentencing Act sentencing would *necessarily* have existed at a post-Fair Sentencing Act sentencing. *Id.* And if Congress *had* wanted courts to undertake that speculative endeavor, it would have stated it plainly.

Second, the Eleventh Circuit's interpretation simultaneously erases the word "impose" from the text—requiring courts to follow normal sentencing procedures—and adds the word "only"—forcing courts to consider *only* Sections 2 and 3 of the Fair Sentencing Act. But the Act does not say that "only" those changes can be considered. Instead, the "as if" clause merely clarifies what drug-quantity thresholds and sentencing rules the district court should apply in conducting the new sentencing—those in effect "at the time the covered offense was committed." First Step Act § 404(b). "In effect, [the clause] makes" Sections 2 and 3 of the Fair Sentencing Act "retroactive." *Chambers*, 956 F.3d at 672.

Finally, Congress's stated purpose in enacting Section 404 of the First Step Act was to remedy the injustice of defendants who committed offenses after August 3, 2010, facing significantly less-harsh penalties than those defendants who committed offenses before August 3, 2010. *See, e.g.*, *United States* v. *Collington*, 995 F.3d 347, 354 (4th Cir. 2021) ("Congress intended section 404 of the First Step Act to give retroactive effect to the Fair Sentencing Act's reforms and correct the effects of an unjust sentencing regime."). But the *Jones* Court's specific version of its no-intervening-case-law rule effectively erects a new date-based dividing line—June 26, 2000, when this Court decided *Apprendi*. It is either ironic or outright absurd to conclude that a remedial statute *removing* an arbitrary

date-based right to relief itself was limited by another arbitrary date—one hidden in a provision giving courts the authority to impose reduced sentences on defendants subject to the harsh, pre-Fair Sentencing Act regime.

The United States agrees that the First Step Act should not be read to "prohibit a court" from "consider[ing] postsentencing changes unrelated to the Fair Sentencing Act." Br. for United States at 39, *Concepcion*, No. 20-1650 (U.S. Dec. 15, 2021) (emphasis omitted). According to the United States, "nothing in Section 404 constrains the choice of a reduction within the applicable, recalculated statutory range." *Id.* at 40. And more than that: "Congress would have not expected a district court adjudicating a Section 404 motion to be bound by prior judicial findings inconsistent with *Apprendi* * * * and its progeny." *Id.* at 40 n.*.

IV. THE QUESTION PRESENTED IS IMPORTANT.

The question presented is important. This Court has already confirmed as much by granting certiorari in *Concepcion*.

The question presented in *Concepcion* and here affects federal prisoners across the country who are eligible for resentencing under the First Step Act. And requiring courts to consider intervening legal developments will have an immense impact on the reductions granted under that Act.

This element of the *Concepcion* question is particularly important given the constitutional implications of the Eleventh Circuit's rule. The practical effect of the Eleventh Circuit's two-tiered approach to the First

Step Act is to limit, if not preclude, relief for defendants sentenced in violation of the Sixth Amendment before *Apprendi* was decided in June 2000, but to leave the door open for the same category of defendants sentenced after that date. Compare Ingram's case with *United States* v. *Bell*, 822 F. App'x 884 (11th Cir. 2020) (per curiam). Because Ingram was sentenced before *Apprendi* was decided, the court used the "judge-found" quantity for which he was held responsible at sentencing to conclude that he was subject to the *same* statutory sentence even after the Fair Sentencing Act: mandatory life.

Compare that to *Bell*. "In 2005, a jury found Bell guilty of" crack-cocaine offenses "involving at least 50 grams" of crack cocaine. 822 F. App'x at 885. At sentencing, Bell was held responsible for 1.5 kilograms of crack cocaine based on a finding in his presentence investigation report. *Id.*; *see also United States* v. *Jackson*, 995 F.3d 1308, 1316 (11th Cir. 2021) (Martin, J., dissenting from the denial of rehearing en banc) (discussing *Bell*). Despite this drug quantity, the Eleventh Circuit concluded that the district court had "authority to reduce [Bell's] sentence under the First Step Act." *Bell*, 822 F. App'x at 887.

The key difference between this case and *Bell* is a date: June 26, 2000. Because Ingram was sentenced before *Apprendi*, his sentence remains unchanged. But had he been sentenced after *Apprendi*, he—like Bell—could have received a lower sentence. *See Jackson*, 995 F.3d at 1316 (Martin, J., dissenting from the denial of rehearing en banc). "The random injustice of this result is clear." *Id.*

And Ingram is not alone. *See, e.g.*, *United States* v. *Walker*, No. 20-13109, 2021 WL 4705230 (11th Cir.

Oct. 8, 2021) (per curiam); *United States* v. *Perez*, 859 F. App'x 356 (11th Cir. 2021) (per curiam); *United States* v. *Ford*, 858 F. App'x 325 (11th Cir. 2021) (per curiam); *United States* v. *Harper*, 855 F. App'x 564 (11th Cir. 2021) (per curiam); *United States* v. *Ford*, 855 F. App'x 542 (11th Cir. 2021) (per curiam); *United States* v. *Malone*, No. CR 98-0183-WS, 2020 WL 4721244 (S.D. Ala. Aug. 13, 2020), *appeal dismissed*, No. 20-13195-BB, 2021 WL 3902436 (11th Cir. Aug. 18, 2021); *United States* v. *Saldana*, No. 95-CR-00605-SEITZ, 2020 WL 7062495, at *4 (S.D. Fla. Nov. 25, 2020), *appeal filed*, No. 21-10634 (11th Cir. Feb. 26, 2021); *United States* v. *Williams*, No. CR 493-082-12, 2020 WL 6325709 (S.D. Ga. Oct. 28, 2020), *appeal dismissed*, No. 20-14277 (11th Cir. Aug. 10, 2021). All of these cases involved defendants whose right to relief under Section 404 was foreclosed because the district court was not permitted to consider the effect *Apprendi* would have on their sentencing range.

CONCLUSION

This Court should hold this petition in abeyance pending the disposition of *Concepcion*.

Respectfully submitted,

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