No. 21-_____

IN THE

SUPREME COURT OF THE UNITED STATES

JOSE MOYHERNANDEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether a sentencing court must consider applicable sentencing factors codified in 18 U.S.C. § 3553(a) when deciding whether to "impose a reduced sentence" on a crack offender who is eligible for a sentence reduction under § 404 of the First Step Act of 2018 -- an issue that divides the circuits.

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STATUTES

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner Jose Moyhernandez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the district court's denial of a motion for a reduced sentence under the First Step Act of 2018.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 5 F.4th 195 (2d Cir. 2021) and is reprinted in the Appendix to the Petition ("Pet. App."). The majority opinion appears at Pet. App. A1. The dissenting opinion appears at Pet. App. A32.

The decision of the district court is unreported and appears at Pet. App. A52.

Jurisdictional Statement

The opinion of the court of appeals was issued on July 15, 2021. Pet. App. A1. The District Court had jurisdiction under 18 U.S.C. § 3231. The Second Circuit had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Relevant Statutory Provisions

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.

Pub. L. No. 115-391, §404(a)-(c), 132 Stat. 5194, 5222 (2018).

INTRODUCTION

The courts of appeals are openly divided on an important question concerning the application of the First Step Act of 2018. That question is: May a district court deny an eligible defendant's motion for a sentence reduction under the First Step Act of 2018, without considering the sentencing factors codified in § 3553(a)?[1]

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[1] A petition for certiorari presenting this issue is pending before the Court in Houston v. United States, No. 20-1479, cert. petition filed Apr. 19, 2021.

The Second Circuit recognized that "[o]ur sister circuits are split" on this issue. United States v. Moyhernandez, 5 F.4th 195, 203 (2d Cir. 2021). "The Third, Fourth, Sixth, and D.C. Circuits require consideration of the § 3553(a) factors[.]" Id.[2]

But "the First, Eighth, Tenth, and Eleventh Circuits, along with the Ninth Circuit ... rule that consideration of those factors is not required." Id.[3] Here, the Second Circuit joined those (five) circuits and held that "consideration of the § 3553(a) factors is not required on review of a motion brought pursuant to § 404 of the First Step Act[.]" Id. at 198.

The Moyhernandez decision, therefore, is "in conflict with the decision of another United States court of appeals on the same important matter," Sup. Ct. R. 10(a). The resolution of this conflict warrants this Court's review.

The First Step Act of 2018 is a landmark bipartisan statute

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[2] See United States v. Easter, 975 F.3d 318, 323 (3d Cir. 2020); United States v. Chambers, 956 F.3d 667, 674 (4th Cir. 2020); United States v. Boulding, 960 F.3d 774, 784 (6th Cir. 2020); United States v. Lawrence, 1 F.4th 40, 43-44 (D.C. Cir. 2021).

[3] United States v. Concepcion, 991 F.3d 279, 289 (1st Cir. 2021), cert. granted on Sept. 30, 2021, No. 19-2025, on the different question whether, on a First Step Act motion, a court must consider intervening legal and factual developments (other than the changes to statutory penalties for crack); United States v. Moore, 963 F.3d 725, 727 (8th Cir. 2020), cert. denied, 141 S. Ct. 1118, 208 (2021); United States v. Mannie, 971 F.3d 1145, 1158 n.18 (10th Cir. 2020); United States v. Stevens, 997 F.3d 1307, 1316 (11th Cir. 2021); United States v. Houston, 805 F. App'x 546, 547 (9th Cir. 2020), pet. for cert. filed, No. 20-1479 (Apr. 21, 2021).

that attempts to remedy an unfortunate legacy: the racially discriminatory impact of federal drug laws involving crack cocaine offenses.

Until 2010, federal law imposed upon a person convicted of distributing crack cocaine the same mandatory penalties as those imposed on someone who distributed 100 times that amount of powder cocaine. Because most federal crack offenders were African-American, the "severe sentences required by the 100-to-1 ratio [were] imposed 'primarily on black offenders.'" Kimbrough v. United States, 552 U.S. 85, 98 (2007) (quoting U.S. Sent'g Comm'n, Report to Congress: Cocaine & Fed. Sent'g Pol'y 103 (May 2002)).

In 2010, therefore, Congress enacted the Fair Sentencing Act, Pub.L.111-220 -- effective August 3, 2010 -- to address this inequity and reduced the crack-to-powder disparity from 100-to-1 to 18-to-1. But the Fair Sentencing Act did not apply retroactively to people sentenced before its enactment.

So eight years later, in December 2018, another Congress, and another President, tried once again to remedy the continuing disparity. They enacted the First Step Act of 2018 to empower district courts to "impose a reduced sentence" on people sentenced before August 2010 for crack offenses "as if" the lower penalties of the Fair Sentencing Act were in effect when the crack offense was committed.

The basic framework for imposing sentences in federal court is provided by 18 U.S.C. § 3553(a), titled "Factors to be considered in imposing a sentence." The First Step Act, however, does not mention § 3553(a) or provide any guidance on when an eligible defendant's sentence should be granted. But if, as six circuits hold, the First Step Act does not require district courts to consider the § 3553(a) factors, then First Step Act proceedings will be divorced from any standard framework for determining an appropriate sentence in federal court, and be vulnerable to arbitrary decisionmaking. And the disparities Congress enacted the First Step Act to eradicate will persist.

So, in circuits where application of the § 3553(a) factors is not required -- like the Second Circuit -- district judges are free to apply their own, individual standards in deciding whether to reduce a person's sentence. See Moyhernandez, 5 F.4th at 205 (each court may decide "what factors are relevant as it determines whether and to what extent to reduce a sentence"); Id. at 212 (Pooler, J., dissent) ("Absent such a requirement, the district courts may apply the factors haphazardly resulting in precisely the unwarranted sentencing disparities that the Guidelines are designed to avoid.").

But "[i]n a system of laws[,] discretion is rarely without limits, even when the statute conferring it does not specify any limits upon the district court's discretion." United States v.

White, 984 F.3d 76, 88 (D.C. Cir. 2020) (citation, internal quotation marks, and brackets omitted). "A motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." Id. (citation and internal quotation marks omitted). Therefore, to ensure that discretionary decisions concerning First Step Act motions are based on appropriate sentencing principles, that are comprehensible to reviewing courts and to the public, courts should be guided by a familiar standard: the § 3553(a) factors and the duty to impose a sentence sufficient, but not greater than necessary to comply with the purposes of § 3553(a). White, 984 F.3d at 89-90; see 18 U.S.C. § 3553(a)). See also United States v. Easter, 975 F.3d 318 (3rd Cir. 2020) (in a First Step Act motion, the court "'must' consider the [§ 3553(a)] factors Congress has prescribed to provide assurance that it is making an individualized determination.").

Given the division among the circuits, only this Court can bring uniformity to this area of law. Only this Court can ensure that defendants eligible for sentence reductions under the First Step Act are considered on an equal basis, regardless of the district court in which the motion is brought or the practices of the particular district judge ruling on the motion.

STATEMENT OF THE CASE

I. Statutory background

1. The crack/powder disparity originated in the Anti-Drug Abuse Act of 1986, Pub.L.No. 99-570, 100 Stat. 3207. The 1986 Act created a three-tiered scheme of mandatory penalties for drug manufacturing and distribution offenses. The tiers are keyed to the type and quantity of drugs involved in an offense.

Subparagraph A -- of 21 U.S.C. § 841(b)(1) -- governs the largest drug quantities, listing different thresholds for different drugs. For such quantities, defendants "shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life" and to a "term of supervised release of at least 5 years in addition to such term of imprisonment." Id. § 841(b)(1)(A). Subparagraph B governs intermediate drug quantities (again, differing by drug). For such quantities, defendants "shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years" and to a "term of supervised release of at least 4 years in addition to such term of imprisonment." Id. § 841(b)(1)(B). Subparagraph C establishes a residual penalty range applicable to violations that do not trigger subparagraph A or B. Id. § 841(b)(1)(C).

Under the 1986 Act, subparagraph A applied to "50 grams or more of" crack cocaine and subparagraph B applied to "5 grams or more" of crack cocaine. 21 U.S.C. § 841(b)(1)(A)(iii),

841(b)(1)(B)(iii)(effective Oct. 27, 1986). By contrast, the 1986 Act required 100 times more powder cocaine to trigger the same penalties -- creating the now-infamous "100-to-1 ratio." Kimbrough v. United States, 552 U.S. 85, 96 (2007).

"[T]he severe sentences required by the 100-to-1 ratio are imposed primarily upon [B]lack offenders." Kimbrough, 552 U.S. at 98. In fact, "[a]pproximately 85 percent of defendants" convicted during this period "of crack offenses in federal court [we]re [B]lack." Id. By 2004, Black defendants spent nearly as long in prison for non-violent drug offenses (58.7 months) as white defendants for violent offenses (61.7 months). See Bureau of Justice Stat., U.S. Dep't of Justice, Compendium of Federal Justice Statistics, 2003, Table 7.16, at 112 (2005), https://www.bjs.gov/content/pub/pdf/cfjs03.pdf.

2. Congress enacted the Fair Sentencing Act of 2010 to "restore fairness to Federal cocaine sentencing." Pub.L.No. 111-220, 124 Stat. 2372. Recognizing the "100-to-1 ratio" was "too high and unjustified," Dorsey v. United States, 567 U.S. 260, 268 (2012), Congress increased the crack-cocaine threshold required to trigger the mandatory penalties in 21 U.S.C. § 841(b)(1)(A) from 50 grams to 280 grams, Fair Sentencing Act of 2010, § 2, 124 Stat. 2372, 2372. Congress similarly amended 21 U.S.C. § 841(b)(1)(B) by increasing the associated crack-cocaine threshold from 5 grams to 28 grams. See Id.

The Fair Sentencing Act, however, did not apply retroactively to those sentenced before its August 3, 2010 effective date. People sentenced under the 1986 Act thus remained imprisoned under their old, higher sentences and the now-rejected 100-to-1 crack/powder disparity.

3. In 2018, to address this continuing inequity, Congress passed § 404 of the First Step Act. The Act "allow[ed] prisoners sentenced before the Fair Sentencing Act ... to petition the court for an individualized review of their case" and to "bring sentences imposed prior to 2010 in line with sentences imposed after the Fair Sentencing Act was passed." S.3649, 115th Cong. (as introduced by S.Comm. on the Judiciary, Nov. 15, 2018). Enacted with broad bipartisan support (and signed into law by President Trump), the "retroactive application of the Fair Sentencing Act" as regarded as an "historic achievement." 164 Cong. Rec. S7749 (daily ed. Dec. 18, 2018) (statement of Sen. Leahy).

Specifically, the First Step Act provides that "a court that imposed a sentence for a covered offense may ... impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 ... were in effect at the time the covered offense was committed." Pub.L.No. 115-391, § 404(b), 132 Stat. 5194, 5222 (2018). The Act defines "covered offense" to mean "a violation of a Federal criminal statute, the statutory penalties for which

were modified by section 2 or 3 of the Fair Sentencing Act ... that was committed before August 3, 2010." Id. § 404(a).

II. Procedural History

1. The original sentencing in July 2000

Petitioner Jose Moyhernandez was convicted in February 2000, after a jury trial, "on charges including conspiracy to distribute, and to possess with intent to distribute, more than 50 grams of cocaine base." Moyhernandez, 5 F.4th at 198. He had made two on-the-street sales of crack to a confidential informant in amounts of 28 and 62 grams, for a total of 90 grams, and he also arranged the confidential informant's purchase of a firearm.

The jury convicted Moyhernandez of both counts of the indictment: the 50-grams-of-a-substance-containing-crack drug con-spiracy (21 U.S.C. § 846), and possessing a firearm as a convicted felon (18 U.S.C. § 922(g)(1)(carrying a 10-year maximum prison sentence)). Because Moyhernandez had a prior drug-felony conviction, the crack-cocaine conviction carried a minimum prison sentence of 20 years. 21 U.S.C. § 841(b)(1)(A)(iii) (2000). In addition, under the Sentencing Guidelines he qualified as a career offender, resulting in a sentencing range was 360 months to life.

On July 13, 2000, Jose Moyhernandez appeared for sentencing, before then-Judge Michael B. Mukasey, of the United States

District Court for the Southern District of New York.[4] At that time, the Guidelines were mandatory, and the sentencing ranges they specified were binding on judges. See United States v. Booker, 543 U.S. 220, 233-34 (2005) (excising 18 U.S.C. § 3553(b)(1), which had made the Sentencing Guidelines "mandatory and impose[d] binding requirements on all sentencing judges," because it violated the Sixth Amendment of the Constitution).

During Moyhernandez's sentencing, the court made clear that if the Guidelines had not been mandatory, it would have imposed a sentence lower than 30 years. "Judge Mukasey explained that in his view, 25 years was a fair and appropriate sentence, but the then-mandatory Guidelines prevented him from" doing so. Moyhernandez, 5 F.4th at 208-09 (Pooler, J., dissent). Instead, the judge imposed the lowest available sentence: 360 months' imprison-ment for the drug conviction (concurrent with ten years on the felon-in-possession count). The conviction and sentence were affirmed on appeal.[5] "Moyhernandez, who was 35 years old in 2000, is now 56." 5 F.4th at 199.

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[4] Judge Mukasey retired from the bench in June 2006. He subsequently served as Attorney General of the United States under President George W. Bush, from November 2007 to January 2009. See https://en.wikipedia.org/wiki/Michael_Mukasey

[5] See United States v. Moyhernandez, 17 F. App'x 62 (2d Cir. 2001) (summary order).

2. The First Step Act motion to the district court, filed in 2019

In August 2019, after the First Step Act became law, Moyhernandez sought relief under section 404 of the Act by filing a motion in the district court. By that time, Judge Mukasey had left the bench, and the case was reassigned to another judge.

Moyhernandez is eligible for a sentence reduction under the First Step Act because section 2 of the Fair Sentencing Act increased, from 50 grams to 280 grams, the quantity of crack cocaine necessary to trigger the 20-year mandatory minimum imposed on prior drug offenders. And "Moyhernandez's 90 grams falls below the new threshold." Moyhernandez, id. at 199 (citing § 2(a)(1), 124 Stat. at 2372 and 21 U.S.C. § 841(b)(1)(A)(iii)).

He thus had been sentenced for a "covered offense" and asked the district court argued for a sentence reduction. "In particular, Moyhernandez argued that 18 U.S.C. § 3553(a), which sets forth 'factors to be considered in imposing a sentence,' militated in favor of a sentence reduction[.]" Moyhernandez, id. at 200.

The district court agreed that Moyhernandez was eligible for relief. But the court declined to grant any relief. "In reaching its decision, the court ruled that 'there is no mandate to consider [the] § 3553(a) factors when reducing a sentence under [the First Step Act].'" Id. at 200. The court cited Moyhernandez's criminal record "and that the First Step Act 'did

not change the applicability of the career-offender designation.'" Id. "Since Moyhernandez's Guidelines range remained unchanged, and he was 'sentenced ... to the minimum of this range in 2000,' the court declined to 'adjust that sentence now.'" Id. at 200 (ellipsis in original).

3. The Second Circuit's opinion

i. The majority opinion

On appeal, "Moyhernandez argue[d] primarily that the district court was required to consider the § 3553(a) factors in deciding whether to grant a sentence reduction pursuant to the First Step Act and failed to do so." Id. at 201. A split panel of the Second Circuit affirmed the district court's decision, rejecting petitioner's argument.

The Panel majority held that "consideration of the § 3553(a) factors is not required on review of a motion brought pursuant to § 404 of the First Step Act[.]" Id. at 198. It reasoned that section 404 "contains no explicit mandate to consider § 3553(a)[.]" Id. at 202. Its view was that the Act does not require courts to consider any factors other than those "that flow from Sections 2 and 3 of the Fair Sentencing Act." Id. at 202 (citation and internal quotation marks omitted) ("'all that § 404(b) instructs a district court to do is to determine the impact of Sections 2 and 3 of the Fair Sentencing Act.'"). Because "the § 3553(a) factors do not flow from §§ 2 and 3 of the

Fair Sentencing Act, district courts have no obligation to apply them." Id. at 203.

The Panel majority held that application of the § 3553(a) factors was not mandated by the word "impose" in § 404(b), which states: "A court that **imposed** a sentence for a covered offense may ... **impose** a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed." First Step Act, § 404(b), 132 Stat. at 5222 (emphasis added). The majority rejected the argument that, because § 3553(a) sets forth "factors to considered in **imposing** a sentence," Congress's use of the word "impose" twice, in the First Step Act, shows it envisioned the application of the § 3553(a) factors in First Step Act motions. See 5 F. 4th at 204 (emphasis in original). The Panel majority held that "[s]ection 404(b) enables only the discretionary reduction of a sentence that was already imposed," and does not contemplate the "imposition of a sentence from scratch." Id.

The Panel majority also rejected the argument that application of § 3553(a) factors was required by § 404(c), which precludes review of a First Step Act motion "if a previous motion made under this section ... was ... denied after a **complete review of the motion on the merits**." First Step Act § 404(c), 132 Stat. at 5222 (emphasis added). It stated that section 404(c) "charges a district court only with 'review' of a defendant's

motion. It does not require that any particular procedures be followed during that review." Id. at 202 (citation and internal quotation marks omitted).

Finally, the Panel majority also noted that the sentence-finality exception under which First Step Act motions fall, 18 U.S.C. § 3582(c)(1)(B), does not explicitly require consideration of § 3553(a) factors (in contrast to § 3582(c)(2), authorizing a sentence reduction when the Sentencing Commission has lowered the applicable Guidelines range, which "explicitly requires consideration of the § 3553(a) factors"). Id. at 204-05.

ii. The Dissent[6]

The Dissent observed that since Petitioner's sentencing, "Congress and the Supreme Court have taken steps to ameliorate the widely critiqued harshness of the legal regime under which Moyhernandez was sentenced." Id. at 209 (Pooler, J. Dissent). **First**, in 2005, Booker held that mandatory-Guidelines were unconstitutional. **Second**, in August 2010, Congress passed the Fair Sentencing Act, reducing the sentencing disparity between crack and powder cocaine, "and, as relevant here, increased the quantity of crack cocaine necessary to trigger a 20-year mandatory minimum imposed on prior drug offenders from 50 grams to 280 grams." Id. But it was not retroactive. So, **third**, in

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[6] See Moyhernandez, 5 F.4th at 208-16 (Pooler, J., dissenting).

2018, "building on the Fair Sentencing Act, Congress passed the First Step Act[,]" and Moyhernandez was finally eligible for a reduction of his sentence. Id.

The Dissent concluded that "[t]he district court was required to consider the Section 3553(a) factors before denying Moyhernandez's motion[.]" Id. at 210 (Pooler, J., dissent). Section 3553(a) factors, the Dissent reasoned, are as fundamental to federal sentencing as Booker's holding that the mandatory application of the Guidelines was unconstitutional. Both the Fair Sentencing Act (2010) and the First Step Act (2018) were enacted in the post-Booker sentencing regime: "a world in which district courts were already required to consider the Section 3553(a) factors in imposing sentence." Id. at 211 (Pooler, J., Dissent. The logic of the majority's reasoning, the Dissent pointed out, would allow district courts to ignore Booker and operate under a regime of mandatory Sentencing Guidelines -- rendering defendants whose Guidelines ranges are unchanged ineligible for First Step Act relief -- since Booker was also a change in the law (since 2000) and did not flow from the Fair Sentencing Act.

The Dissent endorsed the reasoning of the Third Circuit in United States v. Easter, 975 F.3d 318, 325 (3rd Cir. 2020), which concluded: 1) that the term "impose" in § 404(b) reflected a congressional intent that courts apply the sentencing standard applicable at an original sentencing; and 2) that a consistent

policy that the 3553(a) factors be considered -- as opposed to allowing individual judges to decide whether consult the factors or do something else -- makes sentencings more predictable, straightforward, and reviewable. Id. at 212.

Reasons for Granting the Writ

The courts of appeals are divided over whether a district court must consider applicable § 3553(a) sentencing factors in deciding whether to reduce an eligible defendant's sentence under the First Step Act.

The Court should resolve the conflict. And this case squarely presents the issue. The Second Circuit's crabbed construction of the First Step Act is incorrect. The most natural reading of the First Step Act is that a district court deciding whether to "impose a reduced sentence" must consider the § 3553(a) factors -- the basic framework governing any "imposi[tion]" of a sentence. A contrary reading would deprive the First Step Act of much of its force and invite continuing, arbitrary sentence disparities, contrary to Congress's objective in enacting the First Step Act.

I. The courts of appeals are divided over whether a district court must consider applicable § 3553(a) factors in deciding whether to grant or deny the First Step Act motion of an eligible defendant.

1. In this case, the Second Circuit held that the district court did not err by declining to consider § 3553(a) factors before denying the First Step Act motion of a person eligible for

relief under the Act. It reasoned that "[s]ection 404 contains no explicit mandate to consider § 3553(a)," "and we do not infer that Congress intended to imply one." United States v. Moyhernandez, 5 F.4th 195, 202 (2d Cir. 2021). Accordingly, the Panel majority held that "consideration of the § 3553(a) factors is not required on review of a motion brought pursuant to § 404 of the First Step Act." Id.

But the Second Circuit's interpretation of the First Step Act is contrary to the decisions of four other circuits. "The Third, Fourth, Sixth, and D.C. Circuits require consideration of the § 3553(a) factors" when a district court adjudicates an eligible defendant's First Step Act motion. Moyhernandez, id. at 203. Those circuits are correct.

The Fourth Circuit adopted this position in United States v. Chambers, 956 F.3d 667 (4th Cir. 2020). The Fourth Circuit observed, "[d]istrict courts across the country are applying the § 3553(a) factors in these First Step Act cases." Id. at 674. Those courts, the Fourth Circuit explained, relied on the plain language of the statute: the First Step Act "uses the verb 'impose'" and § 3553(a) "is triggered whenever a district court imposes a sentence." Id. (internal citations and alterations omitted). The Fourth Circuit "agree[d]," and "h[e]ld that" the factors "must apply." Id.

The Sixth Circuit arrived at the same conclusion in United

States v. Smith, 959 F.3d 701 (6th Cir. 2020) (per curiam). There, the district court denied the defendant's First Step Act motion without considering several applicable § 3553(a) factors. Id. at 702. The Sixth Circuit vacated the order, holding that a district court "must consider the factors in § 3553(a)" when "decid[ing] whether a prisoner who is eligible for a sentence reduction" under the First Step Act "merits one." Id. at 702-03. The Sixth Circuit thus remanded for the district court to determine whether a sentence reduction "is appropriate **after** considering the § 3553(a) factors with reference to the purposes of the First Step Act and Fair Sentencing Act." Id. at 704 (emphasis added); accord United States v. Boulding, 960 F.3d 774, 784 (6th Cir. 2020) ("[T]he language of § 404 and our cases that interpret it[] stand for the proposition that the necessary review -- at a minimum includes ... thorough renewed consideration of the § 3553(a) factors").

The Third Circuit joined the Fourth and Sixth Circuits in United States v. Easter, 975 F.3d 318 (3d Cir. 2020). There, the district court had denied the defendant's motion, holding that "the applicable mandatory minimum", as reduced by the First Step Act, "has no effect on Easter's sentence." Id. at 322. The Third Circuit vacated and remanded for further consideration because the "District Court failed ... to consider the § 3553(a) factors" including, for example, the defendant's post-sentence

rehabilita-tion. Id.

The Third Circuit expressly noted: "[O]ur sister circuits are divided" on whether such consideration is required -- just as the Second Circuit noted in this case. Easter, 975 F.3d at 323. But unlike the Second Circuit, the Third Circuit "decline[d] to follow" those circuits that had "held that consideration of § 3553(a) factors is permissive," instead endorsing the same rule as the Fourth and Sixth Circuits. Id. at 324. "Nothing in the First Step Act," the court explained, "directs district courts to deviate from § 3553(a)'s mandate that '[t]he court, in determining the parti-cular sentence to be imposed, shall consider' the § 3553(a) factors." Id. at 320. Accordingly, "when deciding whether to exercise its discretion under § 404(b) of the First Step Act to reduce a defendant's sentence, including the term of supervised release, the district court must consider all of the § 3553(a) factors to the extent they are applicable." Id. at 326.

The D.C. Circuit has also adopted the view of the Third, Fourth, and Sixth Circuits, holding that a district court adjudicating a First Step Act motion must consider § 3553(a) factors. United States v. Lawrence, 1 F.4th 40, 43-44 (D.C. Circuit 2021); United States v. White, 984 F.3d 76, 90-91 (D.C. Circuit 2020). The D.C. Circuit reasoned that "[t]he district court's discretion in adjudicating a Section 404 motion is

'broad' but not 'unfettered'." Accordingly, consideration of applicable § 3553(a) factors is necessary to effectuate "Congress's intent to rectify dispropor-tionate and racially disparate sentencing penalties". Lawrence, 1 F.4th at 44.

2. But the Second Circuit and five other circuits are to the contrary.

As Second Circuit observed: "[T]he First, Eighth, Tenth, and Eleventh Circuits, along with the Ninth Circuit (in an unpublished decision)" have also "rule[d] that consideration of those [§ 3553(a)] factors is not required." Moyhernandez, 5 F.4th at 203. See United States v. Concepcion, 991 F.3d 279, 289 (1st Cir. 2021) ("'a district court may, but need not, consider section 3553 factors' in a reduction in sentence"); United States v. Moore, 963 F.3d 725, 727 (8th Cir. 2020) (Because the First Step Act "does not mention the section 3553 factors," "[w]hen reviewing a section 404 petition, a district court may, but need not, consider the section 3553 factors"); United States v. Houston, 805 Fed. App'x 546, 547 (9th Cir. 2020) (There is no "requirement that courts consider section 3553(a) factors" when deciding whether to impose a reduced sentence under the First Step Act); United States v. Mannie, 971 F.3d 1145, 1158 n.18 (10th Cir. 2020) (Because "neither [§ 404] nor § 3582(c)(1)(B) reference the 18 U.S.C. § 3553(a) factors[,]" "they are permissible, although not required, considerations when ruling on

a [First Step Act] motion"); United States v. Stevens, 997 F.3d 1307, 1316 (11th Cir. 2021) (The First Step Act "does not mandate consideration of the § 3553(a) sentencing factors.").

Thus, in six circuits -- the First, Second, Eighth, Ninth, Tenth, and Eleventh -- a district court's failure to address applicable § 3553(a) factors when deciding whether to exercise discretion in a First Step Act proceeding is not error.

3. This issue has sufficiently percolated in the courts of appeals. Ten courts of appeals have addressed the issue and staked out definitive positions on the question presented.[7] The arguments on both sides have been fully vetted. Only this Court can establish a consistent, uniform, standard for the adjudication of motions under the First Step Act.

II. The question presented is an important question central to the remedial purposes of the First Step Act.

Whether a district court must consider the § 3553(a) sentencing factors, when adjudicating a First Step Act motion, is a recurring question of federal law. In the less than three years since the enactment of the Act, ten courts of appeals have addressed the issue and have divided 6 to 4.

Meanwhile, thousands of defendants are eligible for First

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[7] See Moyhernandez, 5 F.4th at 203 n. 7 (only the Fifth and Seventh Circuits have not explicitly decided whether consideration of § 3553(a) factors is required upon review of a First Step Act § 404 motion, "although the Seventh Circuit has implied that it is not") (citing cases)).

Step Act relief.[8] But because of this entrenched conflict, defendants across the country will receive materially different consideration under the same federal law depending on geography.

Congress codified the § 3553(a) sentencing factors in the Sentencing Reform Act of 1984 to constrain "sentencing courts" discretion in important respects," including "by specifying [the § 3553(a)] factors that courts must consider." Pepper v. United States, 562 U.S. 476, 489 (2011). So, while district courts retain broad discretion in sentencing, Congress viewed § 3553(a) as an important means to ensure consistency -- important enough to require district courts to expressly consider the factors therein. "[F]ailing to consider the § 3553(a) factors" is a "significant procedural error" that warrants reversal. Gall v. United States, 552 U.S. 38, 51 (2007).

Ensuring even-handed application of § 404 is particularly vital, given the objectives of the First Step and Fair Sentencing Acts. "[T]he Fair Sentencing Act and the First Step Act, together, are strong remedial statutes, meant to rectify

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[8] When the Act was enacted in 2018, the U.S. Sentencing Commission estimated that only a total of 2,660 offenders were eligible for resentencing under section 404. See U.S. Sent'g Comm'n, Sentence and Prison Impact Estimate Summary S. 756, The First Step Act of 2018 (Dec. 2018), https://tinyurl.com/3nx9h43y. But as of October 2020, 3,363 motions for resentencing under the First Step Act had been granted. See U.S. Sent'g Comm'n, First Step Act of 2018 Resentencing Provisions Retroactivity Data Rep. at 4 (Oct. 2020). So, given that 3,363 motions had been granted within less than two years of enactment, the Commission's estimate was under-inclusive.

disproportionate and racially disparate sentencing penalties." United States v. White, 94 F.3d 76, 90 (D.C. Cir. 2020).[9] Absent this Court's intervention, however, disparate treatment of crack-cocaine offenders will continue -- contrary to Congress's intent.

Mandatory consideration of the § 3553(a) factors is particularly imperative in First Step Act re-sentencings because eligible defendants have necessarily been incarcerated for more than a decade, since before August 3, 2010. See e.g., White, 984 F.3d at 81, 83 (the defendant, convicted in 1994 and sentenced to life, filed First Step Act motion in 2019). They will frequently introduce compelling evidence that would need to be considered if the § 3553(a) factors apply -- for instance, a good prison record and a realistic release plan. See Pepper v. United States, 562 U.S. 476, 491-93 (2011) (post-sentence rehabilitation is "highly relevant to several of the § 3553(a) factors[,] ... clearly relevant to the selection of an appropriate sentence ... [and] may also critically inform a sentencing judge's overarching duty under § 3553(a) to 'impose a sentence sufficient, but not greater

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[9] See Terry v. United States, 141 S.Ct. 1858, 1861 (2021) (the Sentencing Commission found that "persons convicted of crack offenses were disproportionately black," and the 100-to-1 ratio, "created a perception of unfairness"; Dorsey v. United States, 567 U.S. 260, 268 (2012) (the public came "to understand sentences embodying the 100-t0-1 ratio as reflecting unjustified race-based differences").

than necessary'").[10]

If district courts are not required to consider the § 3553(a) factors anew, they may lean on stale justifications from the original sentence. This risk is especially stark in the many cases where, as here, the original sentencing judge is unavailable: a new judge, unfamiliar with the defendant, may "be heavily reliant on a previous explanation and record that was not created with the current statutory framework in mind." United States v. Shaw, 957 F.3d 734, 741 (7th Cir. 2020) (internal quotation marks omitted). "Counsel may have pressed different arguments based on a different statutory framework; a court may have credited those arguments differently, as the statutory minimum and maximum often anchor a court's choice of a suitable sentence." Id.

Fresh consideration of the § 3553(a) factors ensures that resentencing courts avoid repeating the errors of the past.

III. This case is an excellent vehicle for resolving the conflict.

This case presents a clean opportunity for the Court to resolve this entrenched conflict. The issue is squarely presented here, as demonstrated by the opinions of both the Panel majority

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[10] See 18 U.S.C. § 3553(a)(1) (courts must consider "the history and characteristics of the defendant"); id. § 3553(a)(2)(B)-(D) (courts must consider "the need for the sentence imposed" to "protect the public from further crimes of the defendant," and "provide the defendant with needed ... training ... or other correctional treatment").

and the Dissent. See Pet. App. at A1 to A31 (majority opinion); Pet. App. at A32 to A51 (dissenting opinion)[11]

The district court found that Moyhernandez was eligible for relief, but declined to reduce the sentence. And "[i]n reaching this decision, the [district] court ruled that 'there is no mandate to consider [the] § 3553(a) factors when reducing a sentence under [the First Step Act]." 5 F.4th at 200 (bracketed items in circuit opinion).

The Panel majority affirmed the district court, holding that "consideration of the § 3553(a) factors is not required on review of a motion brought pursuant to § 404 of the First Step Act[.]" Id. 198; id. at 202 ("we conclude that consideration of the § 3553(a) factors is not required"); id. at 205 ("Therefore, when reviewing a motion under the First Step Act § 404, 'a district court may, but need not, consider the [§ 3553(a)] factors'") (brackets in original) (quoting Moore, 963 F.3d at 727 [8th Cir.]).

The majority acknowledged that "the circuits are split" on the issue. 5 F.4th at 203. "The Third, Fourth, Sixth, and D.C. Circuits require consideration of the § 3553(a) factors; the First, Eighth, Tenth, and Eleventh Circuits, along with the Ninth Circuit (in an unpublished decision), rule that consideration of

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[11] In the published opinion, the majority opinion is at 5 F.4th at 195-208. The dissent is at 5 F.4th at 208-216.

those factors is not required." Id. (citing the circuit cases).

Moreover, Petitioner would have had a strong prospect of obtaining relief had the district court considered the § 3553(a) factors. As part of the First Step Act motion, defense counsel provided evidence of post-conviction rehabilitation, including educational transcript from the Bureau of Prisons, certificates for drug treatment, and his record of employment while in prison. As the Dissent observed: "The judge sentencing him initially acknowledged that a shorter sentence would serve all the goals of sentencing." Id. at 215 (Pooler, J., dissent). Now, "Moyhernandez is nearly 60 years old" and "[a]t his age, the likelihood of recidivism is sharply reduced." Id. "In a proceeding requiring consideration of the Section 3553(a) factors, the district court could consider these points and the cost of continuing to imprison an aging man subject to immediate deportation during an ongoing pandemic against Moyhernandez's long criminal history and Guidelines range." Id. (footnote omitted).

This procedural step would not have created a hardship for the court "and would provide the reasoned consideration of the costs and consequences of incarceration that Congress desired in passing this important legislation." Id. (footnote omitted).

IV. The Second Circuit's decision is wrong.

Review of the Second Circuit's decision is also warranted because the Second Circuit's interpretation of the First Step Act

is incorrect. Like five other courts of appeals, the Second Circuit held that a district court need not consider the § 3553(a) factors when exercising its resentencing discretion under the First Step Act. That is not a plausible reading of the First Step Act, much less the best reading.

The majority emphasized the First Step Act's "as if" clause. It reasoned that, although a "court 'imposing' a sentence in the first instance" must consider the § 3553(a) factors, a court authorized to "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act... were in effect" can only "determine the impact of ... the Fair Sentencing Act." Moyhernandez, id. at 202-203. But the First Step Act omits the word "only," and this Court will not "add[] words to the law to produce what is thought to be a desirable result." EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 774 (2015). Moreover, as the Dissent noted, Congress enacted both the Fair Sentencing Act and the First Step Act post-Booker, in "a world in which district courts were already required to consider the Section 3553(a) factors in imposing a sentence." Id. at 211-12 (Pooler, J., dissent). A court cannot impose a sentence "as if the Fair Sentencing Act were in effect" while ignoring the § 3553(a) factors. Id. at 212. Under the majority's logic, the district court would have been bound by the original Guidelines range, making Moyhernandez ineligible for relief, because the Guidelines were mandatory in

2000.

The Panel majority also held that § 404(b)'s instruction to "'impose a **reduced** sentence'" "enables only the discretionary reduction of a sentence that was already imposed," and thus does not contemplate "imposition of a sentence from scratch." Id. at 204 (emphasis added). But Congress could have achieved that result simply by saying that courts may "reduce" a sentence. Congress instead used the word "impose" twice, providing that a court "that imposed a sentence for a covered offense" may "impose a reduced sentence" consistent with the Fair Sentencing Act. See § 404(b). "Congress specifically chose the word 'impose' to refer to both the initial sentencing, which must be done in accordance with the Section 3553(a) factors, and the resentencing, rather than using 'reduce' or 'modify' to describe the First Step Act procedure." Moyhernandez, id. at 213 (Pooler, J., dissent). Only this reading renders every word necessary, with the word "reduced" clarifying that a court cannot increase an eligible defendant's sentence. Thus, § 3553(a) factors apply in a § 404(b) resentencing, because application of § 3553(a) is triggered whenever a district court "impose[s]" a sentence.

Moreover, § 404(c) states that a prisoner "cannot seek relief under the Act twice if the first motion was 'denied **after a complete review of the motion** on the merits.'" United States v. Boulding, 960 F.3d 774, 784 (6th Cir. 2020) (emphasis in opinion)

(quoting § 404(c)). This language "shows the dimensions of the resentencing inquiry Congress intended courts to conduct: complete review of the resentencing motions on the merits." Id. At a minimum, that inquiry includes a calculation of the Guidelines range "and thorough renewed consideration of the § 3553(a) factors." Id.

The Second Circuit's analysis of the significance of the sentence-finality exception in 18 U.S.C. § 3582(c)(1)(B) is also flawed. The majority reasoned that, because § 3582(c)(1)(B) does not expressly require courts to consider the § 3553(a) factors in modifying sentences, unlike two neighboring subsections of § 3582(c), Congress did not intend to require application of § 3553(a) factors in First Step Act motions.

However, the language of § 3582(c)(1)(B) -- which, as general matter, authorizes courts to modify sentences "to the extent otherwise expressly permitted by statute or Rule 35 of the Federal rules of Criminal Procedure" -- has no bearing here. The First Step Act itself expressly authorizes a specific type of sentence reduction, making no reference to § 3582(c)(1)(B). Such an independent congressional enactment should be interpreted on its own terms: § 404 is not limited by the language of the general authorization of § 3582(c)(1)(B). See Morton v. Mancari, 417 U.S. 535, 550-51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled ... by a

general one.").

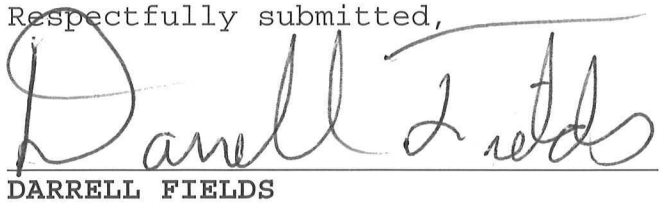
In any event, the Second Circuit's negative inference from the language of § 3582(c)(1)(B) is incorrect. The other sentence-finality exceptions in § 3582(c) specifically mandate consideration of the § 3553(a) factors because those provisions themselves are the sources of the authority to modify a final sentence and therefore specify the frameworks for the proceedings under those provisions. See 18 U.S.C. § 3582(c)(1)(A); id. § 3582(c)(2). By contrast, § 3582(c)(1)(B) merely redirects courts to Rule 35 and any other sources of authority that may exist, without providing any substantive standard of its own. Section 3582(c)(1)(B) thus does no more than point the district court back to the authorizing statute -- here, the First Step Act -- to determine what procedures are appropriate.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
October 14, 2021

Respectfully submitted,

By: 

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