No. 21-

IN THE SUPREME COURT OF THE UNITED STATES

ANTONIO SOUL GONZALEZ,

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 analogous to the question presented in *Concepcion v. United States,* No. 20-1650, on which this Court recently granted certiorari.

Whether, when deciding if it should "impose a reduced sentence" on an individual serving a revocation sentence who has petitioned the court under Section 404(b) of the First Step Act of 2018, a district court must, at a minimum, determine eligibility and calculate the amended sentencing range at the time of resentencing.

PARTIES TO THE PROCEEDINGS BELOW

Antonio Soul Gonzalez, petitioner on review, was the appellant in the Eleventh Circuit Court of Appeals.

United States of America, respondent on review, was the appellee in the Eleventh Circuit Court of Appeals.

NOTICE OF RELATED CASES

All proceedings directly related to this petition include:

United States v. Gonzalez, No. 8:05-cr-188-T-23AEP (M.D. Fla. Oct. 21, 2019)

United States v. Gonzalez, No. 19-14381 (11th Cir. Aug. 19, 2021)

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Antonio Soul Gonzalez 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 reported as *United States v. Gonzalez*, 9 F. 4th 1327 (11th Cir. 2021). Pet. App. 1a-28a. The Middle District of Florida's order denying relief under the First Step Act is not reported. Pet. App. 29a-30a.

STATEMENT OF JURISDICTION

The Eleventh Circuit entered judgment on May 11, 2021. Petitioner did not seek rehearing. This Petition is filed within 90 days of the entry of the Eleventh

Circuit's judgment. 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, 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 case presents a similar issue as *Concepcion v. United States*, No. 20-1650, in which this Court recently granted certiorari. *See* 2021 WL 4464217 (U.S. Sept. 30, 2021) (mem.). Both petitions ask this Court to address a circuit split on the recurring question as to the obligations of a district court when deciding whether to "impose a reduced sentence" on an individual under § 404(b) of the First Step Act of

2018. This Court's guidance and answers in *Concepcion* will likely resolve this case. This Court should hold this petition in abeyance pending the disposition in *Concepcion*, or, alternatively, grant certiorari and hear Petitioner's case in concert with *Concepcion*.

Until 2010, federal law imposed on an offender convicted of distributing crack cocaine the same mandatory penalties as an offender convicted of distributing 100 times that amount of powder cocaine. Congress enacted the Fair Sentencing Act of 2010 to reduce this egregious disparity and modified the crack-to-powder ratio from 100-to-1 to 18-to-1. However, Congress failed to make the law retroactive.

In 2018, Congress passed and the President signed into law the First Step Act, the purpose of which was to reduce the continuing unequal treatment of defendants convicted of crack offenses prior to the passage of the Fair Sentencing Act. Section 404(b) of the First Step Act authorizes district courts to reduce the sentence of offenders convicted of distributing crack cocaine as if the Fair Sentencing Act were in effect at the time the covered offense was committed.

This case squarely presents a recurring question, on which the courts of appeal are sharply divided, about the minimal obligations of a district court when determining whether to apply § 404(b) to a disparately sentenced crack offender serving a revocation sentence: May a district court deny a defendant's request under the First Step Act without first determining eligibility and attempting to determine how the First Step Act and intervening changes in the law would reduce or modify the applicable sentencing range? This question raises an issue of great importance.

First Step Act motions are being litigated across the country with different federal courts taking widely varying approaches to a district court's obligations when applying § 404(b) to the defendants serving revocation sentences who come before them. If district courts are not required to even make the preliminary correct assessment of eligibility and then assess how the First Step Act and intervening law would modify or reduce a defendant's sentence range, particularly those serving a revocation sentence, as is the case here, then, in some circuits, such as the Eleventh Circuit, the analysis of the applicability of First Step Act motions will be conducted in a vacuum without regard for the potential sentence reductions Congress intended, while in others, a court's analysis will be fully informed by the sentencing range the Fair Sentencing Act and First Step Act were enacted to correct. Without this Court stepping in, the arbitrary and disparate approach to resentencing of eligible offenders serving a revocation sentence will continue.

STATEMENT OF THE CASE

I. STATUTORY FRAMEWORK

The crack/powder disparity originated in the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. The 1986 Act set out three levels or classes of penalties for drug offenses. The level or class a defendant falls under is based on the type and quantity of drugs sold or distributed.

Subparagraph A governs the largest drug quantities, listing different thresholds for different drugs. Class A 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." 21 U.S.C. § 841(b)(1)(A). Class A defendants face a maximum revocation sentence of 60 months in prison for violation of the terms of their supervised release. Subparagraph B governs intermediate drug quantities. Class B defendants "shall be sentenced for 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). Class B defendants face a maximum revocation sentence of 36 months in prison for violation of the terms of their supervised release. 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). The 1986 Act required 100 times more powder cocaine to trigger the same penalties, producing the now-infamous "100-to-1 ratio." *Kimbrough v. United States,* 552 U.S. 85, 96 (2007). The severe sentences triggered by this ratio were imposed "primarily upon [B]lack offenders." *Kimbrough,* 552 U.S. at 98. "Approximately 85 percent of defendants" convicted of crack offenses under this law were Black. *Id.* Black defendants spent nearly as long in prison for non-violent drug offenses as white defendants did for violent offenses. *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.

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 raised the crack-cocaine threshold for Class A defendants in 21 U.S.C. § 841(b)(1)(A) from 50 grams to 280 grams, Fair Sentencing Act of 2010 § 2, 124 Stat. 2372, and for Class B defendants from 5 grams to 28 grams as set out in 21 U.S.C. § 841(b)(1)(B). Fair Sentencing Act of 2010 § 2, 124 Stat. 2372. The law, however, was not retroactive and the primarily Black defendants sentenced for crack offenses prior to the passage of the Fair Sentencing Act remained subject to unequal and disparate sentences compared to primarily White defendants sentenced for powder-cocaine and other drug offenses.

In 2018, Congress passed and the President signed § 404 of the First Step Act which made the Fair Sentencing Act retroactive. 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). A 'covered offense" is defined as "a violation of a Federal criminal statute, the statutory penalties for which were modified by Section 2 or 3 of the Fair Sentencing Act … that was committed before August 3, 2010." *Id.* § 404(a).

II. PROCEEDINGS BELOW

On August 3, 2006. Petitioner pled guilty to a single count of Possession with Intent to Distribute Fifty Grams or More of Cocaine Base in violation of 21 U.S.C. §§

841(a)(1) and (b)(1)(A)(iii). The factual basis of the plea established that Gonzalez attempted to deliver 125 grams of cocaine base to a confidential informant. At the time of his plea, Mr. Gonzalez fell into the highest level or Class A sentencing range based on the 125 grams of cocaine base. Gonzalez was scored at an Offense Level of 31 with a criminal history category of V. (Dkt. 66, p. 1). At that time a violation of 21 U.S.C. § 853 with Gonzalez's criminal history, pursuant to 21 U.S.C. § 851 and 21 U.S. C. § 841(b)(1)(a), carried a mandatory minimum of 20 years imprisonment with a maximum of life in prison. The district court sentenced Mr. Gonzalez to the minimum sentence allowed - 20 years in prison followed by 10 years of controlled release.

In December 2014, pursuant to a Rule 35 motion by the government, Mr. Gonzalez was resentenced to 151 months in prison based on a reduced offense level of 31 (lowered from offense level 33) which set a sentencing range of 151 – 188 months. This was a 37% reduction from Mr. Gonzalez's initial prison sentence. The court did not alter the controlled release portion of Mr. Gonzalez's sentence.

In 2015, Mr. Gonzalez moved for a reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2) and Amendments 750, 759 and 780 of the United States Sentencing Guidelines. Amendment 750 reduced Mr. Gonzalez's Total Offense Level to 27, resulting in a Guidelines range of 120 to 150 months imprisonment, and with a Rule 35 departure applied, resulted in a Guidelines range of 92 to 115 months. (Dkt. 66, p.

2). After a comparable 37% reduction, Gonzalez was sentenced to 76 months in prison.

In April of 2018, after Mr. Gonzalez had been released from prison and was serving his controlled release sentence, he was arrested and ultimately pled guilty to a new criminal law violation of distributing crack cocaine while possessing a firearm and other violations in the United States District Court for the Middle District of Florida in case number 8:18-cr-179-T-33AEP. [1] Mr. Gonzalez admitted to violating the terms of his controlled release based on the new offenses and six other violations. On September 4, 2018, the district court sentenced Mr. Gonzalez to 57 months imprisonment consecutive to his sentence in case 8:18-cr-179-T-33AEP.

In April of 2019, Mr. Gonzalez moved *pro se* for a sentence reduction pursuant to the First Step Act. The district court appointed counsel.[2] On September 24, 2019, through court-appointed counsel, Mr. Gonzalez moved to modify his sentence under the First Step Act. Mr. Gonzalez argued that the First Step Act of 2018 made the provisions of the Fair Sentencing Act of 2010 retroactive so that currently incarcerated offenders who received longer sentences for possession of crack cocaine than they would have received if sentenced for the same amount of powder cocaine before the enactment of the Fair Sentencing Act can move in the district courts to have their sentences reduced. Mr. Gonzalez argued that the Fair Sentencing Act

[1] Mr. Gonzalez pled guilty to two violations of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B) and one violation of 18 U.S.C. § 924(c)(1)(A)(i).
[2] The district court initially appointed the Federal Public Defender; Gonzalez moved to dismiss that appointment and the district court granted that motion and appointed CJA counsel.

reduced his offense level from a Class A to a Class B felony under 18 U.S.C. § 3559(a)(2) because the maximum term of imprisonment authorized under Title 21 is now only 40 years. Mr. Gonzalez further argued that the United States Sentencing Commission has explained that terms of imprisonment for violation of the conditions of supervised release are limited by statute and that the statutory maximum term of imprisonment that may be imposed for violation of a condition of supervised release of a Class B felony is three years and, thus, his currently imposed term of 57 months exceeds the statutory maximum. Lastly, Mr. Gonzalez argued that his supervised release sentence was part of the penalty for his initial offense so that his supervised release violation fell under the First Step Act.

In their Response opposing Mr. Gonzalez's Motion, the government argued that Mr. Gonzalez is "ineligible for such a reduction because the First Step Act does not grant [the district court] the authority to modify [Mr. Gonzalez's] term of imprisonment," because Mr. Gonzalez is in custody for a violation of supervised release imposed under 18 U.S.C. § 3583(e)(3), which was not amended by Sections 2 and 3 of the Fair Sentencing Act of 2010, and therefore retroactive application of the Fair Sentencing Act as authorized by the First Step Act is inapplicable. The Government further argued that, even if Mr. Gonzalez was eligible for a sentence reduction, the court should exercise its discretion and deny his request for a reduction because Mr. Gonzalez's new criminal conduct and federal convictions "violate this Court's trust and demonstrate a continued disrespect for authority." Mr. Gonzalez moved for leave to reply to the government's Response, which the

district court denied.

In a 2-page order, the district court ruled that 1) Mr. Gonzalez is ineligible for a sentence modification because the First Step Act does not "grant authority" to the court to modify his sentence, and 2) even if eligible, the court would decline to exercise its discretion due to Gonzalez's "continued lawless behavior." (Pet. A, p. 29-30). The district court did not address in any way Gonzalez's sentencing range under the First Step Act.

Mr. Gonzalez timely appealed. "On appeal, the government … changed its position on the matter of eligibility[,]" and conceded that "Mr. Gonzalez's revocation sentence [was] eligible for a reduction under the First Step Act because the underlying offense was a covered offense under § 404(b)." *United States v. Gonzalez*, 9 F.4th 1327, 1330 (11th Cir. 2021). The government argued now, however, that Gonzalez was mistaken as to the change in his status from a Class A to a Class B felony, and, regardless, his continued lawlessness militated against any reduction.

The Eleventh Circuit found the government's position well-taken and held, in agreement with the Fourth and Sixth Circuits, "that a sentence imposed upon revocation of supervised release is eligible for a sentence reduction under § 404(b) of the First Step Act when the underlying crime is a covered offense within the meaning of the Act." *Id*. at 1331.

The court then reviewed the district court' s decision applying an abuse of discretion standard "as to whether to reduce a sentence for an eligible defendant."

Id. at 1331. The court explained, "A district court must adequately explain its decision under the First Step Act, and that usually requires providing a reasoned basis for the exercise of discretion. *See United States v. Stevens*, 997 F.3d 1307, 1317 (11th Cir. 2021). In exercising its discretion, a district court may consider the sentencing factors set forth in 18 U.S.C. § 3553(a), but it is not required to do so. *See id.* at 1316; *United States v. Potts*, 997 F.3d 1142, 1145–46 (11th Cir. 2021). And as long as it is not ambiguous, a district court's alternative exercise of discretion in denying a First Step Act motion can suffice for affirmance. *See Potts*, 997 F.3d at 1147." *Gonzalez,* at 1331–32.

Applying this standard, the court determined the district court did not abuse it's discretion. The court acknowledged that while the "district court did not refer to the § 3553(a) factors by name, its reasons touched on two of them—the need to 'afford adequate deterrence' and the need to 'protect the public from further crimes of the defendant.' *See* § 3553(a)(2)(B)–(C)." *Gonzalez,* at 1332. [3] The court stated that, "The district court's reasons were clear, supported by the record, and did not constitute an abuse of discretion." *Id.* The circuit court, like the district court, did not rule on the merits of Gonzalez's Class A/Class B argument.

The court then turned to Gonzalez's argument that "district courts must

[3] The district court's reasoning as set out in the order was: "Gonzalez is ineligible for a reduction because the First Step Act does not grant authority to modify his term of imprisonment. Further, even if Gonzalez were eligible, I would decline to reduce Gonzalez's term of imprisonment because of Gonzalez's continued lawless behavior." (Pet. A. 30).

always calculate and consider a defendant's new range under the Sentencing Guidelines before exercising their discretion under § 404(b) of the First Step Act." *Id.* In declining to make such a determination, the Eleventh Circuit declined to follow the Seventh Circuit's decision in *United States v. Corner*, 967 F.3d 662, 666 (7th Cir. 2020). "In [the Seventh Circuit's view], the failure to properly calculate the new range results in an uninformed exercise of discretion and 'amounts to a reversible procedural error.'" *Gonzalez*, at 1332. In rejecting this conclusion, the Eleventh Circuit criticized the Seventh Circuit's "analysis of the text of the First Step Act" and stated the Seventh Circuit took the "'complete review' language [of the First Step Act]—which it called a 'requirement'—out of context." *Gonzalez,* at 1333.

The court additionally held that Rule 52(a) of the Federal Rules of Criminal Procedure and this Court's precedent prohibit "'a federal court [from] invok[ing] supervisory power to circumvent the harmless-error inquiry prescribed by ... Rule 52(a).' *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988). We have held, therefore, that a 'Sentencing Guidelines miscalculation is harmless if the district court would have imposed the same sentence without the error.' *United States v. Barner*, 572 F.3d 1239, 1248 (11th Cir. 2009)." *Gonzalez* at 1333. The court determined that "an automatic reversal rule" as that set out by the Seventh Circuit, "would be in tension, if not in conflict, with Rule 52(a) and our precedent. We are confident that we can decide, on a case-by-case basis, whether a district court's failure to properly calculate the new range

constitutes reversible procedural error under the First Step Act." *Id*. The court did not address the fact that the district court never calculated Gonzalez's revocation sentence and that it exceeded the statutory maximum for a Class B felony under the revisions of the Fair Sentencing Act.

Judge Tjoflat entered a concurring opinion in which he opined that the language of § 404(b) provides no guidance as to the standard of appellate review, and thus a district court's decision as to whether to modify a defendant's sentence is unreviewable. Judge Tjoflat recognized that this Court has held that whether a district court has abused its discretion pursuant to a given statute, an appellate court must first identify "the bounds of that discretion and the principles that guide its exercise." *United States v. Taylor*, 487 U.S. 326, 336, 108 S. Ct. 2413, 2419, 101 L.Ed.2d 297 (1988). "In other words, we must discern the governing standard. And if we can't do that, we must be willing to say the district court's exercise of discretion is unreviewable. We've been unable to articulate any standard that limits a district court's discretion to reduce sentences under § 404(b) of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5222, and yet we've held we can review these decisions for abuse of discretion." *Gonzalez* at 1327 (Tjoflat, J. concurring). Judge Tjoflat further explained that in his opinion *United States v. Stevens*, 997 F.3d 1307, 1316 (11th Cir. 2021), correctly concluded that "district courts considering whether to reduce [a sentence] under § 404(b) aren't required to consider the § 3553(a) factors[,]" but he reasoned, "[i]f district courts need not consider § 3553(a), then what if anything constrains their discretion in reducing

sentences under § 404(b)? The principled answer, in my view, is that nothing constrains their discretion. If nothing constrains their discretion, there can be no abuse. And if no abuse, then no review—even if we think the district court's decision was wholly arbitrary." *Gonzalez* at 1335 (Tjoflat, J., concurring).

REASONS FOR GRANTING THE WRIT

I. THERE EXISTS A DIRECT CIRCUIT SPLIT AS TO WHETHER A DISTRICT COURT MUST BE INFORMED BY AND THEREFOR CALCULATE A DEFENDANT'S SENTENCING RANGE UNDER CURRENT LAW WHEN DECIDING WHETHER TO IMPOSE A REDUCED REVOCATION SENTENCE UNDER THE FIRST STEP ACT.

This petition presents a direct circuit split in the courts of appeals on the scope of a district court's review and minimal obligations when presented with a § 404(b) motion by individuals who are eligible for resentencing of their revocation sentence under the First Step Act. All twelve circuits have now addressed the scope of a district court's authority during a First Step Act resentencing and have issued divergent opinions over what, if any, factors district courts may or must consider when conducting resentencing proceedings.

This deep and entrenched split prevents uniform application of the First Step Act. This Court has recognized the need to clarify the law for the lower courts when it granted certiorari in *Concepcion*. This case squarely raises the question: what are the minimal obligations a district court must meet when determining whether to modify a defendant's revocation sentence under the First Step Act? This Court should accordingly hold this petition in abeyance pending the resolution of *Concepcion*, or, in the alternative, grant certiorari in this case to address the specific issue of the

obligations of a district court when applying the First Step Act to a revocation sentence.

II. The Decision Below Deepens a Clear Circuit Split

Having granted certiorari in Concepcion, this Court has recognized the widely divergent circuit split on First Step Act sentencing proceedings. In rejecting Mr. Gonzalez's appeal, the Eleventh Circuit deepened this split when it held, expressly and directly in conflict with the Seventh Circuit, that a district court need not correctly determine a defendant's eligibility or calculate a defendant's reduced sentence when a defendant seeks a modification of a revocation sentence.

In *United States v. Corner*, 967 F.3d 662 (7th Cir. 2020), the Seventh Circuit addressed how a district court should proceed when presented with a motion for a revocation sentence modification under the First Step Act. The district court had determined that it need not decide whether Corner was eligible for a sentence reduction because the district court "'would deny his request for a reduction even if he was." *Id.* at 663. The district court "cited Corner's untruthfulness with his supervising probation officer, his refusal to comply with drug testing, his persistent use of illegal drugs, and his inability to hold down a job[,]" all factors which the district court had cited when imposing the original revocation sentence. *Id*. In reading the textual language of the Act, the Seventh Circuit determined that the language of the Act which requires a "'complete review' suggests a baseline of process that includes an accurate comparison of the statutory penalties – and any resulting change to the sentencing parameters- as they existed during the original sentencing

and as they presently exist." *Id*. at 664. The court concluded that the district court's failure to consider the lower statutory penalties was procedural error. "The court's uninformed exercise of discretion, therefore, was divorced from the concerns underlying the Fair Sentencing Act [ ], which sought to redress the extreme inequity between sentences for crack and powder cocaine offenses deemed irrational and unfair by Congress." *Id*. at 665. The district court's failure to exercise concerns about the fairness or equity of Corner's revocation sentence was not cured by his alternate ruling. The Seventh Circuit held that it "must be sure that an alternate ruling is not just a conclusory comment tossed in for good measure, but rather reflected a detailed explanation of the basis for the parallel result." *Id.* (internal quotations and citations omitted).

Likewise, the Eighth Circuit has held that failure to determine a defendant's eligibility for a sentence reduction warrants reversal.

> A court considering a motion for a reduced sentence under § 404 of the First Step Act proceeds in two steps. First, the court must decide whether the defendant is eligible for relief under § 404. Second, if the defendant is eligible, the court must decide, in its discretion, whether to grant a reduction. That the court might properly deny relief at the discretionary second step does not remedy any error in determining ineligibility at the first step.

United States v. McDonald, 944 F.3d 769, 772 (8th Cir. 2019) (remanding for the district court to conduct a determination of eligibility and then merits review).

Other courts of appeal have also held that a district court at a minimum must calculate the amended guidelines range. *United States v. Boulding*, 960 F.3d 774, 784 (6th Cir. 2020) ("[Under § 404,] the necessary 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."); accord *United States v. Easter*, 975 F.3d 318, 324-26 (collecting cases) (3d Cir. 2020); *United States v. Chambers*, 956 F.3d 667 (4th Cir. 2020). While others have held the opposite: *United States v. Moore*, 963 F.3d 725, 727 (8th Cir. 2020); *United States v. Mannie*, 971 F.3d 1145, 1158-59 (10th Cir. 2020); *see also United States v. Whitehead*, 986 F.3d 547, 511 n.4 (5th Cir. 2021) ("While consideration of the pertinent § 3553(a) factors certainly seems appropriate in the FSA resentencing context, we have left open whether district courts must undertake the analysis. At present it suffices if the record does indeed reflect such consideration." (internal citation omitted)).

The Eleventh Circuit is far to one side of the split in upholding a district court's erroneous determination that a defendant was ineligible for a sentence reduction and resulting failure to calculate the defendant's sentencing range. The court's conclusory single sentence comment tossed in as an alternative basis for denying the defendant's motion cannot be said to provide a meaningful review and application of a law passed by Congress, with broad bi-partisan support, grounded in an effort to correct well-documented and broadly criticized egregious inequities in federal sentencing.

The division in the courts of appeals over what courts must consider during First Step Act resentencing is deep, acknowledged, and entrenched.

III. The Question Presented is Important and Squarely Presented

The question presented affects many defendants serving revocation sentences who are eligible for resentencing under the First Step Act, and the impact could be

years of unjust imprisonment for those resentenced without even a determination of eligibility or the applicable sentencing range.

Whether a district court must correctly consider eligibility and the resulting defendant's sentencing and guidelines range has immense effect on a court's decision making. Offenders who are seeking a modification of their revocation sentence by the very nature of their position before the court have, after being incarcerated and released, violated the terms of their probation through testing positive for drugs, failing to comply with their supervising probation officer or having committed new law violations. District judges may rightly be initially hesitant to grant them a sentence modification but that is precisely why district judges must first look to how their sentences would change based on current law before denying a modification. Otherwise, the analysis is done in a vacuum without regard for the law and the manner in which Congress intended to remedy the extreme sentencing disparity experienced by crack offenders. As the petitioner in *Concepcion* pointed out to this Court, the Guidelines are the "lodestar" of sentencing. *Molina-Martinez v. United States,* 136 S. Ct. 1338, 1346 (2016). The Guidelines "influenc[e] the sentences imposed by judges," and that "data indicate that when a Guidelines range moves up or down, offenders' sentences move with it." *Peugh v. United States,* 569 U.S. 530, 543-44 (2013). Years, or even decades, of imprisonment are at stake depending on the Guidelines range used by a sentencing judge.

This case should be held in abeyance pending the resolution of *Concepcion*, or in the alternative, this Court should grant certiorari so that this Court can address

the particular facts and issues facing district courts called upon to decide whether defendants, serving revocation sentences who qualify for a sentence reduction under the First Step Act, should be granted a reduction. That analysis at a minimum must include an assessment of the offender's new sentencing range.

IV. The Decision Below Is Wrongly Decided

This Court should hold Mr. Gonzalez's petition in abeyance or grant certiorari because the Eleventh Circuit's decision is wrong and unduly narrows and eviscerates the corrective effect of the First Step Act for revocation-sentenced offenders.

The First Step Act authorizes district courts to *"impose* a reduced sentence." First Step Act § 404(b), Pub. L. No. 115-391, 132 Stat. 5194 (emphasis added). As other federal sentencing statutes make clear, the term "impose" capaciously allows a court to consider any thing relevant to what is an appropriate sentence. For example, section 3553(a) states that "in determining the particular sentence to be imposed," district courts "shall consider" various factors, including "the history and characteristics of the defendant" and "the sentencing range established" under the Sentencing Guidelines. 18 U.S.C. § 3553(a); *see also* 18 U.S.C. § 3582(a) (directing consideration of the § 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"); 18 U.S.C. § 3661 (prohibiting any "limitation" on what information about a defendant's circumstances a district court may consider "for the purpose of imposing an appropriate sentence").

District courts "impos[ing] a reduced sentence" under the First Step Act should

follow the same process of considering all information bearing on crafting a just sentence that is available at the time of sentencing. This Court presumes that Congress "uses a particular word with a consistent meaning in a given context." *Erlenbaugh v. United States,* 409 U.S. 239, 243-44 (1972); *see id.* ("The rule of *in pari materia* ... assumes that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject."). Congress' use of "impose" in the First Step Act should be interpreted accordingly. *See Easter,* 975 F.3d at 325; *Chambers,* 956 F.3d at 671-72.

When a district court imposes a reduced sentence under the First Step Act, it must calculate "the sentencing range established" under the Sentencing Guidelines as it exists at the time of the motion's adjudication. 18 U.S.C. § 3553(a)(4), (5). Indeed, as this Court made clear in *Gall v. United States,* "a district court should begin *all* sentencing proceedings by correctly calculating the applicable Guidelines range." 552 U.S. 38, 49 (2007) (emphasis added). Thus, a First Step Act resentencing, "at a minimum-includes an accurate calculation of the amended guidelines range at the time of resentencing." *Easter,* 975 F.3d at 325-26; *see also United States v. Brown,* 974 F.3d 1137, 1145 (10th Cir. 2020)("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 674 (rejecting argument that "a court must perpetuate a Guidelines calculation error that was an error even at the time of initial sentencing"). To determine the accurate Guidelines range, district courts must consider intervening legal developments at the time of resentencing.

Application of the above principles to First Step Act resentencings is also consistent with Congress' purpose. "The First Step Act provides a vehicle for defendants sentenced under a starkly disparate regime to seek relief that has already been available to later-sentenced defendants for nearly a decade." *United States v. Wirsing,* 943 F.3d 175, 186 (4th Cir. 2019); *cf.* Pet.App.26a (Barron, J., dissenting) (The First Step Act "should not be "construe[d] ... in a way that would attribute to Congress an intent to constrain district courts from exercising the remedial discretion that they are accustomed to exercising when revisiting a sentence that may have been too harsh when first imposed").

The Eleventh Circuit wrongly determined that there is no abuse of discretion when a district court wrongly determines a defendant's eligibility and, thus wholly fails to consider a defendant's sentencing range or the statutory maximum, which is currently in dispute by the parties, and, corrects that error with a toss away phrase declining discretion that is uninformed by the parameters of the defendant's new sentencing range.

The Eleventh Circuit's own precedent underscores the illogic of its approach. The Eleventh Circuit has held that an abuse of discretion occurs when a district court "fails to apply the proper legal standard or to follow proper procedures in making the determination." *Boyes v. Shell Oil Prods. Co.,* 199 F.3d 1260, 1265 (11th Cir. 2000). In this case, the district court failed to make the correct legal determination and failed to follow this Court's precedent in *Gall* and sentencing statutes and law and allowed stand a revocation sentence potentially above today's

statutory maximum. Further, a revocation sentence is by design limited. "The periods of imprisonment authorized by statute for a violation of the conditions of supervised release generally are more limited, however, than those available for a violation of the conditions of probation." United States Sentencing Commission, Guidelines Manuel, §73B (Nov. 2018). At the revocation of violation of conditions of supervised release, a court should sanction primarily the defendant's breach of trust, while taking into account, *to a limited degree*, the seriousness of the underlying violation and the criminal history of the violator. *Id.* A new criminal violation is punished by the sentence imposed in the new case, not in the revocation sentence. Neither the Eleventh Circuit nor the district court gave any consideration to this principle in their analysis.

The Eleventh Circuit's hands-off approach also leads to widely disparate results within the circuit itself. In *United States v. Shipp*, 2020 WL 3440947 (M.D. Ga. 2020) (slip op.), the district court considered modification of a defendant's revocation sentence for "possessing a firearm and committing aggravated assault and criminal damage to property; he shot into an acquaintance's car with a firearm then rammed her car, and the victim suffered injuries caused by glass fragments." *Id.* **2.* In determining whether to reduce the revocation sentence, the district court determined that Shipp's offense under the Fair Sentencing Act became a Class B felony rather than a Class A felony, and that the "statutory maximum revocation sentence following conviction for a Class B felony is three years. 18 U.S.C. § 3583(e)(3)[,]" and that his revocation sentencing guidelines range sentence had

changed." *Id.* *3. Informed by "today's penalties," the district court determined that the statutory maximum 36-month revocation sentence "was sufficient but not greater than necessary to serve the interests of sentencing[,]" and reduced Shipp's sentence to 36 months. *Id.* *4. Shipp's revocation violations were more egregious than Gonzalez's in that, while both committed new law violations involving a firearm, Shipp actually fired the weapon and injured another human being.

It is difficult to imagine a more arbitrary disparity than ignoring present-day law and facts in a resentencing hearing for petitioner, while a similarly situated defendant in a courtroom a state away but in the same circuit, is allowed to take advantage of twelve years of factual and legal developments. "Such a regime is antithetical to Congress' intent and the Guidelines' purpose." *Easter,* 975 F.3d at 325. That is particularly so where individuals, like Mr. Gonzalez, are serving sentences above the current statutory maximum. This Court should "decline to read Congress's intent as directing a district court to impose a sentence possibly predicated on a legal error." *Brown,* 974 F.3d at 1146.

This arbitrariness also creates practical problems for the imposition and appellate review of sentences under the First Step Act. In circuits where district courts must consider present-day law and facts, the parties, district courts, and circuit courts all can apply familiar, predictable rules for arguing about and determining the appropriate sentence to be imposed. *See Easter,* 975 F.3d at 325 (requiring consideration of § 3553(a) factors "(1) makes sentencing proceedings under the First Step Act more predictable to the parties, (2) more straightforward for

district courts, and (3) more consistently reviewable on appeal" (internal quotation marks omitted)); *United States v. McDonald,* 986 F.3d 402, 411-12 (4th Cir. 2021) (applying existing standards for review of district court's consideration of § 3553(a) factors and defendant's postsentencing conduct).

Conversely, where district courts may ignore a defendant's sentencing range, as in the Eleventh Circuit, these familiar standards go out the window. In those circuits, parties have no idea whether their judge will even hear their arguments. District courts that choose to consider such arguments have no guidance as to what weight to give them. And appellate courts reviewing such sentences have no standards to say whether and when a district court can ever err in its consideration of arguments the district court is not obligated to consider in the first place.

The Court should grant certiorari to restore uniformity to this important criminal justice reform or, hold this petition in abeyance pending resolution of *Concepcion*.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests this Court hold the petition in abeyance pending the resolution of *Concepcion* or grant the petition to review the Eleventh Circuit's decision affirming the district court's denial of Petitioner's § 404(b) motion.

Respectfully submitted,

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