No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NATHANIEL FIELDS,
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 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 has granted certiorari:

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?[1]

[1] Mr. Fields is aware of the following cases pending before this Court raising the same or substantially similar issue: *United States v. Maxwell,* 991 F.3d 685 (6th Cir. 2021), *pet. for cert. filed,* No. 21-1653 (U.S. May 27, 2021) (reply of petitioner filed Sept. 9, 2021); *United States v. Houston,* 980 F.3d 745 (9th Cir. 2021), *pet. for cert. filed,* No. 20-1479 (U.S. Apr. 21, 2021) (reply of petitioner filed Aug. 4, 2021); *United States v. Jackson,* No. 19-11955, 995 F. 3d 1308 (11th Cir. 2021), *pet. for cert. filed,* No. 21-5874 (U.S. Oct. 4, 2021) (government filed motion to hold in abeyance pending a decision in *Concepcion,* Dec. 3, 2021); *United States v. Harper,* No. 20-13296, 855 F. App'x 564 (11th Cir. 2021), *pet. for cert. filed,* No. 21-546 (U.S. Oct 8, 2021) (government response due Dec. 13, 2021); *United States v. Watford*, No. 21-1361, 2021 WL 3856295 (7th Cir. Aug. 2, 2021), *pet. for cert. filed*, No. 21-551 (U.S. Oct. 12, 2021) (government response due Dec. 15, 2021); *United States v. Jarvis*, 999 F.3d 442 (6th Cir. 2021), *pet. for cert. filed*, No. 21-568 (U.S. Oct. 15, 2021) (government response due Dec. 8, 2021); *United States v. Sutton*, 854 F. App'x 59 (7th Cir. 2021), *pet. for cert. filed*, No. 21-6010 (U.S. Oct. 14, 2021) (government response due Dec. 20, 2021); *United States v. Potts,* 997 F.3d 1142 (11th Cir. 2021), *pet. for cert. filed,* No. 21-6007 (U.S. Oct. 19, 2021) (government response filed Nov. 18, 2021).

PARTIES INVOLVED

The parties identified in the caption of this case are the only parties before the Court.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Nathaniel Fields respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit Court of Appeals' panel opinion in *United States v. Fields,* No. 19-13927, 2021 WL 4163784 (11th Cir. Sept. 14, 2021), is reproduced here as Appendix A-1.

JURISDICTION

The judgment of the Eleventh Circuit was entered on September 14, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2253.

STATUTORY PROVISIONS INVOLVED

The First Step Act, Pub. L. 115-391, 132 Stat. 5194 (2018), states in relevant part:

> (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.

STATEMENT OF THE CASE

A. STATUTORY BACKGROUND

For more than three decades, federal drug laws treated one gram of crack-cocaine as the equivalent of 100 grams of powder cocaine for purposes of setting a statutory minimum and maximum sentence. *See* The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1, 100 Stat. 3207. Recognizing the "unjustified race-based differences" in sentences for crack and powder cocaine offenses, Congress passed the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, 2372, "[t]o restore fairness to Federal cocaine sentencing." *Dorsey v. United States*, 567 U.S. 260, 268 (2012); *see also* U.S. Sent'g Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy*, 19 Fed. Sent. R. 297, 298 (2007). Section 2 of the Fair Sentencing Act substantially increased the quantity of crack cocaine needed to trigger the mandatory minimum sentences under 21 U.S.C. § 841(b)(1)(A), (B). Pub. L. No. 111-220, § 2(a)(1), (2), 124 Stat. 2372, 2372 (amending 21 U.S.C. § 841(b)(1)(A)(iii) and (B)(iii)).[2] As directed by the Fair Sentencing Act, the United States Sentencing Commission conformed the drug guideline penalty structure for crack cocaine offenses to the amended statutory guidelines. *See* USSG, App. C, amend. 750 (effective Nov. 1, 2011).

The First Step Act of 2018 makes the Fair Sentencing Act's reforms retroactive. Pub. L. No. 115-391, Title IV, 132 Stat. 5194, 5220-22. As relevant here, section 404(b)

[2] The mandatory-minimum triggering quantities of crack cocaine were increased from 50 grams to 280 grams and from 5 grams to 28 grams.

of the First Step Act allows a person convicted of crack-cocaine offenses and sentenced before August 3, 2010, to receive a reduced sentence "as if" section 2 of the Fair Sentencing Act were "in effect at the time the covered offense was committed."[3] Congress' intent was clear: "[T]o give retroactive effect to the Fair Sentencing Act's reforms and correct the effects of an unjust sentencing regime." *United States v. Collington*, 995 F.3d 347, 354 (4th Cir. 2021).[4]

B. PROCEDURAL HISTORY

Petitioner Nathaniel Fields was sentenced to life imprisonment for a single federal drug offense in 2005.

1. In 2005, Mr. Fields pleaded guilty to a single count of possession with intent to distribute 50 grams of more of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(iii). Because of his prior felony convictions, the government filed a notice of enhancement under 21 U.S.C. § 851.

At sentencing, the district court applied the 2004 edition of the Federal Sentencing Guidelines to calculate his sentencing range. The district court made two calculations under the 2004 Guidelines to determine which sentence should apply:

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[3] A "covered offense" is defined in section 404(a) 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." The government concedes that the crack-cocaine offense Mr. Fields was convicted of is a "covered offense" and that he is thus eligible for relief under the First Step Act.

[4] The Act restricts district courts' resentencing power to prevent defendants from (1) receiving multiple sentence reductions due to the First Step Act or (2) filing successive motions for a sentence reduction if a previous such motion was denied "after a complete review of the motion on the merits." Pub. L. N. 115-391, § 404(c), Title IV, 132 Stat. 5194, 5220-22. Neither limitation applies in this case.

one based on USSG § 2D1.1(c), the drug quantity guideline, and the other using USSG § 4B1.1, the career offender provision.

The district court treated Mr. Fields as a "career offender" under USSG § 4B1.1(a). At the time of the offense, Mr. Fields had prior convictions for sale of cocaine in Florida, and three Washington state convictions for assault. The court reasoned that Mr. Fields qualified as a career offender based on his prior convictions.

The base offense level that would have applied to Mr. Fields under the drug-quantity guideline was lower than that applicable under the career-offender guideline. Therefore, the career offender guideline applied. The career offender provision increased his base offense level from 32 to 37. After an adjustment for acceptance of responsibility, his total offense level combined with a criminal history category VI, produced a guidelines range of 360 months to life imprisonment. Because of the § 851 enhancement, however, Mr. Fields' guidelines range became life imprisonment pursuant to USSG § 5G1.1(b).

Mr. Fields was sentenced to life imprisonment and is still serving that sentence today.

2. After the First Step Act became law, Mr. Fields sought relief under section 404(b) of the Act. Mr. Fields argued that if he were to be sentenced today, his guidelines range would be lower because of the Fair Sentencing Act. Furthermore, because of the elimination of USSG § 4B1.2's residual clause, he would no longer be

subject to the career offender provision.[5] Under the current version of the guidelines, Mr. Fields noted his applicable range would be 77 to 96 months' imprisonment, enhanced to 120 months. Mr. Fields also argued there were numerous 18 U.S.C. § 3553(a) factors which warranted a reduction. He advocated for a re-sentencing based on the current version of the guidelines, or at the very least, a variance from the 2004 Guidelines to the current range.

The government conceded Mr. Fields was eligible for a reduction but argued the court should not consider the current guidelines manual or any sentence below the unenhanced range calculated at the original sentencing. According to the government Mr. Fields was not entitled to a plenary resentencing or the consideration of any intervening changes in the law which have occurred since his original sentencing. His guidelines range, therefore, would remain the same. The government suggested the court reduce Mr. Fields sentence to somewhere within the 262 to 327 month range.

The district court reduced Mr. Fields' sentence to 270 months' imprisonment, to be followed by eight years of supervised release. The court referenced the restrictions on a sentencing court under 18 U.S.C. § 3582(c)(2), concluding the same restrictions applied to motions filed pursuant to the First Step Act. The district court

[5] Without the residual clause, Mr. Fields' Washington assault convictions no longer qualify as "crimes of violence" *See United States v. Slade,* 873 F.3d 712, 716 (9th Cir. 2017) (Washington's second-degree assault is not a "crime of violence" according to the guidelines); *United States v. Sandoval,* 390 F.3d 1077, 1081 (9th Cir. 2004) (Washington's third-degree assault offense is not categorically a crime of violence). Mr. Fields no longer has the requisite two prior convictions for drug offenses or crimes of violence to support the career offender enhancement.

ultimately agreed with the government that Mr. Fields was not entitled to a full resentencing, and for that reason remained a career offender. The court did not address Mr. Fields' request for a variance or reference how the newly imposed sentence would align with similarly situated defendants sentenced today.

3. On appeal, Mr. Fields argued the district court erred by refusing to consider present-day law and facts when resentencing him. He also argued the sentence imposed by the court was unreasonable. As to the law, Mr. Fields argued the district court erred in failing to consider all the intervening changes which had come about since the time of his original sentencing. As to the facts, he contended the district court erred in failing to consider the section 3553(a) factors using present-day information about Mr. Fields' circumstances.

The government did not dispute that intervening changes to the law meant Mr. Fields no longer qualified to be sentenced as a career offender. Nevertheless, the government argued the district court correctly determined it was prohibited from considering the non-career offender guideline.

After oral argument, the Eleventh Circuit affirmed. The court concluded that

> [u]nder our binding precedent, Fields cannot succeed on his argument that the district court should have reexamined his career-offender status and that he should have benefitted from more recent Sentencing Guidelines. The changes in the Guidelines relating to Fields' career offender status were not mandated by the relevant provisions of the Fair Sentencing Act, and Fields may pursue a reduction in sentence under the First Step Act for only "covered offenses" (*i.e.* certain crack-cocaine convictions).

Fields, No. 19-13927, 2021 WL 4163784, at *3 (11th Cir. Sept. 14, 2021).

REASONS FOR GRANTING THE WRIT

I. THIS PETITION PRESENTS THE SAME QUESTION AS *CONCEPCION V. UNITED STATES* AND SHOULD BE HELD PENDING RESOLUTION OF THAT CASE.

To ensure similar treatment of similar cases, the Court routinely holds petitions that implicate the same issue as other cases 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) (noting that the Court has "[granted, vacated, and remanded ('GVR'd')] in light of a wide range of developments, including [its] own decisions"); *id*. at 181 (Scalia, J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted in order that (if appropriate) they may be 'GVR'd' when the case is decided." (emphasis omitted)).

This petition presents the same question as *Concepcion v. United States*, No. 20-1650, on which this Court recently granted certiorari. 2021 WL 4464217. 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* Part II.

The outcome of this case is governed by the outcome of *Concepcion*. If this Court rules that courts must or may consider intervening legal developments when imposing a reduced sentence under Section 404, then the district court in this case erred in failing to consider the guidelines range which applies to Mr. Fields because he no longer qualifies as a career offender.

Given the parity of issue 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.) (GVR'ing for further consideration in light of *Borden v. United States*, 141 S. Ct. 1817 (2021)); *Vickers v. United States*, No. 20-7280, 2021 WL 2519058 (June 21, 2021) (mem.) (same); *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) (GVR'ing for further consideration in light of *Dorsey*, 567 U.S. 260); *Robinson v. United States*, 567 U.S. 948 (2012) (same).

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

1. If Mr. Fields were sentenced in the Third, Fourth, Tenth or D.C. Circuits, the district court would have either reconsidered his career offender status or recalculated his Guidelines range based on current law and facts. The decision below permitted the district court to ignore any changes.

The Fourth Circuit has held that intervening legal changes affecting career-offender designations must be considered when imposing a reduced sentence under section 404. *United States v. Chambers,* 956 F.3d 667 (2020). The court held the text of section 404(b) instructs courts to "impose a reduced sentence," and "when 'imposing' a new sentence, a court … must recalculate the guidelines range." *Id.* at 672. When considering that new range, a court "must" examine all sentencing factors, *id.* at 674, which includes updated facts about the "history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1). *See United States v. McDonald,* 986 F.3d 402, 412

(4th Cir. 2021) (remanding for failure to consider post-sentencing conduct in First Step Act resentencing).

Second, the Fourth Circuit held that nothing in section 404 "preclude[s] the court from applying intervening case law." *Chambers*, 956 F.3d at 672. Therefore, the court explained it would "pervert Congress's intent to maintain a career offender designation that is as wrong today as it was" when the defendant was originally sentenced, especially when the defendant was resentenced under a Guidelines range four times higher than the correct range. *Id*. at 673. Comparing errors in an original sentencing based on intervening case law to a "typo," the court held that "self-circumscrib[ing] a sentencing court's authority under the First Step Act would not only subvert Congress's will but also undermine judicial integrity." *Id*. at 674.

The Third Circuit has similarly held that the First Step Act requires a district court to calculate the current Guidelines range at the time of resentencing—incorporating any legal changes to the Guidelines since the original sentencing—and resentence based on renewed consideration of the sentencing factors, which includes updated facts. *See United States v. Easter*, 975 F.3d 318, 325-26 (3d Cir. 2020). The court stated that resentencing under section 404 must "include [] an accurate calculation of the *amended* guidelines range at the *time of resentencing* and thorough *renewed* consideration" of the sentencing factors. *Id.* (emphasis added) (citation omitted). Because the district court failed to consider updated facts about the defendant, the court remanded. *Id. at* 322, 327. In adopting this rule, the Third

Circuit specifically cited and endorsed the rationale of the Fourth Circuit in *Chambers*. *Id*. at 325-26.

The Tenth Circuit also agrees with the Fourth Circuit that intervening case law must be considered when resentencing under the First Step Act. In *United States v. Brown*, the court emphasized the "importance of calculating the Guideline range correctly" prior to any sentencing. 974 F.3d 1137, 1144 (10th Cir. 2020). Any error in that range is "implicitly adopt[ed]" as a legal conclusion by a district court. *Id*. at 1145. Therefore, as "a clarification of what the law always was," intervening case law demonstrates that a prior sentence was premised on error—and a court "is not obligated to err again." *Id*. When the district court refused to consider how intervening circuit precedent impacted the defendant's career offender designation, the Tenth Circuit remanded with instructions that the district court "*shall* consider [defendant's] challenge to his career offender status." *Id*. at 1146 (emphasis added). However, unlike the Fourth and Third Circuits, the Tenth Circuit does not permit use of updated Guidelines. *Id.* at 1144 ("[T]he First Step Act also does not empower the sentencing court to rely on revised Guidelines instead of the Guidelines used at the original sentencing.").

The D.C. Circuit agrees that district courts must consider all § 3553(a) factors as they exist at the time of the First Step Act proceeding. In *United States v. White*, 984 F.3d 76, 90 (D.C. Cir. 2020), the D.C. Circuit made clear that "[t]hose factors include consideration of the defendant's post-sentencing behavior." Furthermore, the D.C. Circuit added, "the resentencing decision must be procedurally reasonable and

supported by a sufficiently compelling justification." *Id.* at 91 (internal quotation marks omitted). "Nothing less is sufficient to meet the goals of the Fair Sentencing Act and the First Step Act to provide a remedy for defendants who bore the brunt of a racially disparate sentencing scheme." *Id.* Because the district court in *White* had "ma[de] no reference to the extensive mitigating evidence" that the defendants had offered, the D.C. Circuit remanded for the district court to consider that evidence. *See id.* at 93.

By contrast, five circuits, hold that district courts need not consider intervening legal developments or updated Guidelines and facts when resentencing under the First Step Act. In *Maxwell*, the Sixth Circuit concluded that the First Step Act requires the resentencing court to change "just one variable" from the original sentencing—the change to the statutory penalties under the Fair Sentencing Act— and does not require the resentencing court to consider other intervening legal or factual developments. 991 F.3d 685, 689 (6th Cir. 2021). The Sixth Circuit went on to conclude "a district court could reasonably reject reliance on later legal changes unrelated to the First Step Act out of concern regarding disparities with other similarly situated defendants." *Id.* at 693 (quotation omitted). The Sixth Circuit recognized that its ruling split with the Fourth Circuit's decision in *Chambers*. *See id.* at 690.

The Second, Seventh, and Eighth Circuits reach the same result as the Sixth Circuit. *See, e.g.*, *United States v. Moore*, 975 F.3d 84, 90, 91 n.36 (2d Cir. 2020) (holding "*only* that the First Step Act does not *obligate* a district court to consider post-sentencing developments (emphasis added)); *United States v. Shaw*, 957 F.3d 734, 741-

42 (7th Cir. 2020) (permitting, but not requiring, courts to look at sentencing factors "anew"); *United States v. Harris*, 960 F.3d 1103, 1106 (8th Cir. 2020), *cert. denied*, No. 20-6870, 2021 WL 666739 (U.S. Feb. 22, 2021) ("First Step Act sentencing *may* include consideration of the defendant's advisory range under the current guidelines." (emphasis added)).

At the other end of the spectrum and taking the most extreme approach, the Fifth, Ninth and Eleventh Circuits completely *forbid* district courts from considering any intervening case law or updated Guidelines and do not require district courts to consider updated facts. In *United States v. Hegwood*, 934 F.3d 414, 415 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 285 (2019), the defend- ant was designated a career offender during his original sentencing. By the time of his First Step Act motion, intervening circuit precedent established that the defendant's predicate offenses should not have qualified him for the career offender enhancement. The Fifth Circuit rejected the defendant's arguments that he should receive a renewed, legally accurate Guidelines calculation along with a reapplication of the sentencing factors with- out inclusion of his erroneous career-offender status. *See id.* at 417-18. The court reasoned that the "as if" clause of section 404 meant nothing but changes in the Fair Sentencing Act could be considered. *Id.* at 418. It described the First Step Act procedure as requiring a district court to "plac[e] 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." *Id.* at 418-19 (emphasis added). Thus, the court affirmed the district court's refusal to consider the career offender status issue. The result was

application of a Guidelines range of 151-188 months as opposed to the correct range of 77-96 months. *See id.* at 416. Additionally, the court did not require consideration of updated facts. *See id.* at 418. The Fourth Circuit explicitly rejected the Fifth Circuit's conclusion in *Hegwood* as "not persuasive." *Chambers*, 956 F.3d at 676.

The Ninth and Eleventh Circuits both take the same approach as the Fifth Circuit. In *United States v. Kelley*, the Ninth Circuit acknowledged it was adopting the Fifth Circuit's reasoning and thereby "deepen[ing] a circuit split." 962 F.3d 470, 475-76 (9th Cir. 2020), *pet. for cert. filed* Mar. 15, 2021. In so doing, the court rejected the Fourth Circuit's approach in two ways. First, it permitted—but did not require—consideration of sentencing factors, including updated facts. *Id.* at 474, 479. Second, it agreed with the Fifth Circuit that the "as if" clause of section 404 strictly limits the scope of what a district court can consider—reasoning that a court has "no authority" to consider any "changes in law other than sections 2 and 3 of the Fair Sentencing Act." *Id.* at 476. Like the court in *Hegwood*, the Ninth Circuit in *Kelley* affirmed a district court's refusal to correct the defendant's career-offender status that had been established as erroneous by intervening circuit precedent. *See id.* at 474.

In *United States v. Denson*, the Eleventh Circuit followed the same approach on intervening law, prohibiting the district court from considering any legal changes other than changes to sections 2 and 3 of the Fair Sentencing Act, and requiring application of the "original guidelines calculations." 963 F.3d 1080, 1089 (11th Cir. 2020) (citing *Hegwood*, 934 F.3d at 418). The Eleventh Circuit then relied on *Denson* when denying Mr. Fields' appeal.

This petition thus presents the same question presented in *Concepcion*. The district court determined Mr. Fields' was still a career offender, despite changes in the law indicating to the contrary. But had Mr. Fields been sentenced in the Third, Fourth, or Tenth Circuits, the district court would have had to consider the amended guidelines which now apply to him – namely *not* § 4B1.1, the career offender guideline. And that would have resulted in a guidelines range of 120 months —a sentence Mr. Fields has already served. Had he been sentenced in the First, Second, Sixth, Seventh, or Eighth Circuits, the district court would have at least had the *option* to consider the amended guidelines. But because he was sentenced in the Eleventh Circuit, the district court was required to only substitute in the new statutory range, and leave the remainder of the guidelines' calculations unchanged, even though they would not apply today.

Given that this petition presents the same question presented on the same split as *Concepcion*, 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 the 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"). Imposing a sentence 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 Guidelines 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 any amendments to the Guidelines, which in this case would have lowered Mr. Fields' applicable 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 afford carte blanche relief; it instead granted certain federal prisoners a vehicle to go to court and request relief. *See, e.g.*, *United States* v. *Wirsing*, 943 F.3d 175, 186 (4th Cir. 2019) (explaining "[t]he First Step Act provides a vehicle for defendants sentenced under a starkly disparate regime to seek relief"). And in so doing, it 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.* But tying judges' hands to old 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 applied the current version of the Guidelines, along with any changes since the time of an original sentence, 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 endeavor so, 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 con- ducting the new sentencing. "In effect, it 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 whose offenses occurred after August 3, 2010, facing significantly less-harsh penalties than those defendants whose offenses occurred 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—one based on other intervening changes in the law. It is absurd to think Congress limited the reach of a remedial statute removing an arbitrary date-based right to relief with another arbitrary date-based right to relief. Not in the subsection of the statute entitled "Limitations." Nor in the section defining the defendants who are eligible for relief. But by implication in a sentence that gives courts the authority to impose reduced sentences on defendants previously subject to the harsh, pre-Fair Sentencing Act statutory regime.

IV. THE QUESTION PRESENTED IS IMPORTANT.

The question presented is obviously important, as this Court has already confirmed by granting certiorari on a case presenting the same question. Like in *Concepcion*, the question presented 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 the First Step Act. Mr. Fields' case is a prime example: He remains sentenced as a career offender, even though, had intervening law been taken into account, he no longer would be. The importance cannot be understated. Decades of imprisonment are at stake depending on whether intervening law applies at First Step Act proceedings.

CONCLUSION

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

Respectfully submitted,

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