APPENDIX--A--ORDER OF DENIAL

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

VS.

CASE NO. 6:04-cr-104-JA-LHP

BENNIE C. RIVERA

ORDER

The Court previously denied Defendant Bennie C. Rivera's Motion for a Reduced Sentence under Section 404 and 603 of the First Step Act (Doc. No. 356, filed October 22, 2019; Doc. No. 360, filed January 3, 2020; and Doc. No. 373, filed May 24, 2022). Having considered Defendant's pending Motion in Pursuant to the Fair Sentence Act of 2010 Section 404(B) (Doc. No. 379, filed November 14, 2022) and the Government's Response thereto (Doc. No. 381, filed November 30, 2022), it is **ORDERED** that

Defendant's Motion in Pursuant to the Fair Sentence Act of 2010 Section 404(B) (Doc. No. 379) is **DENIED**.

DONE and **ORDERED** in Orlando, Florida, on December 1st, 2022.

JOHN ANTOON II
United States District Judge

Copies furnished to:
United States Attorney
United States Probation Office

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APPENDIX --B
CONCEPCION V. UNITED STATES, 213 L.ED 2D 731
DORSEY V. UNITED STATES, 183 L.ED 2D 250 (2012).

213 LED2D 731, _ US _ CONCEPCION v. UNITED STATES

CARLOS CONCEPCION, Petitioner

vs.

UNITED STATES

597 US ___, 142 S Ct ___, 213 L Ed 2d 731, 2022 US LEXIS 3070

[No. 20-1650]

Argued January 19, 2022.

Decided June 27, 2022.

DECISION

District court erred in believing that it did not have discretion to consider petitioner's arguments that intervening changes of law and fact supported his motion under First Step Act because district court adjudicating such motion had to consider, when raised, intervening changes of law or changes of fact in adjudicating First Step Act motion.

Prior history: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, 991 F.3d 279, 2021 U.S. App. LEXIS 7442

SUMMARY

Overview: HOLDINGS: [1]-The district court erred in believing that it did not have the discretion to consider petitioner's arguments that intervening changes of law and fact supported his motion under the First Step Act because a district court adjudicating a motion under the First Step Act had to consider, when raised, intervening changes of law (such as changes to the Sentencing Guidelines) or changes of fact (such as behavior in prison) in adjudicating a First Step Act motion. By its terms, however, the First Step Act does not compel courts to exercise their discretion to reduce any sentence based on those arguments.

Outcome: Judgment reversed; case remanded. 5-4 decision; 1 dissent.

RESEARCH REFERENCES

18 U.S.C.S. §§ 1152, 1153, 1162; 25 U.S.C.S. § 1321; 132 Stat. 5222

Moore's Federal Practice § 635.02 (Matthew Bender 3d ed.)

L Ed Digest, Criminal Law § 74

L Ed Index, Sentence or Punishment

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Sentencing judge discretion - sources and types of evidence

L Ed Digest: Criminal Law § 69

1. There is a longstanding tradition in American law, dating back to the dawn of the Republic, that a judge at sentencing considers the whole person before him or her as an individual. In line with this history, federal courts today generally exercise a wide discretion in the sources and types of evidence used to craft appropriate sentences. When a defendant appears for sentencing, the sentencing court considers the defendant on that day, not on the date of his offense or the date of his conviction. Similarly, when a defendant's sentence is set aside on appeal, the district court at resentencing can (and in many cases, must) consider the defendant's conduct and changes in the United States Sentencing Guidelines since the original sentencing. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

First Step Act - sentence reduction

L Ed Digest: Criminal Law § 74

2. The First Step Act of 2018 authorizes district courts to reduce the prison sentences of defendants convicted of certain offenses involving crack cocaine. The Act allows a district court to impose a reduced sentence as if the revised penalties for crack cocaine enacted in the Fair Sentencing Act of 2010 were in effect at the time the offense was committed. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

First Step Act - consideration of intervening changes

L Ed Digest: Criminal Law § 74

3. It is only when Congress or the Constitution limits the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, that a district court's discretion to consider information is restrained. Nothing in the First Step Act of 2018 contains such a limitation. Because district courts are always obligated to consider nonfrivolous arguments presented by the parties, the First Step Act requires district courts to consider intervening changes when parties raise them. By its terms, however, the First Step Act does not compel courts to exercise their discretion to reduce any sentence based on those arguments. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

First Step Act - sentence reduction

L Ed Digest: Criminal Law § 74

4. The First Step Act of 2018 authorizes district courts to impose a reduced sentence for qualifying movants as if §§ 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed. Pub. L. 115-391, § 404(b), 132 Stat. 5222. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

Initial sentencing and later reduction - judicial discretion

L Ed Digest: Criminal Law § 74

5. Federal courts historically have exercised broad sentencing discretion to consider all relevant information at an initial sentencing hearing, consistent with their responsibility to sentence the whole person before them. That discretion also carries forward to later proceedings that may modify an original sentence. Such discretion is bounded only when Congress or the Constitution expressly limits the type of information a district court may consider in modifying a sentence. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

Initial sentencing - judicial discretion

L Ed Digest: Criminal Law § 69

6. There is a long and durable tradition that sentencing judges enjoy discretion in the sort of information they may consider at an initial sentencing proceeding. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

Initial sentencing - judicial discretion - aggravating and mitigating factors

L Ed Digest: Criminal Law § 69

7. Federal judges exercising sentencing discretion have always considered a wide variety of aggravating and mitigating factors relating to the circumstances of both the offense and the offender. Indeed, it has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. Accordingly, a federal judge in deciding to impose a sentence may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

Resentencing - rehabilitation evidence

L Ed Digest: Criminal Law § 69

8. The discretion federal judges hold at initial sentencings characterizes sentencing modification hearings. It is clear that when a defendant's sentence has been set aside on appeal and his case remanded for resentencing, a district court may consider evidence of a defendant's rehabilitation since his prior sentencing. Accordingly, federal courts resentencing individuals whose sentences were vacated on appeal regularly consider evidence of rehabilitation developed after the initial sentencing. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

Resentencing - consideration of Guidelines changes

L Ed Digest: Criminal Law § 69

9. Where district courts must calculate new United States Sentencing Guidelines ranges as part of resentencing proceedings, courts have also considered unrelated Guidelines changes in their discretion. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

Initial sentencing and modification - limits

L Ed Digest: Criminal Law § 74

10. The only limitations on a court's discretion to consider any relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the

Constitution. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

Initial sentencing - factors

L Ed Digest: Criminal Law § 69

11. At an initial sentencing, Congress has provided generally that no limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense when deciding what sentence to impose. 18 U.S.C.S. § 3661. Congress has, however, expressly prohibited a district court in crafting an initial sentence from considering a defendant's need for rehabilitation in support of a prison sentence. 18 U.S.C.S. § 3582(a). (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

Initial sentencing - factors

L Ed Digest: Criminal Law § 69

12. Congress has expressly limited district courts to considering only certain factors in sentencing. For example, in determining whether to in-clude a term of supervised release, and the length of any such term, Congress has expressly precluded district courts from considering the need for retribution. 18 U.S.C.S. § 3583(c). (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

Sentence reduction - factors

L Ed Digest: Criminal Law § 74

13. Congress has imposed express statutory limitations on one type of sentencing modification proceeding. 18 U.S.C.S. § 3582(c)(2) provides that in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the United States Sentencing Commission the court may reduce the term of imprisonment, after considering the factors set forth in 18 U.S.C.S. § 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission. For those proceedings, Congress expressly cabined district courts' discretion by requiring courts to abide by the Sentencing Commission's policy statements. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

First Step Act - district courts' sentencing discretion

L Ed Digest: Criminal Law § 74

14. Nothing in the text and structure of the First Step Act of 2018 expressly, or even implicitly, overcomes the established tradition of district courts' sentencing discretion. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

First Step Act - district courts' discretion

L Ed Digest: Criminal Law § 74

15. The text of the First Step Act of 2018 does not so much as hint that district courts are prohibited from considering evidence of rehabilitation, disciplinary infractions, or unrelated United States Sentencing Guidelines changes. The only two limitations on district courts' discretion appear in § 404(c): A district court may not consider a First Step Act motion if the movant's sentence was already reduced under the Fair Sentencing Act or if the court considered and rejected a motion under the First Step Act. By its terms, § 404(c) does not prohibit district courts from considering any arguments in favor of, or against, sentence modification. In fact, § 404(c) only underscores that a district court is not required to modify a sentence for any reason. Drawing meaning from silence is particularly inappropriate in the sentencing context, for Congress has shown that it knows how to direct sentencing practices in express terms. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

Sentence modification - factors

L Ed Digest: Criminal Law § 74

16. The consistent historic norm is that a district court can consider any information in crafting a new or modified sentence, subject to congressional or constitutional limits. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

Sentence modification - district court's discretion

L Ed Digest: Criminal Law § 74

17. 18 U.S.C.S. § 3582(c)(1)(B) is simply a gateway provision that refers to whichever statute expressly permits the sentencing modification. It does not impose any substantive or procedural limits on a district court's discretion; for those details, it refers to the statute authorizing the sentence modification. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

Fair Sentencing Act - applied retroactively

L Ed Digest: Criminal Law § 69

18. Section 404(b) of the First Step Act of 2018 does not erect additional limitations on available relief. The term ``as if'' simply enacts the First Step Act's central goal: to make retroactive the changes in the Fair Sentencing Act of 2010. That language is necessary to overcome 1 U.S.C.S. § 109, which creates a presumption that Congress does not repeal federal criminal penalties unless it says so expressly. To defeat the presumption established by this statute, Congress needed to make clear that the Fair Sentencing Act applied retroactively. Notably, the ``as if'' clause requires a district court to apply the Fair Sentencing Act as if it applied at the time of the commission of the offense, not at the time of the original sentencing. Thus, the language Congress enacted in the First Step Act of 2018 specifically requires district courts to apply the legal changes in the Fair Sentencing Act when calculating the Guidelines if they chose to modify a sentence. The ``as if'' clause does not, however, limit the information a district court may use to inform its decision whether and how much to reduce a sentence. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

First Step Act - retroactive application of Fair Sentencing Act

L Ed Digest: Criminal Law § 74

19. A district court cannot recalculate a movant's benchmark United States Sentencing Guidelines range in any way other than to reflect the retroactive application of the Fair Sentencing Act. Rather, the First Step Act of 2018 directs district courts to calculate the Guidelines range as if the Fair Sentencing Act's amendments had been in place at the time of the offense. That Guidelines range anchors the sentencing proceeding. The district court may then consider postsentencing conduct or nonretroactive changes in selecting or rejecting an appropriate sentence, with the properly calculated Guidelines range as the benchmark. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

First Step Act - judicial discretion

L Ed Digest: Criminal Law § 74

20. The First Step Act of 2018 does not require a district court to recalculate a movant's Guidelines in any respect other than applying the Fair Sentencing Act of 2010. In any event, it is a feature of the sentencing law that different judges may respond differently to the same sentencing arguments. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

First Step Act - factors

L Ed Digest: Criminal Law § 74

21. The First Step Act of 2018 allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence pursuant to the First Step Act. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

First Step Act - consideration of parties' arguments

L Ed Digest: Criminal Law § 74

22. When deciding a First Step Act of 2018 motion, district courts bear the standard obligation to explain their decisions and demonstrate that they considered the parties' arguments. It is well established that a district court must generally consider the parties' nonfrivolous arguments before it. Of course, a district court is not required to be persuaded by every argument parties make, and it may, in its discretion, dismiss arguments that it does not find compelling without a detailed explanation. Nor is a district court required to articulate anything more than a brief statement of reasons. Nothing in the First Step Act contravenes those background principles. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

First Step Act - consideration of parties' arguments

L Ed Digest: Criminal Law § 74

23. When it comes to a reasoned explanation, the First Step Act of 2018 leaves much to the judge's own professional judgment. The First Step Act does not require courts to expressly rebut each argument made by the parties. In excising its discretion, the court is free to agree or disagree with any of the policy arguments raised before it. All that the First Step Act requires is that a district court make clear that it reasoned through the parties' arguments. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

First Step Act - deferential appellate review

L Ed Digest: Criminal Law § 74

24. The broad discretion that the First Step Act of 2018 affords to district courts counsels in favor of deferential appellate review. As a general matter, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence. Section 404(c) of the First Step Act confers particular discretion, clarifying that the Act does not require a court to reduce any sentence. Other than legal errors in recalculating the

United States Sentencing Guidelines to account for the Fair Sentencing Act's changes, appellate review should not be overly searching. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

First Step Act - sentence reduction - consideration of arguments

L Ed Digest: Criminal Law § 74

25. Put simply, the First Step Act of 2018 does not require a district court to accept a movant's argument that evidence of rehabilitation or other changes in law counsel in favor of a sentence reduction, or the Government's view that evidence of violent behavior in prison counsels against providing relief. Nor does the First Step Act require a district court to make a point-by-point rebuttal of the parties' arguments. All that is required is for a district court to demonstrate that it has considered the arguments before it. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

First Step Act - sentence reduction - consideration of arguments

L Ed Digest: Criminal Law § 74

26. The First Step Act of 2018 does not require a district court to be persuaded by the nonfrivolous arguments raised by the parties before it, but it does require the court to consider them. (Sotomayor, J., joined by Thomas, Breyer, Kagan, and Gorsuch, JJ.)

SYLLABUS

Congress passed the Fair Sentencing Act of 2010 to correct the wide disparity between crack and powder cocaine sentencing. Section 2 of that Act increased the amount of crack cocaine needed to trigger a 5-to-40-year sentencing range from 5 grams to 28 grams. § 2(a)(2), 124 Stat. 2372. The Fair Sentencing Act did not apply retroactively, but in 2011, the Sentencing Commission amended the Sentencing Guidelines to lower the Guidelines range for crack-cocaine offenses and applied that reduction retroactively for some defendants. In 2018, Congress enacted the First Step Act, authorizing district courts to ``impose a reduced sentence" on defendants serving sentences for certain crack-cocaine offenses ``as if sections 2 and 3 of the Fair Sentencing Act . . . were in effect at the time the covered offense was committed." Pub. L. 115-391, § 404(b), 132 Stat. 5222.

In 2007, petitioner Carlos **Concepcion** pleaded guilty to one count of distributing five or more grams of crack cocaine in violation of 21 U.S.C. § 841(a)(1), and he was sentenced in 2009 to 19 years (228 months) in prison. When **Concepcion** was sentenced, he qualified for sentencing

as a ``career offender." The career offender provision and other enhancements increased Concepcion's Sentencing Guidelines range from 57 to 71 months to 262 to 327 months. Because **Concepcion** was sentenced as a career offender, he was not eligible for relief under the Sentencing Commission's 2011 amendment.

In 2019, **Concepcion** filed a pro se motion for a sentence reduction under the First Step Act. He argued that he was serving a sentence for a ``covered offense" because § 2 of the Fair Sentencing Act ``modified" the statutory penalties for his conviction under 21 U.S.C. § 841(a)(1). **Concepcion** contended that retroactive application of the Fair Sentencing Act lowered his Guidelines range from 262 to 327 months to 188 to 235 months. The Government conceded Concepcion's eligibility for relief but opposed the motion, emphasizing that Concep-<***pg. 738***> cion's original sentence of 228 months fell within the new Guidelines range of 188 to 235 months, and citing factors in Concepcion's prison record that the Government believed counseled against a sentence reduction. In his reply brief, represented by counsel, **Concepcion** made two primary arguments in support of a reduced sentence. First, he argued that he would no longer be considered a career offender because one of his prior convictions had been vacated and his remaining convictions would not constitute crimes of violence that trigger the enhancement. Without the enhancement, **Concepcion** contended that his revised Guidelines range should be 57 to 71 months. Second, **Concepcion** pointed to postsentencing evidence of rehabilitation.

The District Court denied Concepcion's motion. It declined to consider that **Concepcion** would no longer qualify as a career offender based on its judgment that the First Step Act did not authorize such relief. App. to Pet. for Cert. 72a. The District Court did not address Concepcion's evidence of rehabilitation or the Government's countervailing evidence of Concepcion's disciplinary record. The Court of Appeals affirmed in a divided opinion, and added to the disagreement among the Circuits as to whether a district court deciding a First Step Act motion must, may, or may not consider intervening changes of law or fact.

Held:

The First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence. Pp. ___ - ___, 213 L. Ed. 2d, at 744-751.

(a) Federal courts historically have exercised broad discretion to consider all relevant information at an initial sentencing hearing, consistent with their responsibility to sentence the whole person before them. That discretion also carries forward to later proceedings that may modify an original sentence. District courts' discretion is bounded only when Congress or the Constitution expressly limits the type of information a district court may consider in modifying a sentence. Pp. ___ - ___, 213 L. Ed. 2d, at 744-747.

(1) There is a ``long" and ``durable" tradition that sentencing judges ``enjo[y] discretion in the sort of information they may consider" at an initial sentencing proceeding. Dean v. United States, 581 U.S. 62, 66, 137 S. Ct. 1170, 197 L. Ed. 2d 490. That unbroken tradition also characterizes federal sentencing history. Indeed, ``[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." Koon v. United States, 518 U.S. 81, 113, 116 S. Ct. 2035, 135 L. Ed. 2d 392. Accordingly, a federal judge in deciding to impose a sentence ``may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." United States v. Tucker, 404 U.S. 443, 446, 92 S. Ct. 589, 30 L. Ed. 2d 592. Pp. ___ - ___, 213 L. Ed. 2d, at 744-745.

(2) The discretion federal judges hold at initial sentencings also characterizes sentencing modification hearings. The Court in Pepper v. United States, 562 U.S. 476, 131 S. Ct. <***pg. 739**> 1229, 179 L. Ed. 2d 196, found it ``clear that when a defendant's sentence has been set aside on appeal and his case remanded for resentencing, a district court may consider evidence of a defendant's rehabilitation since his prior sentencing." Id., at 490, 131 S. Ct. 1229, 179 L. Ed. 2d 196. Accordingly, federal courts resentencing individuals whose sentences were vacated on appeal regularly consider evidence of rehabilitation, or evidence of rule breaking in prison, developed after the initial sentencing. Where district courts must calculate new Guidelines ranges as part of resentencing proceedings, courts have also exercised their discretion to consider nonretroactive Guidelines changes. In some cases, a district court is prohibited from recalculating a Guidelines range to account for nonretroactive Guidelines amendments, but the court may nevertheless find those amendments to be germane when deciding whether to modify a sentence at all, and if so, to what extent. Pp. ___ - ___, 213 L. Ed. 2d, at 745-746.

(3) The only limitations on a court's discretion to consider relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution. See Pepper, 562 U.S., at 489, n. 8, 131 S. Ct. 1229, 179 L. Ed. 2d 196; Mistretta v. United States, 488 U.S. 361, 364, 109 S. Ct. 647, 102 L. Ed. 2d 714. Congress has placed such limits where it deems them appropriate. See 18 U.S.C. §§ 3582(a), 3583(c). Congress has further imposed express statutory limitations on one type of sentencing modification proceeding, expressly cabining district courts' discretion by requiring courts to abide by the Sentencing Commission's policy statements. See also § 3582(c)(1)(A) (compassionate release). Pp. ___ - ___, 213 L. Ed. 2d, at 746-747.

(b) Congress in the First Step Act did not contravene well-established sentencing practices. Pp. ___ - ___, 213 L. Ed. 2d, at 747-751.

(1) Nothing in the text and structure of the First Step Act expressly, or even implicitly, overcomes the established tradition of district courts' sentencing discretion. The text of the First Step Act does not so much as hint that district courts are prohibited from considering evidence of rehabilitation, disciplinary infractions, or unrelated Guidelines changes. The only two limitations on district courts' discretion appear in § 404(c): A district court may not consider a First Step Act motion if the movant's sentence was already reduced under the Fair Sentencing Act or if the court considered and rejected a motion under the First Step Act. Neither limitation applies here. By its terms, § 404(c) does not prohibit district courts from considering any arguments in favor of, or against, sentence modification. In fact, § 404(c) only underscores that a district court is not required to modify a sentence for any reason. ``Drawing meaning from silence is particularly inappropriate" in the sentencing context, ``for Congress has shown that it knows how to direct sentencing practices in express terms." Kimbrough v. United States, 552 U.S. 85, 103, 128 S. Ct. 558, 169 L. Ed. 2d 481.

The ``as if " clause in § 404(b) does not impose any limit on the information a district court can consider in exercising its discretion under the First Step Act. The term ``as if " sim-<***pg. 740***> ply enacts the First Step Act's central goal: to make retroactive the changes in the Fair Sentencing Act, necessary to overcome 1 U.S.C. § 109, which creates a presumption that Congress does not repeal federal criminal penalties unless it says so ``expressly." The ``as if " clause also directs district courts to apply the Fair Sentencing Act as if it applied at the time of the commission of the offense, not at the time of the original sentencing, suggesting that Congress did not intend to constrain district courts to considering only the original sentencing record. Thus, the ``as if " clause requires district courts to apply the legal changes in the Fair Sentencing Act when recalculating a movant's Guidelines, but it does not limit the information a district court may use to inform its decision whether and how much to reduce a sentence. Pp. ___ - ___, 213 L. Ed. 2d, at 747-748.

(2) Consistent with this text and structure, district courts deciding First Step Act motions regularly have considered evidence of postsentencing rehabilitation and unrelated Guidelines amendments when raised by the parties. First Step Act movants have amassed prison records of over a decade. See § 404(a), 132 Stat. 5222 (requiring the movant to have been sentenced for an offense ``committed before August 3, 2010"). Those records are naturally of interest to judges authorized by the First Step Act to reduce prison sentences or even to release movants immediately. Likewise, when deciding whether to grant First Step Act motions and in deciding how much to reduce sentences, courts have looked to postsentencing evidence of violence or prison infractions as probative. Moreover, when raised by the parties, district courts have considered nonretroactive Guidelines amendments to help inform whether to reduce sentences at all, and if so, by how much. Nothing express or implicit in the First Step Act suggests that these

courts misinterpreted the Act in considering such relevant and probative information. Pp. ___ - ___, 213 L. Ed. 2d, at 748-750.

(3) The Court therefore holds that the First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence pursuant to the First Step Act. When deciding a First Step Act motion, district courts bear the standard obligation to explain their decisions and demonstrate that they considered the parties' nonfrivolous arguments. See Golan v. Saada, 596 U.S. ___, ___, 142 S. Ct. ___, 213 L. Ed. 2d 203. The district court is not required to articulate anything more than a brief statement of reasons. See Rita v. United States, 551 U.S. 338, 356, 127 S. Ct. 2456, 168 L. Ed. 2d 203.

The broad discretion that the First Step Act affords to district courts also counsels in favor of deferential appellate review. See Solem v. Helm, 463 U.S. 277, 290, n. 16, 103 S. Ct. 3001, 77 L. Ed. 2d 637. Section 404(c) of the First Step Act confers particular discretion because the Act does not ``require a court to reduce any sentence." Other than legal errors in recalculating the Guidelines to account for the Fair Sentencing Act's changes, see Gall v. United States, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445, appellate review should not be overly searching. Pp. ___ - ___, 213 L. Ed. 2d, at 750-751.<***pg. 741**>

991 F.3d 279, reversed and remanded.

Sotomayor, J., delivered the opinion of the Court, in which Thomas, Breyer, Kagan, and Gorsuch, JJ., joined. Kavanaugh, J., filed a dissenting opinion, in which Roberts, C. J., and Alito and Barrett, JJ., joined.

APPEARANCES OF COUNSEL ARGUING CASE

Charles L. McCloud argued the cause for petitioner.

Matthew Guarnieri argued the cause for respondent.

OPINION

Justice *Sotomayor* delivered the opinion of the Court.

[1] There is a longstanding tradition in American law, dating back to the dawn of the Republic, that a judge at sentencing considers the whole person before him or her ``as an individual." Koon v. United States, 518 U.S. 81, 113, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996). In line with this history, federal courts today generally ``exercise a wide discretion in the sources

and types of evidence used" to craft appropriate sentences. Williams v. New York, 337 U.S. 241, 246, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949). When a defendant appears for sentencing, the sentencing court considers the defendant on that day, not on the date of his offense or the date of his conviction. Pepper v. United States, 562 U.S. 476, 492, 131 S. Ct. 1229, 179 L. Ed. 2d 196 (2011). Similarly, when a defendant's sentence is set aside on appeal, the district court at resentencing can (and in many cases, must) consider the defendant's conduct and changes in the Federal Sentencing Guidelines since the original sentencing. Ibid.

Congress enacted the First Step Act of 2018 against that backdrop. **[2]** The First Step Act authorizes district courts to reduce the prison sentences of defendants convicted of certain offenses involving crack cocaine. The Act allows a district court to impose a reduced sentence ``as if " the revised penalties for crack cocaine enacted in the Fair Sentencing Act of 2010 were in effect at the time the offense was committed. The question in this case is whether a district court adjudicating a motion under the First Step Act may consider other intervening changes of law (such as changes to the Sentencing Guidelines) or changes of fact (such as behavior in prison) in adjudicating a First Step Act motion.

The Court holds that they may. **[3]** It is only when Congress or the Constitution limits the scope of information that a district court may consider in deciding whether, and to what extent, to modify a sentence, that a district court's discretion to consider information is restrained. Nothing in the First Step Act contains such a limitation. Because district courts are always obligated to consider nonfrivolous arguments presented by the parties, the First Step Act requires district courts to consider intervening changes when parties raise them. By its terms, however, the First Step Act does not compel courts to exercise their discretion to reduce any sentence based on those arguments.

The District Court in this case declined to consider petitioner Carlos Concepcion's arguments that intervening changes of law and fact supported his motion, erroneously believing that it did not have the discretion to do so, and the Court of Appeals affirmed. The Court now reverses.

I

A

In 2007, **Concepcion** pleaded guilty <***pg. 742**> to one count of distributing five or more grams of crack cocaine in violation of 21 U.S.C. § 841(a)(1) (2006 ed.). **Concepcion** admitted that he sold 13.8 grams of crack cocaine, and he was sentenced in 2009 to 19 years (228 months) in prison. Two features of his sentencing are relevant here. First, **Concepcion** was sentenced under a scheme that created a 100-to-1 disparity between crack-cocaine and powder-cocaine

offenders. At the time **Concepcion** was sentenced, an offense involving five or more grams of crack cocaine resulted in a statutory sentencing range of 5 to 40 years' imprisonment; it required 100 times as much powder cocaine to trigger the same penalties. Second, when **Concepcion** was initially sentenced, he qualified as a ``career offender." The career offender provision, together with other enhancements, increased Concepcion's Guidelines range from 57 to 71 months to 262 to 327 months.

Both of these features of Concepcion's sentencing have since been altered. Just one year after **Concepcion** was sentenced, Congress passed the Fair Sentencing Act of 2010 to correct the harsh disparities between crack and powder cocaine sentencing. Section 2 of that Act increased the amount of crack cocaine needed to trigger the 5-to-40-year sentencing range from 5 grams to 28 grams. § 2(a)(2), 124 Stat. 2372. The Sentencing Commission then retroactively amended the Sentencing Guidelines to lower the Guidelines range for crack-cocaine offenses, but that amendment did not benefit all prisoners serving sentences handed down during the 100-to-1 regime. See United States Sentencing Commission, Guidelines Manual App. C, Amdt. 750 (Supp. Nov. 2011) (USSG). **Concepcion** was not eligible for retroactive relief under that 2011 Sentencing Commission's amendment because he was sentenced under the career offender enhancement, but he became eligible to have his sentence reduced in 2018, when Congress passed the First Step Act. **[4]** The First Step Act authorized district courts to ``impose a reduced sentence" for qualifying movants ``as if sections 2 and 3 of the Fair Sentencing Act . . . were in effect at the time the covered offense was committed." Pub. L. 115-391, § 404(b), 132 Stat. 5222.

B

Concepcion filed a pro se motion under the First Step Act in 2019. He argued that he was serving a sentence for a ``covered offense" because § 2 of the Fair Sentencing Act ``modified" the statutory penalties for his conviction under 21 U.S.C. § 841(a)(1). **Concepcion** contended that retroactive application of the Fair Sentencing Act lowered his Guidelines range from 262 to 327 months to 188 to 235 months. The Government conceded Concepcion's eligibility for relief and his calculation of the Guidelines but opposed the motion, emphasizing that Concepcion's original sentence of 228 months fell within the new Guidelines range of 188 to 235 months. While recognizing Concepcion's participation in various programs in prison, the Government detailed ``troubling behaviors such as '[f]ighting (12/19/2017); Interfering with Staff (11/15/2012); and Possession of a Weapon' " in Concepcion's prison records that, in the Government's view, counseled against a sentence reduction. Electronic Case Filing in No. 1:07-cr-10197 (Mass.) (ECF), Doc. 78, pp. 4-5, n. 4.

In his reply brief, represented by <***pg. 743**> counsel, **Concepcion** made two primary arguments in support of a reduced sentence. First, he argued that he would no longer be

considered a career offender under the amended Guidelines, because one of his prior convictions had been vacated and his remaining convictions would no longer be considered crimes of violence that trigger the enhancement.[1] Without the career offender enhancement, **Concepcion** argued that his revised Guidelines range should be 57 to 71 months. Second, **Concepcion** pointed to postsentencing evidence of rehabilitation. **Concepcion** highlighted his successfully completed drug and vocational programming, as well as his stable reentry plan. He also submitted a letter from a Bureau of Prisons chaplain who attested to Concepcion's spiritual growth while incarcerated.

The District Court denied Concepcion's motion. It adopted the Government's argument that if the Court ``considered only the changes in law that the Fair Sentencing Act enacted, [Concepcion's] sentence would be the same." App. to Pet. for Cert. 71a. The court declined to consider that **Concepcion** would no longer qualify as a career offender on the ground that the First Step Act ``does not authorize such relief." Id., at 72a. In doing so, the District Court adopted the reasoning of the Fifth Circuit, which understood the First Step Act to require 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 74a (quoting United States v. Hegwood, 934 F.3d 414, 418 (CA5 2019)). The District Court did not address Concepcion's evidence of rehabilitation or the Government's countervailing evidence of Concepcion's disciplinary record.

The Court of Appeals affirmed in a divided opinion. The court interpreted the First Step Act as requiring a ``two-step inquiry." 991 F.3d 279, 289 (CA1 2021). At the first step of that inquiry, a district court decides whether a movant should be resentenced at all, considering only the changes wrought by the Fair Sentencing Act. Ibid. If the district court answers in the affirmative at the first step, it may then, in its discretion, consider new factual or legal developments in determining how to resentence the movant. Id., at 289-290. Judge Barron dissented, rejecting the panel's bifurcated approach. In his view, the First Step Act requires only one step of analysis, at which district courts have ``substantial discretion" to consider evidence of rehabilitation and Guidelines changes. Id., at 293, 309-310.

The Court of Appeals opinion added to the disagreement among the Circuits as to whether a district court deciding a First Step Act motion must, may, or may not consider intervening changes of law or fact.[2] This Court granted certiorari to resolve <***pg. 744**> this disagreement. 594 U.S. ___, 142 S. Ct. 54, 210 L. Ed. 2d 1024 (2021).

II

``From the beginning of the Republic, federal judges were entrusted with wide sentencing

discretion." K. Stith & J. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9 (1998) (Stith & Cabranes). **[5]** Federal courts historically have exercised this broad discretion to consider all relevant information at an initial sentencing hearing, consistent with their responsibility to sentence the whole person before them. That discretion also carries forward to later proceedings that may modify an original sentence. Such discretion is bounded only when Congress or the Constitution expressly limits the type of information a district court may consider in modifying a sentence.

A

[6] There is a ``long" and ``durable" tradition that sentencing judges ``enjo[y] discretion in the sort of information they may consider" at an initial sentencing proceeding. Dean v. United States, 581 U.S. 62, 66, 137 S. Ct. 1170, 197 L. Ed. 2d 490 (2017).[3] This history dates back to before the founding: ``[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." Williams, 337 U.S., at 246. Early state and English courts broadly recognized this discretion. See, e.g., Rex v. Bunts, 2 T. R. 683, 100 Eng. Rep. 368 (K. B. 1788) (``[W]hen any defendant shall be brought up for sentence on any indictment" the court shall hear evidence from the prosecution and the defense in determining an appropriate sentence); State v. Summers, 98 N.C. 702, 705, 4 S.E. 120, 121 (1887) (``It was competent for [the trial judge] to hear such evidence as he might deem necessary and proper to aid his judgment and discretion in determining the punishment to be imposed"); State v. Reeder, 79 S. C. 139, 141, 60 S.E. 434, 435 (1908) (rejecting claim that trial court erred in considering aggravating evidence at sentencing, and explaining that ``[t]he circuit judge merely permitted himself to be informed as to the character of the accused and the circumstances of the crime, so that he might be able to exercise his discretion intelligently and pronounce a just sentence").

That unbroken tradition characterizes federal sentencing history as well. **[7]** ``Federal judges exercising sentencing discretion have always <***pg. 745***> considered a wide variety of aggravating and mitigating factors relating to the circumstances of both the offense and the offender." Stith & Cabranes 14. Indeed, ``[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." Koon, 518 U.S., at 113, 116 S. Ct. 2035, 135 L. Ed. 2d 392; see, e.g., United States v. Randall, 27 F. Cas. 696, 708 (No. 16,118) (DC Ore. 1869) (considering the defendant's ``former good reputation" in imposing sentence); United States v. Nye, 27 F. Cas. 210, 211, F. Cas. No. 15906 (No. 15,906) (CC Mass. 1855) (considering ``palliating circumstance[s]," including that the defendants were ``sober, and fit for duty," in imposing

sentence); Lyon's Case, 15 F. Cas. 1183, 1185, F. Cas. No. 8646 (No. 8,646) (CC Vt. 1798) (considering the ``reduced condition of [the defendant's] estate" in imposing sentence). Accordingly, a federal judge in deciding to impose a sentence ``may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." United States v. Tucker, 404 U.S. 443, 446, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972).

B

[8] The discretion federal judges hold at initial sentencings also characterizes sentencing modification hearings. Relying on Williams and Koon, the Court in Pepper found it ``clear that when a defendant's sentence has been set aside on appeal and his case remanded for resentencing, a district court may consider evidence of a defendant's rehabilitation since his prior sentencing." 562 U.S., at 490, 131 S. Ct. 1229, 179 L. Ed. 2d 196. Pepper reached that conclusion in light of the ``federal sentencing framework" that allows sentencing judges to consider the `` 'fullest information possible concerning the defendant's life and characteristics.' " Id., at 488, 490, 131 S. Ct. 1229, 179 L. Ed. 2d 196.

Accordingly, federal courts resentencing individuals whose sentences were vacated on appeal regularly consider evidence of rehabilitation developed after the initial sentencing. See, e.g., United States v. Rodriguez, 2020 U.S. Dist. LEXIS 86886, 2020 WL 2521551, *5 (SDNY, May 18, 2020) (considering the movant's ``exemplary conduct during a lengthy period of incarceration"); United States v. Raifsnider, 2020 U.S. Dist. LEXIS 54642, 2020 WL 1503527, *3 (D Kan., Mar. 30, 2020) (considering that the movant ``has completed his GED, taken hundreds of hours of programming offered by the Bureau of Prisons, and is taking college classes"). Similarly, district courts in resentencing proceedings frequently consider evidence of violence and rule breaking in prison. See, e.g., United States v. Riley, 785 Fed. Appx. 282, 285 (CA6 2019) (considering a `` 'series of disciplinary violations while in the Bureau of Prisons' "); United States v. Diaz, 486 Fed. Appx. 979, 980 (CA3 2012) (considering ``infractions while in prison, e.g., possession of marijuana").

[9] Where district courts must calculate new Guidelines ranges as part of resentencing proceedings, courts have also considered unrelated Guidelines changes in their discretion. See, e.g., United States v. Frates, <***pg. 746**> 896 F.3d 93, 101-102 (CA1 2018) (distinguishing between recalculating a Guidelines range based on nonretroactive intervening changes of law and considering those changes as a matter of ``discretion to select an appropriate sentence"); United States v. Taylor, 648 F.3d 417, 425 (CA6 2011) (``[T]he district court can consider subsequent amendments to the Guidelines for purposes of fashioning an appropriate sentence [at resentencing]"); United States v. Gilmore, 599 F.3d 160, 166-167 (CA2 2010) (considering

subsequently updated Guidelines as ``evidence of society's judgment of the seriousness of [the movant's] offense"). In many cases, a district court is prohibited from recalculating a Guidelines range in light of nonretroactive Guidelines amendments, but the court may find those amendments to be germane when deciding whether to modify a sentence at all, and if so, to what extent.

C

[10] The only limitations on a court's discretion to consider any relevant materials at an initial sentencing or in modifying that sentence are those set forth by Congress in a statute or by the Constitution. See Pepper, 562 U.S., at 489, n. 8, 131 S. Ct. 1229, 179 L. Ed. 2d 196 (``Of course, sentencing courts' discretion . . . is subject to constitutional constraints"); Mistretta v. United States, 488 U.S. 361, 364, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989) (``[T]he scope of judicial discretion with respect to a sentence is subject to congressional control").

Congress is not shy about placing such limits where it deems them appropriate. **[11]** At an initial sentencing, Congress has provided generally that ``[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense" when deciding what sentence to impose. 18 U.S.C. § 3661. Congress has, however, expressly prohibited a district court in crafting an initial sentence from considering a defendant's need for rehabilitation in support of a prison sentence. See § 3582(a); Tapia v. United States, 564 U.S. 319, 328, 131 S. Ct. 2382, 180 L. Ed. 2d 357 (2011).

In other aspects of sentencing, **[12]** Congress also has expressly limited district courts to considering only certain factors. For example, in determining whether to include a term of supervised release, and the length of any such term, Congress has expressly precluded district courts from considering the need for retribution. See § 3583(c); id., at 326, 131 S. Ct. 2382, 180 L. Ed. 2d 357.

[13] Congress has further imposed express statutory limitations on one type of sentencing modification proceeding. Section 3582(c)(2) provides that

``in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

For those proceedings, Congress expressly cabined district courts' discretion by requiring courts to abide by the Sentencing Commission's policy statements. See also § 3582(c)(1)(A) <***pg. 747**> (permitting district courts to grant compassionate release in certain circumstances if

``such a reduction is consistent with applicable policy statements issued by the Sentencing Commission").[4]

III

A

Congress in the First Step Act simply did not contravene this well-established sentencing practice. **[14]** Nothing in the text and structure of the First Step Act expressly, or even implicitly, overcomes the established tradition of district courts' sentencing discretion.

The first section of the First Step Act, § 404(a), sets out who is eligible for relief:

``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 . . . that was committed before August 3, 2010." 132 Stat. 5222.

The second section, § 404(b), describes what relief is available for the parties who meet § 404(a)'s criteria:

``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 . . . were in effect at the time the covered offense was committed." 132 Stat. 5222.

The third section, § 404(c), places two explicit limitations on available relief:

``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 . . . 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." 132 Stat. 5222.

[15] The text of the First Step Act does not so much as hint that district courts are prohibited from considering evidence of rehabilitation, disciplinary infractions, or unrelated Guidelines changes. The only two limitations on district courts' discretion appear in § 404(c): A district court may not consider a First Step Act motion if the movant's sentence was already reduced under the Fair Sentencing Act or if the court considered and rejected a motion under the First Step Act. Neither of those limitations applies here. By its terms, § 404(c) does not prohibit district courts from considering any arguments in favor of, or against, sentence modification. In fact, § 404(c)

only underscores that a district court is not required to <*pg. 748> modify a sentence for any reason. ``Drawing meaning from silence is particularly inappropriate" in the sentencing context, ``for Congress has shown that it knows how to direct sentencing practices in express terms." Kimbrough v. United States, 552 U.S. 85, 103, 128 S. Ct. 558, 169 L. Ed. 2d 481 (2007).[5]

Nor did Congress hide any limitations on district courts' discretion outside of § 404(c). **[18]** Section 404(b) does not erect any additional such limitations. The term ``as if " simply enacts the First Step Act's central goal: to make retroactive the changes in the Fair Sentencing Act. That language is necessary to overcome 1 U.S.C. § 109, which creates a presumption that Congress does not repeal federal criminal penalties unless it says so ``expressly." To defeat the presumption established by this statute, Congress needed to make clear that the Fair Sentencing Act applied retroactively. Notably, the ``as if " clause requires a district court to apply the Fair Sentencing Act as if it applied at the time of the commission of the offense, not at the time of the original sentencing. Had Congress intended to constrain district courts to consider only the record as it existed at the time of the original sentencing, Congress would have written the ``as if " clause to refer to that sentencing, not the commission of the offense. Thus, the language Congress enacted in the First Step Act specifically requires district courts to apply the legal changes in the Fair Sentencing Act when calculating the Guidelines if they chose to modify a sentence.[6] The ``as if " clause does not, however, limit the information a district court may use to inform its decision whether and how much to reduce a sentence.

B

Consistent with this text and structure, district courts deciding First Step Act motions regularly have considered evidence of postsentencing rehabilitation and unrelated Guidelines amendments when raised by the parties. By definition, First Step Act movants have amassed prison records of over a decade. See § 404(a), 132 Stat. 5222 (requiring the movant to have <*pg. 749> been sentenced for an offense ``committed before August 3, 2010"). Those records are naturally of interest to judges authorized by the First Step Act to reduce prison sentences or even to release movants immediately. See, e.g., United States v. Crawford, 483 F. Supp. 3d 378, 381 (ND W. Va. 2020) (considering that the movant earned his GED in prison, obtained a carpentry certification through a local community college, and was sanctioned for only ``two minor write-ups" in the nine years preceding his motion); United States v. Henderson, 399 F. Supp. 3d 648, 656 (WD La. 2019) (considering that the movant ``ha[d] not seen his children in eight years," that he had ``possible employment opportunities . . . upon his release," and that he ``ha[d] received only two incident reports" while incarcerated); United States v. Mitchell, 2019 U.S. Dist. LEXIS 107396, 2019 WL 2647571, *8 (D DC, June 27, 2019) (considering that the movant ``incurred no disciplinary infractions over his last fourteen years in prison" and that the

movant would no longer be considered a career offender based on an intervening change of law).

Likewise, when deciding whether to grant First Step Act motions and in deciding how much to reduce sentences, courts have looked to postsentencing evidence of violence or prison infractions as probative. See, e.g., United States v. Rose, 841 Fed. Appx. 328, 329 (CA2 2021) (affirming partial denial of motion where the district court relied on the movant's ``lengthy history of prison disciplinary infractions, which included many recent violent infractions"); United States v. Barlow, 544 F. Supp. 3d 491, 505 (NJ 2021) (considering, in denying motion, that the movant was disciplined in prison seven times, including ``three times for possessing a dangerous weapon," ``once for possessing marijuana," and ``once for fighting"); United States v. Slutzkin, 2019 U.S. Dist. LEXIS 190754, 2019 WL 5696122, *8 (Conn., Nov. 4, 2019) (considering in denying motion the movant's ``behavior once incarcerated [as] perhaps the greatest concern to the Court," in light of ``25 disciplinary citations while in state incarceration and six more in federal prison").[7]

Moreover, when raised by the parties, district courts have considered nonretroactive Guidelines amendments to help inform whether to reduce sentences at all, and if so, by how much. See, e.g., United States v. Coachman, 2020 U.S. Dist. LEXIS 222182, 2020 WL 6939890, *3 (ND Fla., June 22, 2020) (considering that the movant ``would not qualify for career offender status" at the time of his sentence modification hearing); United States v. Frederick, 2020 U.S. Dist. LEXIS 17466, 2020 WL 555302, *4 (WD Pa., Feb. 4, 2020) (considering ``the fact that [the movant] would not qualify as a career offender under the current version of the career offender provisions . . . as a factor favoring the exercise of the discretionary relief that may be awarded"); United States v. Newton, 2019 U.S. Dist. LEXIS 33356, 2019 WL 1007100, *5 (WD Va., Mar. 1, 2019) (considering that the <***pg. 750***> movant, ``if he were sentenced today," would no longer qualify for career offender status). Nothing express or implicit in the First Step Act suggests that these courts misinterpreted the Act in considering such relevant and probative information.[8]

C

[21] The Court therefore holds that the First Step Act allows district courts to consider intervening changes of law or fact in exercising their discretion to reduce a sentence pursuant to the First Step Act.

It follows, under the Court's sentencing jurisprudence, that **[22]** when deciding a First Step Act motion, district courts bear the standard obligation to explain their decisions and demonstrate that they considered the parties' arguments. It is well established that a district court must generally consider the parties' nonfrivolous arguments before it. See Golan v. Saada, 596 U.S. ___, ___, 142 S. Ct. ___, 213 L. Ed. 2d 203 (2022). Of course, a district court is not required to

be persuaded by every argument parties make, and it may, in its discretion, dismiss arguments that it does not find compelling without a detailed explanation. Nor is a district court required to articulate anything more than a brief statement of reasons. See Rita v. United States, 551 U.S. 338, 356, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007). Nothing in the First Step Act contravenes those background principles.

[23] When it comes to that reasoned explanation, the First Step Act `` 'leaves much . . . ' '' Chavez-Meza v. United States, 585 U.S. ___, ___, 138 S. Ct. 1959, 201 L. Ed. 2d 359 (2018) (quoting Rita, 551 U.S., at 356, 127 S. Ct. 2456, 168 L. Ed. 2d 203). The First Step Act does not ``require courts to expressly rebut each argument'' made by the parties. United States v. Maxwell, 991 F.3d 685, 694 (CA6 2021). In exercising its discretion, the court is free to agree or disagree with any of the policy arguments raised before it. Cf. Kimbrough, 552 U.S., at 111, 128 S. Ct. 558, 169 L. Ed. 2d 481. All that the First Step Act requires is that a district court make clear that it ``reasoned through [the parties'] arguments.'' 991 F.3d, at 693.

[24] The broad discretion that the First Step Act affords to district courts also counsels in favor of deferential appellate review. As a general matter, ``it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular <***pg. 751***> sentence.'' Solem v. Helm, 463 U.S. 277, 290, n. 16, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983). Section 404(c) of the First Step Act confers particular discretion, clarifying that the Act does not ``require a court to reduce any sentence.'' Other than legal errors in recalculating the Guidelines to account for the Fair Sentencing Act's changes, see Gall v. United States, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007), appellate review should not be overly searching.

[25] Put simply, the First Step Act does not require a district court to accept a movant's argument that evidence of rehabilitation or other changes in law counsel in favor of a sentence reduction, or the Government's view that evidence of violent behavior in prison counsels against providing relief. Nor does the First Step Act require a district court to make a point-by-point rebuttal of the parties' arguments. All that is required is for a district court to demonstrate that it has considered the arguments before it.

* * *

[26] The First Step Act does not require a district court to be persuaded by the nonfrivolous arguments raised by the parties before it, but it does require the court to consider them. The contrary judgment of the Court of Appeals for the First Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SEPARATE OPINION

Justice *Kavanaugh*, with whom The Chief Justice, Justice *Alito*, and Justice *Barrett* join, dissenting.

Beginning in the mid-1980s, Congress prescribed higher criminal sentences for crack-cocaine offenses than for powder-cocaine offenses involving the same amounts of cocaine. In 2010, Congress enacted the Fair Sentencing Act to narrow that crack/powder disparity by lowering the sentencing ranges for certain crack-cocaine offenses. But the Act lowered those crack-cocaine sentencing ranges only prospectively-that is, for crack-cocaine offenders who were sentenced on or after the Act's effective date of August 3, 2010.

The First Step Act of 2018 changed that. It provided that the 2010 Fair Sentencing Act's lower crack-cocaine sentencing ranges would also apply retroactively to offenders who were sentenced before August 3, 2010. But how to implement that change? Congress did not mandate a specific across-the-board reduction to all pre-August 3, 2010, crack-cocaine sentences. Instead, the First Step Act authorized district courts, on motion, to ``impose a reduced sentence as if '' the lower sentencing ranges for crack-cocaine offenses ``were in effect at the time the covered offense was committed.'' § 404(b), 132 Stat. 5222.

The straightforward question in this case is whether district courts in First Step Act sentence-modification proceedings may reduce sentences based not only on the changes to the crack-cocaine sentencing ranges, but also on other unrelated legal or factual changes that have occurred since the original sentencing. For many crack-cocaine offenders who were sentenced before August 3, 2010, the most significant such change is a non-<*pg. 752> retroactive 2016 Sentencing Guidelines amendment that substantially altered the career-offender guideline and would significantly lower many of those offenders' Guidelines ranges. See United States Sentencing Commission, Guidelines Manual, App. C, Amdt. 798 (Nov. 2021).

The Court today concludes that district courts in First Step Act sentence-modification proceedings may reduce sentences based not only on the changes to the crack-cocaine sentencing ranges, but also on other unrelated legal or factual changes that have occurred since the original sentencing.

I respectfully disagree. The text of the First Step Act authorizes district courts to reduce sentences based only on changes to the crack-cocaine sentencing ranges, not based on other unrelated changes that have occurred since the original sentencing. In other words, the First Step Act directs district courts to answer one fundamental question: What would the offender's

sentence have been if the lower crack-cocaine sentencing ranges had been in effect back at the time of the original sentencing?

The Court sidesteps the text of the Act and equates sentence-modification proceedings with plenary sentencing proceedings. But as this Court has recognized, there are ``fundamental differences between sentencing and sentence-modification proceedings." Dillon v. United States, 560 U.S. 817, 830, 130 S. Ct. 2683, 177 L. Ed. 2d 271 (2010). The finality of criminal judgments is essential to the operation of the criminal justice system. See Calderon v. Thompson, 523 U.S. 538, 555-556, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998); United States v. Frady, 456 U.S. 152, 166, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982). Once a federal sentence becomes final, a court may alter that sentence ``only in very limited circumstances." Pepper v. United States, 562 U.S. 476, 501-502, n. 14, 131 S. Ct. 1229, 179 L. Ed. 2d 196 (2011). As relevant here, Congress has made clear that courts may reduce ``an imposed term of imprisonment to the extent" such a reduction is ``expressly permitted by statute." 18 U.S.C. § 3582(c)(1)(B) (emphasis added).

The First Step Act states that the district court ``may . . . impose a reduced sentence as if" the lower sentencing ranges for crack-cocaine offenses ``were in effect at the time the covered offense was committed." § 404(b), 132 Stat. 5222. By its terms, the First Step Act authorizes consideration only of the lower sentencing ranges for crack-cocaine offenses. The First Step Act does not authorize consideration of unrelated intervening legal or factual changes. Indeed, the relevant provision of the First Step Act does not mention changes other than the lower sentencing ranges for crack-cocaine offenses. Therefore, the First Step Act does not ``expressly permi[t]" reductions based on those unrelated intervening changes. 18 U.S.C. § 3582(c)(1)(B).

In support of its conclusion that district courts in First Step Act sentence-modification proceedings may consider other unrelated changes, the Court cites Pepper and similar decisions. See ante, at ___ - ___, 213 L. Ed. 2d, at 745-746. But those decisions involved resentencings, not sentence-modification proceedings. See Pepper, 562 U.S., at 486-487, 131 S. Ct. 1229, 179 L. Ed. 2d 196. Those cases therefore do not <*pg. 753> support the Court's approach here. To reiterate, for sentence-modification proceedings, Congress has declared that courts may reduce a sentence only as ``expressly permitted by statute." 18 U.S.C. § 3582(c)(1)(B). And the First Step Act does not authorize consideration of unrelated intervening legal or factual changes since the original sentencing.

The Court's disregard of the text of the First Step Act and § 3582(c)(1)(B) will create significant and inexplicable sentencing inequities. Consider the following. First Step Act sentence-modification proceedings are available only for offenders who were sentenced before August 3, 2010. So a crack-cocaine offender such as **Concepcion** who was sentenced before August 3, 2010, may now obtain the benefit of the non-retroactive 2016 change to the career-offender guideline. But a crack-cocaine offender who was sentenced from August 3, 2010,

to July 31, 2016, will not be able to obtain the benefit of the non-retroactive 2016 change to the career-offender guideline. What sense does that make? That anomalous outcome will amount to a ``haphazard windfall'' for crack-cocaine offenders sentenced before August 3, 2010. United States v. Lancaster, 997 F.3d 171, 180 (CA4 2021) (Wilkinson, J., concurring in judgment).

Still more inequities will ensue because the Court affords district courts blanket discretion to choose between two vastly different approaches to First Step Act proceedings. To be sure, the Court properly notes that district courts must begin a First Step Act proceeding by calculating the new Guidelines range based solely on the changes to the crack-cocaine sentencing ranges. See ante, at ___, n. 6, 213 L. Ed. 2d, at 748. So far, so good. But district courts then have free rein either to take into account-or to completely disregard-other intervening changes since the original sentencing.

Needless to say, different district courts will choose different approaches. The Court's decision will therefore produce massive inequities in how the First Step Act is implemented on the ground. Those inequities further illustrate why today's decision is wrong as a matter of statutory interpretation: Congress enacted the First Step Act to provide a targeted retroactive reduction in crack-cocaine sentencing ranges, not to unleash a sentencing free-for-all in the lower courts.

The Court's disregard of the text of the First Step Act is especially audacious because the Act was a heavily negotiated and vigorously debated piece of legislation. The Act reflects a compromise among competing interests. Not for the first time in a sentencing case, the Court's decision today unravels the legislative compromise reflected in the statutory text. The Court in effect green-lights district courts, if they wish, to make the 2016 amendment to the career-offender guideline retroactive in First Step Act proceedings-even though neither Congress nor the Sentencing Commission has made that amendment retroactive. Perhaps the Court's decision represents better sentencing policy. Perhaps not. But under the Constitution's separation of powers, this Court may not simply rewrite the First Step Act as the Court thinks best.

In sum, I would conclude that the First Step Act authorizes district courts to reduce a sentence based on <*pg. 754> changes to the crack-cocaine sentencing ranges, but not based on other unrelated legal or factual changes since the original sentencing. The Court holds otherwise. Therefore, I respectfully dissent.

FOOTNOTES

[1] In 2015, this Court held that the Armed Career Criminal Act's residual clause was unconstitutional, see Johnson v. United States, 576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed. 2d 569, prompting the Sentencing Commission to amend the identical clause of the career offender Guideline, see USSG App. C, Amdt. 798 (Supp. Aug. 2016). The Sentencing Commission did not apply the amendment retroactively.

2 Compare United States v. Collington, 995 F.3d 347, 355, 360 (CA4 2021) (must consider changed law and facts); United States v. Easter, 975 F.3d 318, 325-327 (CA3 2020) (same); United States v. Brown, 974 F.3d 1137, 1144-1145 (CA10 2020) (must consider intervening Circuit precedent); United States v. White, 984 F.3d 76, 93, 450 U.S. App. D.C. 287 (CADC 2020) (must consider changed facts), with United States v. Maxwell, 991 F.3d 685, 689 (CA6 2021) (may consider); United States v. Moore, 975 F.3d 84, 92, n. 36 (CA2 2020) (same);United States v. Harris, 960 F.3d 1103, 1106 (CA8 2020) (same); United States v. Shaw, 957 F.3d 734, 741-742 (CA7 2020) (same), with United States v. Denson, 963 F.3d 1080, 1089 (CA11 2020) (may not consider); United States v. Kelley, 962 F.3d 470, 475 (CA9 2020) (same); United States v. Hegwood, 934 F.3d 414, 418-419 (CA5 2019) (same).

3 The dissent invokes another background principle: the importance of ``finality of criminal judgments." Post, at ___, 213 L. Ed. 2d, at 752 (opinion of Kavanaugh, J.). No one doubts the importance of finality. Here, however, the Court interprets a statute whose very purpose is to reopen final judgments.

4 The dissent brushes aside this venerable tradition of discretion by emphasizing the differences between initial sentencings and sentence modification proceedings. See post, at ___ - ___, 213 L. Ed. 2d, at 752-753. Of course there are differences between the two, but the feature common to both is that only Congress and the Constitution limit the historic scope of district courts' discretion.

5 The dissent demands that Congress expressly specify the scope of information that a district court can consider in a sentencing modification proceeding. See post, at ___, 213 L. Ed. 2d, at 752. This gets it backward. **[16]** The consistent historic norm is that a district court can consider any information in crafting a new or modified sentence, subject to congressional or constitutional limits. See supra, at ___ - ___, 213 L. Ed. 2d, at 744-747. Moreover, the dissent's reliance on § 3582(c)(1)(B), post, at ___, 213 L. Ed. 2d, at 744, misses the point. **[17]** Section 3582(c)(1)(B) is simply a gateway provision that refers to whichever statute ``expressly permit[s]" the sentencing modification. Ibid. It does not impose any substantive or procedural limits on a district court's discretion; for those details, it refers to the statute authorizing the sentence modification. See United States v. Triestman, 178 F.3d 624, 629 (CA2 1999) (`` '[S]ubsection (c)(1)(B) simply notes the authority to modify a sentence if modification is permitted by statute' " (quoting S. Rep. No. 98-225 (1984)).

6 **[19]** A district court cannot, however, recalculate a movant's benchmark Guidelines range in any way other than to reflect the retroactive application of the Fair Sentencing Act. Rather, the First Step Act directs district courts to calculate the Guidelines range as if the Fair Sentencing Act's amendments had been in place at the time of the offense. That Guidelines range ``anchor[s]" the sentencing proceeding. Peugh v. United States, 569 U.S. 530, 541, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013). The district court may then consider postsentencing conduct or nonretroactive changes in selecting or rejecting an appropriate sentence, with the properly calculated Guidelines range as the benchmark.

7 In the dissent's view, each of these District Courts erred in considering evidence outside of the original sentencing record. See post, at ___ - ___, 213 L. Ed. 2d, at 751-752. Instead, the dissent's interpretation would require a district court adjudicating a First Step Act motion to decide whether, and by how much, to reduce a sentence based only on the original sentencing record. But again, the text of the First Step Act does not require that counterfactual procedure.

8 The dissent contends that permitting a district court to consider nonretroactive Guidelines amendments will create a disparity between First Step Act-eligible movants and other defendants. See post, at ___ - ___, 213 L. Ed. 2d, at 752-753. **[20]** To reiterate, the First Step Act does not require a district court to recalculate a movant's Guidelines in any respect other than applying the Fair Sentencing Act. See n. 6, supra. In any event, it is a feature of our sentencing law that different judges may respond differently to the same sentencing arguments. Cf. Kimbrough v. United States, 552 U.S. 85, 110, 128 S. Ct. 558, 169 L. Ed. 2d 481 (2007) (permitting, but not requiring, district courts to consider certain policy arguments at sentencing). Moreover, disparities are always unavoidable when some, but not all, defendants are permitted to move for modifications of an original sentence. Even the dissent's interpretation would create disparities between First Step Act movants and defendants eligible for a sentence reduction under the 2011 retroactive crack-cocaine Guidelines, see supra, at ___, 213 L. Ed. 2d, at 742, because the Commission permitted the latter group to argue postsentencing developments, see USSG § 1B1.10, comment, n. 1(B)(iii).

132SCT2321, 183 LED2D 250, 567 U.S. 260 DORSEY v. UNITED STATES

EDWARD DORSEY, Sr., Petitioner (No. 11-5683)
vs.
UNITED STATES

COREY A. HILL, Petitioner (No. 11-5721)
vs.
UNITED STATES

567 US 260, 132 S Ct 2321, 183 L Ed 2d 250, 2012 US LEXIS 4664

Argued April 17, 2012.

Decided June 21, 2012.

DECISION

More lenient penalty provisions of Fair Sentencing Act of 2010 (124 Stat. 2372), which took effect on August 3, 2010, held to apply to offenders who committed crack cocaine crime before, but were sentenced after, that date.

Prior history: 635 F.3d 336, 2011 U.S. App. LEXIS 4759 (No. 11-5683); 417 Fed. Appx. 560, 2011 U.S. App. LEXIS 7223 (No. 11-5721)

SUMMARY

Procedural posture: Petitioner defendants were convicted in separate trials of selling crack cocaine, and in both cases the trial judge found that changes Congress adopted in the Fair Sentencing Act (``FSA), 124 Stat. 2372, did not apply to petitioners because they committed their crimes before August 3, 2010, when the FSA took effect. The U.S. Court of Appeals for the Seventh Circuit affirmed, and the U.S. Supreme Court granted certiorari.

Overview: The first defendant sold 53 grams of crack cocaine in March 2007 and the second defendant sold 5.5 grams of crack cocaine in August 2008, and they were convicted of those offenses but sentenced after August 3, 2010, the effective day of the FSA. In both cases, the trial judge ruled that changes the FSA made to the Anti-Drug Abuse Act of 1986 which lowered the mandatory minimum sentences for individuals who were convicted of selling crack cocaine did not apply to either defendant because they committed their offenses before August 3, 2010, and the Seventh Circuit upheld those rulings. The Supreme Court held that the more lenient mandatory minimum provisions in the FSA applied to defendants who committed their crimes before August 3, 2010, but were sentenced after that date, including individuals such as the second defendant who were sentenced after August 3, 2010, but before November 1, 2010, when the U.S. Sentencing Commission adopted interim sentencing guidelines to implement the FSA.

Outcome: The Supreme Court vacated the Seventh Circuit's judgment in both cases and remanded both cases. 5-4 Decision; 1 dissent.<*pg. 251>

RESEARCH REFERENCES

1 U.S.C.S. § 109; 18 U.S.C.S. Appx., Federal Sentencing Guidelines

26 Moore's Federal Practice § 632.20 (Matthew Bender 3d ed.)

L Ed Digest, Criminal Law § 69

L Ed Index, Cocaine

ANNOTATION REFERENCES

Rule of Apprendi v. New Jersey (2000) 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348, and its progeny, as to proof of facts necessary to support criminal sentence-Supreme Court cases. 160 L. Ed. 2d 1163.

What constitutes ex post facto law prohibited by ex post facto clauses in Art. I, § 9, cl. 3 and Art. I, § 10, cl. 1 of Federal Constitution-Supreme Court cases. 131 L. Ed. 2d 1043.<*pg. 257>

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Sentences - powder cocaine - crack cocaine

L Ed Digest: Criminal Law § 69

1. Federal statutes impose mandatory minimum prison sentences upon those convicted of federal drug crimes. These statutes typically base the length of a minimum prison term upon the kind and amount of the drug involved. Until 2010, the Anti-Drug Abuse Act of 1986, 100 Stat. 3207, imposed upon an offender who dealt in powder cocaine the same sentence it imposed upon an offender who dealt in one-hundredth that amount of crack cocaine. In 2010, Congress enacted a new statute that reduced the crack-to-powder cocaine disparity from 100-to-1 to 18-to-1. Fair Sentencing Act, 124 Stat. 2372. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

Federal Sentencing Guidelines

L Ed Digest: Criminal Law § 69

2. The U.S. Sentencing Guidelines originate in the Sentencing Reform Act of 1984, 98 Stat. 1987. That statute created a U.S. Sentencing Commission instructed to write guidelines that judges would use to determine sentences imposed upon offenders convicted of committing federal crimes. 28 U.S.C.S. §§ 991, 994. Congress thereby sought to increase transparency, uniformity, and proportionality in sentencing. U.S. Sentencing Guidelines Manual § 1A1.3 (2011); 28 U.S.C.S. §§ 991(b)(1), 994(f). (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

Federal Sentencing Guidelines

L Ed Digest: Criminal Law § 69

3. The Sentencing Reform Act of 1984, 98 Stat. 1987, directed the U.S. Sentencing Commission to create in the U.S. Sentencing Guidelines categories of offense behavior and offender characteristics. U.S. Sentencing Guidelines Manual § 1A1.2 (2011); 28 U.S.C.S. § 994(a)-(e). A sentencing judge determines a Guidelines range by (1) finding the applicable offense level and offender category and then (2) consulting a table that lists proportionate sentencing ranges at the intersections of rows (marking offense levels) and columns (marking offender categories). U.S. Sentencing Guidelines Manual ch. 5, pt. A, Sentencing Table, §§ 5E1.2 and 7B1.4. The Guidelines, after telling the judge how to determine the applicable offense level and offender category, instruct the judge to apply the intersection's range in an ordinary case, but they leave the judge free to depart from that range in an unusual case. 18 U.S.C.S. § 3553(b); U.S. Sentencing Guidelines Manual §§ 1A1.2 and 1A1.4(b). The United States Supreme Court has held that the Guidelines are advisory. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

Federal Sentencing Guidelines - drug crimes

L Ed Digest: Criminal Law § 69

4. The U.S. Sentencing Guidelines determine most drug-crime offense levels in a special way. They set forth a Drug Quantity Table that lists amounts of various drugs and associates different amounts with different ``Base Offense Levels (to which a judge may add or subtract levels depending upon the ``specific characteristics of the offender's behavior). U.S. Sentencing Guidelines Manual <***pg. 252***> § 2D1.1. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

Federal sentencing - powder cocaine - crack cocaine

L Ed Digest: Criminal Law § 69

5. In 1986, Congress enacted a specific, drug-related sentencing statute, the Anti-Drug Abuse Act of 1986, 100 Stat. 3207. That statute set forth mandatory minimum penalties of 5 and 10 years applicable to a drug offender depending primarily upon the kind and amount of drugs involved in the offense. 21 U.S.C.S. § 841(b)(1)(A)-(C). The minimum applicable to an offender convicted of possessing with intent to distribute 500 grams or more of powder cocaine was 5 years, and for 5,000 grams or more of powder the minimum was 10 years. 21 U.S.C.S. § 841(b)(1)(A)(ii) and (B)(ii). The 1986 Drug Act, however, treated crack cocaine crimes as far more serious. It applied its 5-year minimum to an offender convicted of possessing with intent to distribute only 5 grams of crack (as compared to 500 grams of powder) and its 10-year minimum to one convicted of possessing with intent to distribute only 50 grams of crack (as compared to 5,000 grams of powder), thus producing a 100-to-1 crack-to-powder ratio. 21 U.S.C.S. § 841(b)(1)(A)(iii), (B)(iii). (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

Federal sentencing - statutes - Guidelines

L Ed Digest: Criminal Law § 69

6. The Anti-Drug Abuse Act of 1986, 100 Stat. 3207, like other federal sentencing statutes, interacts with the U.S. Sentencing Guidelines in an important way. Like other sentencing statutes, it trumps the Guidelines. Thus, ordinarily no matter what the Guidelines provide, a judge cannot sentence an offender to a sentence beyond the maximum contained in the federal statute setting forth the crime of conviction. Similarly, ordinarily no matter what range the Guidelines set forth, a sentencing judge must sentence an offender to at least the minimum prison term set forth in a statutory mandatory minimum. 28 U.S.C.S. § 994(a), (b)(1); U.S. Sentencing Guidelines Manual

§ 5G1.1. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

Federal sentencing - crack cocaine - powder cocaine

L Ed Digest: Criminal Law § 69

7. In 2010, Congress enacted the Fair Sentencing Act (``FSA), 124 Stat. 2372, into law. The FSA increased the drug amounts triggering mandatory minimums for crack cocaine trafficking from 5 grams to 28 grams in respect to the 5-year minimum sentence and from 50 grams to 280 grams in respect to the 10-year minimum sentence (while leaving powder cocaine at 500 grams and 5,000 grams respectively). FSA § 2(a), 124 Stat. 2372. The change had the effect of lowering the 100-to-1 crack-to-powder ratio to 18-to-1. The FSA also eliminated the 5-year mandatory minimum for simple possession of crack cocaine, FSA § 3, 124 Stat. 2372, instructed the U.S. Sentencing Commission to make such conforming amendments to the U.S. Sentencing Guidelines as it determined necessary to achieve consistency with other Guidelines provisions and applicable law, FSA § 8(2), 124 Stat. 2372, 2374, and directed the Commission to promulgate the guidelines, policy statements, or amendments provided for in the FSA as soon as practicable but not later than 90 days after the FSA took effect<***pg. 253***> . FSA § 8(1), 124 Stat. 2372, 2374. The FSA took effect on August 3, 2010, and the Commission promulgated conforming emergency Guidelines amendments that became effective on November 1, 2010. 75 Fed. Reg. 66188 (2010). A permanent version of those Guidelines amendments took effect on November 1, 2011. 76 Fed. Reg. 24960 (2011). (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

Saving statute - criminal law - repeal - penalties incurred

L Ed Digest: Statutes § 178, 257

8. A federal saving statute, Act of Feb. 25, 1871, § 4, 16 Stat. 432, phrased in general terms, provides that a new criminal statute that repeals an older criminal statute shall not change the penalties ``incurred under the older statute ``unless the repealing Act shall so expressly provide. 1 U.S.C.S. § 109. Case law makes clear that the word ``repeal applies when a new statute simply diminishes the penalties that the older statute set forth. Case law also makes clear that penalties are ``incurred under an older statute when an offender becomes subject to them, i.e., commits the underlying conduct that makes the offender liable. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

Federal Sentencing Guidelines

L Ed Digest: Criminal Law § 69

9. The Sentencing Reform Act of 1984 says that, regardless of when an offender's conduct occurs, the applicable U.S. Sentencing Guidelines are the ones in effect on the date the offender is sentenced, 18 U.S.C.S. § 3553(a)(4)(A)(ii), and the Fair Sentencing Act (``FSA), 124 Stat. 2372, requires the U.S. Sentencing Commission to change the Guidelines in the wake of the FSA's new minimums, making them consistent with other Guidelines provisions and applicable law. FSA § 8(2), 124 Stat. 2374. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

Fair Sentencing Act - applicability

L Ed Digest: Criminal Law § 69

10. Six considerations, taken together, convince the United States Supreme Court that Congress intended the Fair Sentencing Act's, 124 Stat. 2372, more lenient penalties to apply to those offenders whose crimes preceded August 3, 2010, but who are sentenced after that date. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

Saving statute - criminal penalties - powers of Congress

L Ed Digest: Statutes § 20, 257

11. The Act of Feb. 25, 1871, § 4, 16 Stat. 432, permits Congress to apply a new Act's more lenient penalties to pre-Act offenders without expressly saying so in the new Act. It is true that the 1871 Act uses the words ``expressly provide. 1 U.S.C.S. § 109. But the United States Supreme Court has long recognized that this saving statute creates what is in effect a less demanding interpretive requirement. That is because statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified. And Congress remains free to express any such intention either expressly or by implication as it chooses. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

<*pg. 254> Saving statute - powers of Congress

L Ed Digest: Statutes § 257

12. The United States Supreme Court has said that the Act of Feb. 25, 1871, § 4, 16 Stat. 432, cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment. And in a comparable context, the Court has

emphasized that the Administrative Procedure Act's use of the word ``expressly does not require Congress to use any ``magical passwords to exempt a later statute from the provision. Without requiring an ``express statement, the Court has described the necessary indicia of congressional intent by the terms ``necessary implication, ``clear implication, and ``fair implication, phrases it has used interchangeably. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

Saving statute - new criminal penalties - presumption

L Ed Digest: Evidence § 253; Statutes § 257

13. The United States Supreme Court has treated the Act of Feb. 25, 1871, § 4, 16 Stat. 432, as setting forth an important background principle of interpretation. The Court has also assumed Congress is well aware of the background principle when it enacts new criminal statutes. And the principle requires courts, before interpreting a new criminal statute to apply its new penalties to a set of pre-Act offenders, to assure themselves that ordinary interpretive considerations point clearly in that direction. Words such as ``plain import, ``fair implication, or the like reflect the need for that assurance. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

Federal sentencing - Guidelines - new penalties - presumption

L Ed Digest: Constitutional Law § 83; Criminal Law § 69; Evidence § 253

14. The Sentencing Reform Act of 1984 sets forth a special and different background principle. That statute says that when ``determining the particular sentence to be imposed in an initial sentencing, the sentencing court ``shall consider, among other things, the sentencing range established by the U.S. Sentencing Guidelines that are in effect on the date the defendant is sentenced. 18 U.S.C.S. § 3553(a)(4)(A)(ii). Although the Constitution's Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3, prohibits applying a new Act's higher penalties to pre-Act conduct, it does not prohibit applying lower penalties, and the U.S. Sentencing Commission has instructed sentencing judges to use the Guidelines Manual in effect on the date a defendant is sentenced, regardless of when the defendant committed the offense, unless doing so would violate the Ex Post Facto Clause. U.S. Sentencing Guidelines Manual § 1B1.11. Therefore, when the Commission adopts new, lower Guidelines amendments, those amendments become effective to offenders who committed an offense prior to the adoption of the new amendments but are sentenced thereafter. Just as the United States Supreme Court assumes Congress was aware of the background norm established by the Act of Feb. 25, 1871, § 4, 16 Stat. 432, so too does it assume that Congress was aware of this different background sentencingprinciple<***pg. 255***> . (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

Fair Sentencing Act - ``applicable law - natural meaning

L Ed Digest: Statutes § 166.7

15. Language in the Fair Sentencing Act (``FSA), 124 Stat. 2372, implies that Congress intended to follow the Sentencing Reform Act of 1984 background principle. A section of the FSA entitled ``Emergency Authority for United States Sentencing Commission requires the Commission to promulgate ``as soon as practicable (and not later than 90 days after August 3, 2010) ``conforming amendments to the U.S. Sentencing Guidelines that ``achieve consistency with other guideline provisions and applicable law. FSA § 8, 124 Stat. 2372, 2374. Read most naturally, ``applicable law refers to the law as changed by the FSA, including the provision reducing the crack cocaine mandatory minimums. FSA § 2(a), 124 Stat. 2372. As the Commission understood this provision, achieving consistency with ``other guideline provisions means reducing the base offense levels for all crack cocaine amounts proportionally (using the new 18-to-1 ratio), including the offense levels governing small amounts of crack cocaine that did not fall within the scope of the mandatory minimum provisions. 75 Fed. Reg. 66191. And consistency with ``other guideline provisions and with prior Commission practice would require application of the new Guidelines amendments to offenders who committed their offense prior to the new amendments' effective date but were sentenced thereafter. U.S. Sentencing Guidelines § 1B1.11(a). (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

Minimum sentences

L Ed Digest: Criminal Law § 69

16. Applying the Anti-Drug Abuse Act of 1986's, 100 Stat. 3207, old mandatory minimums to post-August 3, 2010, sentencing of pre-August 3, 2010, offenders would create disparities of a kind that Congress enacted the Sentencing Reform Act of 1984 and the Fair Sentencing Act, 124 Stat. 2372, to prevent. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

Federal sentencing

L Ed Digest: Criminal Law § 69

17. In federal sentencing, the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

Minimum sentences - applicability

L Ed Digest: Criminal Law § 69

18. Congress intended the Fair Sentencing Act's, 124 Stat. 2372, new, lower mandatory minimums to apply to post-Act sentencing of pre-Act offenders. That is the Act's ``plain import or ``fair implication. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

Fair Sentencing Act - minimum sentences - applicability

L Ed Digest: Criminal Law § 69

19. The Fair Sentencing Act's (``FSA's) new mandatory minimum sentences apply to defendants who committed an offense prior to August 3, 2010, and were sentenced after August 3, 2010, but before November 1, 2010-a period after the FSA's effective date but before the new U.S. Sentencing Guidelines first took effect<*pg. 256> . The FSA simply instructs the U.S. Sentencing Commission to promulgate new Guidelines ``as soon as practicable (but no later than 90 days after the FSA took effect). FSA § 8(1), 124 Stat. 2374. As far as Congress was concerned, the Commission might have (having prepared new Guidelines in advance) promulgated those Guidelines within a few days-perhaps on August 3, 2010, itself. At the same time, the Commission possesses ample authority to permit appropriate adjustments to be made in the Guidelines sentences of those sentenced after August 3, 2010, but prior to the new Guidelines promulgation. 28 U.S.C.S. § 994(u); 76 Fed. Reg. 41333-41334 (2011). In any event, courts, treating the Guidelines as advisory, possess authority to sentence in accordance with the new minimums. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

Fair Sentencing Act - minimum sentences - applicability

L Ed Digest: Criminal Law § 69

20. If the Fair Sentencing Act's, 124 Stat. 2372, new minimums apply to all of those sentenced after August 3, 2010, (even if the new U.S. Sentencing Guidelines were not yet ready), it is possible to foresee a reasonably smooth transition. On the other hand, it is difficult to foresee such a transition if the FSA's application is keyed to a later date, thereby leaving the courts unable to take the FSA fully into account, particularly when that circumstance might create additional disparities and uncertainties that courts and the U.S. Sentencing Commission may be helpless to correct. The United States Supreme Court has no reason to believe Congress would have wanted to impose an unforeseeable, potentially complex application date. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

SYLLABUS

Under the Anti-Drug Abuse Act (1986 Drug Act), the 5- and 10-year mandatory minimum prison terms for federal drug crimes reflected a 100-to-1 disparity between the amounts of crack cocaine and powder cocaine needed to trigger the minimums. Thus, the 5-year minimum was triggered by a conviction for possessing with intent to distribute 5 grams of crack cocaine but 500 grams of powder, and the 10-year minimum was triggered by a conviction for possessing with intent to distribute 50 grams of crack but 5,000 grams of powder. The United States Sentencing Commission-which is charged under the Sentencing Reform Act of 1984 with writing the Federal Sentencing Guidelines-incorporated the 1986 Drug Act's 100-to-1 disparity into the Guidelines because it believed that doing so was the best way to keep similar drug-trafficking sentences proportional, thereby satisfying the Sentencing Reform Act's basic proportionality objective. The Fair Sentencing Act, which took effect on August 3, 2010, reduced the disparity to 18-to-1, lowering the mandatory minimums applicable to many crack offenders, by increasing the amount of crack needed to trigger the 5-year minimum from 5 to 28 grams and the amount for the 10-year minimum from 50 to 280 grams, while leaving the powder cocaine amounts intact. It also directed the Sentencing Commission to make conforming amendments to the Guidelines ``as soon as practicable (but no later than 90 days after the Fair Sentencing Act's effective date). The new amendments became effective on November 1, 2010.

In No. 11-5721, petitioner Hill unlawfully sold 53 grams of crack in 2007, but was not sentenced until December 2010. Sentencing him to the 10-year minimum mandated by the 1986 Drug Act, the District Judge ruled that the Fair Sentencing Act's 5-year minimum for selling that amount of crack did not apply to those whose offenses were committed before the Act's effective date. In No. 11-5683, petitioner Dorsey unlawfully sold 5.5 grams of crack in 2008. In September 2010, the District Judge sentenced him to the 1986 Drug Act's 10-year minimum, finding that it applied because Dorsey had a prior drug conviction and declining to apply the Fair Sentencing Act, under which there would be no mandated minimum term for an amount less than 28 grams, because Dorsey's offense predated<*pg. 258> that Act's effective date. The Seventh Circuit affirmed in both cases.

Held:

The Fair Sentencing Act's new, lower mandatory minimums apply to the post-Act sentencing of pre-Act offenders. Pp. -- - --, 183 L. Ed. 2d, at 266-272.

(a) Language in different statutes argues in opposite directions. The general federal saving statute (1871 Act) provides that a new criminal statute that ``repeal[s] an older criminal statute

shall not change the penalties ``incurred under that older statute ``unless the repealing Act shall so expressly provide. 1 U.S.C. § 109. The word ``repeal applies when a new statute simply diminishes the penalties that the older statute set forth, see Warden v. Marrero, 417 U.S. 653, 659-664, 94 S. Ct. 2532, 41 L. Ed. 2d 383, and penalties are ``incurred under the older statute when an offender becomes subject to them, i.e., commits the underlying conduct that makes the offender liable, see United States v. Reisinger, 128 U.S. 398, 401, 9 S. Ct. 99, 32 L. Ed. 480. In contrast, the Sentencing Reform Act says that, regardless of when the offender's conduct occurs, the applicable sentencing guidelines are the ones ``in effect on the date the defendant is sentenced. 18 U.S.C. § 3553(a)(4)(A)(ii).

Six considerations, taken together, show that Congress intended the Fair Sentencing Act's more lenient penalties to apply to offenders who committed crimes before August 3, 2010, but were sentenced after that date. First, the 1871 saving statute permits Congress to apply a new Act's more lenient penalties to pre-Act offenders without expressly saying so in the new Act. The 1871 Act creates what is in effect a less demanding interpretive requirement because the statute ``cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment. Great Northern R. Co. v. United States, 208 U.S. 452, 465, 28 S. Ct. 313, 52 L. Ed. 567. Hence, this Court has treated the 1871 Act as setting forth an important background principle of interpretation that requires courts, before interpreting a new criminal statute to apply its new penalties to a set of pre-Act offenders, to assure themselves by the ``plain import or ``fair implication of the new statute that ordinary interpretive considerations point clearly in that direction. Second, the Sentencing Reform Act sets forth a special and different background principle in § 3553(a)(4)(A)(ii), which applies unless ex post facto concerns are present. Thus, new, lower Guidelines amendments apply to offenders who committed an offense before the adoption of the amendments but are sentenced thereafter. Third, language in the Fair Sentencing Act implies that Congress intended to follow the Sentencing Reform Act's special background principle here. Section 8 of the Fair Sentencing Act requires the Commission to promulgate conforming amendments to the Guidelines that ``achieve consistency with other guideline provisions and applicable law. Read most naturally, ``applicable law refers to the law as changed by the Fair Sentencing Act, including the provision reducing the crack mandatory minimums. And consistency with ``other guideline provisions and with prior Commission practice would require application of the new Guidelines amendments to offenders who committed their offense before the new amendments' effective date but were sentenced thereafter. Fourth, applying the 1986 Drug Act's old mandatory<*pg. 259> minimums to the post-August 3 sentencing of pre-August 3 offenders would create sentencing disparities of a kind that Congress enacted the Sentencing Reform Act and the Fair Sentencing Act to prevent. Fifth, not to apply the Fair Sentencing Act would do more than preserve a disproportionate status quo; it would make matters worse by creating new anomalies-new sets of disproportionate sentences-not previously present. That is because sentencing courts must apply the new Guidelines (consistent with the Fair

Sentencing Act's new minimums) to pre-Act offenders, and the 1986 Drug Act's old minimums would trump those new Guidelines for some pre-Act offenders but not for all of them. Application of the 1986 Drug Act minimums to pre-Act offenders sentenced after the new Guidelines take effect would therefore produce a set of sentences at odds with Congress' basic efforts to create more uniform, more proportionate sentences. Sixth, this Court has found no strong countervailing considerations that would make a critical difference. Pp. -- - --, 183 L. Ed. 2d, at 266-271.

(b) The new Act's lower minimums also apply to those who committed an offense prior to August 3 and were sentenced between that date and November 1, 2010, the effective date of the new Guidelines. The Act simply instructs the Commission to promulgate new Guidelines ``as soon as practicable (but no later than 90 days after the Act took effect), and thus as far as Congress was concerned, the Commission might have promulgated those Guidelines to be effective as early as August 3. In any event, courts, treating the Guidelines as advisory, possess authority to sentence in accordance with the new minimums. Finally, applying the new minimums to all who are sentenced after August 3 makes it possible to foresee a reasonably smooth transition, and this Court has no reason to believe Congress would have wanted to impose an unforeseeable, potentially complex application date. Pp. -- - --, 183 L. Ed. 2d, at 271-272.

No. 11-5683, 635 F.3d 336, and No. 11-5721, 417 Fed. Appx. 560, vacated and remanded.

Breyer, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Sotomayor, and Kagan, JJ., joined. Scalia, J., filed a dissenting opinion, in which Roberts, C. J., and Thomas and Alito, JJ., joined.

APPEARANCES OF COUNSEL ARGUING CASE

Stephen E. Eberhardt argued the cause for petitioners.

Michael R. Dreeben argued the cause for respondent supporting petitioners.

Miguel A. Estrada argued the cause as amicus curiae, appointed by the court, in support of the judgment below.

OPINION

Justice *Breyer* delivered the opinion of the Court.

[1]Federal statutes impose mandatory minimum prison sentences upon those convicted of federal drug crimes. These statutes typically base the length of a minimum prison term upon the

kind and amount of the drug involved. Until 2010, the relevant statute imposed upon an offender who dealt in powder cocaine the same sentence it imposed upon an offender who dealt in one-hundreth that amount of crack cocaine. It imposed, for example, the same 5-year minimum term upon (1) an offender convicted of possessing with intent to distribute 500 grams of powder cocaine as upon (2) an offender convicted of possessing with intent to distribute 5 grams of crack.

In 2010, Congress enacted a new statute reducing the crack-to-powder cocaine disparity from 100-to-1 to 18-to-<*pg. 260> 1. Fair Sentencing Act, 124 Stat. 2372. The new statute took effect on August 3, 2010. The question here is whether the Act's more lenient penalty provisions apply to offenders who committed a crack cocaine crime before August 3, 2010, but were not sentenced until after August 3. We hold that the new, more lenient mandatory minimum provisions do apply to those pre-Act offenders.

I

The underlying question before us is one of congressional intent as revealed in the Fair Sentencing Act's language, structure, and basic objectives. Did Congress intend the Act's more lenient penalties to apply to pre-Act offenders sentenced after the Act took effect?

We recognize that, because of important background principles of interpretation, we must assume that Congress did not intend those penalties to apply unless it clearly indicated to the contrary. See infra, at -- - --, 183 L. Ed. 2d, at 266-268. But we find that clear indication here. We rest our conclusion primarily upon the fact that a contrary determination would seriously undermine basic Federal Sentencing Guidelines objectives such as uniformity and proportionality in sentencing. Indeed, seen from that perspective, a contrary determination would (in respect to relevant groups of drug offenders) produce sentences less uniform and more disproportionate than if Congress had not enacted the Fair Sentencing Act at all. See infra, at -- - --, 183 L. Ed. 2d, at 268-271.

Because our conclusion rests upon an analysis of the Guidelines-based sentencing system Congress has established, we describe that system at the outset and include an explanation of how the Guidelines interact with federal statutes setting forth specific terms of imprisonment.

A

[2]The Guidelines originate in the Sentencing Reform Act of 1984, 98 Stat. 1987. That statute created a federal Sentencing Commission instructed to write guidelines that judges would use to determine sentences imposed upon offenders convicted of committing federal crimes. 28 U.S.C. §§ 991, 994. Congress thereby sought to increase transparency, uniformity, and proportionality in sentencing. United States Sentencing Commission (USSC or Commission), Guidelines Manual §

1A1.3, p. 2 (Nov. 2011) (USSG); see 28 U.S.C. §§ 991(b)(1), 994(f).

[3]The Sentencing Reform Act directed the Commission to create in the Guidelines categories of offense behavior (e.g., `` 'bank robbery/committed with a gun/$2500 taken' ) and offender characteristics (e.g., ``one prior conviction). USSG § 1A1.2, at 1; see 28 U.S.C. §§ 994(a)-(e). A sentencing judge determines a Guidelines range by (1) finding the applicable offense level and offender category and then (2) consulting a table that lists proportionate sentencing ranges (e.g., 18 to 24 months of imprisonment) at the intersections of rows (marking offense levels) and columns (marking offender categories). USSG ch. 5, pt. A, Sentencing Table, §§ 5E1.2, 7B1.4; see also § 1A1.4(h), at 11. The Guidelines, after telling the judge how to determine the applicable offense level and offender category, instruct the judge to apply the intersection's range in an ordinary case, but they leave the judge free to depart from that range in an unusual case. See<***pg. 261**> 18 U.S.C. § 3553(b); USSG §§ 1A1.2, at 1-2, 1A1.4(b), at 6-7. This Court has held that the Guidelines are now advisory. United States v. Booker, 543 U.S. 220, 245, 264, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005); see Kimbrough v. United States, 552 U.S. 85, 91, 128 S. Ct. 558, 169 L. Ed. 2d 481 (2007).

[4]The Guidelines determine most drug-crime offense levels in a special way. They set forth a Drug Quantity Table (or Table) that lists amounts of various drugs and associates different amounts with different ``Base Offense Levels (to which a judge may add or subtract levels depending upon the ``specific characteristics of the offender's behavior). See USSG § 2D1.1. The Table, for example, associates 400 to 499 grams of powder cocaine with a base offense level of 24, a level that would mean for a first-time offender a prison term of 51 to 63 months. § 2D1.1(c).

[5]In 1986, Congress enacted a more specific, drug-related sentencing statute, the Anti-Drug Abuse Act (1986 Drug Act), 100 Stat. 3207. That statute sets forth mandatory minimum penalties of 5 and 10 years applicable to a drug offender depending primarily upon the kind and amount of drugs involved in the offense. See 21 U.S.C. §§ 841(b)(1)(A)-(C) (2006 ed. and Supp. IV). The minimum applicable to an offender convicted of possessing with intent to distribute 500 grams or more of powder cocaine is 5 years, and for 5,000 grams or more of powder the minimum is 10 years. §§ 841(b)(1)(A)(ii), (B)(ii). The 1986 Drug Act, however, treated crack cocaine crimes as far more serious. It applied its 5-year minimum to an offender convicted of possessing with intent to distribute only 5 grams of crack (as compared to 500 grams of powder) and its 10-year minimum to one convicted of possessing with intent to distribute only 50 grams of crack (as compared to 5,000 grams of powder), thus producing a 100-to-1 crack-to-powder ratio. §§ 841(b)(1)(A)(iii), (B)(iii) (2006 ed.).

[6]The 1986 Drug Act, like other federal sentencing statutes, interacts with the Guidelines in an important way. Like other sentencing statutes, it trumps the Guidelines. Thus, ordinarily no matter what the Guidelines provide, a judge cannot sentence an offender to a sentence beyond the

maximum contained in the federal statute setting forth the crime of conviction. Similarly, ordinarily no matter what range the Guidelines set forth, a sentencing judge must sentence an offender to at least the minimum prison term set forth in a statutory mandatory minimum. See 28 U.S.C. §§ 994(a), (b)(1); USSG § 5G1.1; Neal v. United States, 516 U.S. 284, 289-290, 295, 116 S. Ct. 763, 133 L. Ed. 2d 709 (1996).

Not surprisingly, the Sentencing Commission incorporated the 1986 Drug Act's mandatory minimums into the first version of the Guidelines themselves. Kimbrough, supra, at 96-97, 128 S. Ct. 558, 169 L. Ed. 2d 481. It did so by setting a base offense level for a first-time drug offender that corresponded to the lowest Guidelines range above the applicable mandatory minimum. USSC, Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 53-54 (Oct. 2011) (2011 Report). Thus, the first Guidelines Drug Quantity Table associated 500 grams of powder cocaine with an offense level of 26, which for a first-time offender meant a sentencing range of 63 to 78 months (just above the 5-year minimum), and it associated 5,000 grams<***pg. 262**> of powder cocaine with an offense level of 32, which for a first-time offender meant a sentencing range of 121 to 151 months (just above the 10-year minimum). USSG § 2D1.1 (Oct. 1987). Further reflecting the 1986 Drug Act's 100-to-1 crack-to-powder ratio, the Table associated an offense level of 26 with 5 grams of crack and an offense level of 32 with 50 grams of crack. Ibid.

In addition, the Drug Quantity Table set offense levels for small drug amounts that did not trigger the 1986 Drug Act's mandatory minimums so that the resulting Guidelines sentences would remain proportionate to the sentences for amounts that did trigger these minimums. 2011 Report 54. Thus, the Table associated 400 grams of powder cocaine (an amount that fell just below the amount triggering the 1986 Drug Act's 5-year minimum) with an offense level of 24, which for a first-time offender meant a sentencing range of 51 to 63 months (the range just below the 5-year minimum). USSG § 2D1.1 (Oct. 1987). Following the 100-to-1 crack-to-powder ratio, the Table associated four grams of crack (an amount that also fell just below the amount triggering the 1986 Drug Act's 5-year minimum) with an offense level of 24. Ibid.

The Commission did this not because it necessarily thought that those levels were most in keeping with past sentencing practice or would independently have reflected a fair set of sentences, but rather because the Commission believed that doing so was the best way to keep similar drug-trafficking sentences proportional, thereby satisfying the Sentencing Reform Act's basic ``proportionality objective. See Kimbrough, 552 U.S., at 97, 128 S. Ct. 558, 169 L. Ed. 2d 481; USSG § 1A1.3 (Nov. 2011); 2011 Report 53-54, 349, and n. 845. For this reason, the Commission derived the Drug Quantity Table's entire set of crack and powder cocaine offense levels by using the 1986 Drug Act's two (5- and 10-year) minimum amounts as reference points and then extrapolating from those two amounts upward and downward to set proportional

offense levels for other drug amounts. Ibid.

B

During the next two decades, the Commission and others in the law enforcement community strongly criticized Congress' decision to set the crack-to-powder mandatory minimum ratio at 100-to-1. The Commission issued four separate reports telling Congress that the ratio was too high and unjustified because, for example, research showed the relative harm between crack and powder cocaine less severe than 100-to-1, because sentences embodying that ratio could not achieve the Sentencing Reform Act's ``uniformity goal of treating like offenders alike, because they could not achieve the ``proportionality goal of treating different offenders (e.g., major drug traffickers and low-level dealers) differently, and because the public had come to understand sentences embodying the 100-to-1 ratio as reflecting unjustified race-based differences. Kimbrough, supra, at 97-98, 128 S. Ct. 558, 169 L. Ed. 2d 481; see, e.g., USSC, Special Report to the Congress: Cocaine and Federal Sentencing Policy 197-198 (Feb. 1995) (1995 Report); USSC, Special Report to Congress: Cocaine and Federal Sentencing Policy 8 (Apr. 1997) (1997 Report); USSC, Report to Congress: Cocaine and Federal Sentencing Policy 91, 103 (May 2002) (2002 Report); USSC, Report to Congress<*pg. 263> : Cocaine and Federal Sentencing Policy 8 (May 2007) (2007 Report). The Commission also asked Congress for new legislation embodying a lower crack-to-powder ratio. 1995 Report 198-200; 1997 Report 9-10; 2002 Report 103-107; 2007 Report 6-9. And the Commission recommended that the legislation ``include an ``emergency amendment allowing ``the Commission to incorporate the statutory changes in the Guidelines while ``minimiz[ing] the lag between any statutory and guideline modifications for cocaine offenders. Id., at 9.

[7]In 2010, Congress accepted the Commission's recommendations, see 2002 Report 104; 2007 Report 8-9, and n. 26, and enacted the Fair Sentencing Act into law. The Act increased the drug amounts triggering mandatory minimums for crack trafficking offenses from 5 grams to 28 grams in respect to the 5-year minimum and from 50 grams to 280 grams in respect to the 10-year minimum (while leaving powder at 500 grams and 5,000 grams respectively). § 2(a), 124 Stat. 2372. The change had the effect of lowering the 100-to-1 crack-to-powder ratio to 18-to-1. (The Act also eliminated the 5-year mandatory minimum for simple possession of crack. § 3, 124 Stat. 2372.)

Further, the Fair Sentencing Act instructed the Commission to ``make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law. § 8(2), id., at 2374. And it directed the Commission to ``promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event not later than 90 days after the

new Act took effect. § 8(1), ibid.

The Fair Sentencing Act took effect on August 3, 2010. The Commission promulgated conforming emergency Guidelines amendments that became effective on November 1, 2010. 75 Fed. Reg. 66188 (2010). A permanent version of those Guidelines amendments took effect on November 1, 2011. See 76 id., at 24960 (2011).

C

With this background in mind, we turn to the relevant facts of the cases before us. Corey Hill, one of the petitioners, unlawfully sold 53 grams of crack in March 2007, before the Fair Sentencing Act became law. App. in No. 11-5721, pp. 6, 83 (hereinafter Hill App.). Under the 1986 Drug Act, an offender who sold 53 grams of crack was subject to a 10-year mandatory minimum. 21 U.S.C. § 841(b)(1)(A)(iii) (2006 ed.). Hill was not sentenced, however, until December 2010, after the Fair Sentencing Act became law and after the new Guidelines amendments had become effective. Hill App. 83-94. Under the Fair Sentencing Act, an offender who sold 53 grams of crack was subject to a 5-year, not a 10-year, minimum. § 841(b)(1)(B)(iii) (2006 ed., Supp. IV). The sentencing judge stated that, if he thought that the Fair Sentencing Act applied, he would have sentenced Hill to that Act's 5-year minimum. Id., at 69. But he concluded that the Fair Sentencing Act's lower minimums apply only to those who committed a drug crime after August 3, 2010-the Act's effective date. Id., at 65, 68. That is to say, he concluded that the new Act's more lenient sentences did not apply to those who committed a crime before August 3, even if they were sentenced after that date. Hence, the judge sentenced Hill to 10 years of imprisonment. Id., at 78. The Court<***pg. 264***> of Appeals for the Seventh Circuit affirmed. 417 Fed. Appx. 560 (2011).

The second petitioner, Edward Dorsey (who had previously been convicted of a drug felony), unlawfully sold 5.5 grams of crack in August 2008, before the Fair Sentencing Act took effect. App. in No. 5683, pp. 9, 48-49, 57-58 (hereinafter Dorsey App.). Under the 1986 Drug Act, an offender such as Dorsey with a prior drug felony who sold 5.5 grams of crack was subject to a 10-year minimum. § 841(b)(1)(B)(iii) (2006 ed.). Dorsey was not sentenced, however, until September 2010, after the new Fair Sentencing Act took effect. Id., at 84-95. Under the Fair Sentencing Act, such an offender who sold 5.5 grams of crack was not subject to a mandatory minimum at all, for 5.5 grams is less than the 28 grams that triggers the new Act's mandatory minimum provisions. § 841(b)(1)(B)(iii) (2006 ed., Supp. IV). Dorsey asked the judge to apply the Fair Sentencing Act's more lenient statutory penalties. Id., at 54-55.

Moreover, as of Dorsey's sentencing in September 2010, the unrevised Guidelines (reflecting the 1986 Drug Act's old minimums) were still in effect. The Commission had not yet finished

revising the Guidelines to reflect the new, lower statutory minimums. And the basic sentencing statute, the Sentencing Reform Act, provides that a judge shall apply the Guidelines that ``are in effect on the date the defendant is sentenced. 18 U.S.C. § 3553(a)(4)(A)(ii).

The sentencing judge, however, had the legal authority not to apply the Guidelines at all (for they are advisory). But he also knew that he could not ignore a minimum sentence contained in the applicable statute. Dorsey App. 67-68. The judge noted that, even though he was sentencing Dorsey after the effective date of the Fair Sentencing Act, Dorsey had committed the underlying crime prior to that date. Id., at 69-70. And he concluded that the 1986 Drug Act's old minimums, not the new Fair Sentencing Act, applied in those circumstances. Ibid. He consequently sentenced Dorsey to the 1986 Drug Act's 10-year mandatory minimum term. Id., at 80. The Court of Appeals for the Seventh Circuit affirmed, United States v. Fisher, 635 F.3d 336 (2011), and denied rehearing en banc, 646 F.3d 429 (2011) (per curiam); see also United States v. Holcomb, 657 F.3d 445 (CA7 2011).

The Courts of Appeals have come to different conclusions as to whether the Fair Sentencing Act's more lenient mandatory minimums apply to offenders whose unlawful conduct took place before, but whose sentencing took place after, the date that Act took effect, namely, August 3, 2010. Compare United States v. Douglas, 644 F.3d 39, 42-44 (CA1 2011) (Act applies), and United States v. Dixon, 648 F.3d 195, 203 (CA3 2011) (same), with 635 F.3d, at 339-340 (Act does not apply), United States v. Sidney, 648 F.3d 904, 910 (CA8 2011) (same), and United States v. Tickles, 661 F.3d 212, 215 (CA5 2011) (per curiam) (same). In light of that disagreement, we granted Hill's and Dorsey's petitions for certiorari. Since petitioners and the Government both take the position that the Fair Sentencing Act's new minimums do apply in these circumstances, we appointed as amicus curiae Miguel Estrada to argue the contrary position. He has ably discharged his responsibilities.<*pg. 265>

II

A

The timing issue before us is difficult in part because relevant language in different statutes argues in opposite directions. See Appendix A, infra. On the one hand, **[8]**a federal saving statute, Act of Feb. 25, 1871 (1871 Act), § 4, 16 Stat. 432, phrased in general terms, provides that a new criminal statute that ``repeal[s] an older criminal statute shall not change the penalties ``incurred under that older statute ``unless the repealing Act shall so expressly provide. 1 U.S.C. § 109. Case law makes clear that the word ``repeal applies when a new statute simply diminishes the penalties that the older statute set forth. See Warden v. Marrero, 417 U.S. 653, 659-664, 94 S. Ct. 2532, 41 L. Ed. 2d 383 (1974); see also United States v. Tynen, 11 Wall. 88, 92, 20 L. Ed. 153 (1871).

Case law also makes clear that penalties are ``incurred under the older statute when an offender becomes subject to them, i.e., commits the underlying conduct that makes the offender liable. See United States v. Reisinger, 128 U.S. 398, 401, 9 S. Ct. 99, 32 L. Ed. 480 (1888); Great Northern R. Co. v. United States, 208 U.S. 452, 464-470, 28 S. Ct. 313, 52 L. Ed. 567 (1908).

On the other hand, **[9]**the Sentencing Reform Act says that, regardless of when the offender's conduct occurs, the applicable Guidelines are the ones ``in effect on the date the defendant is sentenced. 18 U.S.C. § 3553(a)(4)(A)(ii). And the Fair Sentencing Act requires the Commission to change the Guidelines in the wake of the Act's new minimums, making them consistent with ``other guideline provisions and applicable law. § 8(2), 124 Stat. 2374.

Courts that have held that they must apply the old, higher 1986 Drug Act minimums to all pre-Act offenders, including those sentenced after the Fair Sentencing Act took effect, have emphasized that the 1871 Act requires that result unless the Fair Sentencing Act either expressly says or at least by fair implication implies the contrary. See 635 F.3d, at 339-340; Sidney, supra, at 906-908; Tickles, supra, at 214-215; see also Holcomb, supra, at 446-448 (opinion of Easterbrook, J.). Courts that have concluded that the Fair Sentencing Act's more lenient penalties apply have found in that Act, together with the Sentencing Reform Act and other related circumstances, indicia of a clear congressional intent to apply the new Act's minimums. See Douglas, supra, at 42-44; Dixon, supra, at 199-203; see also Holcomb, 657 F.3d, at 454-457 (Williams, J., dissenting from denial of rehearing en banc); id., at 461-463 (Posner, J., dissenting from denial of rehearing en banc). We too take the latter view. **[10]**Six considerations, taken together, convince us that Congress intended the Fair Sentencing Act's more lenient penalties to apply to those offenders whose crimes preceded August 3, 2010, but who are sentenced after that date.

First, **[11]**the 1871 saving statute permits Congress to apply a new Act's more lenient penalties to pre-Act offenders without expressly saying so in the new Act. It is true that the 1871 Act uses the words ``expressly provide. 1 U.S.C. § 109. But the Court has long recognized that this saving statute creates what is in effect a less demanding interpretive requirement. That is because statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current<***pg. 266**> statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified. See, e.g., Fletcher v. Peck, 6 Cranch 87, 135, 3 L. Ed. 162 (1810); Reichelderfer v. Quinn, 287 U.S. 315, 318, 53 S. Ct. 177, 77 L. Ed. 331 (1932). And Congress remains free to express any such intention either expressly or by implication as it chooses.

Thus, **[12]**the Court has said that the 1871 Act ``cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment. Great Northern R. Co., supra, at 465, 28 S. Ct. 313, 52 L. Ed. 567 (emphasis added). And in a

comparable context the Court has emphasized that the Administrative Procedure Act's use of the word ``expressly does not require Congress to use any ``magical passwords to exempt a later statute from the provision. Marcello v. Bonds, 349 U.S. 302, 310, 75 S. Ct. 757, 99 L. Ed. 1107 (1955). Without requiring an ``express statement, the Court has described the necessary indicia of congressional intent by the terms ``necessary implication, ``clear implication, and ``fair implication, phrases it has used interchangeably. Great Northern R. Co., supra, at 465, 466, 28 S. Ct. 313, 52 L. Ed. 567; Hertz v. Woodman, 218 U.S. 205, 218, 30 S. Ct. 621, 54 L. Ed. 1001 (1910); Marrero, supra, at 660, n. 10, 94 S. Ct. 2532, 41 L. Ed. 2d 383. One Member of the Court has said we should determine whether ``the plain import of a later statute directly conflicts with an earlier statute, and, if so, ``the later enactment governs, regardless of its compliance with any earlier-enacted requirement of an express reference or other 'magical password.' Lockhart v. United States, 546 U.S. 142, 149, 126 S. Ct. 699, 163 L. Ed. 2d 557 (2005) (Scalia, J., concurring).

Hence, **[13]**the Court has treated the 1871 Act as setting forth an important background principle of interpretation. The Court has also assumed Congress is well aware of the background principle when it enacts new criminal statutes. E.g., Great Northern R. Co., supra, at 465, 28 S. Ct. 313, 52 L. Ed. 567; Hertz, supra, at 217, 30 S. Ct. 621, 54 L. Ed. 1001; cf. Marcello, supra, at 310, 75 S. Ct. 757, 99 L. Ed. 1107. And the principle requires courts, before interpreting a new criminal statute to apply its new penalties to a set of pre-Act offenders, to assure themselves that ordinary interpretive considerations point clearly in that direction. Words such as ``plain import, ``fair implication, or the like reflect the need for that assurance. And it is that assurance, which we shall assume is conveyed by the phrases ``plain import or ``fair implication, that we must look for here.

Second, **[14]**the Sentencing Reform Act sets forth a special and different background principle. That statute says that when ``determining the particular sentence to be imposed in an initial sentencing, the sentencing court ``shall consider, among other things, the ``sentencing range established by the Guidelines that are ``in effect on the date the defendant is sentenced. 18 U.S.C. § 3553(a)(4)(A)(ii) (emphasis added). Although the Constitution's Ex Post Facto Clause, Art. I, § 9, cl. 3, prohibits applying a new Act's higher penalties to pre-Act conduct, it does not prohibit applying lower penalties. See Calder v. Bull, 3 Dall. 386, 390-391, 1 L. Ed. 648 (1798); Collins v. Youngblood, 497 U.S. 37, 41-44, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990). The Sentencing<***pg. 267**> Commission has consequently instructed sentencing judges to ``use the Guidelines Manual in effect on the date that the defendant is sentenced, regardless of when the defendant committed the offense, unless doing so ``would violate the ex post facto clause. USSG § 1B1.11. And therefore when the Commission adopts new, lower Guidelines amendments, those amendments become effective to offenders who committed an offense prior to the adoption of the new amendments but are sentenced thereafter. Just as we assume Congress was aware of the

1871 Act's background norm, so we assume that Congress was aware of this different background sentencing principle.

Third, **[15]**language in the Fair Sentencing Act implies that Congress intended to follow the Sentencing Reform Act background principle here. A section of the Fair Sentencing Act entitled ``Emergency Authority for United States Sentencing Commission requires the Commission to promulgate ``as soon as practicable (and not later than 90 days after August 3, 2010) ``conforming amendments to the Guidelines that ``achieve consistency with other guideline provisions and applicable law. § 8, 124 Stat. 2374. Read most naturally, ``applicable law refers to the law as changed by the Fair Sentencing Act, including the provision reducing the crack mandatory minimums. § 2(a), id., at 2372. As the Commission understood this provision, achieving consistency with ``other guideline provisions means reducing the base offense levels for all crack amounts proportionally (using the new 18-to-1 ratio), including the offense levels governing small amounts of crack that did not fall within the scope of the mandatory minimum provisions. 75 Fed. Reg. 66191. And consistency with ``other guideline provisions and with prior Commission practice would require application of the new Guidelines amendments to offenders who committed their offense prior to the new amendments' effective date but were sentenced thereafter. See USSG § 1B1.11(a); e.g., USSG App. C, amdts. 706, 711 (Supp. Nov. 2004-Nov. 2007); see also Memorandum from G. Schmitt, L. Reed, & K. Cohen, USSC, to Chair Hinojosa et al., Subject: Analysis of the Impact of the Crack Cocaine Amendment if Made Retroactive 23 (Oct. 3, 2007). Cf. USSG App. C, amdt. 571 (amendment increasing restitution, which may present ex post facto and one-book-rule concerns, would apply only to defendants sentenced for post-amendment offenses), discussed post, at --, 183 L. Ed. 2d, at 276 (Scalia, J., dissenting).

Fourth, **[16]**applying the 1986 Drug Act's old mandatory minimums to the post-August 3 sentencing of pre-August 3 offenders would create disparities of a kind that Congress enacted the Sentencing Reform Act and the Fair Sentencing Act to prevent. Two individuals with the same number of prior offenses who each engaged in the same criminal conduct involving the same amount of crack and were sentenced at the same time would receive radically different sentences. For example, a first-time post-Act offender with five grams of crack, subject to a Guidelines range of 21 to 27 months, could receive two years of imprisonment, while an otherwise identical pre-Act offender would have to receive the 5-year mandatory minimum. Compare USSG § 2D1.1(c) (Nov. 2011) with 21 U.S.C. § 841(b)(1)(B) (2006 ed.). A first-time post-Act 50-gram offender would be subject to a Guidelines range of less than<*pg. 268> six years of imprisonment, while his otherwise identical pre-Act counterpart would have to receive the 10-year mandatory minimum. Compare USSG § 2D1.1(c) (Nov. 2011) with 21 U.S.C. § 841(b)(1)(A) (2006 ed.).

Moreover, unlike many prechange/postchange discrepancies, the imposition of these disparate

sentences involves roughly contemporaneous sentencing, i.e., the same time, the same place, and even the same judge, thereby highlighting a kind of unfairness that modern sentencing statutes typically seek to combat. See, e.g., 28 U.S.C. § 991(b)(1)(B) (purposes of Guidelines-based sentencing include ``avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct); S. Rep. No. 98-223, p. 74 (1983) (explaining rationale for using same, current Guidelines for all roughly contemporaneous sentencings). Further, it would involve imposing upon the pre-Act offender a pre-Act sentence at a time after Congress had specifically found in the Fair Sentencing Act that such a sentence was unfairly long.

Finally, one cannot treat such problems as if they were minor ones. Given the 5-year statute of limitations for federal drug offenses, the 11-month median time between indictment and sentencing for those offenses, and the approximately 5,000 federal crack offenders convicted each year, many pre-Act offenders were not (and will not be) sentenced until after August 3, 2010, when the new, more lenient mandatory minimums took effect. See 18 U.S.C. § 3282(a); Administrative Office of United States Courts, Judicial Business of the United States Courts, p. 272 (2010) (Table D-10); 2011 Report 191.

Fifth, not to apply the Fair Sentencing Act would do more than preserve a disproportionate status quo; it would make matters worse. It would create new anomalies-new sets of disproportionate sentences-not previously present. That is because sentencing courts must apply new Guidelines (consistent with the Fair Sentencing Act's new minimums) to pre-Act offenders, see supra, at -- - --, 183 L. Ed. 2d, at 266-267, and the 1986 Drug Act's old minimums would trump those new Guidelines for some pre-Act offenders but not for all of them-say, pre-Act offenders who possessed crack in small amounts not directly the subject of mandatory minimums.

Consider, for example, a first-time offender convicted of possessing with intent to distribute four grams of crack. No mandatory sentence, under the 1986 Drug Act or the Fair Sentencing Act, applies to an offender possessing so small an amount. Yet under the old law, the Commission, charged with creating proportionate sentences, had created a Guidelines range of 41 to 51 months for such an offender, a sentence proportional to the 60 months that the 1986 Drug Act required for one who trafficked five grams of crack. See supra, at -- - --, 183 L. Ed. 2d, at 262; USSG § 2D1.1(c) (Nov. 2009).

The Fair Sentencing Act, however, requires the Commission to write new Guidelines consistent with the new law. The Commission therefore wrote new Guidelines that provide a sentencing range of 21 to 27 months-about two years-for the first-time, 4-gram offender. See USSG § 2D1.1(c) (Nov. 2011). And the Sentencing Reform Act requires application of those new Guidelines to all offenders <*pg. 269> (including pre-Act offenders) who are sentenced once those new Guidelines take effect. See 18 U.S.C. § 3553(a)(4)(A)(ii). Those new Guidelines must

take effect and apply to a pre-Act 4-gram offender, for such an offender was never subject to a trumping statutory 1986 Drug Act mandatory minimum. However, unless the Fair Sentencing Act's new, more lenient mandatory minimums apply to pre-Act offenders, an otherwise identical offender who possessed five grams would have to receive a 5-year sentence. See 21 U.S.C. § 841(b)(1)(B) (2006 ed., Supp. IV).

For example, imagine that on July 1, 2010, both Smith and Jones commit a crack crime identical but for the fact that Smith possesses with intent to distribute four grams of crack and Jones five grams. Both are sentenced on December 1, 2010, after the Fair Sentencing Act and the new Guidelines take effect. Smith's Guidelines sentence would be two years, but unless the Fair Sentencing Act applies, Jones's sentence would have to be five years. The difference of one gram would make a difference, not of only one year as it did before enactment of the Fair Sentencing Act, but instead of three years. Passage of the new Act, designed to have brought about fairer sentences, would here have created a new disparate sentencing ``cliff.

Nor can one say that the new Act would produce disproportionalities like this in only a few cases. In fiscal year 2010, 17.8 percent of all crack offenders were convicted of offenses not subject to the 1986 Drug Act's minimums. 2011 Report 191. And since those minimums apply only to some drug offenders and they apply in different ways, one can find many similar examples of disproportionalities. See Appendix B, infra. Thus, application of the 1986 Drug Act minimums to pre-Act offenders sentenced after the new Guidelines take effect would produce a crazy quilt of sentences, at odds with Congress' basic efforts to achieve more uniform, more proportionate sentences. Congress, when enacting the Fair Sentencing Act, could not have intended any such result.

Sixth, we have found no strong countervailing consideration. Amicus and the dissent argue that one might read much of the statutory language we have discussed as embodying exceptions, permitting the old 1986 Drug Act minimums to apply to pre-Act offenders sentenced after August 3, 2010, when the Fair Sentencing Act took effect. The words ``applicable law in the new Act, for example, could, linguistically speaking, encompass the 1986 Drug Act minimums applied to those sentenced after August 3. Post, at -- - --, 183 L. Ed. 2d, at 276-277 (Scalia, J., dissenting). Moreover, Congress could have insisted that the Commission write new Guidelines with special speed to assure itself that new, post-August 3 offenders-but not old, pre-August 3 offenders-would receive the benefit of the new Act. Post, at -- - --, 183 L. Ed. 2d, at 277-278. Further, amicus and the dissent note that to apply the new Act's minimums to the old, pre-August 3 offenders will create a new disparity-one between pre-Act offenders sentenced before August 3 and those sentenced after that date. Post, at --, 183 L. Ed. 2d, at 279.

We do not believe that these arguments make a critical difference. Even if the relevant statutory language can be read as amicus and the dissent suggest and even if Congress might have

wanted Guidelines written speedily simply in order to apply them<*pg. 270> quickly to new offenders, there is scant indication that this is what Congress did mean by the language in question nor that such was in fact Congress' motivation. The considerations we have set forth, supra, at -- - --, 183 L. Ed. 2d, at 266-269 and this page, strongly suggest the contrary.

We also recognize that application of the new minimums to pre-Act offenders sentenced after August 3 will create a new set of disparities. But those disparities, reflecting a line-drawing effort, will exist whenever Congress enacts a new law changing sentences (unless Congress intends re-opening sentencing proceedings concluded prior to a new law's effective date). We have explained how **[17]**in federal sentencing the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced. Supra, at --, 183 L. Ed. 2d, at 267; compare 18 U.S.C. § 3553(a)(4)(A)(ii) with § 3582(c). And we have explained how, here, continued application of the old 1986 Drug Act minimums to those pre-Act offenders sentenced after August 3 would make matters worse. Supra, at -- - --, 183 L. Ed. 2d, at 268-269. We consequently conclude that this particular new disparity (between those pre-Act offenders already sentenced and those not yet sentenced as of August 3) cannot make a critical difference.

For these reasons considered as a whole, we conclude that **[18]**Congress intended the Fair Sentencing Act's new, lower mandatory minimums to apply to the post-Act sentencing of pre-Act offenders. That is the Act's ``plain import or ``fair implication.

B

We add one final point. Several arguments we have discussed involve the language of statutes that determine how new Guidelines take effect. Supra, at -- - --, 183 L. Ed. 2d, at 266-268. **[19]**What about those who committed an offense prior to August 3 and were sentenced after August 3 but before November 1, 2010-a period after the new Act's effective date but before the new Guidelines first took effect? Do the Fair Sentencing Act's new mandatory minimums apply to them?

In our view, the new Act's lower minimums apply to them as well. Our reason is that the statute simply instructs the Commission to promulgate new Guidelines ``as soon as practicable (but no later than 90 days after the Act took effect). § 8(1), 124 Stat. 2374. As far as Congress was concerned, the Commission might have (having prepared new Guidelines in advance) promulgated those Guidelines within a few days-perhaps on August 3 itself. At the same time, the Commission possesses ample authority to permit appropriate adjustments to be made in the Guidelines sentences of those sentenced after August 3 but prior to the new Guidelines promulgation. See 28 U.S.C. § 994(u) (power to make Guidelines reductions retroactive); 76

Fed. Reg. 41333-41334 (2011) (amended 18-to-1 Guidelines made retroactive). In any event, courts, treating the Guidelines as advisory, possess authority to sentence in accordance with the new minimums.

For these reasons, **[20]**if the Fair Sentencing Act's new minimums apply to all of those sentenced after August 3, 2010 (even if the new Guidelines were not yet ready), it is possible<***pg. 271**> to foresee a reasonably smooth transition. On the other hand, it is difficult to foresee such a transition if the new Act's application is keyed to a later date, thereby leaving the courts unable to take the new Act fully into account, particularly when that circumstance might create additional disparities and uncertainties that courts and the Commission may be helpless to correct. We have no reason to believe Congress would have wanted to impose an unforeseeable, potentially complex application date.

* * *

We vacate the Court of Appeals' judgments and remand these cases for further proceedings consistent with this opinion.

It is so ordered.

APPENDIXES

A

Act of Feb. 25, 1871, § 4, 16 Stat. 432, 1 U.S.C. § 109

Repeal of statutes as affecting existing liabilities

``The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

Sentencing Reform Act of 1984, 18 U.S.C. § 3553(a)(4)(A)(ii)

Imposition of a sentence

``FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE. . . . The court, in determining the particular sentence to be imposed, shall consider . . . the kinds of sentence and

sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . that . . . are in effect on the date the defendant is sentenced . . . .

Fair Sentencing Act of 2010, § 8, 124 Stat. 2374

Emergency Authority for United States Sentencing Commission

``The United States Sentencing Commission shall-

``(1) promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act, in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987 (28 U. S. C. [§]994 note), as though the authority under that Act had not expired; and

``(2) pursuant to the emergency authority provided under paragraph (1), make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.<***pg. 272***>

B

The following chart shows the sentencing scheme that would result for first-time pre-Act crack offenders if the 1986 Drug Act's old 100-to-1 mandatory minimums remain in effect after the Fair Sentencing Act's new 18-to-1 Guidelines became effective. 21 U.S.C. §§ 841(b)(1)(A)-(C) (2006 ed.); USSG §§ 2D1.1(c), 5G1.1(b) (Nov. 2011).

"See print and online version for table."

The chart illustrates the disproportionate sentences that such a scheme would create. See supra, at -- - --, 183 L. Ed. 2d, at 268-269. For one thing, it would create sentencing ``cliffs at the 1986 Act's old triggering amounts of 5 grams and 50 grams (where the old minimums would entirely trump the new Guidelines), resulting in radically different Guidelines sentences for small differences in quantity. For another, because of those ``cliffs, the scheme would create similar Guidelines sentences for offenders who dealt in radically different amounts of crack, e.g., 50 grams versus 500 grams.

To be sure, as amicus points out, Congress has provided two mechanisms through which an offender may escape an otherwise applicable mandatory minimum, diminishing this problem for some offenders. First, an offender may escape a minimum by providing substantial assistance in the investigation or prosecution of another person. 18 U.S.C. § 3553(e); Fed. Rule Crim. Proc. 35(b); see also 28 U.S.C. § 994(n); USSG § 5K1.1. Second, under 18 U.S.C. § 3553(f), drug

offenders who have little or no criminal history and who satisfy other requirements in the provision may obtain ``safety valve relief. See also USSG § 5C1.2. And because of these mechanisms a substantial portion of first-time offenders are relieved of application of a mandatory minimum. However, offenders<*pg. 273> with a criminal history category of II or higher are ineligible for ``safety valve relief; they escape application of a minimum at a much lower percentage. See 2011 Report 193 (Table 8-8).

"See print and online version for table."

Yet similar sentencing anomalies would result for repeat offenders if the 1986 Drug Act's minimums remain in effect after the Fair Sentencing Act's Guidelines became effective. Take, for example, Category II offenders.

"See print and online version for table."

In contrast, a scheme with the Fair Sentencing Act's 18-to-1 minimums and new Guidelines produces the proportionality in sentencing that Congress intended in enacting the Sentencing Reform Act and the Fair Sentencing Act.

"See print and online version for table."

SEPARATE OPINION

Justice *Scalia*, with whom The *Chief Justice*, Justice *Thomas*, and Justice *Alito* join, dissenting.

In the Fair Sentencing Act of 2010, 124 Stat. 2372, Congress increased the threshold quantities of crack cocaine required to trigger the 5- and 10-year mandatory minimum penalties associated with offenses involving the manufacture, distribution, or dispensation of the drug, and eliminated the 5-year mandatory minimum previously associated with simple possession of it. The Act is silent as to whether these changes apply to defendants who committed their offenses before, but whose sentencing proceedings occurred after, its August 3, 2010, effective date. In my view, the general saving statute, 1 U.S.C. § 109, dictates that the new, more lenient mandatory minimum provisions do not apply to such pre-enactment offenders.

I

The Court starts off on the right foot by acknowledging, ante, at -- - --, 183 L. Ed. 2d, at 265, that the ameliorative amendments at issue here trigger application of the general saving statute. Enacted in 1871 to reverse the common-law rule that<*pg. 275> the repeal or amendment of a

criminal statute would abate all nonfinal convictions under the repealed or amended statute, see Warden v. Marrero, 417 U.S. 653, 660, 94 S. Ct. 2532, 41 L. Ed. 2d 383 (1974), the saving statute provides in relevant part:

``The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. 1 U.S.C. § 109.

By reducing the statutory penalties for crack cocaine offenses, the Fair Sentencing Act ``repeal[ed] the former penalties; for defendants who committed their offenses (and hence ``incurred the penalties) while the prior law was in force, § 109 directs that the prior law ``shall be treated as still remaining in force.

Although § 109 purports to require that subsequent legislation opting out of its default rule must do so ``expressly, the Court correctly observes, ante, at --, 183 L. Ed. 2d, at 266, that express-statement requirements of this sort are ineffective. See Lockhart v. United States, 546 U.S. 142, 147-150, 126 S. Ct. 699, 163 L. Ed. 2d 557 (2005) (Scalia, J., concurring). Because ``one legislature cannot abridge the powers of a succeeding legislature, Fletcher v. Peck, 6 Cranch 87, 135, 3 L. Ed. 162 (1810), a statute is ``alterable when the legislature shall please to alter it, Marbury v. Madison, 1 Cranch 137, 177, 2 L. Ed. 60 (1803). Consequently, the express-statement requirement of § 109 is itself subject to repeal on the same terms as any other statute, which is to say that a repeal may be accomplished by implication. See, e.g., Marrero, supra, at 659-660, n. 10, 94 S. Ct. 2532, 41 L. Ed. 2d 383; Great Northern R. Co. v. United States, 208 U.S. 452, 465, 28 S. Ct. 313, 52 L. Ed. 567 (1908).

Understanding the interpretive problem posed by these cases as one of implied repeal helps to explain the Court's observation, ante, at --, 183 L. Ed. 2d, at 266, that what is required to override § 109's default rule is a clear demonstration of congressional intent to do so. Admittedly, our cases have not spoken with the utmost clarity on this point. In Marrero, for example, we suggested that a ``fair implication from a subsequently enacted statute would suffice, 417 U.S., at 660, n. 10, 94 S. Ct. 2532, 41 L. Ed. 2d 383, while in Hertz v. Woodman, 218 U.S. 205, 30 S. Ct. 621, 54 L. Ed. 1001 (1910), we used the phrase ``clear implication, id., at 218, 30 S. Ct. 621, 54 L. Ed. 1001 (emphasis added); see also ibid. (``plain implication). In Great Northern R. Co., we split the difference, stating at one point that § 109 controls unless Congress expresses a contrary intention ``either expressly or by necessary implication in a subsequent enactment, 208 U.S., at 465, 28 S. Ct. 313, 52 L. Ed. 567 (emphasis added), but suggesting at another point that a ``fair implication, id., at 466, 28 S. Ct. 313, 52 L. Ed. 567, would do. In my view, the ``fair implication formulation understates the burden properly imposed on a defendant who would claim

an implicit exception from § 109's terms. Because the effect of such an exception is to work a pro tanto repeal of § 109's application to the<*pg. 276> defendant's case, the implication from the subsequently enacted statute must be clear enough to overcome our strong presumption against implied repeals. See, e.g., Matsushita Elec. Industrial Co. v. Epstein, 516 U.S. 367, 381, 116 S. Ct. 873, 134 L. Ed. 2d 6 (1996); Posadas v. National City Bank, 296 U.S. 497, 503, 56 S. Ct. 349, 80 L. Ed. 351 (1936). Thus, we should conclude that Congress has deviated from § 109 (or any similar statute establishing a background interpretive principle) only when the ``plain import of a later statute directly conflicts with it. Lockhart, supra, at 149, 126 S. Ct. 699, 163 L. Ed. 2d 557 (Scalia, J., concurring) (emphasis added).

II

A

The considerations relied upon by the Court do not come close to satisfying the demanding standard for repeal by implication. As an initial matter, there is no persuasive force whatever to the Court's observation that continuing to apply the prior mandatory minimums to pre-enactment offenders would ``involve imposing upon the pre-Act offender a pre-Act sentence at a time after Congress had specifically found in the Fair Sentencing Act that such a sentence was unfairly long. Ante, at --, 183 L. Ed. 2d, at 268. That is true whenever Congress reduces a criminal penalty, and so is a consequence that Congress affirmatively embraced when it said in § 109 that ameliorative amendments to criminal statutes do not apply to pre-enactment conduct. Nor does it matter that Congress has instructed district courts, when applying the Federal Sentencing Guidelines, to apply the version in force on the date of sentencing, with the object of reducing disparities in sentences between similar defendants who are sentenced for the same conduct at the same time. See 18 U.S.C. § 3553(a)(4)(A)(ii). The presumption against implied repeals requires us to give effect, if possible, to both § 3553(a)(4)(A)(ii) and § 109. ``The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. Morton v. Mancari, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). We may readily do so here by holding that § 3553(a)(4)(A)(ii) applies to Guidelines amendments, and § 109 to statutory ones.

The Court also stresses that the Fair Sentencing Act instructs the Sentencing Commission to promulgate ``as soon as practicable (and not later than 90 days after August 3, 2010) ``such conforming amendments to the Sentencing Guidelines ``as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law. § 8, 124 Stat. 2374. The argument goes that, because the Commission implemented this directive by reducing the

Guidelines ranges for crack cocaine offenses to track the 18-to-1 crack-to-powder ratio reflected in the new mandatory minimums, see 75 Fed. Reg. 66191 (2010), and because the general rule is that a sentencing court should apply the version of the Guidelines in effect at the time of sentencing, see 18 U.S.C. § 3553(a)(4)(A)(ii), Congress must have understood that the new mandatory minimums would apply immediately, since otherwise there would be a<*pg. 277> mismatch between the statutory penalties and Guidelines ranges.

That conclusion simply does not follow. For one thing, the argument begs the very question presented here: What is the ``applicable law relevant to pre-enactment offenders who are sentenced after enactment? The Commission could well have answered this question by concluding that, in light of § 109, the law applicable to such offenders is the pre-Act mandatory minimums. It might therefore have retained, as to those offenders, the existing Guidelines ranges reflecting a higher crack-to-powder ratio. Although rare, it is not unheard of for the Commission to establish Guidelines whose application turns on the date of commission of the defendant's offense. See United States Sentencing Commission, Guidelines Manual § 5E1.1(g)(1) (Nov. 2011) (governing restitution for offenses committed on or after November 1, 1997, and providing that the prior version of the Guideline shall govern all other cases); id., § 8B1.1(f)(1) (same for restitution obligations of organizational defendants). Of course, the Commission did not interpret the Fair Sentencing Act's directive in this manner. But the possibility that it could (not to mention the probability that it should) have done so illustrates the folly of basing inferences about what Congress intended when it passed the Fair Sentencing Act on decisions the Commission would not make until several months later.[1]

Moreover, even if one takes it as given that the Commission's new crack cocaine Guidelines would apply the lower 18-to-1 ratio to all defendants sentenced after the new Guidelines were put in place, it would not follow that Congress necessarily expected the new mandatory minimums to apply to pre-enactment offenders. The directive to update the Guidelines on an emergency basis is equally consistent with Congress's seeking to avoid a mismatch between the Guidelines and the statutory penalties for post-enactment offenders sentenced shortly after the Act's effective date.

Petitioners and the Government discount this explanation, noting that because of the lags associated with investigating and prosecuting drug offenses, most of the defendants sentenced on the 91st day after the Fair Sentencing Act's enactment were sure to be pre-Act offenders. If Congress did not expect the new mandatory minimums to apply to such offenders, they say, there would have been no need to ensure that revised Guidelines were in place so quickly. But most is not all, and it would have been entirely sensible for Congress to worry that some post-Act offenders-offenders clearly subject to the new mandatory minimums-would nonetheless be sentenced under outdated Guidelines if the Guidelines were not revised in short order.

The 11-month median time between indictment and sentencing for non-marijuana federal drug

offenses, see Administrative Office of United States Courts, Judicial Business of the United States Courts, p. 272 (2010) (Table D-10), does not establish that<*pg. 278> prompt issuance of new Guidelines for post-Act offenders could not have been a pressing concern. Because that is a median figure, it shows that half of all drug defendants are sentenced sooner than 11 months after being indicted. And it is only an aggregate figure. For drug possession offenses-relevant here because the Fair Sentencing Act eliminated the mandatory minimum sentence previously applicable to simple possession of crack cocaine, see § 3, 124 Stat. 2372-the equivalent figure was just 5.4 months from indictment to sentencing. The pace of criminal cases also varies considerably from district to district. In the Eastern District of Virginia, for instance, the median time from indictment to sentencing for all criminal cases was just 3.6 months. See Judicial Business, supra, at 252 (Table D-6). What is more, without the Fair Sentencing Act's emergency directive, amendments to the Guidelines to implement the Act likely would not have been put in place until more than a year after its passage.[2] In the interim, a great many post-Act offenders might have been sentenced under the outdated Guidelines, even though they were clearly entitled to take advantage of the statutory amendments. Because the emergency authority conferred on the Commission can reasonably be understood as directed at this mismatch problem, it creates no clear implication that Congress expected the new statutory penalties to apply to pre-enactment offenders.

The Court's last argument is that continuing to apply the prior mandatory minimums to pre-enactment offenders would lead to anomalous, disproportionate sentencing results. It is true enough, as the Court notes, ante, at -- - --, 183 L. Ed. 2d, at 268-269, that applying the prior mandatory minimums in tandem with the new Guidelines provisions-which track the new, more lenient mandatory minimums-leads to a series of ``cliffs at the mandatory minimum thresholds. But this does not establish that Congress clearly meant the new mandatory minimums to apply to pre-enactment offenders. As noted above, supra, at -- - --, 183 L. Ed. 2d, at 277, there is no reason to take the Guidelines amendments ultimately promulgated by the Commission as a given when evaluating what Congress would have understood when the Fair Sentencing Act was enacted. The Commission could have promulgated amendments that ameliorated this problem by retaining the old Guidelines ranges for pre-enactment offenders.

Moreover, although the cliffs produced by the mismatch between Guidelines and statutory penalties are<*pg. 279> admittedly inconsistent with the premise of the Guidelines system that sentences should vary in proportion to the gravity of the offense and the culpability of the offender, see 18 U.S.C. § 3553(a)(1), (a)(2)(A), the same objection can be lodged against any mandatory minimum that trumps an otherwise applicable Guidelines range. And it is not as though the results of continuing to apply the pre-Act statutory penalties are so senseless as to establish that Congress must not have intended them. Retaining the old mandatory minimums ensures at least rough equivalence in sentences for defendants who committed their crimes at the same time,

but were sentenced at different times-even as it leads to disparities for defendants who are sentenced at the same time, but committed their offenses at different times. In light of this plausible basis for continuing to apply the prior law to pre-enactment offenders, there is no reason to conclude that Congress necessarily expected the new statutory penalties to apply.

B

Petitioners and the Government press a handful of additional arguments which require only brief discussion. They first contend that an intention to apply the new mandatory minimums to pre-enactment offenders can be inferred from § 10 of the Fair Sentencing Act, 124 Stat. 2375, which instructs the Commission to study the effects of the new law and make a report to Congress within five years. The suggestion is that, if the statutory penalties do not apply to pre-enactment offenders, then the Act would have no effect on many defendants sentenced during the study period, which would in turn undermine Congress's goal of compiling useful data. This is makeweight. Whether or not the new mandatory minimums are held applicable to pre-enactment offenders, they will be applied to many post-enactment offenders during the study period, and the Commission will have the opportunity to collect useful data. The study provision simply has nothing to say about the question at issue here.

The Government also notes that the Senate bill that ultimately became the Fair Sentencing Act was based on an earlier bill which contained a provision that would have delayed the Act's effective date until 180 days after passage, and specifically provided that ``[t]here shall be no retroactive application of any portion of this Act. H. R. 265, 111th Cong., 1st Sess., § 11 (2009). Even if one is inclined to base inferences about statutory meaning on unenacted versions of the relevant bill, but see Hamdan v. Rumsfeld, 548 U.S. 557, 668, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006) (Scalia, J., dissenting), this argument from drafting history is unpersuasive. That Congress considered and rejected a proposal that would have delayed application of the Act until 180 days after passage says nothing about whether the version finally enacted applies to defendants whose criminal conduct pre-dated the Act. Moreover, the same bill would have provided permissive authority for the Commission to promulgate amended Guidelines on an emergency basis, see § 8(a), notwithstanding its delayed effective date provision. This point undercuts the argument that emergency amendment authority and immediate application of the new statutory penalties go hand-in-hand.

Petitioners finally appeal to the rule of lenity and the canon of constitutional avoidance. But the rule of lenity<*pg. 280> has no application here, because the background principle supplied by § 109 serves to remove the ambiguity that is a necessary precondition to invocation of the rule. See Deal v. United States, 508 U.S. 129, 135, 113 S. Ct. 1993, 124 L. Ed. 2d 44 (1993). The canon of constitutional avoidance also has no application here. Although many observers viewed

the 100-to-1 crack-to-powder ratio under the prior law as having a racially disparate impact, see, e.g., United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy 8 (Apr. 1997), only intentional discrimination may violate the equal protection component of the Fifth Amendment's Due Process Clause. See Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-265, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 217, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995). There is thus no constitutional doubt triggered by application of the prior mandatory minimums, much less the sort of ``serious constitutional doub[t] required to invoke the avoidance canon. Clark v. Martinez, 543 U.S. 371, 381, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005).

* * *

In the end, the mischief of the Court's opinion is not the result in this particular case, but rather the unpredictability it injects into the law for the future. The Court's decision is based on ``[s]ix considerations, taken together, ante, at --, 183 L. Ed. 2d, at 265, and we are not told whether any one of these considerations might have justified the Court's result in isolation, or even the relative importance of the various considerations. One of them (the Commission's emergency authority to issue conforming amendments to the Guidelines) is a particular feature of the statute at issue in these cases, but another (the fact that applying the prior statutory penalties alongside the new Guidelines leads to a mismatch) is a general feature of a sentencing scheme that calibrates Guidelines ranges to the statutory mandatory minimums for a given offense. Are we to conclude that, after the Sentencing Reform Act, § 109 has no further application to criminal penalties, at least when statutory amendments lead to modification of the Guidelines? Portions of the Court's opinion could be understood to suggest that result, but the Court leaves us in suspense.

That is most unfortunate, because the whole point of § 109, as well as other provisions of the Dictionary Act, see 1 U.S.C. §§ 1-8, and the definitional provisions of the federal criminal law, see 18 U.S.C. §§ 5-27 (2006 ed. and Supp. IV), is to provide a stable set of background principles that will promote effective communication between Congress and the courts. In this context, stability is ensured by a healthy respect for our presumption against implied repeals, which demands a clear showing before we conclude that Congress has deviated from one of these background interpretive principles. Because the Court's result cannot be reconciled with this approach, I respectfully dissent.

FOOTNOTES

1 Congressional reliance on future Commission action might be plausible if the Commission had a settled practice of tying reductions in statutory mandatory minimums to immediately applicable

reductions in Guidelines ranges, without any distinction based on the timing of the defendant's offense. But the Court does not cite any such settled practice, and I am not aware of any. Presumably there has been no occasion for a practice to develop either way, since congressional legislation reducing criminal penalties is, in this day and age, very rare.

2 In the ordinary course, the Commission may submit proposed Guidelines amendments to Congress ``at or after the beginning of a regular session of Congress, but not later than the first day of May. 28 U.S.C. § 994(p). Unless disapproved by Congress, the proposed amendments ``take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment . . . is submitted. Ibid. As a matter of practice, the Commission has adopted November 1 as the default effective date for its proposed amendments. See United States Sentencing Commission, Rules of Practice and Procedure, Rule 4.1 (amended Aug. 2007). Because the Fair Sentencing Act was enacted on August 3, 2010-after May 1-there would have been no opportunity for the Commission to submit proposed amendments to Congress until January 2011. Given the 180-day waiting period, the amendments could not have gone into force until the very end of June 2011 at the earliest. And in all likelihood, they would not have been effective until November 1, 2011.