No.

In the Supreme Court of the United States

ANTONIO SOUL GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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[*] Appointed by the United States Court of Appeals for the Eleventh Circuit pursuant to the Criminal Justice Act, 18 U.S.C. 3006A.

QUESTION PRESENTED

Whether a district court must recalculate a movant's sentencing range as if Sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time of the offense before exercising its discretion to reduce the movant's sentence for a covered offense under the First Step Act of 2018.

RELATED PROCEEDINGS

United States District Court (M.D. Fla.):

United States v. *Gonzalez*, Crim. No. 05-188 (Oct. 21, 2019)

United States Court of Appeals (11th Cir.):

Gonzalez v. *United States*, No. 19-14381 (Aug. 19, 2021)

Gonzalez v. *United States*, No. 19-14381 (June 21, 2023) (decision on remand from this Court)

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Antonio Soul Gonzalez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (App., *infra*, 1a-11a) is reported at 71 F.4th 881. The previous opinion of the court of appeals (App., *infra*, 12a-35a) is reported at 9 F.4th 1327. The opinion of the district court denying petitioner's motion for sentence reduction (App., *infra*, 36a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, provides in relevant part:

> (a) Definition of Covered Offense. — In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010.
>
> (b) Defendants Previously Sentenced. — A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) were in effect at the time the covered offense was committed.
>
> (c) Limitations. — No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

STATEMENT

This case implicates an acknowledged conflict among six courts of appeals concerning the procedures that a district court must follow when reviewing a motion for sentence reduction under the First Step Act of 2018. That law retroactively reduced the racially disparate statutory penalties for crack-cocaine offenses that had previously been reduced on a prospective basis by the Fair Sentencing Act of 2010. See Pub. L. No. 111-220, § 2, 124 Stat. 2372. In the First Step Act, Congress gave a district court discretion to "impose a reduced sentence as if" the revised penalties in the Fair Sentencing Act "were in effect at the time" the offense was committed. Pub. L. No. 115-391, § 404(b), 132 Stat. 5222.

Petitioner was sentenced in 2006 for possessing crack cocaine with intent to distribute. After completing his prison term, he was arrested for violating the conditions of his supervised release. The district court revoked petitioner's supervised release and sentenced him to a term of imprisonment of 57 months. Following the passage of the First Step Act, petitioner moved for a sentence reduction and argued that the statute changed his sentencing range. The district court denied the motion, concluding that the First Step Act did not apply to revocation sentences and that, even if petitioner were eligible for relief, the court would still deny the motion as a matter of discretion. The district court did not calculate how Sections 2 and 3 of the Fair Sentencing Act would affect petitioner's sentencing range.

The court of appeals affirmed. It held that the First Step Act applied to petitioner's sentence but affirmed on the ground that the district court had not abused its discretion. This Court granted certiorari, vacated the judgment of the court of appeals, and remanded for further proceedings in light of *Concepcion* v. *United States*, 142

S. Ct. 2389 (2022). On remand, the court of appeals again affirmed, expressly disagreeing with a Seventh Circuit decision that required a district court to recalculate a movant's sentencing range as if Sections 2 and 3 of the Fair Sentencing Act were in effect at the time of the offense.

In total, five courts of appeals have held that a district court must recalculate a movant's sentencing range in that fashion. In addition, the Second, Fifth, Sixth, and Ninth Circuits have recognized the same in dicta. The Eleventh Circuit alone has held that a district court is not required to recalculate the sentencing range.

That holding is erroneous. The First Step Act authorizes a district court to "impose" a reduced sentence and contemplates that a motion will receive "complete review." It stands to reason that, as in any sentencing proceeding, the district court must begin by recalculating the sentencing range and must do so "as if" the Fair Sentencing Act were in effect at the time of the offense. This Court's decision in *Concepcion* confirms that interpretation.

This case presents an excellent vehicle for resolving the entrenched circuit conflict, not least because the court of appeals specifically ordered the parties to address whether, in light of *Concepcion*, "a district court [is] required to calculate a defendant's [G]uidelines range before discretionarily denying relief under the First Step Act." C.A. Dkt. 51. The question presented is also exceptionally important to the thousands of individuals who are eligible for relief under the First Step Act. The petition for a writ of certiorari should therefore be granted.

A. Background

Federal law imposes mandatory minimum penalties for drug offenses based on drug quantity. See 21 U.S.C. 841(b). For many years, "Congress set the quantity

thresholds far lower for crack offenses than for powder offenses." *Terry* v. *United States*, 141 S. Ct. 1858, 1860 (2021). When petitioner was sentenced in 2006, the ratio of those thresholds was 100 to 1. In other words, "an offender convicted of possessing with intent to distribute *500* grams of powder cocaine" and "an offender convicted of possessing with intent to distribute *5* grams of crack" both faced the same five-year minimum penalty. *Dorsey* v. *United States*, 567 U.S. 260, 263-264 (2012).

In 2010, Congress passed the Fair Sentencing Act to ameliorate that disparity on a prospective basis. See Pub. L. No. 111-220, § 2, 124 Stat. 2372. Section 2(a) of the Fair Sentencing Act "increas[ed] the crack quantity thresholds from 5 grams to 28 for the 5-year mandatory minimum and from 50 grams to 280 for the 10-year mandatory minimum." *Terry*, 141 S. Ct. at 1861; see Pub. L. No. 111-220, § 2, 124 Stat. 2372. Section 3 further eliminated the mandatory minimum sentence for simple possession in Section 404(a) of the Controlled Substances Act, 21 U.S.C. 844(a). See Pub. L. No. 111-220, § 3, 124 Stat. 2372. But the Fair Sentencing Act did not apply retroactively to individuals, such as petitioner, who had committed their offenses before enactment.

In 2018, Congress fixed that additional disparity when it enacted the First Step Act, Pub. L. No. 115-391, 132 Stat. 5194. Section 404(b) of the First Step Act allows courts to "impose[]" a reduced sentence "as if" the revised penalties for crack cocaine were in effect at the time the offense was committed. *Ibid.*; see *Terry*, 141 S. Ct. at 1861-1862. A movant may not move for a sentence reduction under Section 404 "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." Pub. L. No. 115-391, § 404(c), 132 Stat. 5222.

In *Concepcion* v. *United States*, 142 S. Ct. 2389 (2022), this Court resolved a conflict among the courts of appeals "as to whether a district court deciding a First Step Act motion must, may, or may not consider intervening changes of law or fact." *Id.* at 2398. The Court held that district courts, in exercising their discretion to grant or deny relief, must consider all non-frivolous arguments made by movants based on "intervening changes of law or fact." *Id.* at 2404. The Court added that "[i]t follows, under the Court's sentencing jurisprudence, that 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." *Ibid.* The Court also observed that "the First Step Act directs district courts to calculate the [Sentencing] Guidelines range as if the Fair Sentencing Act's amendments had been in place at the time of the offense," because the Guidelines range should "'anchor[]' the sentencing proceeding." *Id.* at 2402 n.6 (quoting *Peugh* v. *United States*, 569 U.S. 530, 541 (2013)).

B. Facts And Procedural History

1. On August 4, 2006, petitioner pleaded guilty to one count of possession of 50 grams or more of crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii). In his plea agreement, petitioner accepted enhanced penalties under 21 U.S.C. 851 based on a state conviction for possession of a controlled substance. Petitioner was initially sentenced to 240 months of imprisonment, to be followed by 120 months of supervised release. App., *infra*, 2a; D. Ct. Dkt. 36.

Petitioner's sentence was reduced on two separate occasions. In 2014, the district court reduced his term of imprisonment to 151 months for providing substantial as-

sistance to the government. The following year, the district court reduced his term of imprisonment further to 76 months based on the Sentencing Commission's clarification regarding substantial assistance. App., *infra*, 2a.

Petitioner began his term of supervised release in 2015. He was arrested in 2018 for violating the conditions of that release. He was charged and sentenced separately for the new criminal offenses. The district court also revoked petitioner's supervised release and sentenced him to 57 months of imprisonment, to be served consecutively with the sentence imposed in the separate criminal proceeding. App., *infra*, 2a-3a.

2. Following the passage of the First Step Act, petitioner moved to reduce his sentence. He argued that the First Step Act made his conviction a Class B felony, rather than a Class A felony, because the maximum term of imprisonment was reduced to 40 years. He further argued that the maximum sentence for violating the conditions of supervised release for a Class B felony was 36 months under 18 U.S.C. § 3583(e)(3) and, by incorporation, the Sentencing Guidelines. He thus requested a reduction of his sentence from 57 months to 36 months. D. Ct. Dkt. 105, at 1-2.

The district court denied the motion. App., *infra*, 36a-37a. It concluded that petitioner was statutorily ineligible for a reduction because his 57-month sentence was imposed for violating the conditions of his supervised release, not for committing a crack-cocaine offense. *Id.* at 37a. The court further concluded that, even if petitioner were statutorily eligible, it would "decline to reduce" his sentence because of his "unwillingness or * * * inability to abide by the law" and his "continued lawless behavior." *Ibid.* The district court did not recalculate petitioner's sentencing range before making that discretionary determination.

3. The court of appeals affirmed. App., *infra*, 12a-21a.

Disagreeing with the district court, the court of appeals first held that petitioner was statutorily eligible for a reduction because the sentence imposed on revocation of his supervised release related to his original offense, which was covered by the First Step Act. App., *infra*, 15a-17a. The court of appeals concluded, however, that the district court did not abuse its discretion by denying petitioner's motion. *Id.* at 17a-21a.

The court of appeals rejected petitioner's argument that the district court committed procedural error by failing to recalculate his sentencing range before exercising its discretion under the First Step Act. App., *infra*, 19a-21a. The court of appeals expressly "decline[d] to follow" a Seventh Circuit decision cited by petitioner in a notice of supplemental authority. *Id.* at 19a; see C.A. Dkt. 20. The court concluded that the reference to "complete review" in Section 404 does not mandate a recalculation of the adjusted sentencing range because it is located in Section 404(c), which limits the number of motions a movant may bring, not Section 404(b). App., *infra*, 19a-20a. The court of appeals further posited that treating the failure to recalculate as procedural error is "in tension, if not in conflict, with Rule 52(a)," which provides for harmless-error review of sentencing errors. *Id.* at 20a. Rather than reviewing the failure to recalculate merely for harmlessness, however, the court chose to "decide, on a case-by-case basis, whether a district court's failure to properly calculate the new range constitutes reversible procedural error" in the first place. *Id.* at 20a-21a. And in this case,

the court concluded—without any harmlessness inquiry—that the failure to recalculate the sentencing range did not constitute error. *Id.* at 21a.[*]

4. This Court granted certiorari, vacated the judgment below, and remanded the case for further proceedings in light of *Concepcion* v. *United States*, 142 S. Ct. 2389 (2022). See 142 S. Ct. 2900 (2022).

5. On remand, the court of appeals directed the parties to submit supplemental briefs addressing whether, in light of *Concepcion*, "a district court [is] required to calculate a defendant's [G]uidelines range before discretionarily denying relief under the First Step Act." C.A. Dkt. 51.

The court of appeals again affirmed, concluding that the district court did not err by failing to recalculate petitioner's sentencing range. App., *infra*, 1a-11a. The court reinstated the portion of its previous opinion holding that a district court need not recalculate the adjusted sentencing range to account for the changes in the Fair Sentencing Act. *Id.* at 8a-10a. In a new section of the opinion, it further concluded that the district court had adequately explained its reasoning under *Concepcion*. *Id.* at 10a-11a; see *Concepcion*, 142 S. Ct. at 2404. As in its earlier opinion, the court of appeals did not conduct a harmlessness inquiry.

REASONS FOR GRANTING THE PETITION

The decision below creates a circuit conflict, disrupting the previous consensus among the courts of appeals

[*] Judge Tjoflat filed a concurring opinion stating that, if he were "writing on a blank slate," he would hold that the court of appeals "lack[s] jurisdiction to review a district court's exercise of discretion to reduce—or not reduce—a sentence under § 404(b)." App., *infra*, 35a.

that a district court must recalculate a movant's sentencing range as if Sections 2 and 3 of the Fair Sentencing Act were in effect at the time of the offense before exercising its discretion under the First Step Act. The Third, Fourth, Seventh, Eighth, and Tenth Circuits have correctly held that a district court must recalculate the range as an essential anchor for the exercise of its discretion, and other circuits have said the same in dicta.

The Eleventh Circuit's contrary holding undercuts the process for seeking relief that Congress provided in the First Step Act, and it undermines the congressional policy judgment that the harsh and disparate sentences for crack-cocaine offenses do not reflect this Nation's values. If the decision below is allowed to stand, First Step Act movants in that circuit will be denied the process they would receive elsewhere. Because the courts of appeals are in conflict on an important question of federal law, and because this case presents an ideal vehicle to answer the question presented, the petition for a writ of certiorari should be granted.

A. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals

The decision below rejects the considered, uniform view of nine other federal courts of appeals. The Third, Fourth, Seventh, Eighth, and Tenth Circuits require a district court to recalculate a movant's sentencing range as if Sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time of the offense before exercising its discretion to reduce the movant's sentence under the First Step Act. The Second, Fifth, Sixth, and Ninth Circuits have recognized the same obligation in dicta. Only the Eleventh Circuit disclaims any such requirement. The resulting conflict warrants this Court's review.

1. Five courts of appeals have squarely held that a district court must recalculate a movant's sentencing range based on the changes in the Fair Sentencing Act.

a. As the court of appeals acknowledged, the Seventh Circuit requires a district court to recalculate a movant's sentencing range. In *United States* v. *Corner*, 967 F.3d 662 (2020), the Seventh Circuit held that "a district court's discretionary determination whether to grant a petitioner's motion for a reduced sentence under the First Step Act must be informed by a calculation of the new sentencing parameters." *Id.* at 665.

The Seventh Circuit reasoned that the First Step Act "contemplates a close review of resentencing motions," because it provides that "a person cannot seek relief under the Act more than once if the first motion was 'denied *after a complete review of the motion* on the merits.'" 967 F.3d at 665 (quoting Pub. L. No. 115-391, § 404(c), 132 Stat. 5222). The Seventh Circuit explained that the statute's reference to a "complete review" "suggests a baseline of process that includes an accurate comparison of the statutory penalties—and any resulting change to the sentencing parameters—as they existed during the original sentencing and as they presently exist." *Ibid.* The Seventh Circuit also observed that, just as "a failure to properly calculate and consider the [G]uidelines amounts to a reversible procedural error" in any other sentencing proceeding, so too a district court may not deny a First Step Act motion "without first determining the parameters of what it *could* do." *Id.* at 666; see *United States* v. *Fowowe*, 1 F.4th 522, 529 (7th Cir. 2021).

The Seventh Circuit has reaffirmed that rule in the wake of this Court's decision in *Concepcion* v. *United States*, 142 S. Ct. 2389 (2022), which held that a district court deciding a motion under the First Step Act must

consider intervening changes if they are raised by the movant. See *id.* at 2396. In *United States* v. *Miedzianowski*, 60 F.4th 1051 (7th Cir. 2023), the movant argued that the district court "needed to restate his statutory ranges later in the order when it explained its discretionary reasons for denying his motion." *Id.* at 1056. The Seventh Circuit reiterated that "a district court must calculate a defendant's sentencing parameters 'as they existed during the original sentencing and as they presently exist,'" and it concluded that the district court had adequately done so in its order. *Ibid.* (quoting *Corner*, 967 F.3d at 665).

The Seventh Circuit has recognized that the failure to recalculate a movant's Guidelines range may constitute harmless error in narrow circumstances. See, *e.g.*, *United States* v. *Blake*, 22 F.4th 637, 642 (2022). For example, where the movant's adjusted Guidelines range would fall entirely below the statutory minimum sentence, a district court's failure to recalculate the Guidelines range constitutes harmless error. See *United States* v. *Sanders*, No. 21-2643, 2022 WL 4104024, at *2 (Sept. 8, 2022). But as a general matter, "the nature of the error precludes a finding of harmlessness." *Blake*, 22 F.4th at 642. For present purposes, the essential point is that—unlike in the decision below—the failure to recalculate a movant's sentencing range is always error in the Seventh Circuit.

b. The Third Circuit also requires a district court to "start with the benchmark Guidelines range recalculated" to "adjust[] for the Fair Sentencing Act." *United States* v. *Shields*, 48 F.4th 183, 192 (2022). Before this Court's decision in *Concepcion*, the Third Circuit held that "a resentencing under § 404(b) includes an accurate calculation of the amended [G]uidelines range *at the time of resentencing*," including *all* intervening legal changes. *United States* v. *Murphy*, 998 F.3d 549, 556 (2021) (internal quotation marks and citation omitted). After *Concepcion*, the

Third Circuit recognized that this Court had abrogated its rule to the extent that it required, as opposed to permitted, recalculation based on legal changes *other than* those in Sections 2 and 3 of the Fair Sentencing Act. See *Shields*, 48 F.4th at 190. But the Third Circuit concluded that this Court's decision in *Concepcion* "validated" the obligation to "recalculate [a movant's] Guidelines range as if the Fair Sentencing Act's amendments had been in place at the time of his offense." *Ibid.*

c. The Fourth Circuit has similarly held, both before and after *Concepcion*, that a district court must recalculate a movant's sentencing range as if the Fair Sentencing Act were in effect at the original sentencing. In *United States* v. *Collington*, 995 F.3d 347 (2021), the Fourth Circuit explained that "the First Step Act contemplates a robust resentencing analysis" that "faithfully consider[s] a number of resentencing factors." *Id.* at 358. It proceeded to hold that "one of those criteria—as is typically true in sentencing—is the applicable statutory maximum sentence." *Ibid.*

After *Concepcion*, the Fourth Circuit again held that "district courts exercising their discretion under the First Step Act [must] proceed in two steps," the first of which is to "recalculate the movant's Guidelines range only to the extent it adjusts for the Fair Sentencing Act." *United States* v. *Troy*, 64 F.4th 177, 184 (2023) (internal quotation marks and citation omitted). The Fourth Circuit recognized that *Concepcion* had abrogated its rule to the extent that it required a district court to recalculate the sentencing range in light of legal changes other than the Fair Sentencing Act. But the Fourth Circuit reiterated that "the proper 'benchmark' for the district court's analysis (and for our review) is the impact of the Fair Sentencing Act

on the defendant's Guidelines range." *Ibid.* (quoting *Concepcion*, 142 S. Ct. at 2402 & n.6); see *United States* v. *Reed*, 58 F.4th 816, 824 n.6 (4th Cir. 2023).

d. The Eighth Circuit has adopted the same procedure. In *United States* v. *Holder*, 981 F.3d 647 (2020), it concluded that deciding a First Step Act motion "requires the court to determine the amended [G]uidelines range *before* exercising its discretion whether to grant relief." *Id.* at 651. The court noted that "[a] mistake in that determination, like any other [G]uidelines mistake, is procedural error." *Ibid.* The Eighth Circuit has since expressed the view that this Court's decision in *Concepcion* "require[s]" that procedural step. See *United States* v. *Shephard*, 46 F.4th 752, 756 (2022).

The Eighth Circuit has recognized that the failure to recalculate a movant's Guidelines range may constitute harmless error. See *Holder*, 981 F.3d at 651. But like the Seventh Circuit, the Eighth Circuit has read this Court's sentencing decisions as "strongly cautioning courts of appeals not to make * * * assumptions * * * as to what the district court might have done had it considered the correct Guidelines range." *Ibid.* (alterations in original) (quoting *United States* v. *Harris*, 908 F.3d 1151, 1156 (8th Cir. 2018)). And unlike the court of appeals in this case, the Eighth Circuit always treats the failure to recalculate as procedural error. *Ibid.*

e. The Tenth Circuit has likewise held that "a correct Guidelines calculation is the 'starting point' to any sentencing proceeding and 'paramount' when sentencing under the First Step Act." *United States* v. *Burris*, 29 F.4th 1232, 1235 (2022) (quoting *United States* v. *Brown*, 974 F.3d 1137, 1144-1145 (10th Cir. 2020)). It has explained that, "although the First Step Act does not authorize plenary resentencing, effecting the changes contemplated by the First Step Act nevertheless requires a district court

to 'calculate the defendant's Guideline[s] range.'" *Ibid.* (alteration in original) (quoting *Brown*, 974 F.3d at 1144). The Tenth Circuit based its interpretation on "the plain language of the First Step Act," which "directs courts to 'impose a reduced sentence as if * * * the Fair Sentencing Act * * * were in effect at the time the covered offense was committed.'" *Ibid.* (alterations in original) (quoting *United States* v. *Crooks*, 997 F.3d 1273, 1278 (10th Cir. 2021)). For that reason, according to the Tenth Circuit, the First Step Act "*necessarily* requires a correct calculation of the [G]uidelines range." *Ibid.* (alteration in original) (quoting *Crooks*, 997 F.3d at 1278).

The Tenth Circuit has adopted the Seventh Circuit's rule that failure to recalculate the Guidelines range may constitute harmless error "in certain exceptional instances." *Burris*, 29 F.4th at 1239-1240 (internal quotation marks and citation omitted). And the Tenth Circuit has specifically rejected the government's argument that an error is harmless simply because "the district court stated it would deny relief 'whatever the[] result' of the correct Guidelines calculation." *Id.* at 1238-1239 (citation omitted). But for purposes of the circuit conflict, the critical point is that the Tenth Circuit, like the Seventh and Eighth Circuits, always treats the failure to recalculate as procedural error.

2. In cases addressing other questions under the First Step Act, the Second, Fifth, Sixth, and Ninth Circuits have recognized the same procedural obligation in dicta.

a. The Second Circuit has held that the First Step Act "does not entail a plenary resentencing." *United States* v. *Moore*, 975 F.3d 84, 92 (2020). In the course of so holding, the Second Circuit recognized that the First Step Act nonetheless "obligate[s] a district court to recal-

culate an eligible defendant's Guidelines range" to account for "those changes that flow from Sections 2 and 3 of the Fair Sentencing Act of 2010." *Ibid.* The court based its analysis on the "'as if' clause" in Section 404(b), which "instructs a district court * * * to determine the impact of Sections 2 and 3 of the Fair Sentencing Act." *Id.* at 91.

b. The Fifth Circuit has similarly observed that appropriately adjudicating a First Step Act motion involves a Guidelines recalculation reflecting the Fair Sentencing Act. In a decision predating *Concepcion*, it held that a district court is forbidden to consider anything other than the changes in the Fair Sentencing Act when deciding a motion under Section 404(b). See *United States* v. *Hegwood*, 934 F.3d 414, 415, 418-419, cert. denied, 140 S. Ct. 285 (2019). This Court's decision in *Concepcion*, which held that courts may consider intervening legal and factual changes, abrogated the Fifth Circuit's holding prohibiting consideration of those changes. See 142 S. Ct. at 2396. But it did not undermine the Fifth Circuit's further analysis that, on a First Step Act motion, "[t]he calculations that had earlier been made under the Sentencing Guidelines are adjusted" by the district court "'as if' the lower drug offense sentences were in effect at the time of the commission of the offense." *Hegwood*, 934 F.3d at 418. That is precisely the calculation that the Eleventh Circuit held was unnecessary here.

c. The Sixth Circuit has also consistently recognized that a district court must recalculate a movant's Guidelines range to account for the Fair Sentencing Act when adjudicating a First Step Act motion. The Sixth Circuit has explained that, "[a]fter finding that a defendant is eligible for relief, a district court should first calculate a movant's amended Guidelines range," taking into account "the retroactive application of the Fair Sentencing Act."

United States v. *Domenech*, 63 F.4th 1078, 1083 (6th Cir. 2023). Even a judge who dissented on other grounds agreed with that proposition. See *id.* at 1089 (opinion of Murphy, J.) (recognizing that "the First Step Act requires courts to recalculate a defendant's [G]uidelines range in a way that addresses * * * the Fair Sentencing Act's relevant changes"). Other decisions from that court are to the same effect. See *United States* v. *Maxwell*, 991 F.3d 685, 689 (6th Cir. 2021), cert. denied, 142 S. Ct. 2903 (2022); *United States* v. *Boulding*, 960 F.3d 774, 784 (6th Cir. 2020).

d. Finally, the Ninth Circuit held in a pre-*Concepcion* case that a district court may not conduct a "plenary resentencing." *United States* v. *Kelley*, 962 F.3d 470, 471 (9th Cir. 2020), cert. denied, 141 S. Ct. 2878 (2021). In explaining its holding, the Ninth Circuit provided unambiguous instructions. First, a district court must "consider the state of the law at the time the defendant committed the offense, and change only one variable: the addition of sections 2 and 3 of the Fair Sentencing Act as part of the legal landscape." *Id.* at 475. Second, "[w]ith this counterfactual situation in mind, the court must then determine how changing this single variable would affect the defendant's sentence." *Ibid.* And "[t]hen the court may exercise its discretion to impose a reduced sentence consistent with that change." *Ibid.*

* * * * *

There is a square conflict between the Eleventh Circuit and the Third, Fourth, Seventh, Eighth, and Tenth Circuits with regard to whether a district court deciding a First Step Act motion must recalculate the movant's sentencing range to reflect Sections 2 and 3 of the Fair Sentencing Act. In the decision below, the Eleventh Cir-

cuit held that failure to recalculate the movant's sentencing range was not procedural error. But in the Third, Fourth, Seventh, Eighth, and Tenth Circuits, the failure to do so is erroneous. And in those circuits—and seemingly in the Second, Fifth, Sixth, and Ninth Circuits as well—petitioner would have received a properly anchored sentencing decision and an informed exercise of discretion by the district court. Because petitioner was sentenced in the Eleventh Circuit, he did not. Further review is warranted to resolve that conflict.

B. The Decision Below Is Incorrect

The court of appeals concluded that it could "decide, on a case-by-case basis, whether a district court's failure to properly calculate the new range constitutes reversible procedural error under the First Step Act." App., *infra*, 10a. That conclusion is erroneous; it is unmoored from the statutory text and inconsistent with this Court's decision in *Concepcion*.

1. The text of Section 404 of the First Step Act contains two principal indications that a district court is required to recalculate a movant's sentencing range, just as a district court is required to calculate a defendant's sentencing range at an initial sentencing.

First, Section 404(b) of the First Step Act places a district court in the role of a first-instance sentencing court with respect to the changes in the Fair Sentencing Act. The First Step Act authorizes a "court that imposed a sentence for a covered offense" to "impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 * * * were in effect at the time the covered offense was committed." Pub. L. No. 115-391, § 404(b), 132 Stat. 5222. It uses the same verb ("imposed") to refer to the role of the court at the initial sentencing and at the resen-

tencing under the First Step Act. It also requires a district court to act "as if sections 2 and 3 of the Fair Sentencing Act of 2010" were always the law. Section 404(b) thus puts a court in the position of an initial sentencing court in that hypothetical world.

Second, Section 404(c) contemplates that a district court will undertake a "complete review" of each motion. Section 404(c) bars a second or successive motion for sentence reduction if a previous motion was "denied after a *complete review* of the motion on the merits." Pub. L. No. 115-391, § 404(c), 132 Stat. 5222 (emphasis added). As the Seventh Circuit has recognized, "[t]he requirement that a motion under § 404 receive a 'complete review' suggests a baseline of process that includes an accurate comparison of the statutory penalties—and any resulting change to the sentencing parameters—as they existed during the original sentencing and as they presently exist." *Corner*, 967 F.3d at 665.

By placing a district court in the role of a sentencing court and requiring a "complete review," the First Step Act contemplates the recalculation of a movant's sentencing range "as if" the Fair Sentencing Act were originally in effect. In any sentencing, the Guidelines "serve as the starting point for the district court's decision and anchor the court's discretion in selecting an appropriate sentence." *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1349 (2016). "In the usual sentencing, * * * the judge will use the Guidelines range as the starting point in the analysis and impose a sentence within the range." *Freeman* v. *United States*, 564 U.S. 522, 529 (2011). But even if a district court varies, it "*must* begin [its] analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Peugh* v. *United States*, 569 U.S. 530, 541 (2013). That requirement en-

sures that the Guidelines serve their purpose of "*uniformity* in sentencing * * * imposed by different federal courts for similar criminal conduct" and "*proportionality* in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity." *Rita* v. *United States*, 551 U.S. 338, 349 (2007).

Treating recalculation as the "essential framework" of the adjudication of a First Step Act motion, *Molina-Martinez*, 136 S. Ct. at 1345, serves the same purpose. Congress passed the First Step Act to ensure proportional punishment for crack-cocaine offenses, as well as uniformity between crack and powder offenses and between offenses committed at different times. See, *e.g.*, *Terry* v. *United States*, 141 S. Ct. 1858, 1861-1862 (2021). As with sentencing more generally, a district court cannot "decide[] what to do without first determining the parameters of what it *could* do." *Corner*, 967 F.3d at 666. The district court's "uninformed exercise of discretion" here was thus "divorced from the concerns underlying the Fair Sentencing Act." *Ibid.*

2. This Court's decision in *Concepcion* confirms that interpretation. This Court explained that "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." *Concepcion*, 142 S. Ct. at 2402. And the Court clarified that "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." *Id.* at 2402 n.6. As in an initial sentencing proceeding, the "Guidelines range 'anchor[s]' the sentencing proceeding" under the First Step Act. *Ibid.* (quoting *Peugh*, 569 U.S. at 541).

3. The court of appeals rejected petitioner's interpretation for three reasons. *First*, it relied on the fact that the phrase "complete review" appears in the subsection governing second or successive motions, not initial motions. See App., *infra*, 9a. *Second*, the court of appeals viewed a requirement to recalculate the Guidelines as being "in tension, if not in conflict, with Rule 52(a) and [the court's] precedent" on harmless error. *Id.* at 10a. *Third*, the court of appeals read this Court's decision in *Concepcion* as making the Guidelines calculation optional. See *id.* at 10a-11a. All three reasons are unpersuasive.

a. The location of the provision referring to "complete review" favors petitioner's interpretation, not the court of appeals'. "[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Parker Drilling Management Services, Ltd.* v. *Newton*, 139 S. Ct. 1881, 1888 (2019) (citation omitted). Congress placed subsection (c)'s language immediately after the provision authorizing courts to reduce sentences in accordance with the Fair Sentencing Act of 2010. Its function, as the title of the subsection indicates, is to place "[l]imitations" on the grant of authority in subsection (b) to impose a reduced sentence. Pub. L. No. 115-391, § 404(c), 132 Stat. 5222. The "complete review" that Section 404(c) describes is thus what Congress intended when a movant seeks a sentence reduction under Section 404(b).

The court of appeals' strained reading produces illogical results. Surely Congress could not have meant that a district court may conduct incomplete review in the first instance, requiring a movant (or the government) to file a second motion in order to force complete review. That disjointed interpretation is especially illogical in the sentencing context, which is premised on a presumption of finality. See, *e.g.*, *Dillon* v. *United States*, 560 U.S. 817, 824

(2010). The more harmonious reading of Section 404 is that subsection (c) "[l]imit[s]" subsection (b), rather than creating a separate right to further review premised on the court's incomplete review the first time around.

b. The court of appeals' invocation of Criminal Rule 52(a), the harmless-error rule, is similarly unpersuasive. Petitioner does not dispute that harmless-error review applies to a failure to recalculate the sentencing range before deciding a First Step Act motion. But the applicability of harmless-error review does not give the court of appeals carte blanche to "decide, on a case-by-case basis, whether a district court's failure to properly calculate the new range constitutes reversible procedural error." App., *infra*, 10a. The question whether an error has occurred is obviously discrete from the question whether any error is harmless.

c. The court of appeals' reading of *Concepcion* is equally unavailing. True, district courts are generally obligated to provide only "a 'brief statement of reasons' to 'demonstrate that they considered the parties' arguments.'" App., *infra*, 10a (quoting *Concepcion*, 142 S. Ct. at 2404). But that instruction in *Concepcion* addressed intervening legal and factual changes other than those in Sections 2 and 3 of the Fair Sentencing Act. By contrast, when discussing the changes in the Fair Sentencing Act, the Court recognized that "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." *Concepcion*, 142 S. Ct. at 2402 n.6. Exactly so. There is no valid basis for the court of appeals' decision, and this Court should grant review and reverse it.

C. The Question Presented Is Exceptionally Important And Warrants Review In This Case

The question presented is exceedingly important, and this case is an ideal vehicle in which to consider it. Since the passage of the First Step Act, this Court has recognized the statute's calibrated remedy for the differential treatment of similarly situated movants. The decision below upsets that regime, which was intended to provide relief for thousands of movants.

1. The decision below threatens the core remedial purpose of the First Step Act. The Fair Sentencing Act of 2010 prospectively "correct[ed] the harsh disparities between crack and powder cocaine sentencing," *Concepcion*, 142 S. Ct. at 2396-2397, by revising the 100-to-1 ratio for sentencing to about 18-to-1, see *Terry*, 141 S. Ct. at 1861. The First Step Act retroactively applied the Fair Sentencing Act so that movants sentenced before 2010 would also be eligible for reductions "as if" the Fair Sentencing Act were in force at the time of their offenses. Pub. L. No. 115-391, § 404(b), 132 Stat. 5222.

Congress and the President achieved rare bipartisan cooperation in ameliorating the racially disparate effects of the existing sentencing regime and better serving the aims of federal sentencing policy. President Trump described the law as "an incredible moment" for "criminal justice reform." *Remarks by President Trump at Signing Ceremony for S. 756, the 'First Step Act of 2018' and H.R. 6964, the 'Juvenile Justice Reform Act of 2018,'* 2018 WL 6715859, at *16 (Dec. 21, 2018). A Democratic sponsor of the bill agreed that it was "a glowing recognition that one-size-fits-all sentencing is neither just nor effective" and "comes at a steep human cost, especially in communities of color." 164 Cong. Rec. S7749 (Dec. 18, 2018) (statement of Sen. Leahy); see *id.* at S7764 (statement of Sen. Booker) (emphasizing that the bill would "address[]

some of the racial disparities in our system because 90 percent of the people who will benefit * * * are African Americans").

The First Step Act has made concrete progress. According to one report, 97% of the individuals that have obtained relief are members of minority groups. See U.S. Sentencing Commission, *First Step Act of 2018 Resentencing Provisions Retroactivity Data Report* 7 (Aug. 2022) <tinyurl.com/retroactivity-report> (*First Step Act Report*). The decision below threatens that progress by rendering optional one of the most basic requirements of any federal sentencing proceeding.

2. Clarity on the question presented will have immediate and robust practical implications. District courts decide a large number of First Step Act motions brought by individuals who are eligible for significant relief. From December 2018 through September 2021 alone, the courts decided thousands of motions under Section 404. See *First Step Act Report* 3-4. As of August 2021, the average sentence reduction was nearly six years. See *First Step Act Report* 9; U.S. Sentencing Commission, *The First Step Act of 2018: One Year of Implementation* 11 (Aug. 2020) <tinyurl.com/FSA-one-year>. That relief is immeasurably important to the individuals that receive it, as well as their families and communities.

In approximately 70% of cases, courts that grant relief under the First Step Act do so by imposing a sentence that falls within the Guidelines range. See *First Step Act Report* 8. That reinforces the importance of this Court's consistent instruction that a proper Guidelines calculation plays an anchoring role in sentencing. Both the large number of individuals eligible for relief and the enormous stakes for those individuals heavily weigh in favor of review.

3. This case provides an ideal opportunity to resolve the question presented. That question was pressed and passed upon below, with the court of appeals even ordering supplemental briefing specifically to address it. In all, six courts of appeals have now squarely answered the question presented, and four others have implicitly resolved it. Those courts have reached different conclusions after substantial analysis, and they remain divided after this Court's decision in *Concepcion*. The Court should grant review to resolve the conflict among the courts of appeals and clarify the required procedure for the thousands of movants seeking relief under the First Step Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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