No. 20-1479

IN THE

Supreme Court of the United States

EDDIE HOUSTON, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
SMITA GHOSH**
MIRIAM BECKER-COHEN
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

May 21, 2021

* Counsel of Record
** Not admitted in D.C.; supervised by principals of the firm

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC also works to ensure that courts remain faithful to the text and history of important federal statutes like the First Step Act. Accordingly, CAC has a strong interest in ensuring that the First Step Act is understood, in accordance with its text and Congress's plan in passing it, to require courts to consider the sentencing factors in 18 U.S.C. § 3553(a) when imposing a new sentence pursuant to the First Step Act's § 404(b).

INTRODUCTION AND SUMMARY OF ARGUMENT

Fourteen years ago, the United States charged Petitioner Eddie Houston with conspiring to possess with intent to distribute at least 50 grams of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Pet. App. 5a. Houston pleaded guilty to that charge, triggering a mandatory minimum sentence of ten years. *Id.*; 21 U.S.C. § 841(b)(1)(A) (2006). After reviewing the presentence report and the mandatory sentencing factors in 18 U.S.C. § 3553(a), the district court

---

[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus*'s intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

sentenced Houston to 200 months—or nearly seventeen years—of imprisonment.

At the time that Houston was sentenced, federal law punished crimes involving crack cocaine significantly more harshly than crimes involving powder cocaine. *See Kimbrough v. United States*, 552 U.S. 85, 96 (2007) (describing the 100-to-1 crack-to-powder sentencing disparity). But in August 2010, just two years after Houston's sentencing hearing, Congress overhauled that sentencing regime through the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, in recognition of a widespread consensus that sentences for crack offenses were "unjustified," *Dorsey v. United States*, 567 U.S. 260, 268 (2012), particularly when compared to sentences for powder cocaine, *id.* at 263-64, and produced unwarranted "race-based differences" in punishment, *id.* at 268.

The Fair Sentencing Act reduced the penalties for offenses involving crack cocaine by increasing the threshold quantities of the drug triggering the penalties set forth in 21 U.S.C. § 841(b)(1). While an offense involving 50 or more grams of crack cocaine implicated a statutory sentencing range of 10 years to life in prison at the time of Houston's sentencing, the Act amended this section to require a higher quantity of drugs to trigger the same sentence. *Dorsey*, 567 U.S. at 270. But Congress did not apply the Fair Sentencing Act's changes retroactively. *See id.* at 282 (noting that the Act's new minimums applied only to defendants sentenced after August 3, 2010).

In the years after the Act's passage, the average sentence for crack cocaine decreased, becoming closer to the average sentence for powder cocaine. U.S. Sentencing Commission, Report to Congress: Impact of the Fair Sentencing Act of 2010, at 23 (Aug. 2015),

available at https://www.ussc.gov/research/congressional-reports/2015-report-congress-impact-fair-sentencing-act-2010. Individuals like Houston, however, remained subject to the "high and unjustified" penalties that predated the Fair Sentencing Act. *See Dorsey*, 567 U.S. at 268.

Congress recognized this injustice. In 2018, in an overwhelmingly bipartisan effort, Congress passed the First Step Act, which made the Fair Sentencing Act retroactive. Specifically, § 404(b) of the First Step Act provided district courts with the authority 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. 5194, 5222 (2018).

In 2019, Houston moved for a reduced sentence pursuant to the First Step Act. Like many individuals seeking such sentence reductions, he urged the district court to consider not only his initial offense, but his age, his realistic release plan, and the extraordinary efforts at education and rehabilitation that he made while incarcerated for over a decade. In his motion seeking a reduced sentence, he cited 18 U.S.C. § 3553(a), which requires judges to consider a number of factors, including "the nature and circumstances of the offense," the defendant's "history and characteristics," the Sentencing Guidelines range, and the "need to avoid unwarranted sentence disparities" when imposing a sentence under "any federal statute." 18 U.S.C. § 3553(a); Pet. 8. The district court denied his motion without considering the § 3553(a) factors or Houston's efforts at rehabilitation. On appeal, the court below held that the district court was not required to consider the § 3553(a) factors and thus did not commit legal error. Pet. App. 3a-4a.

The decision of the court below, which is consistent with the approach of three other courts of appeals, Pet. 11-12, is at odds with the text and history of the First Step Act, and this Court should grant certiorari to correct it. As that text and history make clear, the First Step Act requires sentencing judges to consider the § 3553(a) factors, and the district court abused its discretion in failing to do so.

First, the First Step Act instructs courts to "impose a reduced sentence as if" the Fair Sentencing Act were in effect at the time the covered offense was committed. In doing so, it directs courts to apply the same procedures and substantive law that have applied in sentencing proceedings for crack cocaine crimes subsequent to the Fair Sentencing Act's passage—including the mandatory consideration of the § 3553(a) factors.

Importantly, ever since the passage of the Sentencing Reform Act of 1984, consideration of the § 3553(a) factors has been mandatory whenever a court imposes a sentence for "an offense described in *any* Federal statute." 18 U.S.C. § 3551(a) (emphasis added). Congress codified the § 3553(a) factors as part of a comprehensive overhaul of the federal sentencing scheme to guide the discretion of sentencing judges and ensure that sentences would be "sufficient, but not greater than necessary," to comply with the four purposes of sentencing—retribution, deterrence, incapacitation, and rehabilitation—set out in § 3553(a)(2). 18 U.S.C. § 3553(a). Because district courts imposing sentences for crack cocaine offenses after the Fair Sentencing Act's passage have been required to consider the § 3553(a) factors, it necessarily follows that district courts "impos[ing] 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" must do so as well.

Moreover, the Act's use of the term "impose," when authorizing courts to "*impose* a reduced sentence" for all "covered offense[s]," further supports this reading. First Step Act § 404(b) (emphasis added). As noted, consideration of the § 3553(a) factors is required whenever a court "imposes" a sentence, *see* 18 U.S.C. § 3553(a) ("The court, in determining the particular sentence to be *imposed*, shall consider [the following factors]." (emphasis added)), and that requirement applies in the context of the First Step Act no less than any other time in which a sentence is "imposed." Importantly, nothing in the text of the First Step Act suggests otherwise.

Second, the decision of the court below rests on an incorrect reading of 18 U.S.C. § 3582(c)(1)(B), which authorizes courts to "modify an imposed term of imprisonment to the extent . . . expressly permitted by statute." The court below reasoned that consideration of the § 3553(a) factors was not required because § 3582(c)(1)(B), unlike other subsections of § 3582(c), "omits the requirement that courts consider section 3553(a) factors in modifying sentences." Pet. App. 3a. But this omission is irrelevant. Even if § 3582(c)(1)(B) authorizes resentencing under the First Step Act, it does not provide the substantive authority for a sentence modification; rather, it simply allows for modification of a sentence when some other statute provides that authority. Here, the text of that statute, *i.e.*, § 404(b) of the First Step Act, plainly mandates consideration of the § 3553(a) factors.

Third, the history of the First Step Act squarely supports what the plain text of the law requires: judges must consider the § 3553(a) factors whenever imposing a new sentence pursuant to § 404(b). The legislative record confirms that Congress intended to leave resentencing proceedings to "judges who sit and

see the totality of the facts." 164 Cong. Rec. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Booker). The § 3553(a) factors ensure that sentencing judges adequately take account of those facts, providing a complete picture of the individual being sentenced. Moreover, it would defy logic to conclude that a law like the First Step Act—so intently focused on reducing disparities in sentencing—permits the imposition of sentences under § 404(b) without requiring consideration of the § 3553(a) factors, which serve to "avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary," *United States v. Booker*, 543 U.S. 220, 264-65 (2005).

ARGUMENT

I. The Text of the First Step Act Makes Clear that Judges Are Required to Consider the § 3553(a) Factors in § 404(b) Proceedings.

Under the First Step Act, sentencing courts that "imposed a sentence" for certain drug offenses "may . . . impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed." First Step Act § 404(b). This text requires courts to take account of the § 3553(a) factors whenever they consider a motion for a reduced sentence under the Act.

A. To start, by instructing courts to "impose a reduced sentence as if" the Fair Sentencing Act were in effect at the time the covered offense was committed, § 404(b) directs courts to follow the same procedures and apply the same substantive laws that would have applied in a sentencing proceeding after the Fair

Sentencing Act's passage.[2] And since the Fair Sentencing Act's passage, district courts conducting sentencing proceedings governed by the statutory provisions that were modified by the Fair Sentencing Act have *always* been required to consider the § 3553(a) factors.

Indeed, since the passage of the Sentencing Reform Act of 1984, which "revolutionized the manner in which district courts sentence persons convicted of federal crimes," *Burns v. United States*, 501 U.S. 129, 132 (1991), consideration of the § 3553(a) factors has been mandatory whenever a court imposes a sentence for "an offense described in *any* Federal statute," 18 U.S.C. § 3551(a) (emphasis added); *see id.* § 3551(b) ("An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to [a term of probation, a fine, or a term of imprisonment]."); *id.* § 3553(a) ("[I]n determining the particular sentence to be imposed," a district court "shall consider [the listed factors]."); *Chavez-Meza v. United States*, 138 S. Ct. 1959, 1963 (2018) (noting that sentencing courts "must always take account of certain statutory factors" and citing § 3553(a)); *Gall v. United States*, 552 U.S. 38, 50 n.6 (2007) (explaining

---

[2] The courts of appeals are divided as to whether a sentencing court may also apply other substantive changes in sentencing law in a § 404(b) resentencing, but this Court need not address that question to hold that consideration of the § 3553(a) factors is mandatory. *Compare*, *e.g.*, *United States v. Boulding*, 960 F.3d 774, 784 (6th Cir. 2020) (resentencing under the First Step Act "at a minimum[,] includes an accurate calculation of the amended guidelines range at the time of resentencing and thorough renewed consideration of the § 3553(a) factors"), *with United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir. 2019) ("The express backdating only of Sections 2 and 3 of the Fair Sentencing Act of 2010 . . . supports that Congress did not intend that other changes were to be made as if they too were in effect at the time of the offense.").

that "[s]ection 3553(a) lists seven factors that a sentencing court *must* consider" (emphasis added)); *Rita v. United States*, 551 U.S. 338, 357 (2007) (describing § 3553(a) as a "congressional mandate[]"); *see also* Fed. R. Crim. P. 32(d)(2)(G) (requiring the submission of a presentence report that includes "information relevant to the factors under 18 U.S.C. § 3553(a)" before a court "imposes a sentence").

In passing the Sentencing Reform Act, Congress recognized that "one of the most glaring defects in current sentencing law" was "the absence of general legislative guidance concerning the factors to be considered in imposing sentence[s]." S. Rep. No. 98-225, at 74-75 (1984). The § 3553(a) factors were central to the Sentencing Reform Act's effort to prevent arbitrariness in federal sentencing, *Pepper v. United States*, 562 U.S. 476, 489-90 (2011) (the discretion of federal sentencing courts is "constrain[ed]" by the requirement that they consider the § 3553(a) factors), and ensure that courts uniformly consider important individualized factors, such as "the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1). As the text of § 3551 makes clear, legislators envisioned that the § 3553(a) factors would apply in "each case," S. Rep. No. 98-225, at 77 (1984); *see* 130 Cong. Rec. 840 (1984) (statement of Sen. Laxalt) ("Section 3553 requires the judge to consider the kinds of available sentences . . . and to state the reasons for each sentence."); *see also* 18 U.S.C. § 3551(a), (b) ("a defendant who has been found guilty of an offense described in any Federal statute . . . shall be sentenced, in accordance with the provisions of section 3553").

Significantly, every court of appeals has held that a sentencing court's failure to consider the § 3553(a) factors in an initial sentencing proceeding constitutes reversible error. *Gall*, 552 U.S. at 51 ("[T]he appellate

court must . . . ensure that the district court committed no significant procedural error, such as . . . failing to consider the § 3553(a) factors."); *Probation*, 49 Geo. L.J. Ann. Rev. Crim. Proc. 909, 910 n.2275 (2020) (collecting cases). Thus, district courts sentencing individuals after the Fair Sentencing Act's passage must consider the § 3553(a) factors, and it necessarily follows that district courts "impos[ing] 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" must do so as well.

B. Section 404(b)'s use of the word "impose" reinforces this reading because, as noted, consideration of the § 3553(a) factors is required whenever a court "imposes" a sentence. The text of § 3553(a) itself makes that clear, mandating that "[t]he court, in determining the particular sentence to be imposed, shall consider [the following delineated factors]." 18 U.S.C. § 3553(a). The title of subsection 3553(a), which refers to "factors to be considered in *imposing* a sentence," provides an additional "cue[] as to what Congress intended," *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) (citations omitted) (internal quotation marks omitted), further supporting the notion that courts are required to consider the § 3553(a) factors when *imposing* a sentence—whether under the First Step Act or any other law.

Moreover, that Congress used the same word—"impose"—to describe both sentencing and resentencing procedures in § 404(b) bolsters the conclusion that courts must consider the § 3553(a) factors in a First Step Act resentencing. Section 404(b) provides that the "court that imposed a sentence for a covered offense may," on motion, "impose a reduced sentence." The first use of the word "impose" clearly refers to the act of imposing the original sentence for a drug offense,

in which the court would have undoubtedly been required to consider the § 3553(a) factors. *See, e.g.*, *Kimbrough*, 552 U.S. at 93 (when sentencing a defendant for a crack cocaine offense, the judge accounted for various factors "as required by § 3553(a)"); *Booker*, 543 U.S. at 259 (concluding, when reviewing a sentence imposed under 21 U.S.C. § 841, that the law "requires judges to take account of the Guidelines together with [18 U.S.C. § 3553(a)]").

If the decision of the court below were correct, the verb "impose" would have two different meanings within the same sentence. That cannot be right. After all, "identical words and phrases within the same statute should normally be given the same meaning," *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 232 (2007), and the presumption of consistent usage is "doubly appropriate" where, as here, the identical phrases were "inserted" into a statute at the same time. *Id.*; *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 169-70 (2012).

II. The Court Below Misinterpreted 18 U.S.C. § 3582(c)(1)(B), Which Does Not Eliminate the Requirement that Courts Consider the § 3553(a) Factors.

According to the court below, resentencing under the First Step Act is authorized by the sentence-finality exception in 18 U.S.C. § 3582(c)(1)(B), which permits a court to "modify an imposed term of imprisonment to the extent . . . expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure," and because § 3582(c)(1)(B) does not explicitly mention § 3553(a), courts need not consider it. But even if § 3582(c) authorizes resentencing under the

First Step Act,[3] the fact that it does not reference § 3553(a) is irrelevant: § 3582(c)(1)(B) provides no substantive standards to guide resentencing. Instead, the rules for modifying a sentence under § 3582(c)(1)(B) are provided by the statute that expressly permits the modification. *See United States v. Triestman*, 178 F.3d 624, 629 (2d Cir. 1999) (Sotomayor, J.) (reading § 3582(c)(1)(B) to "requir[e] only that a statute contain an express grant of remedial power, and that this power be broad enough to permit the resentencing in question"); *see also* S. Rep. No. 98-225, at 121 (1984).

For example, § 3582(c)(1)(B) provides the authority for sentence modifications under 28 U.S.C. § 2255, which permits courts to vacate and set aside previously imposed judgments on collateral attack. Although § 3582(c)(1)(B) does not reference § 3553(a), the courts of appeals have required courts to consider the § 3553(a) factors when resentencing defendants under § 2255. *See, e.g.*, *United States v. Brown*, 879 F.3d 1231, 1241 (11th Cir. 2018); *see also United States v. Nichols*, 897 F.3d 729, 736-37 (6th Cir. 2018) (holding that the breadth of § 2255 "does not purport to override the reasonableness standard of review," which requires consideration of the § 3553(a) factors); *Gray v. United States*, 833 F.3d 919, 924 (8th Cir. 2016) (remanding for further resentencing because the district court "did not accurately consider the requirements of 18 U.S.C. § 3553(a) . . . in the § 2255 proceeding"); *see also United States v. Wirsing*, 943 F.3d 175, 184 (4th

[3] As the petition explains, the First Step Act independently authorizes resentencing. Pet. 23; *United States v. Edwards*, No. 19-13366, 2021 WL 1916358, at *3 (11th Cir. May 13, 2021) ("[Section] 404(b)'s text is clear: It independently grants a district court the authority, in the relevant circumstances, to impose a reduced sentence. It is self-contained and self-executing. It requires no assist from § 3582(c)(1)(B). It is its own procedural vehicle." (internal quotations omitted)).

Cir. 2019), *as amended* (Nov. 21, 2019) ("[i]n pre-First Step Act cases, courts found § 3582(c)(1)(B) to encompass," among other things, § 2255); *Triestman*, 178 F.3d at 629 (same). In these cases, consideration of the § 3553(a) factors is required by the underlying statute permitting modification—§ 2255's authority to "resentence" defendants after a successful collateral attack—rather than the text of § 3582(c)(1)(B) itself.

To be sure, the other sentence-finality exceptions in § 3582(c)—which allow courts to resentence for "extraordinary and compelling reasons," 18 U.S.C. § 3582(c)(1)(A)(i), and when the applicable sentencing range was "subsequently . . . lowered by the Sentencing Commission," *id.* § 3582(c)(2)—explicitly require consideration of the § 3553(a) factors. But resentencing proceedings under these subsections are different from those envisioned by § 3582(c)(1)(B). When a sentence is modified under § 3582(c)(1)(B) or § 3582(c)(2), § 3582(c) provides the *only* substantive authority for the modification, and its text contains all the relevant guidance for district courts. Both subsections create standards for sentence reductions and both require that such reductions be "consistent with . . . policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A)(ii), (c)(2). It is no surprise, then, that both subsections include the directive to consider the § 3553(a) factors "to the extent that they are applicable." *Id.* § 3582(c)(1)(A), (c)(2).[4]

---

[4] Some courts have implied that consideration of the § 3553(a) factors should be limited or not required in First Step Act proceedings because those factors play a limited role in the sentence modifications authorized by 18 U.S.C. § 3582(c)(2). *See, e.g.*, *United States v. Kelley*, 962 F.3d 470, 478 (9th Cir. 2020) (adopting an approach "similar" to the "two-step approach to a § 3582(c)(2) resentencing" under *Dillon v. United States*, 560 U.S. 817, 827 (2010)); *Hegwood*, 934 F.3d at 418 (noting that "[t]he district court under Section 3582(a) is only required to consider the

Thus, although § 3582(c)(1)(B) does not mention § 3553, the court below should have considered the statute that expressly permits modification—that is, § 404(b)—to determine whether consideration of the § 3553(a) factors was required. And § 404(b) makes clear that consideration of the § 3553(a) factors is required. *See supra*.

III. Interpreting § 404(b) to Require Consideration of the § 3553(a) Factors Accords with Congress's Plan to Reduce Disparities in Sentencing and Provide for Individualized Sentencing Review.

The history of the First Step Act only reinforces what the plain text of the statute makes clear: judges imposing sentences pursuant to § 404(b) must consider the § 3553(a) factors. Congress's decision to enact the First Step Act was driven by its longstanding interest in reducing sentencing disparities between like offenders and facilitating individualized review of potentially unjust sentences. To permit district courts to

---

Section 3553(a) factors 'to the extent that they are applicable'" (quoting § 3582(c)(2))). But § 3582(c)(2), unlike § 404(b), does not authorize a new sentence to be imposed; instead, it authorizes a previously imposed sentence to be reduced for specific reasons, and gives courts guidance for doing so. As this Court explained in *Dillon*, § 3582(c)(2) requires only limited consideration of the § 3553(a) factors because of the "language of § 3582(c)(2)," which authorizes a "sentence modification" rather than "further sentencing," the provision's "narrow scope," and its explicit reference to Sentencing Commission policy statements, 560 U.S. at 825-26; *cf. United States v. Collington*, No. 19-6721, 2021 WL 1608756, at *5 (4th Cir. Apr. 26, 2021) (in resentencing under the First Step Act, "the court must consider the § 3553(a) factors to determine what sentence is appropriate[, u]nlike sentence modification proceedings under § 3582(c)(2)—which limit use of the § 3553(a) factors to determining simply whether to reduce a sentence to within a predetermined range").

ignore the § 3553(a) sentencing factors for some defendants and not others would perpetuate sentencing disparities among like offenders and make it nearly impossible to determine whether courts adequately considered the individual circumstances of each offender, gutting the central purposes of the First Step Act.

As discussed earlier, the First Step Act extended the reforms of the Fair Sentencing Act of 2010, which was designed to "restore fairness to Federal cocaine sentencing." 124 Stat. at 2372. Having determined that the 100-to-1 crack-to-powder sentencing disparity was unjustified and had a disproportionate effect on African Americans, Congress passed the Fair Sentencing Act to bring greater uniformity to sentencing. *See Dorsey*, 567 U.S. at 268-69; 155 Cong. Rec. 24954 (2009) (statement of Sen. Durbin) (quoting then–Vice President Joe Biden as stating, "[e]ach of the myths upon which we based the disparity has since been dispelled or altered"); 156 Cong. Rec. 14393 (2010) (statement of Rep. Jackson Lee) ("The unwarranted sentencing disparity not only overstates the relative harmfulness of the two forms of the drug and diverts federal resources from high-level drug traffickers, but it also disproportionately affects the African-American community.").

But even after the enactment of the Fair Sentencing Act, a major disparity remained: individuals sentenced for crack cocaine crimes prior to enactment of the Fair Sentencing Act were still serving lengthy sentences imposed under the old unjust statutory regime. As Senator Booker explained, "there are people sitting in jail right now for selling an amount of drugs equal to the size of a candy bar who have watched people come in and leave jail for selling enough drugs to fill a

suitcase." 164 Cong. Rec. S7764 (daily ed. Dec. 18, 2018); *see also* 164 Cong. Rec. S7645 (daily ed. Dec. 17, 2018) (statement of Sen. Durbin) (expressing the need to give a "chance [for a reduced sentence] to thousands of people still serving sentences for nonviolent offenses involving crack cocaine under the 100-to-1 standard" even after passage of the Fair Sentencing Act). Congress sought to remedy this lingering disparity by making the Fair Sentencing Act retroactive.

It did so through the First Step Act—the product of a lengthy process of bipartisan negotiations, driven by the common goal of reducing disparities in the criminal justice system. Indeed, legislators heralded § 404 of the First Step Act as an embodiment of the broad remedial purpose of reducing disparities—including racial disparities—in the criminal justice system. *See, e.g.*, 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Feinstein) (applauding the First Step Act for "help[ing] address some of the racial disparities in our criminal justice system" by "finally mak[ing] the Fair Sentencing Act retroactive"); *id.* at S7764 (statement of Sen. Booker) (explaining that "this bill alone will mean that thousands of Americans who have more than served their time will become eligible for release, and it addresses some of the racial disparities in our system because 90 percent of the people who will benefit from that are African Americans; 96 percent are Black and Latino").

The decision of the court below, which sanctions the district court's decision to ignore the § 3553(a) sentencing factors, directly undermines this plan. As many courts have recognized, application of the sentencing factors "makes sentencing proceedings under the First Step Act more predictable to the parties," "more straightforward for district courts," and "more

consistently reviewable on appeal." *United States v. Easter*, 975 F.3d 318, 325 (2020) (quotation marks omitted); *see, e.g.*, *United States v. Shaw*, 957 F.3d 734, 741 (7th Cir. 2020) ("Familiarity fosters manageability, and courts are well versed in using § 3553 as an analytical tool for making discretionary decisions."). It would defy logic to conclude that a law like the First Step Act—so intently focused on reducing sentencing disparities—permits the imposition of sentences under § 404(b) without the critical parameters that ensure sentencing uniformity, including the required consideration of the § 3553(a) factors.

There is no trace of evidence in the legislative record that Congress intended sentencing courts to ignore the § 3553(a) factors in § 404(b) proceedings. To the contrary, in debates on the First Step Act, members of Congress repeatedly emphasized that the law, by reducing default statutory penalties for certain people convicted of crack crimes, would help restore the fundamental concept of individualized sentencing embodied in § 3553(a)—proceedings that are driven "not [by] legislators but judges who sit and see the totality of the facts." 164 Cong. Rec. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Booker); *see, e.g.*, 164 Cong. Rec. S7748 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar) ("[T]his bill will not automatically reduce any one person's prison sentence. Instead, the bill simply allows people to petition courts and prosecutors for an individualized review based on the particular facts of their case.").

If courts were permitted to ignore the § 3553(a) factors when imposing sentences pursuant to § 404(b), it would be impossible to determine whether they took account of things like "the nature and circumstances of the offense and the history and characteristics of the

defendant," 18 U.S.C. § 3553(a)(1), or "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," *id.* § 3553(a)(6). This would stymie the ability of reviewing courts and the public to evaluate First Step Act proceedings, undermining the "public's trust in the judicial institution," *Rita*, 551 U.S. at 356, and making it impossible to determine whether a judge "look[ed] at an individualized case and decide[d] what is best for public safety and what is best for the community," 164 Cong. Rec. S7748 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar).

Accordingly, the history of the First Step Act squarely supports what the plain text of the law requires: judges must consider the § 3553(a) factors whenever imposing a reduced sentence pursuant to § 404(b). This Court should grant certiorari to correct the error of the court below and give effect to that text and Congress's plan in passing it.

CONCLUSION

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

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
SMITA GHOSH**
MIRIAM BECKER-COHEN
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

May 21, 2021

* Counsel of Record
** Not admitted in D.C.; supervised by principals of the firm