No. 20-1650

IN THE

Supreme Court of the United States

CARLOS CONCEPCION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Under Supreme Court Rule 37.3(a), Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas are the separation of powers and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF is part of a transpartisan coalition of organizations that advocate for a broad array of consensus-based criminal justice reforms, such as the First Step Act ("FSA"), Pub. L. No. 115-391,132 Stat. 5194 (2018). As Professor Shon Hopwood has explained, "with the efforts of the criminal justice reform community pushing from all sides of the political aisle, Congress finally broke the logjam and passed meaningful reform" via the FSA. Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 Yale L.J. F. 791, 817 (2019).

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[1] All parties have consented to the filing of this brief. *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

"Republicans and Democrats worked together to pass . . . [this] historic bill that eliminated some of the worst injustices in the federal criminal justice system. The First Step Act makes it possible for thousands of people with criminal records to rejoin society and start to realize their potential." Charles Koch with Brian Hooks, *Believe in People: Bottom-Up Solutions for a Top-Down World*, 224 (2020). "Because of provisions in the law, as of the one-year anniversary of its passage [in December 2019], more than 3,000 incarcerated individuals have been released, and more than 2,000 had their sentences reduced." Ivan J. Dominguez, et al., *NACDL and Charles Koch Foundation Mark the One-Year Anniversary of the First Step Act with the NACDL First Step Act Resource Center*, 44 Champion 10 (2020).

AFPF supports the FSA and believes in additional chances—*everyone* has a gift and something to offer to society, people can change, and incarcerated persons who do not pose a danger to public safety and have paid their debt to society deserve to have a chance to rejoin their families and communities. Examples abound of individuals who despite being incarcerated have managed to grow from whatever mistakes they made, overcome obstacles, and use their unique experiences and gifts to benefit society. After all, "[c]haracter is not static, people change, and the law must recognize this reality." Shon Hopwood, *Second Looks & Second Chances*, 41 Cardozo L. Rev. 83, 119 (2019). Many incarcerated persons have the potential to make significant contributions to our society.

AFPF has an interest in this case because it believes the panel majority erred by adding limitations onto Section 404 of the FSA's grant of discretionary authority.[2] At the least, district courts are empowered to, and should, take post-sentencing factual and legal developments into consideration when handling pleas for leniency filed under Section 404(b) by incarcerated persons with covered offenses, particularly at the critical gatekeeping stage of determining whether to grant the motion.

SUMMARY OF ARGUMENT

"An offender is eligible for a sentence reduction under the First Step Act only if he previously received 'a sentence for a covered offense.'" *Terry v. United States*, 141 S. Ct. 1858, 1862 (2021) (quoting FSA § 404(b)). "[T]he 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." FSA § 404(a). *See also Dorsey v. United States,* 567 U.S. 260, 264 (2012). This means an incarcerated person eligible to ask a district court to exercise its discretion to reduce a sentence pursuant to Section 404 of the FSA has necessarily spent over a decade in prison already.

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[2] AFPF also believes the FSA should be construed consistent with the rule of lenity, to the extent it applies, with any lingering ambiguities resolved in favor of affording eligible incarcerated persons who have rehabilitated themselves over the past decade-plus a chance to rejoin their families and contribute to their communities.

Yet, the panel majority found district courts may not even look at what an incarcerated person has done to rehabilitate him or herself (or not) over the past decade-plus in making the critical gatekeeping determination of *whether* to exercise discretion to grant a sentence reduction pursuant to Section 404, let alone consider other intervening factual and legal developments. That cannot be, and is not, the law. Given Section 404's discretionary nature, as well as the FSA's broader structure and purpose, it blinks reality to suggest Congress intended to hamstring district courts from taking into account conspicuously relevant information in making a judgment call *whether* to grant a motion for a sentence reduction.

At bottom, the question presented by this case can be framed as follows: "Must a sentencing court studiously ignore one of the most conspicuous facts about a defendant when deciding how long he should spend in prison?" *United States v. Smith*, 756 F.3d 1179, 1180 (10th Cir. 2014) (Gorsuch, J.) (addressing a different sentencing dispute). Or as Judge Barron put it below: "Is the district court in making the reduction decision in the here and now supposed to blind itself to the present state of the world beyond the fact of the existence of that new mandate imposed by the 'as if' clause?" Pet. App. 30a (Barron, J., dissenting). We believe the answer to that question must be "no."

Nothing in Section 404 requires a district court to be an ostrich, burying its head in the sand as to the most relevant information to the decisions *whether* to grant discretionary sentencing relief and *to what extent*. "Sentencing in this context may proceed just as it does elsewhere, with a humble recognition that 'no

more difficult task confronts judges than the determination of punishment' and '[e]ven the most self-assured judge may well want to bring to his aid every consideration that counsel for the accused can appropriately urge.'" *See Smith,* 756 F.3d at 1193 (quoting *Carter v. Illinois*, 329 U.S. 173, 178 (1946)). So too here. Contrary to the panel majority, a federal district court can, and *should*, account for intervening factual and legal developments—most prominently, a defendant's post-sentencing conduct—when deciding if it should "impose a reduced sentence." Any lingering doubts should be resolved in favor of principles of lenity and common sense.

ARGUMENT

I. SECTION 404 PROVIDES A *CHANCE* AT ANOTHER CHANCE—NOT A GET-OUT-OF-JAIL-FREE CARD.

A. District Courts Have Wide Latitude to Determine Whether and How to Exercise Discretion to Grant Sentence Reductions.

Section 404 of the FSA does *not* require federal district courts to reduce sentences. *See* FSA § 404(b) ("A court . . . *may* . . . impose a reduced sentence[.]" (emphasis added));[3] *see also* FSA § 404(c) ("Nothing in this section shall be construed to require a court to

[3] *Cf. Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1609 (2020) ("[T]he word 'may' *clearly* connotes discretion." (cleaned up)).

reduce any sentence[.]").[4] "The statutory language used by Congress in section 404(b) of the First Step Act is wholly permissive." *United States v. Stevens*, 997 F.3d 1307, 1315 (11th Cir. 2021) (Lagoa, J.). "The upshot is that the Act gives a district court authority to reduce a defendant's sentence retroactively to account for the changes established by the Fair Sentencing Act. But that authority is discretionary." *United States v. Maxwell*, 991 F.3d 685, 689 (6th Cir. 2021) (Sutton, J.).

"District courts have wide latitude to determine *whether and how* to exercise their discretion in" handling Section 404(b) motions. *United States v. Jones*, 962 F.3d 1290, 1304 (11th Cir. 2020) (Pryor, C.J.) (emphasis added). That latitude extends to the types of information properly considered in deciding whether to grant relief and, if so, to what extent. *See also United States v. Allen*, 956 F.3d 355, 357 (6th Cir. 2020) ("Section 404's silence regarding the standard that courts should use in determining whether to reduce a defendant's sentence cannot be read to limit the information that courts may consider."). Section

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[4] Section 404(c) of the FSA is titled "Limitations," FSA § 404(c). *See also Yates v. United States,* 574 U.S. 528, 552 (2015) (Alito, J., concurring in the judgment) ("Titles can be useful devices to resolve doubt about the meaning of a statute." (cleaned up)). If Congress intended to impose unusual temporal limitations on the information district courts could consider in handling Section 404(b) petitions, it would presumably have in Section 404(c). It did not. *See also* Antonin Scalia & Bryan Garner, Reading Law 107 (2012) ("The expression of one thing implies the exclusion of others[.]").

404 thus allows district courts to account for post-sentencing factual and legal developments.

Buttressing this conclusion, Section 404 was enacted against the backdrop of 18 U.S.C. § 3661, which provides: "No limitation shall be placed on the information concerning the background, character, and conduct of a person . . . which a [federal] court . . . may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661. As then-Judge Gorsuch has observed: "As the Supreme Court has explained, this provision ensures sentencing judges access to 'the widest possible breadth of information about a defendant' so that the punishments they issue 'suit not merely the offense but the individual.'" *Smith*, 756 F.3d at 1181 (quoting *Pepper v. United States*, 562 U.S. 476, 488 (2011)). "In this way, the statute preserves a long tradition, one extending back 'before . . . the American colonies became a nation,' a tradition of affording judges 'discretion in the sources and types of evidence' they may consult at sentencing, subject of course and always to the Constitution's constraints." *Id.* at 1181 (quoting *Pepper*, 562 U.S. at 488). Nothing in Section 404 purports to displace the traditional sentencing principles codified in 18 U.S.C. § 3661.

B. Courts Should Apply the Section 3553(a) Factors Afresh, Accounting for Post-Sentencing Developments.

Nor can Section 404 reasonably be read to categorically displace the traditional sentencing principles codified in 18 U.S.C. § 3553(a). Accordingly, in deciding whether to grant Section 404(b) petitions, district courts properly consider post-sentencing

factual and legal developments, such as post-imprisonment rehabilitation and changes to the Guidelines, through the lens of the Section 3553(a) factors. *See United States v. Barber*, 966 F.3d 435, 438 (6th Cir. 2020) (Thapar, J.) ("[T]he court may consider all relevant information (*including post-sentencing conduct*) and should consider the sentencing factors laid out in 18 U.S.C. § 3553(a)." (emphasis added)); *see also Stevens*, 997 F.3d at 1318 ("[T]he district court may consider the § 3553(a) factors, as well as the probation office's submissions, post-sentence rehabilitation, *post-imprisonment rehabilitation*, or any other relevant facts and circumstances." (emphasis added)). And district courts should do so.

After all, as Judge Sutton observed: "How could a district court exercise its discretion in deciding whether to make a First Step Act reduction without considering the § 3553(a) factors?" *Maxwell*, 991 F.3d at 691; *see also United States v. White*, 984 F.3d 76, 90 (D.C. Cir. 2020) ("Every circuit court that has examined the issue has held that a district court may, or must, consider the 18 U.S.C. § 3553(a) sentencing factors when passing on a motion for relief under section 404 of the First Step Act."). The answer to that question is, at the least, far from obvious. And while Section 404(b) of the FSA may not require consideration of the § 3553(a) factors in all cases, at the least, as Judge Lagoa has suggested, "it may be a best practice for the district court to consider § 3553(a) factors when exercising its discretion to either grant or deny a motion for a sentence reduction based on an eligible covered offense[.]" *See Stevens*, 997 F.3d at 1318; *see also Jones*, 962 F.3d at 1304 ("In exercising their discretion, . . . [courts] may consider all the

relevant factors, including the statutory sentencing factors, 18 U.S.C. § 3553(a).").

In order for the second looks contemplated by Section 404 to be meaningful, they must also include consideration of up-to-date information about the defendant, as well as the state of the world. And nothing in Section 404 requires courts to turn a blind eye to the most relevant information or engage in theoretical time-travel exercises. *See* Pet. App. 35a & n.6 (Barron, J., dissenting) ("Concededly, that grant of authority in § 404(b) is conditional, but the chief condition—set forth in the 'as if' clause—does not by terms purport to speak to whether the clock stops at the original sentencing proceeding or the § 404(b) proceeding[.]"); *Maxwell*, 991 F.3d at 691 ("The Act's 'as if' directive tells us some things, but not all things, . . . about the extent to which a sentencing judge must separate the present from the past in ruling on these motions."). *Cf. United States v. Murphy*, 998 F.3d 549, 562 (3d Cir. 2021) (Bibas, J., dissenting) ("In exercising its discretion to vary downwards, . . . [the court] can consider new facts and new law.").

As this Court has explained, "evidence of postsentencing rehabilitation may be highly relevant to several of the Section 3553(a) factors that Congress has expressly instructed district courts to consider at sentencing. For example, evidence of postsentencing rehabilitation may plainly be relevant to 'the history and characteristics of the defendant.'" *Pepper*, 562 U.S. at 491 (quoting 18 U.S.C. § 3553(a)(1)); *see also* Pet. App. 54a (Barron, J., dissenting) ("[T]he Supreme Court has recognized that such intervening facts as a defendant's admirable post-sentencing conduct can be

'highly relevant to several of the § 3553(a) factors.'" (citing *Pepper*, 562 U.S. at 491)).[5] So too here.

And at a minimum, district courts should also recalculate eligible defendants' Guidelines range to account for changes ushered in by Sections 2 and 3 of the Fair Sentencing Act. *See also Maxwell*, 991 F.3d at 689; *Murphy*, 998 F.3d at 560–61 (Bibas, J., dissenting) ("[T]he First Step Act, Congress authorized district courts to reduce sentences 'as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time' of the crime. So a court must update the Guidelines range to reflect these new statutory punishments." (citing FSA § 404(b)). But district courts may also take into consideration other intervening factual and legal developments that would affect a defendant's Guidelines range in some form or fashion, at least as part of the § 3553(a) analysis, in deciding both *whether* and, if so, *how much* to reduce a defendant's sentence. *See also United States v. Lawson,* 824 F. App'x 411, 412 (6th Cir. 2020) (Kethledge, J.) (Under applicable precedent, "in deciding whether to grant a defendant's motion under the First Step Act, the district court may consider—as simply a 'factor' under 18 U.S.C. § 3553—that the defendant was sentenced based in part on what would now be considered a legal

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[5] To be sure, there are instances where post-sentencing rehabilitative conduct may not outweigh the severity of the underlying criminal conduct apart from the "covered offense." *See, e.g., United States v. Morales,* No. 3:94-cr-112 (SRU), 2020 U.S. Dist. LEXIS 151584, at *15 (D. Conn. Aug. 20, 2020) (denying Section 404(b) motion on the merits based on defendant's multiple murder convictions).

mistake."); *see also Gall v. United States,* 552 U.S. 38, 49 (2007) ("[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.").

This approach makes sense, particularly because district courts' authority to vary downward from the advisory Guidelines range was well established when the Fair Sentencing Act was enacted. *See also United States v. Moore,* 975 F.3d 84, 92 n.36 (2d Cir. 2020). Accordingly, Section 404, at a minimum, empowers courts to take into account what the defendant has done *after* being sentenced to rehabilitate him or herself and make amends, as well as other intervening factual and legal developments, in applying the Section 3553(a) factors afresh.

C. Use of the Section 3553(a) Rubric to Take Into Account Post-Sentencing Factual and Legal Developments Makes Sense.

Regardless of the extent to which Section 404 permits district courts to take into account post-sentencing legal and factual developments (beyond those ushered in by Sections 2 and 3 of the Fair Sentencing Act) in recalculating a defendant's Guidelines range, this much seems clear: at the least, district courts can—and *should*—take these intervening factual and legal developments into account through the lens of the Section 3553(a) factors in deciding whether to grant a sentence reduction and, if so, by how much. And for good reason.

Handling Section 404(b) motions through the Section 3553(a) lens empowers courts to take into account who an incarcerated person is *today* (good or

bad), as opposed to ten-plus years ago.[6] *See also Barber*, 966 F.3d at 438; 18 U.S.C. § 3553(a)(1) ("The court . . . shall consider . . . the history and characteristics of the defendant[.]"). Someone who has been incarcerated for over a decade may well be a very different person with a different character. *Cf. Smith,* 756 F.3d at 1184 ("Under a longstanding American tradition embodied in § 3661 and § 3553(a), federal courts *seeking a just sentence may look to the whole of the defendant's person, character*, and crimes." (emphasis added)).

Incarcerated persons who have made mistakes (even many or very bad mistakes) in their teenage years or early twenties often, though not always, are able to change for the better over time, and when they are in their thirties or forties have addressed the issues that led them to make those mistakes. *See* Marc Mauer, *Long Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. Rev. 114 (2018) (discussing "aging out" of crime).[7] Section 404

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[6] *See, e.g., United States v. Benson,* No. 08–135, 2020 U.S. Dist. LEXIS 241722, at *14 (E.D. Tenn. Dec. 23, 2020) (reducing sentence to time served and three years supervised release "[i]n light of defendant's post-sentencing conduct and his seemingly low risk of recidivism"); *United States v. Fields,* No. 08-11, 2020 U.S. Dist. LEXIS 102769, at *11–13 (N.D. Ind. June 11, 2020) (similar); *United States v. Young,* No. 02-078, 2020 U.S. Dist. LEXIS 217894, at *14 (E.D. Tenn. Nov. 20, 2020); *United States v. Davis,* 423 F. Supp. 3d 13, 17 (W.D.N.Y. 2019).

[7] *See also* Office of the Inspector General, U.S. DOJ, The Impact of an Aging Inmate Population on the Federal Bureau of Prisons, i, iii (Rev. Feb. 2016) (finding that "aging inmates are more costly

provides a procedural pathway for individuals sentenced for a "covered offense" who have rehabilitated themselves to petition for leniency, based in part on their post-sentencing positive work.

Consider the following observation by a district court judge on the real-world impact of the FSA:

> [U]nder a new law that came out, the [FSA], . . . [defendants with covered offenses] are eligible to be resentenced, have their sentence reduced. I have had the benefit of them coming back to court and telling me what they have been doing in the ten, 15 years in jail, and it is remarkable how much positive work they have done in terms of bettering themselves, or as you say, wanting to do better and learn from your mistakes. They have taken classes and courses, the list goes on and on of the educational programs they have taken. . . . I noticed with these particular Defendants they had no real disciplinary record while they have been there despite being there

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to incarcerate than their younger counterparts due to increased medical needs" and that "the rate of recidivism of aging inmates is significantly lower").

> for many, many years. . . . So, this is a long way of saying don't give up hope[.][8]

That well describes the subset of incarcerated persons with "covered offenses" who are generally most deserving of relief under Section 404. *Cf.* Pet. Br. 11, 45–46. And it is simply wrong to bar judges from even looking at incarcerated persons' efforts to change for the better over the past decade-plus in deciding *whether* to grant relief under Section 404.

For many individuals with covered offenses, it is also hard to see how continued incarceration would serve any rehabilitative benefit. Indeed, as Professor Hopwood has observed more broadly: "Several studies have concluded that more prison time doesn't equal more success; longer terms of imprisonment do not reduce the likelihood of reoffending. . . . Long sentences of incarceration can actually increase crime because incarceration is criminogenic[.]" Hopwood, 41 Cardozo L. Rev. at 93. "By imprisoning so many people for so long, we've made it harder for them to develop skills and find employment after their release—controlling, rather than empowering, or at least rehabilitating, them." *Believe in People*, 211.

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[8] Sentencing Tr., at 16, *United States v. Curry*, No. 9:19–CR–80087–001 (S.D. Fla., Dec. 4, 2019), *available at* https://www.supremecourt.gov/DocketPDF/20/20-7284/169843/20210224133805514_Cert.%20Appendix.pdf#page=68

More broadly, as Professor Hopwood has observed:

> It is difficult, if not impossible, to determine who, after having been convicted of a serious crime, has the capacity to become rehabilitated and redeemed. . . .
>
> There is little reason to continue warehousing people who have been adequately punished by serving long sentences, and who are no longer a danger to society. The social costs to the families left behind, the loss of human capital and productivity, and the need to give people a second chance at redemption all favor identifying [these] people . . . and releasing them.

Hopwood, 41 Cardozo L. Rev. at 119. This resonates here and captures a core theme of the FSA. On top of these societal costs caused by the problem of overincarceration, it is also a waste of resources.[9]

II. THE PANEL MAJORITY'S APPROACH IS AS ILLOGICAL AS IT IS ATEXTUAL.

The panel majority's judicially created bifurcated process for handling Section 404 petitions is not only

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[9] *See* U.S. DOJ, Federal Prison System FY 2019 Performance Budget, at 2 (FY 2016 chart showing that cost per inmate ranges between over $20,000 per year to well above $60,000 per year, depending on nature of facility), https://www.justice.gov/jmd/page/file/1034421/download.

wrong as a matter of statutory interpretation but contrary to common sense. The reason why is that the panel majority interprets Section 404(b) to "cabin[]" the "district court's discretion" with respect to the critical threshold inquiry of "whether resentencing of an eligible defendant is appropriate under the circumstances of the particular case." *See* Pet. App. 18a. According to the panel majority, a district court must essentially engage in a theoretical time-travel exercise and "place itself at the time of the original sentencing and keep the then-applicable legal landscape intact, save only for the changes specifically authorized by sections 2 and 3 of the Fair Sentencing Act." Pet. App. 18a. That is, a district court must put on blinders.

"[T]he upshot of the majority's approach, taken as a whole, is this: no post-sentencing developments other than the First Step Act's own mandate to give retroactive effect to the Fair Sentencing Act may inform the district court's decision as to whether to reduce the defendant's sentence." Pet. App. 33a (Barron, J., dissenting). This means that district courts *must*, as a categorical matter, turn a blind eye to "(1) post-sentencing statutory or Guidelines changes unrelated to the crack-powder disparity, (2) the overturning of the defendant's prior convictions that had been relied on to determine his criminal history category, or even (3) the defendant's admirable post-sentencing conduct," Pet. App. 33a–34a (Barron, J., dissenting), in deciding *whether* to

exercise discretion to grant a sentence reduction.[10] *Cf. Smith*, 756 F.3d at 1180.

Yet, curiously, the panel majority concluded a district court "may choose to consider conduct that occurred between the date of the original sentencing and the date of resentencing," as well as "guideline changes, whether or not made retroactive by the Sentencing Commission, once it reaches the second step of the resentencing pavane"—"what the new sentence should be"—and even "in its discretion order the preparation of a new PSI report" including non-retroactive guidelines changes. Pet. App. 18a–20a.

That distinction makes no sense. Section 404(b) grants district courts discretion to, on motion, "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." FSA § 404(b). Whatever else Section 404(b)'s "as if" clause accomplishes, it does not limit the universe of information courts can, and should, consider in ruling on these requests at any point. *See also* Pet. App. 35a & n.6 (Barron, J., dissenting); *Maxwell*, 991 F.3d at 691. *Cf. Smith*, 756 F.3d at 1186 (providing example of statute in different sentencing context showing that

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[10] "While in prison, Mr. Concepcion completed drug treatment and regularly attended AA meetings. The prison chaplain wrote a letter supporting Mr. Concepcion, noting that he is 'dedicated to personal spiritual growth,' 'leads his faith community by being a positive influence,' and 'encourages other individuals at the institution.'" Pet. Br. 45–46 (citing C.A. J.A. 110). He also has an "ongoing, supportive relationship with his teenage daughter, who has special needs." Pet. Br. 11 (citing C.A. J.A. 110).

"Congress knows exactly how to strip district courts of their traditional sentencing discretion when it wishes to do so").

And, as Judge Barron explained, the distinction drawn under the panel majority's approach is hardly without a difference:

> Given the deferential standard of review that we must apply, in many—maybe most—instances concerning § 404(b), the legal difference between my approach and the majority's will not matter, practically speaking. . . . Nonetheless, Concepcion's case does illustrate how this legal difference might very well matter in some instances. And, in cases involving *intervening factual developments, I would think the legal difference might be especially significant*.

Pet. App. 66a (Barron, J., dissenting) (emphasis added).

More broadly, as Judge Sutton has observed:

> To say that the First Step Act does not require plenary resentencing hearings is not to say that it prohibits trial judges from considering intervening legal and factual developments in handling First Step Act requests. . . . And if a court may consider these [Section 3553(a)] factors in making that decision, why can't it account for future dangerousness and up-to-date notions about the risk of

> recidivism of this defendant, including his career-offender status under the law *today*?

Maxwell, 991 F.3d at 691 (emphasis in original).[11] The upshot is the panel majority's bifurcated approach to handling Section 404(b) petitions is out of step with not only the statutory scheme but the practical realities of federal sentencing law.

III. THE RULE OF LENITY RESOLVES ANY LINGERING DOUBTS.

To the extent the answer to the question presented by this case remains a mystery after a thorough statutory investigation and reasonable doubts persist, this Court should not "default to a presumption of severity but to the rule of lenity." *Smith*, 756 F.3d at 1191. *Cf.* Pet. App. 30a–31a (Barron, J., dissenting) (noting "§ 404(b) is more cryptic than clear" on questions of timing and expressing the view that "one could stare at the text of § 404(b) all day long looking for answers to those questions and not find them," suggesting that "only by placing that text in the context of the overall federal sentencing framework in

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[11] The mere fact that someone was sentenced as a so-called "career offender"—particularly under the old Guidelines—does not necessarily suggest a high degree of culpability justifying a draconian prison sentence. *Cf. Terry,* 141 S. Ct. at 1866 (Sotomayor, J., concurring in part and concurring in the judgment) (Mr. "Terry was sentenced as a career offender because of two prior drug convictions committed when he was a teenager and for which he spent a total of only 120 days in jail. That enhancement caused Terry's Guidelines range to skyrocket [from about 3 or 4 years] to about 15 to 20 years.").

which it is embedded that it is possible to discern answers to them").

"The maxim that penal statutes should be narrowly construed is one of the oldest canons of interpretation. . . . Schooled in the English tradition, American judges applied the principle of lenity from the start." Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 128, 129 (2010). Indeed, "[t]hat rule is 'perhaps not much less old than' the task of statutory 'construction itself.'" *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (quoting *United States v. Wiltberger*, 18 U.S. 76, 5 Wheat. 76, 95 (1820) (Marshall, C. J.)).

To be sure, "[t]he rule applies only when, after consulting traditional canons of statutory construction," the Court finds it is "left with an ambiguous statute."[12] *Shular v. United States*, 140 S. Ct. 779, 787 (2020) (internal quotation marks and citation omitted). *Cf.* Antonin Scalia & Bryan Garner,

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[12] Oddly, shortly after the FSA was signed into law, the Sentencing Commission informally advised: "Courts will have to decide whether a resentencing under the Act is a plenary resentencing proceeding or a more limited resentencing." First Step Act, ESP Insider Express (U.S. Sentencing Comm'n, Washington, D.C.), Feb. 2019, at 10 https://www.ussc.gov/sites/default/files/pdf/training/newsletters/2019-special_FIRST-STEP-Act.pdf. If the Commission is correct, lenity ought to play a role in implementing this provision of the FSA. "In this situation, a judge applying a canon like lenity to implement unclear text is not deviating from her best understanding of Congress's instructions; the best understanding of Congress's instructions is that Congress left the problem to her." Barrett, 90 B.U. L. Rev. at 123.

Reading Law 299 (2012) ("The criterion we favor [for whether lenity applies] is this: whether, after all legitimate tools of interpretation have been applied, 'a reasonable doubt persists.'" (citing *Moskal v. United States*, 498 U.S. 103, 108 (1990) (per Marshall, J.)). But under the rule of lenity, "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *Davis*, 139 S. Ct. at 2333. That is, "any doubts at the end of a thorough statutory investigation must be resolved for the defendant, any tie must go to the citizen, not the state." *Smith*, 756 F.3d at 1191; *see also Yates v. United States,* 574 U.S. 528, 547 (2015).

"[T]his principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *see, e.g., United States v. Granderson*, 511 U.S. 39, 56–57 (1994); *see Taylor v. United States*, 495 U.S. 575, 596 (1990) (suggesting "sentencing provisions[] are to be construed in favor of the accused"). The rule of lenity thus applies with full force to Section 404, to the extent it contains ambiguities unresolvable even after a full statutory investigation.[13]

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[13] Numerous federal district courts have also found the rule of lenity applicable to the FSA. *See, e.g., United States v. Day,* No. 1:05-cr-460-AJT-1, 2020 U.S. Dist. LEXIS 133586, at *19 n.20 (E.D. Va. July 23, 2020) (lenity principle would apply to the FSA); *United States v. McDonald*, No. 09-268, 2020 U.S. Dist. LEXIS 133592, at *9 n.2 (W.D. Pa. July 28, 2020); *United States v.*

"This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 178 (1958). Thus, "when there are two rational readings of a criminal statute, one harsher than the other, [courts] are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359–60 (1987).

As Justice Scalia explained: "This venerable rule not only vindicates the fundamental principle that no citizen should be . . . subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *United States v. Santos*, 553 U.S. 507, 514 (2008).

To the extent this Court, after a thorough and searching statutory investigation, is unable to discern an answer to the question presented using traditional tools of statutory interpretation, this Court should resolve any reasonable doubts in favor of this venerable rule of lenity. And here, at the least, the

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Martin, No. 03-CR-795 (ERK), 2019 U.S. Dist. LEXIS 103559, at *5 (E.D.N.Y. June 20, 2019) ("Multiple district courts interpreting . . . [§ 404(a)] of the First Step Act have applied the rule of lenity."); *United States v. Holman*, No. 5:04-964, 2020 U.S. Dist. LEXIS 167604, at *5-6 (D.S.C. Sep. 10, 2020).

panel majority's cramped reading of Section 404 is not unambiguously correct.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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