

No. 20-1650

IN THE
Supreme Court of the United States

CARLOS CONCEPCION,
Petitioner,
v.
UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

**BRIEF FOR AMICI CURIAE
THE HOWARD UNIVERSITY SCHOOL OF LAW
CIVIL RIGHTS CLINIC AND A NEW WAY OF LIFE
REENTRY PROJECT
IN SUPPORT OF PETITIONER**

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INTEREST OF AMICI CURIAE¹

Howard University School of Law is the nation's first historically Black law school. For more than 150 years since its founding during Reconstruction, the law school has worked to train "social engineers" devoted to the pursuit of human rights and racial justice. As part of this mission, the Howard University School of Law's Civil Rights Clinic advocates on behalf of clients and communities fighting for the realization of civil rights guaranteed by the U.S. Constitution. The Clinic has a particular interest in eradicating racial disparities in the criminal justice system and dismantling unjust laws and policies that contribute to mass incarceration and the prison industrial complex.

A New Way of Life Reentry Project (ANWOL) advances multi-dimensional solutions to the effects of incarceration by providing housing and community support, facilitating family reunification, and promoting individual healing for formerly incarcerated women. Since ANWOL's founding in Los Angeles in 1998, over 1,200 women and children have found safety and support in the organization's safe homes. ANWOL's Family Reunification Program has reunited over 400 women with their children by offering pro bono legal services. ANWOL works to restore the civil rights of formerly incarcerated people and

¹ The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

empowers, organizes, and mobilizes formerly incarcerated people as advocates for social change and personal transformation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Susan Burton is a survivor. She survived an upbringing amid the poverty and projects of East Los Angeles. She persevered through a childhood marred by physical and sexual abuse. But 1982 nearly broke her. It was then that her five-year-old son was hit by an unmarked van driven by a Los Angeles Police Department detective and killed. Consumed by grief and rage, Burton found an escape in crack cocaine. Crack brought silence: “All of the chatter, all of the pain, all of the hurt, all of the grief was gone.”² Crack—and the government’s response to it—also brought a new form of suffering. She recalls:

I was arrested for being in possession of a controlled substance, and that substance was crack. I remember my leg being pulled on at about three in the morning and being woken up to get dressed to be shipped off to prison. Me and about 70 other women were put into a large room, stripped out of our clothing, every part of our body looked at, and then chained together on this long chain and put on a bus early in the morning. And

² *Crack: Cocaine, Corruption, & Conspiracy*, 54:35 (Netflix 2021).

driven off to this place that I'd never been before.

I was sentenced to prison six different times. You would have thought someone would have said that 'you don't have a criminal problem. You have an alcohol or a drug problem. And there is help for that.' But I was never offered any help. And I read the papers today, and I look at the approach to opioid use. And you hear about a health approach, not a criminal approach. I'm 21 years sober now. Wasn't I worth an investment in treatment?³

She was. All the Black women and men who—amid the record unemployment and extreme poverty of the 1980s—fell victim to crack cocaine addiction deserved compassion and medical treatment. They were instead demonized and subjected to unprecedented punishment.

That punishment was fueled by false media claims about crack and those suffering from crack addiction. Building upon decades of anti-drug politicization directed toward Black people, Congress promulgated a suite of draconian “tough-on-crime” laws in the 1980s and 1990s as part of its domestic war on drugs and crime. Chief among the new statutory penalties was a provision penalizing crack cocaine at 100 times the rate of any other drug. This penalty lacked any penological or medical basis. The 100:1 sentencing ratio—which was “imposed

³ *Id.* at 1:14:10, 1:24:00.

primarily upon Black offenders”⁴—accounts for thousands of years served in federal prison and thousands of lives ruined. It has “foster[ed] disrespect for and lack of confidence in the criminal justice system” because of a “widely-held perception” that it “promotes unwarranted disparity based on race.”⁵ As a result, the crack era remains defined by lasting trauma stemming from violence, targeted policing, and mass incarceration.

In two critical pieces of legislation, Congress acted to ameliorate the injustice worked by the overly harsh crack cocaine penalties it imposed. Sections 2 and 3 of the Fair Sentencing Act of 2010, as interpreted by this Court in *Dorsey v. United States*, lowered the sentencing ratio from 100-to-1 to 18-to-1 for all incarcerated persons sentenced *after* its enactment (August 3, 2010).⁶ Later, Section 404(b) of the First Step Act of 2018⁷ empowered federal judges to apply the Fair Sentencing Act retroactively to those sentenced *before* August 3, 2010. Section 404(b) permits district courts to impose a reduced sentence “as if” the Fair Sentencing Act’s lowered penalties for crack cocaine were “in effect at the time the covered [crack cocaine] offense was committed.” This case presents the question whether, in imposing a reduced sentence under

⁴ *Kimbrough v. United States*, 552 U.S. 85, 98 (2007).

⁵ *Id.*

⁶ *Dorsey v. United States*, 567 U.S. 260, 279-81 (2012), *superseded* by Fair Sentencing Act of 2010 *as recognized by United States v. Bryant*, 991 F.3d 452 (2d Cir. 2021).

⁷ First Step Act of 2018, Pub. L. No. 115-391, §404(b), 132 Stat. 5194, 5222; 21 U.S.C. § 841.

Section 404(b), the law prohibits district courts from considering intervening legal or factual changes.

Petitioner ably explains that the answer is no.⁸ Barring consideration of current law and facts when deciding whether to impose a reduced sentence cannot be reconciled with the text and purpose of Section 404(b). *Amici*—including Susan Burton and the organization she founded to support women recovering from drug addiction and incarceration—submit this brief to emphasize three additional points. First, *amici* believe that to fully appreciate the breadth of the remedy intended by the First Step Act, it is necessary to understand the parallel breadth of the social and moral crisis the Act was enacted to address—and the extent of Congress’s utter failure to adequately address the crisis in its initial legislation. Second, because of the magnitude of the crisis, Congress enacted Section 404 of the First Step Act on the heels of the Fair Sentencing Act to provide sweeping retroactive relief. Third, failure to apply the First Step Act to permit the broad relief Congress intended will visit yet another injustice upon incarcerated people already subjected to a punishment that is now widely recognized as unfair and unjust.

⁸ Pet. Br. 17-33.

ARGUMENT

I. Misinformation And Race-Based Myths Spurred Unprecedented Penalties For Crack Cocaine Offenses And Facilitated Targeted Policing And Over-Prosecution Of Black People

Crack was not the first drug to cause an epidemic of addiction in the United States. In the late nineteenth century, for example, medical use of morphine and cocaine “produced a sharp rise in drug dependence among white, middle-class men and especially women.”⁹ And in the mid-twentieth century, barbiturates and amphetamines created a new wave of serious addiction throughout the country.¹⁰ Nor was crack the first drug to prompt demonization and scapegoating of racial minorities. Chinese immigrants were blamed for the opioid crisis of the late 1900s, and Black cocaine users were derided as gamblers, prostitutes, and junkies.¹¹ What is unprecedented about the crack era, however, is the harshness of the criminal penalties attached to drug addiction and the widespread belief—even among serious scientists, publications, and elected officials—in the myths that supported those penalties.

⁹ David Herzberg et al., *Recurring Epidemics of Pharmaceutical Drug Abuse in America: Time for an All-Drug Strategy*, 106 *Am. J. Public Health* 408, 408 (2016).

¹⁰ *Id.*

¹¹ Eric Trickey, *Inside the Story of America's 19th-Century Opiate Addiction*, *Smithsonian Mag.* (Jan. 4, 2018), <https://tinyurl.com/khn7p3pe>.

Some of the myths focused on the drug itself; the media falsely reported that crack was instantly addicting and more potent than other narcotics. But the most harmful lies were told about the people who fell victim to addiction. Echoing racist tropes from centuries earlier, newspapers and public officials claimed that crack transformed Black men into violent “super-predators.”¹² Black women addicts were portrayed as hypersexual and self-indulgent, wiling to “put [their] love for crack above [their] love for [their] children.”¹³

The consequences of these lies have been devastating. Congress relied on them to impose draconian penalties that ruined thousands of lives and destroyed entire communities. Congress’s actions during the crack epidemic birthed a new era of mass incarceration and targeted policing that persists today. The First Step Act is one step toward rectifying these consequences; its provisions should be read to support the broad retroactive relief Congress intended.

A. Myths About Crack Cocaine Motivated an Overly Punitive Response from Congress

Cocaine hydrochloride—colloquially known as powder cocaine—reached peak popularity by the

¹² Nkechi Taifa, *Race, Mass Incarceration, and the Disastrous War on Drugs*, The Brennan Center (May 10, 2021), <https://tinyurl.com/5eaj3rd3>.

¹³ Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* 156 (1997).

early 1980s.¹⁴ Alongside a sleek martini glass of sparkling white powder, the July 1981 cover of Time Magazine hailed it as “a drug with status.”¹⁵ Newsweek similarly suggested that cocaine, like champagne and caviar, signified wealth.¹⁶ Celebrities commonly wore gold or silver “cocaine spoons” around their necks, allowing for quick snorts of the drug.¹⁷ And Eric Clapton even composed an ode to cocaine, crooning that it was perfect for when “you wanna get down.”¹⁸ In news and popular culture, the drug was cast as the epitome of glamour and opulence.

Cocaine base—colloquially known as crack—entered the scene in the mid 80s and met a much different treatment despite its nearly identical chemical and molecular structure to powder cocaine.¹⁹ The removal of hydrochloride from powder cocaine, which has little impact on the drug’s physical effects, allows smoking of the resulting “rocks” of cocaine.²⁰ But whereas powder cocaine was popular among the wealthy, cocaine base was “priced so that almost anyone can afford it,” allowing it to take hold in poor

¹⁴ Carl Hart, *High Price: A Neuroscientist's Journey of Self-Discovery* 158 (2013).

¹⁵ *Id.*; see also *High On Cocaine: A Drug With Status—and Menace*, Time, July 6, 1981.

¹⁶ Hart, *supra* note 14.

¹⁷ *Id.*

¹⁸ Eric Clapton, *Cocaine* (RSO Records 1977).

¹⁹ Hart, *supra* note 14, at 159.

²⁰ *Id.*

neighborhoods.²¹ Despite their similarities, the glamorous veneer attached to powder cocaine was absent from media coverage of crack. Time called it a “scourge” peddled by “sleazy dealers” to mostly Black users.²²

Sensationalized claims by the media enhanced the idea that crack was fundamentally different—and more dangerous—than cocaine. Crack was said to be so addictive that users were hooked after one hit. This was a lie. Even at the peak of the epidemic, only 10 to 20 percent of crack users became addicted.²³ And crack was so powerful, it was said, that addicts were unable to focus on anything other than scoring the next dose. This, too, was a lie. Research demonstrated that many crack users were able to perform considerable planning tasks and meet demanding schedules with few problems.²⁴

In addition to the baseless claims about crack’s addictive properties, the media built a frenzy around crack by blaming the drug for high-profile deaths of Black athletes. When Maryland basketball star Len Bias died of a cocaine overdose in 1986, news outlets claimed he had “smok[ed] a pure form of cocaine free-

²¹ Jacob V. Lamar, Jr., *Crack: A Cheap and Deadly Cocaine Is a Fast-Spreading Menace*, Time (June 2, 1986), <https://tinyurl.com/2vy2tcw3>.

²² *Id.*

²³ Hart, *supra* note 14, at 290.

²⁴ *Id.*

base.”²⁵ But Bias had never touched cocaine base; he had snorted powder cocaine.²⁶ And when Cleveland Browns defensive back Don Rogers died eight days after Bias of a cocaine overdose, the media linked his death to crack.²⁷ But as with Bias, powder cocaine had been the true culprit.²⁸

Congress did not endeavor to discern the truth. It instead adopted the media’s exaggerations wholesale. Lawmakers characterized crack cocaine as an “elusive and deadly”²⁹ “threat” that “strikes ... savagely”³⁰ and that was a “clear and present danger to America’s national security.”³¹ Crack was “a plague” that was “eating away at the fabric of America.”³² The cost of this “epidemic” cost American businesses billions of dollars in lost productivity, “the educational system

²⁵ Associated Press, *Evidence Indicates Bias Had Smoked Pure Form of Drug*, L.A. Times (July 10, 1986), <https://tinyurl.com/y5yny66n>.

²⁶ Jon Schuppe, *Thirty Years after Basketball Star Len Bias' Death, Its Drug War Impact Endures*, NBC News (June 19, 2016), <https://tinyurl.com/ac2mupvh>.

²⁷ Hart, *supra* note 14, at 291.

²⁸ *Id.*

²⁹ 132 Cong. Rec. S26,429, S26,440 (daily ed. Sept. 26, 1986), <https://tinyurl.com/xf426un3> (statement of Sen. Hawkins).

³⁰ *Id.*

³¹ *Id.*

³² Craig Reinerman & Harry G. Levine, *The Crack Attack: Politics and Media in America's Latest Drug Scare*, in *Crack in America: Demon Drugs and Social Justice* 18, 20-24 (Craig Reinerman & Harry G. Levine eds., 1997) <https://tinyurl.com/bhaw33jb>.

[was] being undermined,” and “the family” was “disintegrating.”³³ Crack “threatened all the central institutions in American life—families, communities, schools, businesses, [and] law enforcement”³⁴ The drug was touted as “responsible for the fact that vast patches of the American urban landscape [were] rapidly deteriorating.”³⁵

Politicians used language of war with little understanding of the science underlying crack cocaine addiction or the need for medical treatment. President Ronald Reagan compared the war on drugs to “when we were attacked in World War II.”³⁶ “Crime is a national defense problem,” warned then-Senator Joseph R. Biden, “[y]ou’re in as much jeopardy in the streets as you are from a Soviet missile.”³⁷ According to Senator Alfonse D’Amato, the “drug epidemic” was “as dangerous, if not even more so, than any other terrorist that this Nation faces, including the Qadhafi’s, the Khomeini’s, because terror is being spread in the neighborhoods.”³⁸

³³ *Id.* at 49.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Ronald Reagan, *Address to the Nation on the Campaign Against Drug Abuse* (Sept. 14, 1986), <https://tinyurl.com/4x3shftm>.

³⁷ Mary Thornton, *Senate Votes to Toughen Federal Sentencing Law*, *Wash. Post* (Oct. 1, 1982), <https://tinyurl.com/yexnehe7>.

³⁸ “*Crack*” *Cocaine*: Hearing Before the Permanent Subcomm. on Investigations of the Comm. On Governmental

B. Race-Based Stereotypes Painted Crack Addicts as Irredeemable and Deserving of Harsh Punishment

Exaggerations about the addictive properties of crack were accompanied by race-based stereotypes about crack addicts. Most crack users were and still are white.³⁹ Yet Black people became the face of crack cocaine in the media. And the picture the media painted was based on the greatest hits of America's racist tropes. With imagery that harkened back to early twentieth century stereotypes of the "cocaine n*gger," "a peculiarly dangerous criminal" so powerful he could not be stopped with a bullet to the heart,⁴⁰ Black crack users were portrayed as irredeemable, violent predators so "murderous" that they were "impervious to bullets."⁴¹ This was, of course, a fanciful lie. The violence associated with crack stemmed almost entirely from the drug trade and cocaine trafficking and not from individual crack users. In 1988 in New York, for example, only 2 percent of murders "involved crack addicts killing people while seeking to

Affairs, 99 Cong. 12 (1986), <https://tinyurl.com/ma79k> (statement of Sen. D'Amato).

³⁹ Equal Just. Initiative, *Racial Double Standard in Drug Laws Persists Today*, <https://tinyurl.com/tzeekfdv> (last visited Nov. 19, 2021).

⁴⁰ Edward Huntington Williams, *Negro Cocaine Fiends Are A New Southern Menace*, N.Y. Times (Feb. 8, 1914), <https://tinyurl.com/fwuhxxbs>.

⁴¹ Hart, *supra* note 14, at 240.

buy crack and just 1 percent involved people who had recently used the drug.”⁴²

Black women, who were especially hard hit by crack addiction, were portrayed as selfish and promiscuous, willing to do anything for crack. The most prevalent stereotype was the Black pregnant crack addict, commonly depicted as “a prostitute who sometimes traded sex for crack, in violation of every conceivable quality of a good mother.”⁴³ Medical professionals claimed that crack “undermin[ed] maternal instincts” entirely.⁴⁴ “The monstrous crack-smoking mother was added to the iconography of depraved Black maternity, alongside the matriarch and the welfare queen.”⁴⁵

Black women were also blamed for perhaps the most shameful lie of the crack era: the myth of “crack babies.” The media’s description of these children was terrifying. The crack-addicted babies allegedly “cr[ie]d in a high feline wail, sometimes for hours on end, and nothing [could] console them.”⁴⁶ The “creepy catlike cry” was said to be “indicative of neurological

⁴² *Id.* at 110.

⁴³ Roberts, *supra* note 13, at 246.

⁴⁴ Cathy Trost, *Born to Lose: Babies of Crack Users Crowd Hospitals, Break Everybody's Heart*, Wall Street J. (July 18, 1989), <https://tinyurl.com/2s3wrkww>.

⁴⁵ Roberts, *supra* note 13, at 247.

⁴⁶ Ellen Hopkins, *Childhood's End: What Life Is Like for Crack Babies*, Rolling Stone (Oct. 18, 1990), <https://tinyurl.com/m53jkr29>.

damage.”⁴⁷ The babies were ostensibly “oblivious to affection.”⁴⁸ They were “time bombs” who appeared “normal” but were in fact “addicts” whose “brains [would] never forget cocaine.”⁴⁹ Their mother’s drug use had “interfer[ed] with the central core of what it is to be human.”⁵⁰ All of this was a lie. It had started with a single study of just 23 babies that was quickly discredited.⁵¹ While not harmless, exposure to cocaine in pregnancy does not cause a known set of birth defects, such as fetal alcohol syndrome, and does not produce infant drug withdrawal like opiates.⁵² Poverty, it turns out, “is a more powerful influence on the outcome of inner-city children than gestational exposure to cocaine.”⁵³

In demonizing and criminalizing crack addiction, Congress—and the media that fueled it—ignored the root causes affecting those experiencing that addiction. Behind these myths and caricatures were real people wrecked by the trauma of poverty. Crack had

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Courtland Milloy, *A Time Bomb in Cocaine Babies*, Wash. Post (Sept. 17, 1989), <https://tinyurl.com/2xcfdp7d>.

⁵⁰ Sandra Blakeslee, *Crack's Toll Among Babies: A Joyless View, Even of Toys*, N.Y. Times (Sept. 17, 1989), <https://tinyurl.com/2t29p9pp>.

⁵¹ Katherine Greider, *Crackpot Ideas*, Mother Jones (July 1995), <https://tinyurl.com/y54aaxtr>.

⁵² *Id.*

⁵³ Susan FitzGerald, *Crack Baby Study Ends with Unexpected but Clear Result*, Philadelphia Inquirer (July 21, 2013), <https://tinyurl.com/4rhcrjtc>.

appeared as a respite from unemployment and scarce resources, and neighborhoods fell victim to the violence caused by drug trafficking. The confluence of economic decline and the introduction of crack cocaine produced a crippling mix of drug addiction, crime, and suffering that demanded “an appropriate mix between condemnation and compassion.”⁵⁴ Congress’s response was nearly all condemnation; it was a declaration of war.

C. Congress Imposed Unprecedented and Unjustified Criminal Penalties Based on Myths and Stereotypes

The first weapon in Congress’s war on crack was the 1986 Anti-Drug Act that imposed severe mandatory minimums and punished crack cocaine trafficking offenses 100 times more than any other drug, including powder cocaine, which is pharmacologically identical to crack. An individual convicted for a trafficking offense involving five grams of crack cocaine (the weight of two pennies) received the same five-year mandatory minimum sentence as someone convicted for an offense involving 500 grams of powder cocaine (the weight of three apples). And a trafficking offense involving 50 grams of crack cocaine (the weight of a candy bar) received the same ten-year minimum sentence as an offense involving 5,000 grams of powder cocaine (the weight of a gallon paint).

This harshly disproportionate sentencing scheme was unsupported by any medical or penological

⁵⁴ 132 Cong. Rec., *supra* note 29, at S26,429, S26,440 (statement by Sen. Biden).

research. The sentencing ratio “overstate[d] the relative harmfulness of crack cocaine compared to powder cocaine” and “overstate[d] the seriousness of most crack cocaine offenses.”⁵⁵ But under mounting House reelection concerns⁵⁶ and perceived pressure and support from constituents,⁵⁷ Congress passed the omnibus crime and drug bill without engaging in extensive, thoughtful debate or adequate hearings.

“Very candidly,” Senator Charles Mathias remarked:

[N]one of us has had an opportunity to study this enormous package. It did not emerge from the crucible of the committee process, tempered by the heat of debate. The committees are important because, like them or not, they do provide a means by

⁵⁵ U.S. Sent’g Comm’n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 8 (May 2007), <https://tinyurl.com/hvds6ybe>.

⁵⁶ See, e.g., Edward Walsh, *House Votes Antidrug Legislation*, Wash. Post (Sept. 12, 1986), <https://tinyurl.com/3j7bectd> (“the antidrug effort is seen as a compelling election-year issue.”); see also *Hearings Before the United States Sentencing Comm’n on Proposed Guideline Amendments* (Mar. 22, 1993) (testimony of Eric E. Sterling, President of the Criminal Justice Policy Foundation who served as counsel to the House Subcommittee on Crime during the bill’s drafting process).

⁵⁷ See, e.g., 132 Cong. Rec., *supra* note 29, at S26,436 (statement of Rep. Hawkins) (“The people are watching our record votes on each key issue on this bill ... It is our people who know best what illegal drug use has done and is doing to ... our very civilization ... The public has always known that no threat strikes America more frequently nor savagely than that of illegal drugs.”).

which legislation can be carefully considered, can be put through a filter, can be exposed to public view and public discussion by calling witnesses before the committee. That has not been the origin of this bill. Many of the provisions of the bill have never been subjected to committee review... If we are contemplating changes to important individual freedoms, if we are about to alter major social commitments, then those modifications simply must be discussed fully.⁵⁸

The abbreviated legislative process lacked critical consideration of whether crack cocaine warranted enhanced punishment compared to powder cocaine and other drugs. For example, Congress failed to genuinely analyze the addictiveness of crack cocaine, whether the drug engendered crime, violence, psychosis, and death, or if it posed a particular threat to young people compared to other drugs.⁵⁹ Congress appeared to have instead simply regurgitated the media's skewed reporting and relied on a single police investigator as its "expert" witness.⁶⁰

⁵⁸ *Id.* at S26,462.

⁵⁹ Alyssa L. Beaver, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 *Fordham L. Rev.* 2531, 2534 (2010).

⁶⁰ 132 *Cong. Rec.*, *supra* note 29, at S26,447 (statement of Sen. Chiles) ("It can turn promising young people into robbers and thieves, stealing anything they can to get the money to feed their habit."); *id.* at S26436 (statement by Sen. Hawkins) ("Drug addiction turns people into walking crime machines.").

Making matters worse, in the 1988 Anti-Drug Act, Congress abandoned its initial focus of arresting and punishing “major traffickers” and “drug kingpins” connected to crime syndicates and violent crime.⁶¹ Congress expanded crack cocaine penalties to drug users, including first-time offenders. The law applied the 100-to-1 crack cocaine ratio to simple possession, making crack cocaine the *only* drug to carry a mandatory minimum penalty for first offense simple possession.⁶² Mere possession of any other drug, including powder cocaine, carried only a misdemeanor with a maximum penalty of no more than one year in prison.⁶³

D. The 1986 and 1988 Anti-Drug Acts Facilitated Disparate Policing and Prosecution that Disproportionately Impacted the Black Community

The 1986 and 1988 Anti-Drug Acts launched a war on crack cocaine and the Black community—even though two-thirds of crack users are white or

⁶¹ H.R. Rep. No. 99-845, 11-12 (1986) (major traffickers were defined as “the manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities” and serious traffickers as “the managers of the retail traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials . . . and doing so in substantial street quantities.”); *see also* 132 Cong. Rec. S27,193-94 (daily ed. Sept. 30, 1986), <https://tinyurl.com/rvnn4a6s> (statement of Sen. Byrd).

⁶² The Sent’g Project, *Crack Cocaine Sentencing Policy: Unjustified and Unreasonable 2*, available at <https://tinyurl.com/r8mkepfu>.

⁶³ *Id.*

Latinx.⁶⁴ The congressional record confirms that this was the intended domestic warzone: “*Big city ghettos*”⁶⁵ “*infested with ... crack houses;*” “[*the*] *centers of the new cocaine trade,*”⁶⁶ “*small cells of pushers, couriers and lookouts from the ghetto’s legion of unemployed teenagers.*”⁶⁷ The record is also clear as to the race of the domestic targets: “*Most of the dealers, as with past drug trends, are [B]lack or Hispanic ... Whites rarely sell the cocaine rocks.*”⁶⁸ The legislation provided copious funding for law enforcement—state police, federal law-enforcement officers, and prosecutors—with marching orders to target low-income, mostly Black communities.

Police surveilled and terrorized Black inner-city neighborhoods, while refraining from the same tactics in predominantly white suburbs. The communities subject to the most police monitoring, of course, became “much more likely to produce bodies for the

⁶⁴ Danielle Kurtzleben, *Data Show Racial Disparity in Crack Sentencing* (Aug. 3, 2010), <https://tinyurl.com/yt8uydju>.

⁶⁵ 132 Cong. Rec. S17,347 (daily ed. July 8, 1988), <https://tinyurl.com/zumbybcw> (statement of Sen. Dole) (emphasis added).

⁶⁶ 132 Cong. Rec. S4419 (daily ed. March 12, 1986), <https://tinyurl.com/bb58ck9e> (statement of Sen. Hawkins) (emphasis added).

⁶⁷ 132 Cong. Rec. S13,027 (daily ed. June 9, 1986), <https://tinyurl.com/yjry7yr9> (statement of Sen. Hawkins) (emphasis added).

⁶⁸ 132 Cong. Rec. S8292 (daily ed. April 22, 1986), <https://tinyurl.com/5f5x2pwa> (statement of Sen. Chiles) (emphasis added).

punishment industry.”⁶⁹ From 1986 to 1991, the number of Black people arrested for drug offenses grew by 350 percent compared to a 50 percent increase for white people.⁷⁰

On the heels of disparate police surveillance and arrests, federal prosecutors made disparate charging decisions that ushered in an era of mass incarceration that essentially “transform[ed] federal prisons into institutions increasingly dedicated to the African American community.”⁷¹ By 1993, Black people accounted for over 88 percent of federal convictions for crack cocaine offenses.⁷² In nineteen federal districts—including those covering major metropolitan areas such as Houston and Indianapolis—no white person was convicted of a crack cocaine offense between 1991 and 1995.⁷³ In California, for example, “despite evidence that large numbers of whites use and sell crack cocaine,” not a single white person was “convicted of a crack cocaine offense in federal courts serving Los

⁶⁹ Doris Marine Provine, *Unequal Under Law: Race in the War on Drugs* 18 (2007).

⁷⁰ DJ Sifton, *U.S. Prisons and Racial Profiling: A Covertly Racist Nation Rides a Vicious Cycle*, 20 *Law & Ineq.* 53, 61 (2002).

⁷¹ Deborah J. Vagins & Jesselyn McCurdy, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law*, *Am. Civ. Liberties Union*, at 3 (2006), <https://tinyurl.com/4y2estfr>.

⁷² U.S. Sent’g Comm’n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 161 (1995).

⁷³ Shannon Mullen, *Crack vs. Heroin: An Unfair System Arrested Millions of Blacks, Urged Compassion for Whites* (Dec. 2, 2019), <https://tinyurl.com/rxwj5979>.

Angeles and six Southland counties” between 1986 and 1995.⁷⁴ “Virtually all white crack offenders,” by contrast, were “prosecuted in state court, where sentences are far less.”⁷⁵

Federal prosecutors also used the new legislation to seek longer prison sentences against Black people as compared to white people.⁷⁶ Before the 1986 Anti-Drug Act, white and Black offenders received relatively comparable sentences in federal courts (a maximum of 51 months and 55 months, on average, respectively).⁷⁷ That changed after the sentencing disparity between crack and powder cocaine became law. By 2003, the average sentence for a powder cocaine offense was 81 months whereas the average sentence for a crack cocaine offense was 123 months, totaling 3.5 more years on average.⁷⁸ The following

⁷⁴ Dan Weikel, *Records Show Federal Officials Almost Solely Prosecute Nonwhites; U.S. Attorney Denies Race Is A Factor*, L.A. Times (May 21, 1995), <https://tinyurl.com/r7p4ajsx>.

⁷⁵ *Id.*

⁷⁶ Regardless whether these decisions were consciously or subconsciously rooted in race-based reasoning, “even a small amount of racial discrimination is a matter that needs to be taken very seriously, both on general normative grounds and because small effects in the aggregate can imply unacceptable deprivations for large numbers of people.” Jeremy Travis, et al., *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (2014).

⁷⁷ Dep’t of Just., Bureau of Justice Statistics, *Sentencing in the Federal Courts: Does Race Matter? The Transition to Sentencing Guidelines, 1986-90*, at 2 (Dec. 1993), available at <https://tinyurl.com/yvz4nkac>.

⁷⁸ U.S. Sent’g Comm’n, *2003 Sourcebook of Federal Sentencing* 91 (2003).

year, Black incarcerated individuals served approximately 58.7 months for *drug* offenses, almost equal to the 61.7 months served by white people for *violent* offenses.⁷⁹ Even among those with little to no prior criminal history, Black individuals were sent to federal prison an average of 40 months longer than white people for crack and powder cocaine possession and distribution from 1991 through 2016.^{80 81}

⁷⁹ Dep't of Just., Bureau of Just. Stat., *Compendium of Federal Justice Statistics* 112 (Oct. 2005).

⁸⁰ Shannon Mullen, *Crack vs. Heroin: An Unfair System Arrested Millions of Blacks, Urged Compassion for Whites*, App (Dec. 2, 2019), <https://tinyurl.com/rxwj5979>.

⁸¹ The consequences of Congress's harsh approach were not limited to federal courts. Federal legislation provided a model for states and sent a signal that no penalty was too harsh to deal with the scourge of crack. The treatment of pregnant addicts provides perhaps the most indefensible example. Based on creative interpretations of state statutes prohibiting distributing drugs to a minor, child abuse and neglect, reckless endangerment, manslaughter, and assault with a deadly weapon, at least two hundred Black women in thirty states were criminally charged with exposing children to cocaine in utero. Roberts, *supra* note 13, at 241. These include Cornelia Whitner, who at twenty-eight years old, was sentenced to eight *years* in prison for endangering the life of her unborn child—a child born healthy with traces of cocaine in his urine. At sentencing, after her lawyer begged for a probation term because Whitner had been sober since giving birth and simply wished for additional drug treatment, the judge callously remarked, “I think I'll just let her go to jail.” *Id.*

Many women were placed under arrest for these crimes *while* giving birth or immediately after delivery. In South Carolina, for example, of 30 detained women, at least one was shackled to her bed during delivery; others were handcuffed (some with chains that went over their swollen bellies) and placed into holding cells while they waited for hours while “weak and in

II. Congress Enacted Section 404(b) Of The First Step Act To Provide Robust Resentencing Review For Persons Subjected To Unjustly Punitive Sentences For Crack Cocaine Offenses

The First Step Act means more than making the Fair Sentencing Act retroactive; it is a rare, bipartisan acknowledgment from the federal government of a grave error. It comes after decades of outcry from stakeholders across the political spectrum. The U.S. Sentencing Commission urged Congress to change the severe crack cocaine penalties on at least three occasions between 1995 and 2002, concluding that the “100-to-1 crack cocaine to powder cocaine quantity ratio [was] the primary cause of the growing disparity between sentences for Black and White federal defendants.”⁸² The Commission “believe[d] strongly that the disparity between penalties for the same quantities of crack and powder cocaine [was] wrong”⁸³ and

pain, still bleeding heavily from childbirth [and] vomiting.” Kimani Paul-Emile, *The Charleston Policy: Substance or Abuse?*, 4 Mich. J. Race & L. 325, 328 (1999). Most were dressed only in a meager hospital gown, and one woman recounts being allowed only a blanket to cover her half-naked body as she was wheeled from the hospital to an awaiting police vehicle. *Id.*

The cruelty of the crack era was reprehensible.

⁸² *Cocaine and Federal Sentencing Policy*, *supra* note 72, at 154.

⁸³ U.S. Sent’g Comm’n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 5 (Apr. 1997) available at <https://tinyurl.com/5ex4p9cj>.

“result[ed] in unduly severe penalties for most crack cocaine offenders, the impact of [which] f[e]ll primarily upon [B]lack offenders.”⁸⁴ This “contributed to a widely held perception that the ... penalty structure promote[d] unwarranted disparity based on race,” finding “even the perception of racial disparity problematic because it fosters disrespect for and lack of confidence in the criminal justice system.”⁸⁵

Civil rights organizations expressed similar criticism. Steven R. Shapiro, the former National Legal Director of the American Civil Liberties Union, stated, “[j]udges should not be required to close their eyes to the fact that the 100-to-1 disparity is unsound in theory and racially discriminatory in practice.”⁸⁶ The Leadership Conference on Civil and Human Rights also published a statement of admonishment:

Now the responsibility lies with Congress. We call on Congress to fix this problem once and for all. The Commission has pointed Congress in the right direction, but Congress needs to go the extra mile for justice. The drug war will continue to lack credibility in

⁸⁴ U.S. Sent’g Comm’n, *Report to the Congress: Cocaine and Federal Sentencing Policy* viii (May 2002) available at <https://tinyurl.com/fd2vrkt5>.

⁸⁵ *Id.*

⁸⁶ *Case Coincides with Congressional Push to Repeal Racially Discriminatory Sentencing Scheme*, Am. Civ. Liberties Union (Oct. 2, 2007), <https://tinyurl.com/tb9p3k77>.

minority communities until these sentencing laws are changed.⁸⁷

Congress finally heeded this advice in 2010 by enacting the Fair Sentencing Act, which sought to ameliorate “the fundamental unfairness” and “longstanding injustice” between federal sentencing for crack and powder cocaine offenses.⁸⁸ The law represented the federal government’s first effort “to restore confidence in the criminal justice system – particularly in communities of color.”⁸⁹ Importantly, the Fair Sentencing Act decreased the disparity between sentences for crack and powder cocaine offenses by lowering the penalty ratio from 100-to-one to 18-to-one, and it eliminated the mandatory minimum provision for simple possession of crack cocaine.

Whether the law applied retroactively, however, triggered mixed responses from the U.S. Sentencing Commission, the Department of Justice, and federal courts. This Court’s opinion in *Dorsey* ultimately settled the debate, holding that the Fair Sentencing Act benefited only incarcerated individuals sentenced for crack cocaine offenses *after* the date the law went into

⁸⁷ *Leadership Conference on Civil Rights Urges Congress to Improve Fairness of Crack/Cocaine Sentencing Laws*, The Leadership Conf. on Civ. and Hum. Rts. (May 22, 2002), <https://tinyurl.com/u6fapt8w>.

⁸⁸ U.S. Sent’g Comm’n, *U.S. Sentencing Commission Voted Unanimously to Apply Fair Sentencing Act of 2010 Amendment to the Federal Sentencing Guidelines Retroactively* (June 30, 2011), <https://tinyurl.com/573bsjv5>.

⁸⁹ *Fair Sentencing Act*, Am. Civ. Liberties Union, <https://tinyurl.com/4akf99fd> (last visited Nov. 19, 2021).

effect.⁹⁰ The Fair Sentencing Act thus provided *no* relief to the thousands sentenced before its enactment.

Finally, more than three decades after the 1986 Anti-Drug Act took effect, Congress passed the First Step Act in 2018 “to effect comprehensive correctional, sentencing, and criminal justice reforms.”⁹¹ The First Step Act made the Fair Sentencing Act’s provisions regarding crack cocaine sentencing retroactive, providing relief to those excluded by *Dorsey*. The law has been lauded as one of “the most substantial changes in a generation to the tough-on-crime prison and sentencing laws that ballooned the federal prison population and created a criminal justice system that many conservatives and liberals view as costly and unfair.”⁹² Through the First Step Act, Congress endeavored to “make our justice system fairer, relieve our overcrowded prisons, redirect funding to our most pressing crime prevention efforts, and make our communities safer.”⁹³

⁹⁰ *Dorsey*, 567 U.S. 260, 279-81 (2012).

⁹¹ Br. of Senators Richard J. Durbin, Charles E. Grassley, Cory A. Booker, and Mike Lee as Amici Curiae in support of Pet’r at 6, *Terry v. United States*, No. 20-5904 (U.S. S. Ct. Feb. 19, 2021) (citing 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018))

⁹² Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. Times (Dec. 18, 2018), <https://tinyurl.com/p9e2b4z8>.

⁹³ Press Release, Committee on the Judiciary, *Grassley, Durbin Statements on First Step Act Passing House* (Dec. 20, 2018), <https://tinyurl.com/6uy4dxb8>.

In commemorating the First Step Act’s one-year anniversary, one of the law’s 32 Senate cosponsors,⁹⁴ Senator Chuck Grassley, stated:

Our criminal justice system is based on the rule of law. That means when you commit a crime, you should be punished. But the punishment should fit the crime. If the penalty is too harsh, it doesn’t do any more to deter criminal activity and its bad value for taxpayers. Overly harsh penalties can also make it harder for prisoners who are trying to change their lives to turn over a new leaf ... With vigilant and consistent oversight into the implementation of the First Step Act, we can ensure that these goals of reducing recidivism and improving our criminal justice system are met.⁹⁵

To this end, Section 404(b) permits eligible individuals originally sentenced under the harsh crack cocaine sentencing laws of the 1980s to petition district courts for resentencing “as if sections 2 and 3 of the Fair Sentencing Act ... were in effect at the time the covered offense was committed.”⁹⁶ The retroactivity provision is of critical importance to Congress. Its

⁹⁴ Press Release, Committee on the Judiciary, *Thirty-Two Senators Now Cosponsoring First Step Act* (Dec. 7, 2018), <https://tinyurl.com/emr2vu2w>.

⁹⁵ Prepared Floor Remarks of U.S. Senator Chuck Grassley, *Grassley On The First Step Act: One Year Anniversary of Senate Passage* (Dec. 18, 2019), <https://tinyurl.com/23ybermy>.

⁹⁶ First Step Act of 2018, Pub. L. No. 115-391, §404(b), 132 Stat. 5194, 5222; 21 U.S.C. § 841.

inclusion was “key” to the Senate passing the First Step Act at all,⁹⁷ and it makes the criminal justice system “more fair” and “better reflect[s] our collective values and ideals.”⁹⁸

In passing Section 404(b) of the First Step Act, Congress intended to move away from the injustice of the crack era. There is no reason—in the statute’s text or purpose—to force judges to act as if no time has passed.

III. Adopting A Narrow Reading Of Section 404(b) Will Continue To Disproportionately Harm Black People Imprisoned For Crack Cocaine Offenses And Their Families

Expressing his support for the First Step Act on the Senate floor, Senator Booker remarked that “[Our] system ... inflicts poverty by concentrating its attacks on low-income neighborhoods; it burdens families, hurting them economically and fracturing entire communities.”⁹⁹ The public—particularly the Black community, which was most harmed by the anti-drug policies of the 1980s—now deserves a less destructive course than those previously forged.¹⁰⁰ Denial of the

⁹⁷ Br. of Senators, *supra* note 91, at 6 (statement of Sen. Cardin).

⁹⁸ *Id.* at 7 (statement of Rep. Goodlatte).

⁹⁹ 164 Cong. Rec. S7765 (daily ed. Dec. 18, 2018), <https://tinyurl.com/uemb7sfb> (statement of Sen. Booker).

¹⁰⁰ Those who have received relief under § 404 of the First Step Act, 98.4 percent are male, and 91.6 percent are Black. U.S. Sentencing Commission, *First Step Act of 2018 Resentencing*

full measure of the relief Congress intended to provide through Section 404(b) continues an unjust punishment that harms not only those incarcerated, but also their families and communities at large.

Those wrongly denied relief under Section 404(b) face prisons that are persistently overcrowded, resulting in an increased rate of poor physical and mental health, including an increased risk of suicide and serious illness.¹⁰¹ Many prisons operating over capacity are also unable to provide adequate rehabilitative programming,¹⁰² undermining the individual's successful reentry upon release.

Imprisonment is thus strongly correlated with curtailed social and economic efficacy for *formerly* incarcerated individuals and their families, most of whom are Black. Scholars, activists, and even federal judges have long decried the profound harm of exclusion stemming from mass incarceration “by disintegrating legions” of Black people “from family and economic life.”¹⁰³ Three decades ago, Judge Heaney of the Eighth Circuit observed that, “[u]ntil our society begins to provide effective drug treatment and education programs, and until young [B]lack men have equal opportunities for a decent education and jobs, a

Provisions Retroactivity Data Report, tbl.4 (Oct. 2020), <https://tinyurl.com/km4dwps4>.

¹⁰¹ Travis, *supra* note 76, at 6.

¹⁰² *Id.*

¹⁰³ See, e.g., Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 Harv. Civil Rights-Civil L. Rev. 477, 505 (2009).

bad situation will only get worse. All of us and our children will suffer.”¹⁰⁴

In addition to the burden of reentry following extensive periods of incarceration, laws passed during the drug war of the 1980s bar formerly incarcerated persons from obtaining certain employment opportunities, government subsidized welfare and public housing benefits, and financial aid for higher education.¹⁰⁵ Even if a formerly incarcerated individual can obtain a job, those with a criminal record typically experience a reduced earning potential after release, exacerbating personal and family financial hardship and likelihood of substance abuse.¹⁰⁶

There is also a strong correlation between paternal incarceration and myriad economic stressors on the family, including an increased risk of material hardship to meet basic needs, housing insecurity and child homelessness.¹⁰⁷ In addition, there is a connection between paternal incarceration and significant social consequences for children beyond economic well-being, including cognitive performance and academic performance issues, negative mental,

¹⁰⁴ *United States v. Willis*, 967 F.2d 1220, 1226-27 (8th Cir. 1991).

¹⁰⁵ See generally James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. St. Thomas L.J. 387 (2006); see also Jeff Manza, Christopher Uggen, *Locked Out: Felony Disenfranchisement and American Democracy* (2006).

¹⁰⁶ Travis, *supra* note 76, at 6.

¹⁰⁷ *Id.* at 267-8.

emotional, and physical health changes, increased behavioral problems and delinquency, and an overarching detriment to the parent-child relationship.¹⁰⁸

This is particularly true for Black women and their children. On the heels of the Anti-Drug Acts, the rate of children with an incarcerated mother increased by 122 percent.¹⁰⁹ Black children are six times more likely to have an incarcerated parent than white children,¹¹⁰ and one in every 14 Black minors will have an incarcerated parent during their adolescence.¹¹¹ Of foster youth with an incarcerated mother, only 26 percent ever reunify with her.¹¹² For foster

¹⁰⁸ *Id.* at 269-73.

¹⁰⁹ See Rebecca Shlafer, Erica Gerrity, Ebony Ruhland, & Marc Wheeler, *Children with Incarcerated Parents — Considering Children’s Outcomes in the Context of Complex Family Experiences* 3 (2013), <https://tinyurl.com/enhpzhzz>.

¹¹⁰ Leila Morsy & Richard Rothstein, *Mass Incarceration and Children’s Outcomes* 1, Econ. Pol’y Inst. (Dec. 15, 2016), <https://tinyurl.com/5nc87a75>; see also U.S. Dep’t of Just., Office of Just. Programs, Bureau of Justice Statistics No. NCJ 222984, *Parents in Prison and Their Minor Children* 2 (Rev. Mar. 30, 2010), <https://tinyurl.com/4bjvzry3>.

¹¹¹ Deborah J. Vagins & Jesselyn McCurdy, Am. Civ. Liberties Union, *Cracks in the System: 20 Years of the Unjust Federal Crack Cocaine Law* 4 (Oct. 2006), <https://tinyurl.com/ycwe3r6a>.

¹¹² Amy D’Andrade & Melanie Valdez, San Jose University School of Social Work, *Reunifying from Behind Bars: A Quantitative Study of the Relationship Between Parental Incarceration, Service Use, and Foster Care Reunification* 17 (Oct. 2012).

youth with an incarcerated father, only 14 percent reunify with him.¹¹³

Increased incarceration during the crack cocaine era expanded the legal system's reliance on family services systems, and forced separation as a result of substance was common. As a result, Black mothers "are more likely than other mothers to be reported to child welfare authorities by all reporters, including obstetricians suspecting prenatal drug use, pediatricians, school systems, and neighbors."¹¹⁴ And decades of research and scholarship has confirmed that children of color experience higher rates of removal, spend additional time in out-of-home care, receive fewer family preservation services, and are less likely to be reunified with their families.¹¹⁵ In fact, most Black children are placed in foster care whereas their white counterparts receive supportive services to remain in their homes.¹¹⁶

In 2014, the National Research Council concluded, "[t]he change in penal policy over the past four decades may have had a wide range of unwanted social costs, and the magnitude of crime reduction

¹¹³ *Id.*

¹¹⁴ A New Way of Life Reentry Project, *White Paper on Amending the Adoption and Safe Families Act of 1997*, at 6 (June 4, 2021), available at <https://tinyurl.com/tzh2k4cu>.

¹¹⁵ *Id.* at 3; see also Ann F. Garland et al., *Racial/Ethnic Disparities in Mental Health Service Use Among Children in Foster Care*, 25 *Child. & Youth Serv. Rev.* 5/6, 491-507 (2003).

benefits is highly uncertain.”¹¹⁷ Public opinion knows the expense with certainty today and demands prisons to be used carefully as instruments of justice as opposed to “undermin[ing] society’s aspirations for a fair distribution of rights, resources, and opportunities.”¹¹⁸

CONCLUSION

This Court should vacate the judgment of the First Circuit Court of Appeals and the case should be remanded for further proceedings.

Respectfully submitted,

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November 22, 2021

¹¹⁷ Travis, *supra* note 76, at 7.

¹¹⁸ *Id.* at 8.