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 DRUG POLICY ALLIANCE AND THE LAW ENFORCEMENT ACTION PARTNERSHIP AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

VINCENT LEVY*
**Counsel of Record*
GREGORY DUBINSKY
KAREN A. SEBASKI
TIMOTHY W. GRINSELL
HOLWELL SHUSTER
& GOLDBERG LLP
425 Lexington Avenue
New York, NY 10017
(646) 837-5151
vlevy@hsgllp.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae **Drug Policy Alliance** ("DPA") is a non-profit organization seeking to advance policies and attitudes that best reduce the harms of both drug use and drug prohibition. DPA is composed of and supported by a broad coalition of individuals who share the belief that the war on drugs has failed. As part of its mission, DPA is interested in reducing the role of criminalization in drug policy, including working to ensure that our nation's drug policies do not overincarcerate or otherwise harm young people and people of color.

The Law Enforcement Action Partnership ("LEAP") is a nonprofit organization whose members include police, prosecutors, judges, corrections officials, and other law enforcement officials advocating for criminal justice and drug policy reforms that will make our communities safer and more just. Through speaking engagements, media appearances, testimony, and support of allied efforts, LEAP reaches audiences across a wide spectrum of affiliations and beliefs, calling for more practical and ethical policies from a public safety perspective.

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *Amici*'s counsel made a monetary contribution to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Fair Sentencing Act of 2010 was a landmark legislation that sought to remedy a long-standing disparity in federal sentences for crack- and powder-cocaine possession. Before the Fair Sentencing Act, for sentencing purposes, one gram of crack cocaine was equivalent to 100 grams of powder cocaine. The Fair Sentencing Act reduced that disparity to 18-to-1 from 100-to-1. *Dorsey* v. *U.S.*, 567 U.S. 260, 264 (2012). But it was held to be prospective only.

In 2018, to provide relief to imprisoned people serving sentences under the 100-to-1 regime, Congress passed, and President Trump signed into law, the First Step Act. Under section 404 of the First Step Act, defendants convicted of certain offenses involving crack cocaine may seek to reduce their sentences "as if" the Fair Sentencing Act's revised penalties were "in effect at the time the covered offense was committed." First Step Act of 2018, § 404(b), Pub. L. No. 115-391, 132 Stat. 5194, 5222. The First Step Act leaves the decision whether to reduce a defendant's sentence, and by how much, to judicial discretion.

The question presented in this case should be addressed against this background. The Fair Sentencing Act was a critical step in a bipartisan project to make the criminal-justice system fairer. The First Step Act made further strides in that respect by allowing those sentenced before the Fair Sentencing Act's effective date the opportunity to reduce their sentences. Critically, in the First Step Act, Congress mandated "individualized review based on the particular facts of the[] case" in order to "better see that justice is done." 164 Cong. Rec. S7748 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar). In that

light, it makes no sense to cabin the First Step Act's broad grant of discretion—in either direction. Courts should be permitted the latitude that Congress legislated, allowing them to consider *all* factors—both in favor of sentence reductions and against—to ensure that the Fair Sentencing Act's mandate of fairness and consistency is carried out, freed from the prior injustices of the 100-to-1 regime.

ARGUMENT

I. Racial Disparities in Sentencing Motivated the Fair Sentencing Act of 2010.

A. The 100-to-1 Ratio Led to Unfair and Racially Disparate Sentences.

The Anti-Drug Abuse Act of 1986 (the "1986 Act") established a 100-to-1 crack-to-powder-cocaine ratio in minimum and maximum sentences for certain federal drug offenses. Pub. L. No. 99-570 § 1002, 100 Stat. 3207, 3207-2 to -3. Under the 1986 Act, an individual convicted of an offense involving just five grams of crack cocaine faced a mandatory minimum prison sentence of five years; for powder cocaine, the requisite was a hundred times more, 500 grams.[2]

"[T]he careful deliberative practices of the Congress were set aside for the 1986 omnibus crime bill that included the 100-to-1 ratio, as part of a rush to pass dramatic drug legislation before the midterm elections." *Terry v. United States*, 141 S. Ct. 1858, 1864 n.1 (2021) (Sotomayor, J., concurring) (quotation marks and citation omitted). Beyond the "race-based myths about crack cocaine" that "the media" had disseminated, Congress said little to explain the 100-

[2] "Crack" and "powder" refer to the form in which the drug is taken. Pharmacologically, they are the exact same drug.

to-1 ratio. *Id.* As the Sentencing Commission later explained, the "legislative history, as evidenced mainly by [] statements of individual legislators, suggests [that] four specific areas of congressional purpose" were at play: (1) the apparent perception that crack cocaine was at the forefront of the drug epidemic of the 1980s; (2) a perception that crack cocaine was more dangerous; (3) a "decision by Congress to differentiate crack cocaine from powder cocaine in the penalty structure [that] was deliberate, not inadvertent"; and (4) an intention "that the quantities triggering drug mandatory minimum penalties for crack cocaine would be consistent with the 1986 Act's overall drug mandatory minimum scheme," targeting "major" and "serious" traffickers.[3]

In practice, Congress's 100-to-1 ratio did not result in stringent penalties for "major" or "serious" drug traffickers. Instead, in line with the "extensive record of race-based myths about crack cocaine," *Terry*, 141 S. Ct. at 1864 n.1 (Sotomayor, J., concurring), it led to grossly unfair sentences disproportionately imposed on racial minorities.

First, the trigger for a five-year mandatory minimum sentence—possession of five grams of crack—was so low that it captured conduct well below the level of "major" or "serious" trafficking. Five grams of crack cocaine, triggering the five-year mandatory minimum, is as little as ten doses.[4] To put that in perspective, the DOJ reported in 2002, citing "DEA intelligence," that "a crack user is likely to consume

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[3] U.S. Sent'g Comm'n, *Special Report to Congress: Cocaine and Federal Sentencing Policy* 117-18 (Feb. 1995).

[4] U.S. Sent'g Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* 63 (2007).

anywhere from 3.3 to 16.5 grams of crack a week."[5] In other words, a consumer of crack cocaine carrying a week's supply of the drug back to his or her home for personal consumption could possess *three times* the amount triggering the five-year mandatory minimum.

Consider by contrast the doses resulting in a five-year mandatory sentence for powder cocaine. Per the DOJ, "500 grams of powder … contains between 1,000 and 5,000 individual doses, and a typical dose of powder cocaine ranges from 30 to 150 milligrams."[6] "The typical intravenous cocaine user injects between 7.2 and 9.6 grams of cocaine per week," while "[t]he typical intranasal powder user consumes about 2 grams per month."[7] The typical user of intravenous cocaine would thus have to carry a year's worth of supply to trigger the five-year mandatory minimum.

Second, the 100-to-1 ratio "closely track[ed] inner city ethnic and racial lines"[8] and resulted in racially disparate sentencing. In 2010, for example, white people constituted just 7.3% of all defendants sentenced under the federal crack cocaine laws, whereas Black people represented 78.5%.[9] The 100-to-1 ratio created racial disparities in this way not just because it formed the basis for statutorily prescribed minimum sentences, but also because the ratio infected the recommended guidelines that the

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[5] U.S. Dep't of Just., *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties* 4 (Mar. 17, 2002), https://bit.ly/3qTQdja.
[6] *Id.*
[7] *Id.*
[8] See Gerald F. Uelmen, *Federal Sentencing Guidelines: A Cure Worse than the Disease*, 29 Am. Crim. L. Rev. 899, 904 (1992).
[9] U.S. Sent'g Comm'n, *2010 Sourcebook of Federal Sentencing Statistics*, Table 34 (2010), https://bit.ly/3FA4YMe.

Sentencing Commission suggested federal judges impose for drug offenses. Indeed, for many years, taking Congress's cue, the Sentencing Commission incorporated the 100-to-1 ratio into the Guidelines, either directly, or through the backdoor of Congress's mandates in the 1986 Act—as mandatory maximums and minimums affect Guideline ranges. *Dorsey*, 567 U.S. at 267-68.

Statistics bear these disparities out. Before the enactment of federal mandatory minimum sentencing for crack cocaine offenses, the average federal drug sentence for Black Americans was 11% higher than for whites; four years later, it was 49% higher.[10] From 1994 to 2003, the average time Black people served in prison for drug offenses increased by 77%, compared to an increase of 33% for white people.[11]

By 2004, Black people served nearly as much time in prison for *nonviolent* drug offenses (58.7 months) as white people did for *violent* offenses (61.7 months).[12] Indeed, the five-year minimum triggered by possessing just one week's average supply of crack cocaine for personal use was enough to trigger a sentence of roughly the same length as that for the average *violent* offense committed by white defendants. In large part due to the crack mandatory

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[10] B.S. Meierhoefer, Federal Judicial Center, *The General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentences Imposed* 20 (1992), https://bit.ly/3qY5sHW.
[11] U.S. Dep't of Just. Bureau of Just. Stat., *Compendium of Federal Justice Statistics, 1994*, Table 6.11, at 85 (Apr. 1998), https://bjs.ojp.gov/content/pub/pdf/cfjs94.pdf; U.S. Dep't of Just. Bureau of Just. Stat., *Compendium of Federal Justice Statistics, 2003*, Table 7.16, at 112, https://bit.ly/3qVXq22.
[12] *Compendium of Federal Justice Statistics, 2003*, Table 7.16, at 112.

minimums, the Black prison population reached nearly 850,000 people by 2008.[13]

B. The Fair Sentencing Act Targeted Racial Disparities in Sentencing.

By the time the Fair Sentencing Act of 2010 reduced the 100-to-1 ratio to 18:1, the disparate treatment of crack and powder was widely recognized as pernicious. Pub. L. No. 111-220, 124 Stat. 2372 (2010).

As early as 1995, the Sentencing Commission "acknowledged that its crack guidelines," and the 100-to-1 ratio, "bear no meaningful relationship to the culpability of defendants sentenced pursuant to them. . . . [T]he Commission has never before made such an extraordinary mea culpa acknowledging the enormous unfairness of one of its guidelines." *U.S. v. Anderson*, 82 F.3d 436, 449-50 (D.C. Cir. 1996) (Wald, J., dissenting) (footnotes omitted).

In 2002, the Commission issued a new report on crack- and powder-cocaine disparities and found that the crack penalties: (1) exaggerated the relative harmfulness of crack cocaine; (2) swept too broadly and applied most often to low-level conduct;

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[13] See U.S. Dep't of Just. Bureau of Just. Stat., *Prison Inmates at Midyear 2008 - Statistical Tables*, Table 16, at 17 (Mar. 2009), https://bit.ly/3czSxU5 (In 2008 there were approximately 846,000 Black men held in state or federal prison or in local jails.); Meierhoefer at 20; Joshua Fischman & Max Schanzenbach, *Racial Disparities under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. of Empirical Legal Stud. 729, 761 (2012) ("[M]andatory minimums [are] more constraining for black offenders.").

(3) overstated the seriousness of most crack cocaine offenses; and (4) mostly affected minorities.[14]

In 2010, Congress sought "[t]o restore fairness to Federal cocaine sentencing" by targeting this disparity through the Fair Sentencing Act. 124 Stat. 2372. As the Fair Sentencing Act's chief sponsor stated, "[e]very day that passes without taking action to solve this problem is another day that people are being sentenced under a law that virtually everyone agrees is unjust." 156 Cong. Rec. S1681 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin).

Moreover, Congress explicitly sought to redress racial disparities resulting from crack-cocaine sentences. In the Senate, Senator Durbin explained "[i]t was the same cocaine, though in a different form, and [Black people] were being singled out for much more severe and heavy sentences." 156 Cong. Rec. S1681 (daily ed. Mar. 17, 2010). And in the House, Representative Dan Lungren regretted "that a bill which was characterized by some as a response to the crack epidemic in African American communities has led to racial sentencing disparities which simply cannot be ignored in any reasoned discussion of this issue," 156 Cong. Rec. H6202 (daily ed. July 28, 2010), while Representative Steny Hoyer stated simply, "The 100-to-1 disparity is counterproductive and unjust," 156 Cong. Rec. H6203 (daily ed. July 28, 2010).

The sponsors of the Fair Sentencing Act believed reducing the crack/powder ratio to 18:1 would "decrease racial disparities and help restore

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[14] U.S. Sent'g Comm'n, *Report to Congress: Cocaine and Federal Sentencing Policy* v-vii (May 2002).

confidence in the criminal justice system, especially in minority communities."[15]

II. The Legislative History of The First Step Act Shows It Was Intended to Be Broad, Flexible Remedial Legislation.

A. Although the Fair Sentencing Act ameliorated the 100-to-1 sentencing disparity, it applied only to sentences imposed after it was effective. *Dorsey*, 567 U.S. 273. In the words of one legislator, that still left "people sitting in jail . . . for selling an amount of drugs equal to the size of a candy bar" before the Fair Sentencing Act was passed, watching "people come in and leave jail for selling enough drugs to fill a suitcase." 164 Cong. Rec. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Booker). And these "people sitting in jail" were "90 percent . . . African American; 96 percent . . . Black and Latino." *Id*. Congress determined that treating past and future defendants so differently did not "make any sense." 164 Cong. Rec. S7645 (daily ed. Dec. 17, 2019) (statement of Sen. Durbin).

The First Step Act was intended to provide relief to "individuals sentenced unjustly as a result of the disparity between crack cocaine and powder cocaine." 164 Cong. Rec. H10363 (daily ed. Dec. 20, 2018) (statement of Rep. Jeffries). The law provided discretion to implement sentencing relief "not [to] 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). Judges were charged with providing an "individualized review

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[15] Letter from Senators Durbin and Leahy to Attorney General Eric Holder (Nov. 17, 2010), https://bit.ly/3CDG8cc.

based on the particular facts of the[] case" and provided the "tools to better see that justice is done." 164 Cong. Rec. S7748 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar).

The First Step Act passed both Houses of Congress by overwhelming margins. It was "not just bipartisan," but "nearly nonpartisan." 164 Cong. Rec. S7749 (daily ed. Dec. 18, 2018) (statement of Sen. Leahy); see *id.* at S7742 (statement of Sen. Durbin) ("I can't remember another bill that has had this kind of support, left and right, liberal, conservative, Republican, Democrat."). In the Senate, the bill was introduced in virtually its current form on December 13, 2018, and passed five days later 87 to 12. See *id.* at S7781 (daily ed. Dec. 18, 2018). Two days after that, the House approved the bill, 358 to 36. 164 Cong. Rec. H10430 (daily ed. Dec. 20, 2018).

B. The views of Texas Senator John Cornyn, the then-Majority Whip, bear special emphasis given his role in the passage of the First Step Act and the fact that he spoke for a coalition of legislators critical to the Act's passage. Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—and What Happens Next*, Brennan Center for Justice (Jan. 4, 2019), https://bit.ly/2Z8aPsn.

Senator Cornyn had previously worked on bipartisan efforts to try to remedy the crack-to-powder disparity by permitting resentencing of those in prison, but those efforts failed. In 2018, at a critical juncture when the bill that would become the First Step Act came out of committee, Senator Cornyn threw his support behind the Act, and he was instrumental in its passage, stating he believed it would offer the sort of second chance that related

reforms in Texas provided. 164 Cong. Rec. S7737 (daily ed. Dec. 18, 2018) (statement of Sen. McConnell) ("Particular credit for this [advancing the First Step Act] belongs to Senator Cornyn."); Grawert & Lau, *How the FIRST STEP Act Became Law*.

Senator Cornyn, speaking on behalf of a broad coalition, noted that the statute had the support of law enforcement. Law enforcement well understood the First Step Act would allow "prisoners sentenced for a crack cocaine offense prior to the Fair Sentencing Act of 2010 to petition for relief *consistent with* the Fair Sentencing Act," or to allow "the Fair Sentencing Act [to] be applied retroactively." Letter from American Correctional Association and others to Congressional Leaders (Nov. 20, 2018) ("consistent with," emphasis added), https://bit.ly/3wCqD2R; Fraternal Order of Police, *FOP Partners with President Trump on Criminal Justice Reform* (Nov. 9, 2018), https://bit.ly/3C1Tz5H ("Fair Sentencing Act" "applied retroactively").

C. President Trump signed the First Step Act into law on December 21, 2018, describing it as "an incredible moment" for "criminal justice reform." *Remarks by President Trump at Signing Ceremony for S. 756, the "First Step Act of 2018" and H.R. 6964, the "Juvenile Justice Reform Act of 2018,"* 2018 WL 6715859, at *16, White House (Dec. 21, 2018). Members of Congress recognized the Act as "the most significant criminal justice reform bill in a generation," 164 Cong. Rec. at S7649 (daily ed. Dec. 17, 2018) (statement of Sen. Grassley) and "one of the most historic changes in criminal justice legislation in our history," *id*. at S7646 (statement of Sen. Durbin).

Even in its first year, the Act made significant progress: 91.8 percent of those receiving retroactive sentencing reductions were Black. U.S. Sent'g Comm'n, *First Step Act of 2018 Resentencing Provisions Retroactivity Data Report* Table 4 (May 2021), https://bit.ly/3nDVYzj.

III. Section 404(b) Should Be Construed Against this Background.

In the First Step Act, Congress recognized that it had erred in broadly legislating a 100-to-1 ratio distinguishing crack and powder cocaine, and it granted district courts correspondingly broad discretion to correct this error through individualized resentencing determinations under section 404(b).

Accordingly, the First Step Act provided relief to "individuals sentenced unjustly as a result of the disparity between crack cocaine and powder cocaine" by granting discretion "not [to] legislators but judges who sit and see the totality of the facts." 164 Cong. Rec. H10363 (daily ed. Dec. 20, 2018) (statement of Rep. Jeffries) (first quote); 164 Cong. Rec. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Booker) (second quote). Judicial discretion, Congress recognized, can correct the 1986 Act's hasty overgeneralizations while protecting public safety. 164 Cong. Rec. S7644 (daily ed. Dec. 17, 2018) (statement of Sen. Durbin). For example, the 1986 Act's mandatory penalties "don't allow judges to distinguish between drug kingpins, who should be our focus when it comes to criminal penalties, and lower level offenders." *Id*. "That isn't fair. It isn't smart. It isn't an effective way to keep us safe." *Id*.

Thus, Congress's aim was to remedy the unfairness and racial disparity of that regime by

affording persons sentenced under it the opportunity, on a case-by-case basis, to seek discretionary relief in the courts. Congress could have written a statute categorically requiring resentencing for all those convicted of qualifying crack-cocaine offenses, or otherwise prescribed a reticulated set of rules. Instead, in line with the modern approach to sentencing reflected in this Court's jurisprudence, *e.g.*, *Pepper* v. *United States*, 562 U.S. 476 (2011), *United States* v. *Booker*, 543 U.S. 220 (2005), it settled on granting district judges the discretion to apply the law based on the new ratio and to evaluate the propriety of a reduced sentence on an individualized basis.

As Congress well recognized, in this as in all sentencing contexts, district courts can make informed decisions based on their experience and an "individualized review based on the particular facts of the[] case" in order to "better see that justice is done." 164 Cong. Rec. S7748 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar). Only that sort of review, based upon "the fullest information possible concerning the defendant's life and characteristics," *Pepper*, 562 U.S. at 480, can appropriately remedy the unfairness of the prior 100-to-1 regime.

Given all this, there is no warrant to cabin the First Step Act's broad grant of judicial discretion in deciding whether to reduce sentences pursuant to section 404(b). Congress legislated to allow courts to consider all relevant factors—both those weighing *for* sentence reductions and those weighing *against*—to ensure that its goal of fairness and consistency is carried out, in line with individual circumstances.

CONCLUSION

The Court should vacate and remand.

Respectfully submitted,

VINCENT LEVY*
**Counsel of Record*
GREGORY DUBINSKY
KAREN A. SEBASKI
TIMOTHY W. GRINSELL
HOLWELL SHUSTER
& GOLDBERG LLP
425 Lexington Ave.
New York, NY 10017
(646) 837-5151
vlevy@hsgllp.com

Counsel for Amici Curiae

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