No. 20-291

In the Supreme Court of the United States

JAMELL BIRT, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's conviction for possessing an unspecified amount of cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) (2000), is a "covered offense" as defined in the First Step Act of 2018, Pub. L. No. 115-391, § 404(a), 132 Stat. 5222, such that petitioner is eligible under the First Step Act for a reduced sentence.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Conn.):

Birt v. *Warden, FCI Danbury*, No. 18-cv-607 (June 29, 2018)

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

United States v. *Birt*, No. 02-cr-286 (June 13, 2013)

Birt v. *United States*, No. 13-cv-1177 (June 13, 2013)

United States Court of Appeals (2d Cir.):

Birt v. *Warden, FCI Danbury*, No. 18-2318 (Feb. 7, 2019)

United States Court of Appeals (3d Cir.):

United States v. *Birt*, No. 12-1273 (Sept. 19, 2012)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 966 F.3d 257. The order of the district court (Pet. App. 19a-25a) is unreported. Prior opinions of the court of appeals are not published in the Federal Reporter but are reprinted at 537 Fed. Appx. 34, 479 Fed. Appx. 445, and 120 Fed. Appx. 424.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 2020. The petition for a writ of certiorari was filed on September 1, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of possessing an unspecified amount of cocaine base (crack cocaine) with intent to distribute,

in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) (2000). Judgment 1. He was sentenced to 240 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed, 120 Fed. Appx. 424, and this Court denied a petition for a writ of certiorari, 544 U.S. 1062.

The district court subsequently granted petitioner's motion for a sentence reduction pursuant to 18 U.S.C. 3582(c)(2) and reduced his sentence to 210 months of imprisonment. The court of appeals affirmed. 479 Fed. Appx. 445. Petitioner then sought to vacate the judgment in the resentencing proceeding. The district court denied his motion, D. Ct. Doc. 99, at 2 (June 13, 2013); the court of appeals affirmed, 537 Fed. Appx. 34; and this Court denied a petition for a writ of certiorari, 572 U.S. 1040.

Petitioner later filed a motion for a reduction of sentence pursuant to Section 404 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5222. The district court denied the motion. Pet. App. 19a-25a. The court of appeals affirmed. *Id.* at 1a-18a.

1. In 2001, petitioner was caught with 185.6 grams of crack cocaine during a routine traffic stop. Presentence Investigation Report (PSR) ¶¶ 7-10.[1] After a Pennsylvania state trooper stopped petitioner's car for speeding, petitioner consented to a search of the car. PSR ¶¶ 7, 10. Officers discovered the cocaine in an overnight bag in the car's trunk. PSR ¶ 10. At the time, petitioner was already on probation for an earlier Maryland conviction for distributing crack cocaine. PSR ¶ 31. In 2002, a grand jury in the Middle District of

[1] The decision below contains an apparent typographical error, referring to the quantity as 186.5 grams. Pet. App. 3a.

Pennsylvania returned an indictment charging petitioner with possessing 50 grams or more of crack cocaine with the intent to manufacture or distribute it, in violation of 21 U.S.C. 841(a)(1) (2000). PSR ¶ 1. While on federal pretrial release, petitioner was arrested in Maryland and charged by the State with possessing crack cocaine with intent to distribute. PSR ¶¶ 4, 24, 38; see Addendum to PSR 1.

In the federal case, petitioner ultimately agreed to plead guilty to a superseding information charging him with possessing an unspecified amount of crack cocaine with intent to manufacture or distribute, in violation of 21 U.S.C. 841(a)(1) (2000), while reserving the right to appeal the denial of his motion to suppress the evidence obtained in the traffic stop. PSR ¶¶ 2-3. Petitioner's plea agreement stated that "the maximum penalty for his offense is imprisonment for a period of 20 years and a fine of $1 million dollars." Pet. App. 3a (brackets omitted); see 21 U.S.C. 841(b)(1)(C) (2000) (specifying those penalties).

The Probation Office determined that petitioner was responsible for possessing 185.6 grams of crack cocaine, resulting in a base offense level of 34 under the Sentencing Guidelines. PSR ¶¶ 10, 18. The Probation Office also determined that petitioner qualified as a career offender under the Guidelines, based on his prior felony drug convictions. PSR ¶ 25; see PSR ¶¶ 30-31. Under the career-offender guideline, the defendant's base offense level is either the base offense level for the underlying offense or a base offense level determined under the career-offender guideline based on the maximum statutory penalty for the offense—whichever is higher. Sentencing Guidelines § 4B1.1 (2002). Here, peti-

tioner's base offense level of 34 for the underlying offense was controlling. PSR ¶ 25. The Probation Office calculated that an offense level of 34 and a criminal history category of VI (as a career offender, see PSR ¶ 36) would result in a guidelines range of 262 to 327 months, but that petitioner's guidelines range was instead capped at the statutory maximum term of 240 months. PSR ¶ 52.

At sentencing, the district court adopted those findings and calculations. Sent. Tr. 6. The court found "no reason to depart from the sentence called for by application of the guidelines," *id.* at 6-7, which had not yet been rendered advisory by this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005). The court imposed a sentence of 240 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed, 120 Fed. Appx. 424, and this Court denied a petition for a writ of certiorari, 544 U.S. 1062.

2. a. In the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, Congress altered the penalty range for certain crack-cocaine offenses. Before those amendments, Section 841(b)(1)(A)(iii) specified a minimum term of imprisonment of ten years and a maximum of life for violations of Section 841(a) involving 50 grams or more of crack cocaine, and Section 841(b)(1)(B)(iii) specified a minimum term of imprisonment of five years and a maximum of 40 years for violations involving five grams or more of crack cocaine. 21 U.S.C. 841(b)(1)(A)(iii) and (B)(iii) (2006). For powder-cocaine offenses, Congress had set the threshold amounts necessary to trigger the same enhanced penalties significantly higher. 21 U.S.C. 841(b)(1)(A)(ii) and (B)(ii) (2006).

The Fair Sentencing Act reduced this disparity in the treatment of crack and powder cocaine by increasing the amount of crack cocaine necessary to trigger the enhanced penalties. Specifically, Section 2(a)(1) of the Fair Sentencing Act struck the words "50 grams" in Section 841(b)(1)(A)(iii) and replaced them with "280 grams." § 2(a)(1), 124 Stat. 2372. Section 2(a)(2) struck the words "5 grams" in Section 841(b)(1)(B)(iii) and replaced them with "28 grams." § 2(a)(2), 124 Stat. 2372. Those changes applied only to offenses for which a defendant was sentenced after the Fair Sentencing Act's effective date (August 3, 2010). *Dorsey* v. *United States*, 567 U.S. 260, 273 (2012).

The Fair Sentencing Act did not amend the text of Section 841(b)(1)(C)—the provision under which petitioner had been sentenced. Section 841(b)(1)(C) continued, and still continues, to provide for a default sentencing range of "not more than 20 years" for any violation of Section 841(a) involving a controlled substance in schedule I or II, including crack cocaine, "except as provided in subparagraphs (A), (B), and (D)," the portions of Section 841(b)(1) specifying different penalties for specific listed drug types and quantities. 21 U.S.C. 841(b)(1)(C).

b. The United States Sentencing Commission promulgated Amendment 748 in response to the Fair Sentencing Act. Sentencing Guidelines App. C, Amend. 748 (Nov. 1, 2010); see Fair Sentencing Act § 8(2), 124 Stat. 2374. Under the Sentencing Guidelines, the base offense level for controlled-substance offenses varies depending on the amount and type of substance involved. Amendment 748 "reduc[ed] the base offense levels for all crack amounts proportionally," to reflect the new crack-to-powder ratio that Congress had used in the

Fair Sentencing Act for triggering statutory minimum penalties; those changes applied even to "offense levels governing small amounts of crack [cocaine] that did not fall within the scope of the mandatory minimum provisions" amended by the Act. *Dorsey*, 567 U.S. at 276. The Commission subsequently made the changes permanent and retroactive. See Sentencing Guidelines App. C, Amends. 750, 759 (Nov. 1, 2011).

In 2011, petitioner filed a motion to reduce his sentence under 18 U.S.C. 3582(c)(2), which permits a district court to reduce a previously imposed term of imprisonment if the term was "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2); see 479 Fed. Appx. at 446. Under the Sentencing Guidelines as amended after the Fair Sentencing Act, the base offense level for an offense involving 185.6 grams of crack cocaine was 28, rather than 34. See Sentencing Guidelines § 2D1.1(c)(6) (2011). Because petitioner remained a career offender, however, the Guidelines specified a base offense level of 32 for his particular offense, see *id.* § 4B1.1(b)(3), resulting in a revised guidelines range of 210-240 months, see 479 Fed. Appx. at 446.

The district court granted petitioner's motion and reduced his sentence to 210 months. 479 Fed. Appx. at 446. Petitioner appealed to challenge the amount of the reduction. His counsel filed an *Anders* brief, and the court of appeals affirmed. *Ibid.*; see *Anders* v. *California*, 386 U.S. 738, 744 (1967).

c. In May 2013, petitioner filed a *pro se* motion to vacate the judgment in his criminal case under Federal Rule of Civil Procedure 60(b), objecting to the offense level used in calculating his sentence reduction. D. Ct. Doc. 98, at 1, 12-14 (May 1, 2013). The district court

denied the motion, D. Ct. Doc. 99, at 2; the court of appeals affirmed, 537 Fed. Appx. 34; and this Court denied a petition for a writ of certiorari, 572 U.S. 1040.[2]

3. In 2018, Congress enacted Section 404 of the First Step Act to create a mechanism for certain defendants sentenced before the effective date of the Fair Sentencing Act to seek sentence reductions based on that Act's changes. The mechanism is available only for a "covered offense," which Section 404(a) defines as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act * * * , that was committed before August 3, 2010." § 404(a), 132 Stat. 5222. Under Section 404(b), a district court that "imposed a sentence for a covered offense may, on motion of the defendant * * * impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act * * * were in effect at the time the covered offense was committed." § 404(b), 132 Stat. 5222. Section 404(c) provides that Section 404 "shall [not] be construed to require a court to reduce any sentence." § 404(c), 132 Stat. 5222.

In 2019, petitioner moved for a sentence reduction under Section 404 of the First Step Act. Pet. App. 20a. In opposing that motion, the government at first mistakenly stated that petitioner was eligible for a sentence reduction while arguing that the district court should exercise its discretion not to grant one. See *id.* at 21a; D. Ct. Doc. 120, at 5-6, 12 (July 18, 2019). The government later corrected that mistake, explaining to the

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[2] Petitioner also unsuccessfully sought to challenge his reduced sentence via a petition for a writ of habeas corpus filed in the district in which he was serving the sentence. See *Birt* v. *Warden, FCI Danbury*, No. 18-cv-607, 2018 WL 11196629, at *3 (D. Conn. June 29, 2018), appeal dismissed, No. 18-2318 (2d Cir. Feb. 7, 2019).

court that petitioner was ineligible for a sentence reduction. Pet. App. 21a; see D. Ct. Doc. 122, at 1-5 (Aug. 28, 2019). The court agreed and denied petitioner's motion. Pet. App. 19a-25a.

The district court explained that petitioner "is not eligible for relief" because "a conviction for violating 21 U.S.C. § 841(b)(1)(C) is not a covered offense for purposes of the First Step Act." Pet. App. 22a. As noted above, the First Step Act defines a "covered offense" as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act * * * , that was committed before August 3, 2010." § 404(a), 132 Stat. 5222. The court explained that Section 841(b)(1)(C), which specified the penalties to which petitioner was subject, "does not provide for a mandatory minimum sentence and was 'NOT amended' by the Fair Sentencing Act." Pet. App. 24a (citation omitted).

4. The court of appeals affirmed. Pet. App. 1a-18a. The court observed that "[t]he text of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C)—the statutory provisions comprising [petitioner's] crime of conviction—was * * * untouched by the Fair Sentencing Act. That text remains the same to the last letter." *Id.* at 7a. The court recognized that a "covered offense" is defined as a violation for which "the statutory penalties * * * were modified by sections 2 or 3 of the Fair Sentencing Act," *ibid.* (citation omitted), and that "something that is completely unchanged has not, in ordinary parlance, been 'modified,'" *ibid.*

The court of appeals rejected petitioner's arguments to the contrary. Petitioner principally argued that "'all defendants convicted under Section 841(a)(1)'" are eligible for a reduced sentence under the First Step Act

because "the offense of conviction is § 841(a)," and the Fair Sentencing Act modified some of the penalties for violating that provision, even if it did not modify Section 841(b)(1)(C). Pet. App. 9a (brackets and citation omitted); see *id.* at 7a-8a. The court acknowledged that the First Circuit had apparently adopted that view. *Id.* at 10a (citing *United States* v. *Smith*, 954 F.3d 446, 449 (1st Cir. 2020)). The court recognized, however, that "any fact that legally requires an increased penalty is an element of the substantive crime itself. And if it is necessary to prove different facts for there to be different penalties, then there are different crimes, not merely the same crime with different penalties." *Ibid.* Applying that elements-based approach, the court observed that Section 841(a) in itself "does not contain the drug thresholds that are integral to defining" the "distinct crimes" set out in Section 841. *Id.* at 11a. The court instead determined that petitioner's statute of conviction was "defined by a combination of § 841(a)(1) and § 841(b)(1)(C)," the penalties for which were not altered by the Fair Sentencing Act. *Ibid.* The court also observed that petitioner's contrary interpretation "would have serious and unintended consequences," in that "[e]very defendant convicted under § 841(a) could seek resentencing," even for offenses "entirely unrelated to crack cocaine." *Id.* at 13a.

The court of appeals also rejected petitioner's fallback argument that the Fair Sentencing Act modified Section 841(b)(1)(C) itself. Pet. App. 14a-18a. In petitioner's view, because Section 841(b)(1)(C) sets forth penalties that apply "except as provided in subparagraphs (A) [and] (B)," 21 U.S.C. 841(b)(1)(C), "subparagraph (C) incorporated by reference the penalty triggers in (A) and (B), and thus * * * all three were

modified even though only (A) and (B) were actually changed." Pet. App. 14a. The court noted that the Fourth Circuit had "recently adopted" such a view, but declined to adopt it in this case. *Id.* at 15a n.9 (citing *United States* v. *Woodson*, 962 F.3d 812, 816 (4th Cir. 2020)). The court explained that the Fair Sentencing Act did not modify the penalties for a violation of Section 841(a)(1) and (b)(1)(C) because "the text and effect of § 841(b)(1)(C) are the same now as before." *Id.* at 16a. The court also observed that petitioner could not "point to any circumstance under which someone convicted under (b)(1)(C) would have faced different penalties before and after the passage of the Fair Sentencing Act." *Id.* at 15a. And it noted that its determination—that petitioner is "ineligible for the relief he seeks" because "a conviction under § 841(a)(1) and § 841(b)(1)(C) is not a 'covered offense' within the meaning of the First Step Act"—accords with the determinations of "many courts around the country." *Id.* at 17a-18a; see *id.* at 17a n.11 (collecting cases).

ARGUMENT

The court of appeals correctly determined that petitioner's conviction for possessing an unspecified amount of crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) (2000), is not a "covered offense" as defined in Section 404(a) of the First Step Act, 132 Stat. 5222, because the Fair Sentencing Act did not modify the statutory penalties for such an offense. Accordingly, petitioner is not eligible for a reduction of his sentence under Section 404(b). Petitioner is correct (Pet. 17-19) that the decision below declines to adopt arguments accepted by panels of the First and Fourth Circuits, but the disagreement is recent, shallow, and of diminishing importance. In any event, this

case would be an unsuitable vehicle in which to address the question presented because petitioner has failed to show that resolution of that question in his favor would make any practical difference to his sentence. The petition for a writ of certiorari should be denied.[3]

1. Petitioner contends that he is eligible for a reduced sentence under Section 404 of the First Step Act because "the 'Federal criminal statute' [he] violated is § 841(a), and [the] Fair Sentencing Act indisputably modified 'the statutory penalties' for that crime." Pet. 27-28; see First Step Act § 404(a), 132 Stat. 5222. The court of appeals correctly rejected that contention, which would logically apply to *every* offender convicted of violating Section 841(a)—even if the offense involved, for example, heroin or fentanyl rather than crack cocaine. The court also correctly rejected petitioner's alternative contention (Pet. 30-34) that the Fair Sentencing Act modified the penalties for a violation of Section 841(b)(1)(C), which prescribes exactly the same penalties in exactly the same terms as it did before.

a. Section 404(b) of the First Step Act permits a district court to reduce a previously imposed sentence only for a "covered offense." § 404(b), 132 Stat. 5222. The Act defines a "covered offense" as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act * * * , that was committed before August 3, 2010." § 404(a), 132 Stat. 5222. The only amendments to Section 841 were in Section 2 of the Fair Sentencing Act, which amended Section 841(b)(1)(A)(iii) and (B)(iii) by increasing "the drug amounts triggering mandatory minimums for crack trafficking offenses from 5 grams

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[3] The same question is presented in *Terry* v. *United States*, petition for cert. pending, No. 20-5904 (filed Sept. 28, 2020).

to 28 grams in respect to the 5–year minimum [sentence] and from 50 grams to 280 grams in respect to the 10-year minimum." *Dorsey* v. *United States*, 567 U.S. 260, 269 (2012). In light of those amendments, a defendant who was sentenced before the enactment of the Fair Sentencing Act for a violation of Section 841(a), for which the penalties were specified by Section 841(b)(1)(A)(iii) or (B)(iii), is generally eligible to move for a reduced sentence under Section 404 of the First Step Act.

In contrast, the Fair Sentencing Act did not modify Section 841(b)(1)(C)—the provision specifying the penalty applied in petitioner's case, see Pet. App. 3a-4a. As the court of appeals recognized, Section 841(b)(1)(C) was "untouched by the Fair Sentencing Act" and "remains the same to the last letter." *Id.* at 7a; cf. Pet. 4 (petitioner's acknowledgement that "the Fair Sentencing Act did not amend Subparagraph C's text"). Both before and after the Fair Sentencing Act, the "exact same statutory penalty of up to 20 years" continues to apply to any violation of Section 841(a)(1) and (b)(1)(C). Pet. App. 15a (citation omitted). And because the Fair Sentencing Act did not "modify" Section 841(b)(1)(C) but instead left it "completely unchanged," *id.* at 7a, the court correctly determined that a "conviction under § 841(a)(1) and § 841(b)(1)(C) is not a 'covered offense' within the meaning of the First Step Act," *id.* at 18a.

The court of appeals' understanding of Section 404 accords with the purpose and history of the First Step Act, which was designed to make the Fair Sentencing Act's changes to the statutory minimum sentencing regime for crack-cocaine offenses retroactive—not to provide a windfall for defendants, like petitioner, who were never subject to any statutory minimum penalty in the first place. Before the Fair Sentencing Act, a defendant

convicted of trafficking five grams or more of crack cocaine faced at least a five-year statutory minimum sentence, and a defendant convicted of trafficking 50 grams or more faced at least a 10-year statutory minimum sentence. See 21 U.S.C. 841(b)(1)(A)(iii) and (B)(iii) (2006). The Fair Sentencing Act increased the amount of crack cocaine necessary to trigger those statutory minimum sentences, see *Dorsey*, 567 U.S. at 269, and directed the Sentencing Commission to make conforming amendments to the Sentencing Guidelines, see Fair Sentencing Act § 8(2), 124 Stat. 2374. The Commission did so. See pp. 5-6, *supra*.

The Fair Sentencing Act thus provided for lower statutory and guideline ranges for defendants sentenced under Section 841(b)(1)(A)(iii) or (B)(iii) after the Act's enactment. For many defendants sentenced under those provisions before the Act's enactment, the Commission was able to provide a more limited form of relief by making the Guidelines changes retroactive. As a result, a defendant previously convicted of trafficking five grams or more of crack cocaine could move for a sentence reduction pursuant to 18 U.S.C. 3582(c)(2) and the retroactive Guidelines amendment. But such a defendant still could not take advantage of the Fair Sentencing Act's changes to the *statutory* minimum sentences for crack-cocaine offenses, because the statutory changes were not retroactive. See *Dorsey*, 567 U.S. at 280. A district court entertaining a sentence-reduction motion under Section 3582(c)(2) was still bound by the mandatory minimum sentence in effect at the time the defendant was convicted, even if the defendant's retroactively lowered guidelines range fell below that statutory minimum. See, *e.g.*, *United States* v. *Augustine*,

712 F.3d 1290, 1293-1295 (9th Cir.), cert. denied, 571 U.S. 918 (2013).

Congress addressed that situation in Section 404 of the First Step Act by "making retroactive the Fair Sentencing Act's *statutory* changes for crack cocaine sentences." *United States* v. *Boulding*, 960 F.3d 774, 777 (6th Cir. 2020) (emphasis added). Section 404 now allows a district court to impose a "reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 * * * were in effect at the time the covered offense was committed." First Step Act § 404(b), 132 Stat. 5222. Congress thus provided a mechanism for defendants for whom the retroactive Guidelines amendments provided incomplete relief to seek a sentence reduction in a proceeding at which the district court would not be bound by the pre-Fair Sentencing Act statutory minimum sentences. And Congress correspondingly limited such proceedings to "covered offenses," defined to include violations for which the Fair Sentencing Act had actually modified the previously applicable statutory minimum sentences. First Step Act § 404(a), 132 Stat. 5222.

Nothing in that history suggests that Congress sought to provide an opportunity for a reduced sentence for a defendant, such as petitioner, to whom no statutory minimum sentence ever applied. Even though petitioner admitted to trafficking 185.6 grams of crack cocaine, he was allowed to plead guilty to the lesser offense of trafficking an unspecified amount of crack cocaine under Section 841(b)(1)(C)—an offense which, both before and after the Fair Sentencing Act, carries *no* statutory minimum sentence and a 20-year maximum sentence. See 21 U.S.C. 841(b)(1)(C); 21 U.S.C. 841(b)(1)(C) (2000); PSR ¶ 51. In imposing a sentence for that offense, the district court was not constrained

by any statutory minimum sentence later modified by the Fair Sentencing Act. Indeed, as the court of appeals recognized, petitioner "cannot point to any circumstance under which someone convicted under (b)(1)(C) would have faced different penalties before and after the passage of the Fair Sentencing Act." Pet. App. 15a. And to the extent that the district court's selection of a specific sentence might have been "'anchor[ed]'" (Pet. 7) to the crack-cocaine penalties that *did* trigger statutory minimum sentences, the retroactive Guidelines amendments addressed that issue. They allowed defendants to invoke Section 3582(c)(2) to seek reduced sentences under guidelines ranges that reflected those statutory changes. Petitioner availed himself of that opportunity and received a 30-month sentence reduction.

Petitioner argues (Pet. 32-33) that the court of appeals erred in relying on the fact that he would face the same statutory penalty range even if he had been sentenced after the Fair Sentencing Act took effect. Petitioner observes (*ibid.*) that the same is true of other defendants who have been held to be eligible for relief under the First Step Act—for example, defendants convicted of violating Section 841(a)(1) and (b)(1)(A)(iii) whose offenses involved 280 grams or more of crack cocaine, an amount sufficient to trigger the same enhanced penalties even after the Fair Sentencing Act. It would be reasonable to construe the definition of "covered offense" to also preclude such defendants from obtaining relief under Section 404. Nevertheless, the courts of appeals have declined to do so. See, *e.g.*, *United States* v. *Johnson*, 961 F.3d 181, 187 (2d Cir. 2020) (collecting cases). But for a defendant in those

circumstances, the Fair Sentencing Act at least modified the statutory provision under which the defendant was sentenced. The same cannot be said for petitioner.

b. Petitioner contends that the "Federal criminal statute" that he violated for purposes of Section 404(a)'s definition of "covered offense" is Section 841(a)(1), rather than a criminal "offense" defined by Section 841(a)(1) and (b)(1)(C). Pet. 27; see Pet. 27-30. The court of appeals correctly rejected that contention.

First, treating Section 841(a)(1) as a standalone criminal offense would be in tension with the reasoning of this Court's decision in *Alleyne* v. *United States*, 570 U.S. 99 (2013), which stated that "[a]ny fact that, by law, increases the penalty for a crime is" for constitutional purposes "an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Id.* at 103 (citing *Apprendi* v. *New Jersey*, 530 U.S. 466, 483 n.10 (2000)). This Court has accordingly described a standalone violation of Section 841(a)(1) as a "lesser included offense" of a "crime" that requires proof of the same conduct as well as a sentencing enhancement from Section 841(b). *Burrage* v. *United States*, 571 U.S. 204, 210 n.3 (2014); see Pet. App. 10a ("[I]f it is necessary to prove different facts for there to be different penalties, then there are different crimes, not merely the same crime with different penalties.").

Congress, which was presumably aware of those decisions when it enacted the First Step Act, see, *e.g.*, *Porter* v. *Nussle*, 534 U.S. 516, 528 (2002), thus would have considered Section 841 as setting forth many different "offenses," with different penalties, for trafficking in different quantities of controlled substances. Only two of those offenses were modified by the Fair Sentencing Act: trafficking in 50 grams or more of crack cocaine,

in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(iii) (2006), and trafficking in five grams or more of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(iii) (2006). In contrast, the Fair Sentencing Act made no changes to petitioner's offense of trafficking in an unspecified amount of crack cocaine, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C).

Second, petitioner's argument proves far too much. As the court of appeals observed, if petitioner were eligible for a sentence reduction under the First Step Act merely because his violation involved Section 841(a)(1), then "[*e*]*very defendant*" convicted of a violation involving Section 841(a)(1) would be similarly eligible, "regardless of whether the subsection under which he was convicted was changed in any way." Pet. App. 13a (emphasis added). That cannot be correct. Section 841(a)(1) violations can—and in numerous cases do—involve controlled substances other than crack cocaine, such as heroin and methamphetamine, as to which Sections 2 and 3 of the Fair Sentencing Act are irrelevant. See 21 U.S.C. 841(b)(1)(A)(i) and (viii); see also Pet. App. 13a ("[I]f we treat § 841(a) as the crime of conviction, defendants convicted of, say, heroin offenses, would be entitled to resentencing because the penalties in § 841(b) have been modified.").

Petitioner appears to accept that Section 404 of the First Step Act cannot be read to permit relief in cases that do not involve "crack defendants" (Pet. 5), but he offers no persuasive basis for cabining his argument to crack-cocaine offenses. He notes that a court is authorized to reduce a sentence for a covered offense "'as if' the Fair Sentencing Act was 'in effect at the time the covered offense was committed.'" Pet. 30 (quoting First Step Act § 404(b), 132 Stat. 5222). But the "as if" clause

does not speak to *eligibility* for a sentence reduction, only the procedures for one. It thus does not rebut the court of appeals' observation that petitioner's position would render essentially all defendants sentenced before August 3, 2010, of *any* violation involving Section 841(a)(1) eligible for a sentence reduction.

Congress would not have made every drug defendant sentenced before that date *eligible* for a sentence reduction that they could not in fact receive. Moreover, petitioner's assertion (Pet. 30) that the "as if" clause would preclude relief for a defendant "whose offenses had nothing to do with crack cocaine" is entirely conclusory and unexplained. To the extent petitioner suggests that the "as if" clause would preclude relief for non-crack offenders because the Fair Sentencing Act did not modify the statutory penalties in Section 841(b) for non-crack offenses (so that imposing a reduced sentence "as if" the Fair Sentencing Act were in effect would make no difference), the same logic would preclude relief for petitioner himself, because the Fair Sentencing Act also did not modify the statutory penalties in Section 841(b) for petitioner's own offense.

c. Petitioner alternatively contends (Pet. 30-34) that the Fair Sentencing Act implicitly modified the penalties for his Section 841(b)(1)(C) offense because Section 841(b)(1)(C) applies "except as provided in subparagraphs (A) [and] (B)," 21 U.S.C. 841(b)(1)(C), and the Fair Sentencing Act modified the penalties in Section 841(b)(1)(A)(iii) and (B)(iii). The court of appeals correctly rejected that alternative contention, which is at odds with the plain meaning of the term "'modified.'" Pet. App. 7a (quoting First Step Act § 404(a), 132 Stat. 5222); see, *e.g.*, *The American Heritage Dictionary of the English Language* 1132 (5th ed. 2011) (defining

"modify" to mean "change" or "alter") (emphasis omitted). The Fair Sentencing Act did not make even "minor," "partial," or "small" changes to the text or effect of Section 841(b)(1)(C). Pet. 31 (quoting definitions of "modify" from, respectively, *Webster's Third New International Dictionary of the English Language* 1452 (2002), 9 *Oxford English Dictionary* 952 (2d ed. 1989), and *Black's Law Dictionary* 1157 (10th ed. 2014)). Instead, "the text and effect of § 841(b)(1)(C) are the same now as before." Pet. App. 16a.

Petitioner's contrary view (Pet. 31) rests on inserting into Section 841(b)(1)(C) bracketed language that the provision does not contain, and then striking out that language. Petitioner contends (Pet. 31-32) that, as a result of the changes made by the Fair Sentencing Act, the penalties set out in Section 841(b)(1)(C) now apply to violations of Section 841(a) involving between five and 28 grams of crack cocaine, which previously would have been sufficient to trigger the enhanced penalties in Section 841(b)(1)(B)(iii). But those changes to Section 841(b)(1)(B)(iii) do not affect the statutory sentencing range for defendants, like petitioner, who were already subject to the penalties in Section 841(b)(1)(C). The Fair Sentencing Act did not modify those penalties at all. And while Petitioner emphasizes (Pet. 31) that Section 841(b)(1)(C) "expressly cross-references Subparagraphs A and B," that cross-reference incorporates neither the drug quantities nor the penalties set forth in those subparagraphs. Rather, Section 841(b)(1)(C) sets forth its own, unaltered penalties for any quantity of various controlled substances.

Moreover, petitioner's alternative argument leads to the same "serious and unintended consequences," Pet.

App. 13a, as his principal argument, in that it would logically apply to *all* controlled-substance offenses covered by Section 841(b)(1)(C). In places, petitioner suggests that his alternative argument is limited to crack-cocaine offenses because the Fair Sentencing Act only modified the "upper bound" of Section 841(b)(1)(C) with respect to crack-cocaine offenses. Pet. 19 (citation omitted); see Pet. 31-32. But that argument misunderstands Section 841(b)(1)(C). Section 841(b)(1)(C) applies to a defendant who has distributed any amount (or an unspecified amount) of crack cocaine. 21 U.S.C. 841(b)(1)(C). Thus, both before and after the Fair Sentencing Act, a defendant who distributed more than 280 (or more than 50) grams of crack cocaine could be convicted under Section 841(b)(1)(C). Indeed, the facts of petitioner's case demonstrate that Section 841(b)(1)(C) has no "upper bound": he was convicted and sentenced under Section 841(b)(1)(C) even though his offense involved 185.6 grams of crack cocaine. The Fair Sentencing Act did not modify the "upper bound" of Section 841(b)(1)(C) because it has no "upper bound."

Petitioner's reliance on non-textual arguments is equally unsound. Petitioner asserts (Pet. 7, 32) that district courts imposing sentence under Section 841(b)(1)(C) before the Fair Sentencing Act may have been influenced by an "anchoring effect," in the sense that an offense involving, for example, four and a half grams of crack cocaine may appear to be a more serious violation when measured against the old five-gram threshold for enhanced penalties than when measured against the new 28-gram threshold. But nothing in the Fair Sentencing Act or the First Step Act suggests that Congress made eligibility for a sentence reduction turn on such armchair psychology. Moreover, as discussed

above, the Sentencing Commission already made retroactive changes to the Guidelines for *all* crack-cocaine offenses to reflect Congress's recalibration of the relative seriousness of various amounts of crack cocaine versus powder cocaine; petitioner already obtained a sentence reduction in light of those Guidelines amendments; and any "anchoring" concerns about offenses involving amounts of crack cocaine that fell just short of the old threshold for a statutory minimum sentence are particularly inapposite here, where petitioner's violation in fact involved 185.6 grams of crack cocaine.

Petitioner is also mistaken in asserting that Congress intended to make sentence reductions under Section 404 available "to all crack defendants" or to all "individuals convicted of 'low-level' offenses." Pet. 32-33 (citations omitted). "The best evidence of [a statute's] purpose is the statutory text adopted by both Houses of Congress and submitted to the President." *West Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98 (1991). In the First Step Act, Congress could easily have defined a "covered offense" to mean all crack-cocaine offenses for which the defendant was sentenced before August 3, 2010. It did not. Congress instead referred with precision to the changes previously made by particular sections of the Fair Sentencing Act, which did not modify Section 841(b)(1)(C). The result is not to "perverse[ly]" exclude the lowest level offenders (Pet. 33), but rather to extend relief only to those offenders who were previously subject to the statutory minimum sentencing regime altered by the Fair Sentencing Act. See pp. 12-14, *supra*.

Finally, petitioner's complaint (Pet. 34) that he, personally, is now worse off for having been allowed to plead guilty to a violation involving Section 841(b)(1)(C),

despite being responsible for trafficking 185.6 grams of crack cocaine, is misplaced. Although petitioner would be eligible for a sentence reduction under the First Step Act had he pleaded guilty to a violation of Section 841(a)(1) and (b)(1)(A)(iii), in that counterfactual world petitioner also would have faced a higher guidelines range and a higher statutory penalty range of 10 years to life. See PSR ¶ 52. What petitioner seeks here is the sweet without the bitter—the opportunity for a sentence reduction designed to address a disparity in the amount of crack and powder cocaine necessary to trigger enhanced penalties, without ever having been subject to those enhanced penalties.

2. Petitioner argues (Pet. 17-24) that further review is warranted because the courts of appeals are divided on the question presented. But petitioner overstates the disagreement, which is recent, shallow, and of diminishing practical importance given the shrinking set of defendants to whom the question could be relevant.

a. As petitioner observes (Pet. 21-22), the decision below is consistent with unpublished decisions of the Tenth and Eleventh Circuits. See *United States* v. *Martinez*, 777 Fed. Appx. 946, 947 (10th Cir. 2019) (recognizing that "[t]he Fair Sentencing Act had no effect on § 841(b)(1)(C)," and determining that a defendant's conviction under Section 841(b)(1)(C) is "thus * * * not a 'covered offense' under the Act"); *United States* v. *Foley*, 798 Fed. Appx. 534, 536 n.3 (11th Cir. 2020) (per curiam) (rejecting the argument "that § 841(b)(1)(C) is a covered offense under the First Step Act"); see also *United States* v. *Jones*, 962 F.3d 1290, 1301 (11th Cir. 2020) (stating that if "the movant's offense triggered the higher penalties in section 841(b)(1)(A)(iii) or (B)(iii) * * * the movant committed a covered offense").

The Fifth Circuit has likewise determined, in an unpublished decision, that a defendant convicted of a violation involving Section 841(b)(1)(C) is not eligible for a reduced sentence under Section 404. See *United States* v. *Hargers*, 823 Fed. Appx. 292, 292 (2020) (per curiam) ("The Fair Sentencing Act of 2010 * * * did not modify § 841(b)(1)(C) which required no minimum quantity of cocaine base to apply."). And the Sixth Circuit has made the same determination in an unpublished order. See *United States* v. *Willis*, No. 19-1723, 2020 U.S. App. LEXIS 4244, at *5 (Feb. 11, 2020) ("The Fair Sentencing Act did not modify the statutory penalties set forth in 21 U.S.C. § 841(b)(1)(C).").[4]

b. Petitioner contrasts (Pet. 17-20) the Third Circuit's decision here with decisions of the First, Fourth, and Seventh Circuits, but only the First and Fourth Circuits have squarely decided the question presented.

In *United States* v. *Smith*, 954 F.3d 446 (2020), the First Circuit adopted petitioner's primary argument, concluding that "[t]he relevant statute that [the defendant] violated is either § 841 as a whole, or § 841(a), which describes all the conduct necessary to violate § 841." *Id.* at 449. The court acknowledged, however, that its interpretation would give rise to a "difficult question" about whether "a violation of § 841(a)(1) involving only

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[4] Petitioner errs in relying (Pet. 23) on *United States* v. *Wiseman*, 932 F.3d 411 (6th Cir. 2019), cert. denied, 140 S. Ct. 1237 (2020). That case did not merely arise "in a different posture" (Pet. 23) but rather concerned an entirely different provision of the First Step Act—Section 401, not Section 404. See *Wiseman*, 932 F.3d at 417 (stating that Section 404 "does not pertain to Wiseman's case"). Section 401 made prospective changes to various drug laws, including changes to 21 U.S.C. 841(b)(1); the applicability of those amendments does not turn on whether the defendant has committed a "covered offense" as defined in Section 404.

a controlled substance other than crack cocaine (heroin, for example) would also be considered a 'covered offense.'" *Id.* at 450 n.5. The court declined to address that question in *Smith* itself. *Ibid.* The court also suggested in dictum that it would have reached the same conclusion "[e]ven under the government's preferred" approach, focused on Section 841(b)(1)(C), because (in the court's view) the Fair Sentencing Act "did not literally change the text of § 841(b)(1)(C)" but nonetheless "modifie[d] [it] by incorporation." *Id.* at 450. In *United States* v. *Woodson*, 962 F.3d 812 (2020), the Fourth Circuit agreed with the latter reasoning (which is petitioner's fallback argument), concluding that "the Fair Sentencing Act 'modified' Subsection 841(b)(1)(C) by altering the crack cocaine quantities to which its penalty applies," *id.* at 816; see *id.* at 817.

Petitioner's reliance (Pet. 20) on passing language in the Seventh Circuit's decision in *United States* v. *Hudson*, 967 F.3d 605 (2020), however, is misplaced. The issue there was whether, "if a defendant's aggregate sentence includes both covered and non-covered offenses, * * * a court [may] reduce the sentence for the non-covered offenses." *Id.* at 607. The court of appeals stated in passing that two of a particular defendant's convictions, including a conviction for "possession with intent to distribute less than 5 grams of crack cocaine," were each "'covered offenses' under the First Step Act." *Ibid.* But the Seventh Circuit did not squarely confront (or need to squarely confront) the question presented here, nor did it adopt either of petitioner's arguments. In particular, its "cf." citation of *Smith*, see *id.* at 612, in the course of discussing whether the First Step Act authorizes a sentence reduction even if the Act "did not alter the defendant's *Guidelines* range," *id.* at

611 (emphasis added), is not evidence that it considered and "endorsed the First Circuit's view" (Pet. 20) of the question presented here.

c. The shallow and recent disagreement described above does not warrant this Court's review at this time. Only the First, Third, and Fourth Circuits have squarely confronted the question presented in published decisions, and the First Circuit pointedly declined to decide whether its interpretation of "covered offense" had implications for offenses not involving crack cocaine. See *Smith*, 954 F.3d at 450 n.5. No court of appeals has considered the question presented en banc, and the First and Fourth Circuit panel decisions were rendered without the benefit of the Third Circuit's analysis in this case.

The question presented is also of limited and diminishing practical importance. The First Step Act's definition of a "covered offense" includes the limitation that the offense must have been "committed before August 3, 2010," *i.e.*, before the effective date of the Fair Sentencing Act. First Step Act § 404(a), 132 Stat. 5222. There are presumably a significant number of defendants who continue to serve sentences imposed before August 3, 2010, for crack-cocaine offenses under Sections 841(b)(1)(A)(iii) and (B)(iii), given the enhanced penalties specified in those provisions. But defendants convicted of a violation involving Section 841(b)(1)(C) have never faced a statutory minimum penalty, and many of them—including petitioner—have already benefited from the retroactive Guidelines amendments promulgated by the Sentencing Commission in response to the Fair Sentencing Act. Petitioner emphasizes (Pet. 25) the number of recent cases addressing whether offenses involving Section 841(b)(1)(C) are covered offenses, but those cases

may well represent the high-water mark. And defendants whose Section 404 motions have already been denied are generally not eligible to apply for relief again. See First Step Act § 404(c), 132 Stat. 5222 ("No court shall entertain a motion made under this section * * * if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits.").

Moreover, the question presented concerns only the antecedent issue of eligibility for a sentence reduction. The First Step Act makes any sentence reduction for a covered offense discretionary: the court "may" but need not "impose a reduced sentence" for a covered offense. § 404(b), 132 Stat. 5222. The Act also expressly provides that "[n]othing in [Section 404] shall be construed to require a court to reduce any sentence." § 404(c), 132 Stat. 5222. Petitioner identifies no reason to assume that any significant number of defendants currently serving a sentence imposed under Section 841(b)(1)(C) before August 3, 2010, would actually receive sentence reductions under Section 404—beyond any sentence reductions they may have received pursuant to the Commission's retroactive Guidelines amendments—were they eligible for them.

3. Indeed, for that very reason, this case would be an unsuitable vehicle in which to address the question presented. Petitioner makes no effort to demonstrate that he would actually receive a sentence reduction were he eligible for one. Petitioner is a career offender, who committed his federal offense while on probation for a prior state offense, and who then went on to commit yet another state offense while on federal pre-trial release—all three of which involved crack cocaine. See pp. 2-3, *supra*. Petitioner, like many Section 841(b)(1)(C) defendants, has

already sought and received a reduced sentence reflecting the retroactive changes to the Sentencing Guidelines made in the wake of the Fair Sentencing Act. Based on petitioner's Section 3582(c)(2) motion, the district court reduced his sentence to 210 months. 479 Fed. Appx. at 446. Petitioner has failed to demonstrate that his sentence would be any different even if he were eligible for relief under Section 404.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2020