No. 20-5904

IN THE

Supreme Court of the United States

TARAHRICK TERRY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC also works to ensure that courts remain faithful to the text and history of important federal statutes like the First Step Act. Accordingly, CAC has a strong interest in ensuring that the First Step Act is understood, in accordance with its text and Congress's plan in passing it, to permit reductions in sentences for individuals sentenced for low-level crack-cocaine offenses pursuant to 21 U.S.C. § 841(b)(1)(C).

INTRODUCTION AND SUMMARY OF ARGUMENT

Under 21 U.S.C. § 841, it is a federal crime to manufacture, distribute, or dispense—or possess with intent to manufacture, distribute, or dispense—various controlled substances, including crack and powder cocaine. Subsection (a) of § 841 describes the "[u]nlawful acts" prohibited, and subsection (b) describes the "[p]enalties" for those unlawful acts. Subsection (b) is further divided into three tiers of sentencing ranges

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

for "any person who violates subsection (a)." As originally enacted in the Anti-Drug Abuse Act of 1986, § 841(b)(1)(A) prescribed a mandatory minimum sentence of 10 years for offenses involving 50 grams or more of crack cocaine, and § 841(b)(1)(B) prescribed a mandatory minimum of 5 years for offenses involving 5 grams or more of crack cocaine. *See* Pub. L. No. 99-570, § 1002, 100 Stat. 3207 (1986). The residual penalty provision, § 841(b)(1)(C), prescribed an unenhanced statutory range of 0 to 20 years for all offenses, "except as provided in subparagraphs (A), (B)," and another provision not relevant to this case. *Id.*

The quantities of crack cocaine specified in the original version of § 841(b), as compared with their powder cocaine counterparts, created a 100-to-1 sentencing disparity. In other words, for purposes of criminal punishment, the law treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine. This disparity reflected public sentiment in the mid-1980s that "crack cocaine in particular" posed "a problem of overwhelming dimensions" because it was more dangerous, more addictive, and more damaging to the general public than other types of drugs, including powder cocaine. *See Kimbrough v. United States*, 552 U.S. 85, 95-96 (2007) (quoting U.S. Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy, at 121 (Feb. 1995), *available at* https://www.ussc.gov/research/congressional-reports/1995-report-congress-cocaine-and-federal-sentencing-policy).

Not long after the passage of the Anti-Drug Abuse Act of 1986, additional research and experience revealed that the 100-to-1 crack-to-powder-cocaine sentencing disparity was unwarranted. *See id.* at 97.

Over the next two decades, the United States Sentencing Commission "issued four separate reports telling Congress that the ratio was too high and unjustified." *Dorsey v. United States*, 567 U.S. 260, 268 (2012). As those reports explained, "research showed the relative harm between crack and powder cocaine [was] less severe than 100-to-1, . . . sentences embodying that ratio could not achieve the Sentencing Reform Act's 'uniformity' goal of treating like offenders alike, . . . they could not achieve the 'proportionality' goal of treating different offenders (*e.g.*, major drug traffickers and low-level dealers) differently, and . . . the public had come to understand sentences embodying the 100-to-1 ratio as reflecting unjustified race-based differences." *Id.*

In 2010, Congress accepted the Sentencing Commission's recommendations and enacted the Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2372 (2010). The Fair Sentencing Act reduced the crack-to-powder-cocaine sentencing disparity to 18 to 1. As relevant here, Section 2(a) of the Fair Sentencing Act "increased the drug amounts triggering mandatory minimums for crack trafficking offenses from 5 grams to 28 grams in respect to the 5-year minimum" prescribed in § 841(b)(1)(B)(iii), "and from 50 grams to 280 grams in respect to the 10-year minimum" prescribed in § 841(b)(1)(A)(iii). *Dorsey*, 567 U.S. at 269. And although the text of § 841(b)(1)(C) itself was not amended, these amendments raised § 841(b)(1)(C)'s upper boundary from 5 grams to 28 grams of crack cocaine.

The Fair Sentencing Act produced significant sentencing reform. While the average sentence length for powder cocaine remained relatively stable, the average crack-cocaine sentence decreased from 124 months

to 96 months between 2005 and 2013. *See* U.S. Sentencing Commission, Report to Congress: Impact of the Fair Sentencing Act of 2010, at 23 (Aug. 2015), *available at* https://www.ussc.gov/research/congressional-reports/2015-report-congress-impact-fair-sentencing-act-2010. Critically, however, many individuals serving sentences for crack-cocaine offenses were left out of the Fair Sentencing Act's reforms because the modifications to § 841(b)'s sentencing regime applied only to those sentenced after the Act's effective date of August 3, 2010. *See Dorsey*, 567 U.S. at 264, 281.

Congress recognized this injustice. *See, e.g.*, 164 Cong. Rec. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Booker) ("[T]here are people sitting in jail right now for selling an amount of drugs equal to the size of a candy bar who have watched people come in and leave jail for selling enough drugs to fill a suitcase."); 164 Cong. Rec. S7645 (daily ed. Dec. 17, 2018) (statement of Sen. Durbin) (expressing the need to give a "chance [for a reduced sentence] to thousands of people still serving sentences for nonviolent offenses involving crack cocaine under the 100-to-1 standard" even after passage of the Fair Sentencing Act). In 2018, through an overwhelmingly bipartisan effort, Congress passed the First Step Act, which made the Fair Sentencing Act of 2010 retroactive. Specifically, Section 404(b) of the First Step Act provides that "[a] court that imposed a sentence for a covered offense may . . . impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed," and Section 404(a) 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 of 2010 . . . , that was committed

before August 3, 2010." Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (2018).

Despite the plain text of the First Step Act, several lower courts have interpreted the Act to apply only to those sentenced for crack-cocaine offenses under subsections 841(b)(1)(A) and (B), not under subsection (C). Perversely, this interpretive error has excluded individuals sentenced for the lowest-level crack-cocaine offenses from eligibility for the First Step Act's relief.

Petitioner Tarahrick Terry is one of those individuals. In 2008, Mr. Terry pleaded guilty and was convicted of violating § 841(a)(1). *See* Pet'n 11 (citing Dist. Ct. Dkt. Entry 33 at 1). Because the district court found Mr. Terry accountable for only 3.9 grams of crack cocaine, it sentenced him pursuant to § 841(b)(1)(C). Pet. App. 7a-8a & n.3. After the First Step Act was enacted, Mr. Terry filed a request for resentencing, which the district court denied. *Id.* at 14a. The court below affirmed, holding that Mr. Terry was not eligible for a reduced sentence because he did not have a "covered offense" as defined by the First Step Act. *Id.* at 5a. According to the court below, an individual has a "covered offense" only if the person was sentenced for an offense that triggered one of the statutory penalties provided in subsections 841(b)(1)(A)(iii) or (B)(iii). *Id.*

The court below was wrong. The plain text of the First Step Act makes clear that the offense for which Mr. Terry was sentenced constitutes a "covered offense" within the meaning of the First Step Act. Two aspects of the statutory text compel this conclusion.

First, the text of the First Step Act mandates treating subsection 841(a), not some combination of subsections 841(a) and (b), as the "Federal criminal statute"

that was "violat[ed]" in this case. By its own terms, § 841(b) provides only the "[p]enalties" for violation of § 841(a). Indeed, § 841(b) contains no prohibition for one to "violate," whereas § 841(a) outlaws "manufactur[ing], distribut[ing], or dispens[ing], or possess[ing] with intent to [do those acts]." 21 U.S.C. § 841(a)(1). To read the First Step Act any other way would render its "statutory penalties" phrase superfluous and defy basic principles of grammar and syntax.

Second, the statutory penalties for Mr. Terry's violation of § 841(a)(1), the federal criminal statute of conviction in this case, were plainly "modified by section 2 . . . of the Fair Sentencing Act of 2010." First Step Act § 404(a). In contrast with other verbs commonly used by Congress, the term "modify" does not require *textual* alterations. Rather, as this Court has emphasized, the term "modify," in its ordinary usage, "connotes moderate change." *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994). Thus, although Congress did not alter the text of § 841(b)(1)(C), it still "modified" that provision because § 841(b)(1)(C) incorporates § 841(b)(1)(A) and § 841(b)(1)(B), and amendments to those provisions changed the scope of § 841(b)(1)(C) by raising its ceiling from 5 to 28 grams of crack cocaine.

Finally, interpreting the First Step Act to apply to individuals sentenced for lower-level crack-cocaine offenses under § 841(b)(1)(C) accords with the Act's broad remedial purpose of reducing disparities—including along racial lines—in the criminal justice system. *See, e.g.*, 164 Cong. Rec. S7749 (daily ed. Dec. 18, 2018) (statement of Sen. Leahy) ("[W]hen I look at the scope of reforms before us today[,] including . . . retroactive application of the Fair Sentencing Act, . . . I believe this is a historic achievement."); 164 Cong. Rec.

S7021 (daily ed. Nov. 15, 2018) (statement of Sen. Durbin) ("What we . . . set out to do with this bill . . . is to give a chance to thousands of people who are still serving sentences for nonviolent offenses involving crack cocaine under the old 100-to-1 ruling to petition individually . . . to the court for a reduction in the sentencing."). Fundamentally, it would defy logic and disrupt Congress's plan to preclude resentencing for individuals convicted of distributing small quantities of crack cocaine while allowing relief for those convicted of distributing much larger amounts based on a crabbed reading of the definition of a "covered offense."

Because individuals sentenced under § 841(b)(1)(C) for crack-cocaine offenses were sentenced for a "covered offense" within the meaning of the First Step Act, this Court should reverse the decision of the court below.

ARGUMENT

I. THE TEXT OF THE FIRST STEP ACT MAKES INDIVIDUALS SENTENCED UNDER § 841(b)(1)(C) FOR CRACK-COCAINE OFFENSES ELIGIBLE FOR REDUCED SENTENCES.

A. The Phrase "Federal Criminal Statute" Refers to § 841(a) in this Case.

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 of 2010 . . . , that was committed before August 3, 2010." First Step Act § 404(a) (emphasis added). The phrase "Federal criminal statute" plainly refers to § 841(a), whereas "the statutory penalties" for violations of § 841(a) are set forth in § 841(b).

1. The substance of § 841(a) and (b) compels this interpretation. Critically, the First Step Act refers to a "*violation* of a Federal criminal statute" in its definition of a "covered offense." *Id.* (emphasis added). "Violate" is a transitive verb, meaning one cannot simply "violate"; rather, one must "violate" *something*. *See, e.g.*, *Violate*, Merriam-Webster's Dictionary, https://www.merriam-webster.com/dictionary/violate (last visited Jan. 25, 2021). In ordinary usage, to "violate" means to "break" or to "disregard" something. *Id.*; *see also, e.g.*, *Violate*, American Heritage Dictionary, https://www.ahdictionary.com/word/search.html?q=violate (last visited Jan. 25, 2021) (defining "violate" as "[t]o disregard or act in a manner that does not conform to (a law or promise, for example)"). Hence, when Congress referred to "a violation of a Federal criminal statute" in the First Step Act, it clearly meant the violation of a statute with some substantive prohibition for one to contravene. *See BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) ("[S]tatutory terms are generally interpreted in accordance with their ordinary meaning.").

Subsection 841(a) fits the bill. It proscribes, as relevant here, "manufactur[ing], distribut[ing], or dispens[ing], or possess[ing] with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1). Plainly, one "violates" § 841(a) by engaging in one of the acts made unlawful by that subsection. Subsection 841(b), in contrast, contains no prohibition for one to "violate"; rather, by its own terms, it sets forth the "sentence[s]" for "any person who violates subsection (a) of this section," which vary based on the quantities of drug associated with the acts that violate § 841(a). *See id.* § 841(b) (stating that "any person who violates subsection (a) of this section

shall be sentenced as follows" and then setting forth three tiers of statutory penalties). Thus, when the First Step Act refers to "the violation of a Federal criminal statute," it cannot possibly mean that § 841(b), or some specific sub-provision thereof, is the "Federal criminal statute."

The headings of subsections 841(a) and (b) further support this interpretation. Subsection 841(a) is entitled "Unlawful acts" and subsection 841(b) is entitled "Penalties." "Although section headings cannot limit the plain meaning of a statutory text, they supply cues as to what Congress intended." *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) (citations omitted) (internal quotation marks omitted); *see also Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." (internal quotation marks omitted)). As one court of appeals has aptly noted, these "cues" are especially salient in this context, as "we look to the headings within § 841 not to interpret that Section itself, but rather to inform us as to Congress's understanding of that Section when it later enacted the First Step Act." *United States v. Smith*, 954 F.3d 446, 449 n.3 (1st Cir. 2020).

Indeed, the structure of § 841 is not unique: many federal criminal statutes, particularly those governing drug crimes, are divided into separate sections delineating first a substantive prohibition and then penalties for violating that prohibition. *See, e.g.*, 21 U.S.C. § 842 (describing the "[u]nlawful acts" for certain regulated producers and manufacturers of controlled substances in subsection (a) and (b), and the "[p]enalties" for those unlawful acts in subsection (c)); *id.* § 843 (adhering to the same structure for other crimes related

to the manufacture of controlled substances). Most notably, the other federal criminal statutes amended by Sections 2 and 3 of the Fair Sentencing Act follow the same format. *See* 21 U.S.C. § 844 (defining "[u]nlawful acts" related to simple possession of certain controlled substances in the first half of the statute, and the "penalties" for those unlawful acts in the second half); *id.* § 960 (defining "[u]nlawful acts" related to the import and export of controlled substances in subsection (a), and "[p]enalties" for those unlawful acts in subsection (b)). By structuring the language of § 404(a) of the First Step Act as it did, Congress mirrored the structure of § 841 and other federal criminal statutes implicated by the Act.

2. Despite this common-sense interpretation grounded in the text of § 841 and the First Step Act, the government has insisted, consistent with the Third Circuit's decision in *United States v. Birt*, 966 F.3d 257 (3d Cir. 2020), *cert pending*, No. 20-291 (filed Sept. 1, 2020), that the "Federal criminal statute" referred to in the First Step Act includes each specific subsection of § 841(b)(1). *See* BIO 16-17 (citing *Birt*, 966 F.3d at 262). In other words, as the government would have it, § 841(a)(1) combines with § 841(b)(1)(A), § 841(b)(1)(B), and § 841(b)(1)(C) to create three different "Federal criminal statute[s]" with their own statutory penalties. *See id.* at 16-17; *Birt*, 966 F.3d at 261 (holding that "Birt's statute of conviction is a tight combination of subsections (a)(1) and (b)(1)(C) of § 841, not § 841(a)(1) in isolation"). This argument does violence to the text of the First Step Act.

"A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A Norman J.

Singer, *Statutes and Statutory Construction* § 46.06, at 181-86 (rev. 6th ed. 2000)); *see Fowler v. United States*, 563 U.S. 668, 676-77 (2011) (invoking the rule against surplusage to interpret a criminal statute). The government's interpretation effectively reads the "statutory penalties" clause out of Section 404(a) of the First Step Act. That is, rather than reading the statute as it is written to define 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 of 2010," First Step Act § 404(a) (emphasis added), the government would read the First Step Act as defining a "covered offense" as "a violation of a Federal criminal statute *which was modified* by section 2 or 3 of the Fair Sentencing Act." That, quite simply, is not what the First Step Act says.

Such a reading also defies common sense: Sections 2 and 3 of the Fair Sentencing Act modified only statutory penalties, not the substantive contours of a federal crime. *See* Fair Sentencing Act § 2 (reducing the quantity of crack cocaine triggering certain criminal penalties, while leaving intact the prohibition against producing, distributing, or possessing with intent to distribute *any quantity* of crack cocaine); *cf. Pereira v. Sessions*, 138 S. Ct. 2105, 2115 (2018) (determining that "common sense compels the conclusion" that a particular statutory term should be construed in accordance with its plain meaning). Thus, as the Eleventh Circuit put it in *United States v. Jones*, "it is unnatural to read these subsections [under § 841(b)], which provide the penalties for violations of section 841(a) involving crack cocaine, as being the 'statute' to which the penalties clause refers, especially because doing so requires concluding that the Fair Sentencing

Act modified the penalties that apply to these 'statutes' by modifying the provisions themselves." 962 F.3d 1290, 1300 (11th Cir. 2020).

3. Other arguments the government has made for treating § 841(a), in combination with § 841(b)(1)(C), as the "Federal criminal statute" named in Section 404(a) of the First Step Act are similarly divorced from the First Step Act's text. As an initial matter, the government's reliance on this Court's decision in *Alleyne v. United States*, 570 U.S. 99 (2013), is inapt. In *Alleyne*, this Court held as a matter of constitutional law that any fact that increases a mandatory minimum, such as the drug quantities delineated in § 841(b), is an "element" of a crime that must be submitted to a jury and proved beyond a reasonable doubt. 570 U.S. at 102, 108. Thus, the government argues that the different subsections of § 841(b)(1) each set forth different elements and accordingly should be treated as different "Federal criminal statute[s]."

Congress, however, did not refer to the "elements" of a crime in the First Step Act; rather, it chose the specific phrase "violation of a Federal criminal statute." *See* First Step Act § 404(a). This Court "assume[s] that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Thus, if anything, the language of the First Step Act evinces an effort by Congress to avoid the limitations that an expansive reading of *Alleyne* might impose upon relief under its legislation. *Accord Smith*, 954 F.3d at 450 ("We see no reason to believe that Congress would have thought the holding

in *Alleyne* concerning criminal procedure and the elements of a crime informed the meaning of the phrase 'Federal criminal statute.'").[2]

The government has also asserted that treating the federal criminal statute violated as § 841(a) would make "every drug defendant" convicted of violating that provision eligible for resentencing under the First Step Act, opening the metaphorical floodgates even to § 841(a) offenders whose crimes involved controlled substances *other than crack cocaine*. *See* BIO 17-19 (citing *Birt*, 966 F.3d at 263). But the First Step Act, read properly, permits no such result.

Again, a "covered offense" under the First Step Act is "a violation of a Federal criminal statute, *the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010* . . . , that was committed before August 3, 2010." First Step Act § 404(a) (emphasis added). Sections 2 and 3 of the Fair Sentencing Act modified statutory penalties only for § 841(a) offenses involving crack cocaine. The Fair Sentencing Act did not modify statutory penalties for offenses involving other controlled substances prohibited by § 841(a). Thus, the government's fear is illusory: any petition for a reduced sentence under the First Step Act by a non-crack-cocaine offender convicted of violating § 841(a) would be swiftly denied on the basis that the Fair Sentencing Act of 2010 did not

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[2] Even if Congress *had* referred to the "elements" of an offense in the First Step Act, such that this Court's decision in *Alleyne* might bear on the meaning of the phrase "Federal criminal statute," it is still unlikely that § 841(b)(1)(C) could be properly considered an "element" of the offense that Mr. Terry committed. *Alleyne* held that facts *enhancing* the statutory minimum of a sentence are "elements" that must be proved to a jury, and § 841(b)(1)(C) is a *default*, not an enhanced, statutory penalty.

modify the penalties for that particular "violation of a Federal criminal statute."[3]

Section 404(b), the operative provision of the statute, reinforces this point. It permits 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). Even if Sections 2 and 3 of the Fair Sentencing Act of 2010 *had* been in effect at the time that a non-crack-cocaine offender committed his or her crime, the statutory penalties for that non-crack offense would have been exactly the same as under the Anti-Drug Abuse Act of 1986. Thus, because Sections 2 and 3 of the Fair Sentencing Act modified the penalties only for crack-cocaine offenses, the First Step Act, properly interpreted, provides no windfall for people sentenced for non-crack-cocaine offenses.

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[3] Of course, reading "the penalties clause [to] modif[y] the whole phrase 'violation of a Federal criminal statute,'" *Jones*, 962 F.3d at 1298, and thus limiting § 404 to offenses involving crack cocaine, in no way means "that a movant's covered offense is determined by the actual quantity of crack cocaine involved in his violation," *id.* at 1301. Indeed, every court of appeals to consider that argument has rejected it, *see id.*; *United States v. White*, 984 F.3d 76, 86 (D.C. Cir. 2020); *United States v. Jackson*, 945 F.3d 315, 320 (5th Cir. 2019); *United States v. Wirsing*, 943 F.3d 175, 185-86 (4th Cir. 2019); *United States v. McDonald*, 944 F.3d 769, 772 (8th Cir. 2019), and the government has expressly disavowed the argument in more recent cases, *see, e.g.*, *White*, 984 F.3d at 86 (noting that the government filed a Rule 28(j) letter "agree[ing]" that "whether an offense is 'covered' does not depend on the actual drug amounts attributed to a defendant, whether by a judge or a jury").

B. Section 2 of the Fair Sentencing Act "Modified" § 841(b)(1)(C).

As noted above, for Mr. Terry to have a "covered" offense under the First Step Act, "the statutory penalties for" Mr. Terry's violation of § 841(a) must have been "*modified by* section 2 or 3 of the Fair Sentencing Act of 2010." First Step Act § 404(a) (emphasis added). This Court should adhere to the plain text of the First Step Act and hold that the Fair Sentencing Act "modified" the statutory penalties in § 841(b)(1)(C) for crack-cocaine offenses.

This Court has defined the term "modify," in its ordinary usage, as connoting moderate or minor change. *See MCI Telecomms. Corp.*, 512 U.S. at 225 ("Virtually every dictionary we are aware of says that 'to modify' means to change moderately or in minor fashion."). An examination of the tiered statutory penalties in § 841(b) both before and after passage of the Fair Sentencing Act plainly illustrates that the Fair Sentencing Act changed the scope of § 841(b)(1)(C), not just § 841(b)(1)(A)(iii) and (B)(iii). *Before* enactment of the Fair Sentencing Act, a crack-cocaine offender faced:

- the penalties delineated in § 841(b)(1)(C) for an offense involving up to 5 grams of crack cocaine (or an unspecified quantity);
- the penalties delineated in § 841(b)(1)(B)(iii) for 5 to 50 grams of crack cocaine; or
- the penalties delineated in § 841(b)(1)(A)(iii) for 50 or more grams of crack cocaine.

After enactment of the Fair Sentencing Act, a crack-cocaine offender faced:

- the penalties delineated in § 841(b)(1)(C) for an offense involving up to 28 grams of crack cocaine (or an unspecified quantity);

- the penalties delineated in § 841(b)(1)(B)(iii) for 28 to 280 grams of crack cocaine; or
- the penalties delineated in § 841(b)(1)(A)(iii) for 280 or more grams of crack cocaine.

As these simple comparisons illustrate, the Fair Sentencing Act had the effect of shifting all three brackets upward, including that of § 841(b)(1)(C). It accomplished this modification to § 841(b)(1)(C) without amending the text of that provision because the boundaries of § 841(b)(1)(C) are defined by reference to § 841(b)(1)(A) and (B). *See* 21 U.S.C. § 841(b)(1)(C) ("except as provided in subparagraphs (A), (B), . . . such person shall be sentenced to a term of imprisonment of not more than 20 years"). Accordingly, by "striking '5 grams' and inserting '28 grams'" in § 841(b)(1)(B)(iii), *see* Fair Sentencing Act § 2(a)(2), the Fair Sentencing Act "modified" the quantity of crack cocaine triggering the penalties in § 841(b)(1)(C).

The statement of the court below that "[t]he Fair Sentencing Act did not expressly *amend* § 841(b)(1)(C)" because "§§ 841(b)(1)(A) and 841(b)(1)(B) were the only provisions *modified*," Pet. App. 5a (emphases added), reveals the flaw in the court's analysis. The court improperly equated the words "amend" and "modify" to conclude that the absence of an amendment necessarily means the absence of a modification. Not so.

Unlike the word "amend," the word "modify" does not require *textual* change. *Compare, e.g.*, *Amend*, Black's Law Dictionary (11th ed. 2019) ("to change the wording of; specif., to formally alter (a statute, constitution, motion, etc.) by striking out, inserting, or substituting words"), *with Modify*, Black's Law Dictionary (11th ed. 2019) ("to make somewhat different; to make small changes to (something) by way of improvement,

suitability, or effectiveness"); *see also United States v. Hogsett*, 982 F.3d 463, 466-67 (7th Cir. 2020) ("[T]he Fair Sentencing Act 'modified' § 841(b)(1)(C) even though it did not alter its text."); *United States v. Woodson*, 962 F.3d 812, 816 (4th Cir. 2020) (citing definitions of "modify" in *Webster's Third New International Dictionary* 1452 (2002) ("to make minor changes in the form or structure of: alter without transforming") and in 9 *Oxford English Dictionary* 952 (2d ed. 2004) ("[t]o make partial changes in")). Congress used the term "modify" in section 404(a) of the First Step Act, and there is no reason to infer that it meant something different. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.").

The history of § 404 of the First Step Act reinforces this point. The earliest versions of what would become § 404 all used the word "modify" instead of "amend" in the relevant passage. *See, e.g.*, Smarter Sentencing Act of 2013, H.R. 3382, 113th Cong. § 3(a) (2013) ("In this section, the term 'covered offense' means a violation of a Federal criminal statute, the statutory penalties for which were *modified* by section 2 or 3 of the Fair Sentencing Act of 2010 . . . ." (emphasis added)); Sentencing Reforms and Corrections Act of 2015, S. 2123, 114th Cong. § 106(a) (2015) (same). Congress had over five years, and repeated opportunities, to adjust the language of § 404(a) to narrow the definition of a "covered offense." It did not do so.

II. CONGRESS'S PLAN WAS TO PROVIDE BROAD RELIEF TO INDIVIDUALS SENTENCED FOR CRACK-COCAINE OFFENSES, INCLUDING THOSE SENTENCED UNDER § 841(b)(1)(C).

A. Congress Was Especially Concerned with People Sentenced for Low-Level Crack-Cocaine Offenses When It Passed the Fair Sentencing Act.

As discussed earlier, Congress enacted the Fair Sentencing Act of 2010 because it had determined that the 100-to-1 crack-to-powder-cocaine sentencing disparity embodied in the then-existing version of § 841(b) was unjustified and had a disproportionate effect on African Americans. *See Dorsey*, 567 U.S. at 268-69; 155 Cong. Rec. S10491 (daily ed. Oct. 15, 2009) (statement of Sen. Durbin) (quoting then–Vice President Joe Biden as stating, "[e]ach of the myths upon which we based the disparity has since been dispelled or altered"); 156 Cong. Rec. H6200 (daily ed. July 28, 2010) (statement of Rep. Jackson Lee) ("The unwarranted sentencing disparity not only overstates the relative harmfulness of the two forms of the drug and diverts federal resources from high-level drug traffickers, but it also disproportionately affects the African-American community.").

Although Congress was concerned with the troubling effects of the 100-to-1 disparity for all levels of crack-cocaine offenders when it passed the Fair Sentencing Act, legislators expressed particular concern about the harsh sentences imposed on street-level crack dealers under the 1986 sentencing regime. *See*, *e.g.*, 156 Cong. Rec. H6203 (daily ed. July 28, 2010) (statement of Rep. Hoyer) (bemoaning the harsh sentences imposed for "[p]ossessing an amount of crack

equal to the weight of two pennies"); 155 Cong. Rec. S10491 (daily ed. Oct. 15, 2009) (statement of Sen. Durbin) ("The crack disparity . . . diverts resources away from the prosecution of large-scale drug traffickers. In fact, more than 60 percent of defendants convicted of Federal crack crimes are street-level dealers or mules."). Consistent with Congress's plan to provide relief to lower-level offenders, the Fair Sentencing Act did not just reduce penalties for crack-cocaine producers and distributors, it also eliminated the mandatory minimum for individuals charged with simple possession of crack cocaine, *see* Fair Sentencing Act § 3, while increasing the penalties for "major drug traffickers," *id.* § 4. It thus makes perfect sense that when Congress amended § 841(b) through the Fair Sentencing Act, it ensured that those amendments modified the penalty structure as a whole, including for individuals sentenced for the lowest-level crack-cocaine offenses under § 841(b)(1)(C).

But not all crack-cocaine offenders benefited from these reforms because the modifications to § 841(b)'s sentencing regime applied only to those sentenced after the Fair Sentencing Act's effective date of August 3, 2010. *See Dorsey*, 567 U.S. at 264, 281. It was against this backdrop that Congress—including many of the same legislators at the helm of the Fair Sentencing Act—enacted the First Step Act.

B. Interpreting the First Step Act to Provide Relief to People Sentenced for Crack-Cocaine Offenses Pursuant to § 841(b)(1)(C) Accords with the Act's Broad Remedial Purpose.

The First Step Act of 2018 was the culmination of a bipartisan, collaborative effort to create meaningful

criminal justice reform, including for individuals like Mr. Terry. Earlier bills, which included the sentencing reforms ultimately reflected in § 404 of the First Step Act, had repeatedly stalled due to opposition from congressional Republicans, and in the spring of 2018, when the House of Representatives passed the first version of the First Step Act, many Senate Democrats opposed its enactment because it lacked the sentencing reform provisions from those earlier bills. *See* H.R. 5682, 115th Cong. (2018) (earlier version of First Step Act excluding § 404); Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—and What Happens Next*, Brennan Ctr. for Justice (Jan. 4, 2019), https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next (describing the history of the First Step Act).[4]

After nearly six months of negotiations, on November 15, 2018, Senator Grassley introduced a new version of the First Step Act that incorporated four sentencing reform provisions from the Sentencing Reform and Corrections Act of 2015, including § 404. *See* First Step Act, S. 3649, 115th Cong. § 404 (2018). The bill

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[4] Some House Democrats expressed similar concerns in the House Judiciary Committee's report on H.R. 5682. *See* H.R. Rep. No. 115-699, at 100 (2018) (dissenting views of Reps. Nadler, Jackson Lee, Jayapal, & Raskin) ("The biggest problem with the First Step Act, however, isn't what's in it; it's what's left out. Specifically, sentencing reform." (quoting Editorial, *The Right Way to Fix Prisons*, N.Y. Times, May 21, 2018, at A22, *available at* https://www.nytimes.com/2018/05/20/opinion/trump-prison-reform.html)); *id.* at 103 ("[W]e believe prison reform legislation alone will not ameliorate the crisis of mass incarceration unless we address the principal cause of the problem—unjust sentencing laws.").

garnered forty-two bipartisan cosponsors, *see* Cosponsors S.3649—115th Congress (2017-2018), https://www.congress.gov/bill/115th-congress/senate-bill/3649/cosponsors, and a slightly amended version ultimately passed the Senate by an overwhelming margin of 87-12. *See* Actions Overview S.756—115th Congress (2017-2018), https://www.congress.gov/bill/115th-congress/senate-bill/756/actions. On the day of that historic vote, legislators heralded Section 404 of the First Step Act in particular as embodying the Act's broad remedial purpose of reducing disparities—including along racial lines—in the criminal justice system. *See, e.g.*, 164 Cong. Rec. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Booker) ("Making this fix [retroactive application of the Fair Sentencing Act] in this bill alone will mean that thousands of Americans who have more than served their time will become eligible for release, and it addresses some of the racial disparities in our system because 90 percent of the people who will benefit from that are African Americans; 96 percent are Black and Latino."); *see also* Sarah E. Ryan, *Judicial Authority Under the First Step Act: What Congress Conferred Through Section 404*, 52 Loy. U. Chi. L.J. 67, 125 (2020) ("[A] broad reading of the First Step Act is historically and legally correct. Circuit courts should interpret the law as the broad reform Congress intended.").

The decision of the court below to exclude crack-cocaine offenders sentenced under § 841(b)(1)(C) from the First Step Act's scope directly undermines this broad remedial purpose. There is no trace of evidence in the legislative record that Congress wanted all subsection 841(b)(1)(A) and (b)(1)(B) crack offenders—including drug-trafficking kingpins—to be eligible for relief but, at the same time, wanted to exclude low-level

crack offenders sentenced under § 841(b)(1)(C). To the contrary, much like when it enacted the Fair Sentencing Act, Congress was particularly concerned with individuals sentenced for the lowest-level crack-cocaine offenses when it passed the First Step Act. *See, e.g.*, 164 Cong. Rec. S7022 (daily ed. Nov. 15, 2018) (statement of Sen. Durbin) (noting that the First Step Act "takes into consideration drug offenders who are not kingpins, who are not the bosses and are not involved in any violence in the crime"). It was those individuals who felt the inequities of the 100-to-1 disparity most acutely. *Accord Smith*, 954 F.3d at 451 ("[W]e think it most unlikely that Congress intended to deny sentencing relief to defendants guilty of distributing small quantities of crack cocaine while allowing relief for those defendants guilty of distributing larger amounts whose original sentences were not driven by the mandatory minimum.").

The categorical nature of the decision below—which excludes *all* crack-cocaine offenders sentenced under § 841(b)(1)(C) from the First Step Act's relief—also undermines Congress's plan to restore to district judges, "who sit and see the totality of the facts," 164 Cong. Rec. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Booker), the discretion to impose sentences on crack-cocaine offenders commensurate with the nature of their crimes. *See, e.g.*, 164 Cong. Rec. H10362 (daily ed. Dec. 20, 2018) (statement of Rep. Nadler) ("[T]hese changes [to the sentencing laws in § 404] recognize the fundamental unfairness of a system that imposes lengthy imprisonment that is not based on the facts and circumstances of each offender and each case."); 164 Cong. Rec. S7756 (daily ed. Dec. 18, 2018) (statement of Sen. Nelson) ("This legislation will allow judges to do the job that they were appointed to do—to

use their discretion to craft an appropriate sentence to fit the crime."); 164 Cong. Rec. S7649 (daily ed. Dec. 17, 2018) (statement of Sen. Grassley) ("The bill also makes sentencing fairer by returning some discretion to judges during sentencing."). By reading the First Step Act to deprive district court judges of the authority to revisit the sentences of individuals sentenced for crack-cocaine offenses pursuant to § 841(b)(1)(C), the court below ignored a driving purpose behind the Act: enhancing district court discretion for certain less culpable offenders.

As this Court has repeatedly noted, there is "no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States v. Am. Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940). The text of § 404 of the First Step Act, read together with § 841, unambiguously expresses a rule that directly aligns with Congress's purpose: to provide an opportunity for *all* crack-cocaine offenders convicted of violating § 841(a) to seek reduced sentences under the Fair Sentencing Act's more just regime. This Court should give effect to that text and purpose.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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