No. 23-226

IN THE

Supreme Court of the United States

ANTONIO SOUL GONZALEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF THE DISTRICT OF COLUMBIA, COLORADO, ILLINOIS, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, AND OREGON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

In 2010, Congress enacted the Fair Sentencing Act to address "a bipartisan consensus" that the federal cocaine sentencing laws were "unjust." 156 Cong. Rec. S1681 (daily ed. Mar. 17, 2010) (statement of Sen. Richard Durbin); *see* Pub. L. No. 111-220, 124 Stat. 2372. That landmark law reduced the 100-to-1 sentencing disparity between crack and powder cocaine to 18-to-1 in the U.S. Criminal Code. In 2018, Congress made that change retroactive through the First Step Act, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (2018). Specifically, Congress provided a mechanism through which individuals sentenced prior to 2010 could move to be resentenced "as if" the revised penalties had been in force at the time their original offense was committed. Pub. L. No. 115-391, § 404(b), 132 Stat. 5222.

The First Step Act extended the benefits of the earlier reforms to a broader range of defendants. The prior regime was based on an inaccurate understanding of the effects of crack versus powder cocaine, including now-debunked assumptions that crack cocaine is more dangerous, violence-inducing, and harmful to prenatal development than its powder equivalent. As these assumptions eroded, Congress acted to remedy the harms caused by the prior system. These new sentencing laws reflected a bipartisan understanding that the old regime was excessively punitive and contravened principles of uniformity and proportionality in sentencing.

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[1] All counsel of record received timely notice of *Amici* States' intent to file this amicus brief under Rule 37.2.

This case presents the question whether courts may ignore entirely the effect of the revised statutory penalties on a movant's U.S. Sentencing Guidelines ("Guidelines") range when deciding whether to impose a reduced sentence under the First Step Act. The District of Columbia and the States of Colorado, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, and Oregon ("*Amici* States") submit this brief as *amici curiae* in support of petitioner because the answer to that question is "no." The "Guidelines range 'anchor[s]' the sentencing proceeding" under the First Step Act, *Concepcion v. United States*, 142 S. Ct. 2389, 2402 n.6 (2022) (quoting *Peugh v. United States*, 569 U.S. 530, 541 (2013)), just like any other sentencing proceeding. Failing to recalculate a movant's Guidelines range thus thwarts the intended operation of the federal sentencing regime and undermines the remedial purposes of Congress's legislative reforms.

The *Amici* States represent jurisdictions across the United States. They have a significant interest in the safety and well-being of their communities. And they know from experience that there is little benefit to—and much harm from—excessive prison sentences for low-level drug offenders, including sentences handed down during the now-repudiated 100-to-1 sentencing regime. Indeed, sentencing reform at the state level has produced myriad benefits for *Amici* States and their residents. Realizing those benefits at the federal level requires that resentencing courts—just like courts sentencing in the first instance—consult the Guidelines, which are the "essential framework" for the imposition of criminal

sanctions. *Molina-Martinez v. United States*, 578 U.S. 189, 198 (2016).

SUMMARY OF ARGUMENT

1. States have known for years what Congress acknowledged in 2010: the prior 100-to-1 sentencing regime was unwarranted, unwise, and counterproductive. To that end, states and the District of Columbia had already begun repealing their own harsh penalties that singled out crack cocaine when Congress passed both the Fair Sentencing and First Step Acts. Today, only a handful of states endorse any disparity at all between crack and powder cocaine, and those that do have employed differentials far below the 100-to-1 ratio. These developments are part of a broader, bipartisan effort to roll back excessively harsh sentencing regimes.

2. The Guidelines are crucial to realizing the benefits of this federal sentencing reform. Although resentencing courts retain the discretion to vary from the recommended Guidelines ranges, this Court has long instructed that consulting the Guidelines is a necessary step to inform and constrain that discretion. The experience of the states over the last several decades has proven that sentencing reform that effectively reduces unwarranted disparities improves public safety, enriches communities, and saves taxpayer dollars. Expanding those benefits to federal prisoners requires considering each defendant's revised Guidelines range during resentencing proceedings under the First Step Act. Otherwise, courts might blindly endorse the same disparities that Congress sought to remedy.

Mandating this procedural step would also respect the core remedial purposes of the Act by fostering uniformity and proportionality in sentencing.

ARGUMENT

I. By The Time Congress Passed The First Step Act, States Had Already Realized The Injustices Of The Prior 100-to-1 Sentencing Regime.

Like the federal government, states responded aggressively to the proliferation of crack cocaine in the 1980s. For example, the District of Columbia enacted harsh minimum sentences, *see* District of Columbia Mandatory-Minimum Sentences Initiative of 1981, D.C. Law 4-166, 30 D.C. Reg. 1082 (Mar. 11, 1983), and amended its law to punish crack cocaine ten times more harshly than powder cocaine. *See* Omnibus Narcotic and Abusive Drug Interdiction Amendment Emergency Act of 1989, D.C. Act 8-75, 36 D.C. Reg. 5769 (Aug. 11, 1989); Omnibus Narcotic and Abusive Drug Interdiction Amendment Act of 1990, D.C. Law 8-138, 37 D.C. Reg 4154 (June 29, 1990). States across the country adopted similar measures.[2] *See* U.S. Sent'g Comm'n, *Special Report to the*

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[2] The federal prison population also grew dramatically during this period. According to the Bureau of Justice Statistics, the number of federal inmates incarcerated for drug offenses increased 63 percent from 1998 to 2012. By year-end 2012, drug offenders accounted for 52 percent of the overall federal prison population, and more than 50 percent of these offenders had an offense related to powder or crack cocaine. Bureau of Just. Stats., *Drug Offenders in Federal Prison: Estimates of Characteristics Based on Linked Data* 1 (Oct. 2015), https://tinyurl.com/2n5wwuu8.

Congress: Cocaine and Federal Sentencing Policy 130-34 (Feb. 1995) ("1995 Report"), https://tinyurl.com/437yk4bc.

But as the assumptions underlying the justifications for this harsh regime ended, so too did many states' appetites for heavier criminalization of crack cocaine. In 1994, for instance, the District voted to repeal the portion of its criminal code requiring mandatory minimum sentences for nonviolent drug offenses and differentiating between quantities of crack and powder cocaine. *See* District of Columbia Nonviolent Offenses Mandatory-Minimum Sentences Amendment Act of 1994, D.C. Law 10-258, § 3, 42 D.C. Reg. 238 (Jan. 13, 1995) (repealing entire section). Other states followed suit. *See, e.g.*, 2005 Conn. Acts 771 (Jan. Reg. Sess.) (P.A. 05-248) (equalizing crack and powder penalties); 1995 Neb. Laws 563 (L.B. 371) (same); 2000 Va. Acts 2494 (H.B. 383) (reducing the disparity to 2-to-1); 1993 Wis. Sess. Laws 640 (93 Wis. Act 98) (same). By the next decade, 37 states and the District had eliminated all differential treatment in sentencing between crack and powder cocaine. *See* U.S. Sent'g Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 98 (May 2007) ("2007 Report"), https://tinyurl.com/yckemh7u (surveying the remaining "13 states [that] have some form of distinction between crack cocaine and powder cocaine in their penalty schemes").

Contemporary reports reflected a growing recognition that prior assumptions regarding crack and powder cocaine were incorrect. For example, a 1997 study, cited by the U.S. House of

Representatives in 2010, debunked the notion that crack cocaine was more violence-inducing than powder cocaine. *See* H.R. Rep. No. 111-670, pt. 1, at 3 (2010) (citing Paul J. Goldstein et al., *Crack and Homicides in New York City: A Case Study in the Epidemiology of Violence*, *in* Crack in America: Demon Drugs and Social Justice 120 (Craig Reinarman & Harry G. Levine eds., 1997)). Similarly, in 2002, the U.S. Sentencing Commission ("Commission") highlighted evidence that prenatal exposure to crack cocaine is "identical to the effects of prenatal exposure to powder cocaine." U.S. Sent'g Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 21 (May 2002) ("2002 Report"), https://tinyurl.com/3dzmd3a9. And in 2007, this Court acknowledged that crack and powder cocaine "have the same physiological and psychotropic effects." *Kimbrough v. United States*, 552 U.S. 85, 94 (2007).

Today, only a handful of states differentiate at all between crack and powder cocaine in their criminal codes.[3] Among those that do, none comes close to the 100-to-1 disparity Congress had adopted.[4] By and

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[3] The Commission's report analyzed the criminal codes of Alabama, Arizona, California, Iowa, Maine, Maryland, Missouri, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, and Virginia. *See* 2007 Report at 99-104. Since that report, California, Maryland, Ohio, Oklahoma, and South Carolina have all eliminated their disparities. *See* 2014 Cal. Stat. 4922 (S.B. 1010); 2016 Md. Laws 6239 (S.B. 1005); 2011 Ohio Laws 29 (Am. Sub. H.B. No. 86); 2018 Okla. Sess. Law 679 (S.B. 793); 2010 S.C. Acts 1937 (S.B. 1154).

[4] The most severe is New Hampshire, which has enacted penalties at less than a third of that ratio. *See* N.H. Rev. Stat.

large, states and the federal government now agree that the prior regime was overly punitive and grounded in a misunderstanding of the facts. Congress passed the historic First Step Act against the backdrop of this rare consensus among lawmakers. And the White House agreed: in a press release touting the First Step Act, President Donald J. Trump emphasized the statute's "commonsense reforms to make our justice system fairer" and to "help reduce the rate of recidivism." The White House, *President Donald J. Trump Is Committed to Building on the Successes of the First Step Act* (Apr. 1, 2019), https://tinyurl.com/y9ub8bud.

Underscoring the enduring and bipartisan federal interest in sentencing reform, the Biden Administration has recently moved to eliminate entirely the remaining sentencing disparity between crack and powder cocaine. *See* Att'y Gen. Merrick Garland, U.S. Dep't of Justice, *Memorandum for All Federal Prosecutors: Additional Department Policies Regarding Charging, Pleas, and Sentencing in Drug Cases* 5 (Dec. 16, 2022), https://tinyurl.com/35jc3k36 (directing federal prosecutors pursuing crack cases to "advocate for a sentence consistent with the guidelines for powder cocaine rather than crack cocaine"). As Part II, *infra,* will demonstrate, this longstanding state and federal push to reform the Nation's drug laws will be blunted if courts are permitted to ignore the revised federal Guidelines when extending these benefits retroactively under the First Step Act.

Ann. § 318-B:26(I)(a) (treating five grams of crack cocaine and five ounces of powder cocaine equally).

II. Requiring Courts To Anchor Resentencing In The Guidelines Is Essential To Realizing The Benefits Of Sentencing Reform.

In criminal sentencing, no less than in other areas, states can and do act as "laborator[ies]" of "experimentation." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). And for decades, states have experimented with sentencing reform. The results have been consistent: reducing sentences for many drug-related offenses and allowing those sentenced under prior, harsher regimes a chance to return home improves public safety, reduces recidivism, and saves money.

Bipartisan congressional supermajorities passed the Fair Sentencing and First Step Acts in order to realize these benefits at the federal level. Consistent with states' experiences, the results have been promising. But the Eleventh Circuit's reading of Section 404(b) threatens to stymie this progress by divorcing Congress's historic sentencing reform from the engine of federal sentencing policy: the Sentencing Guidelines promulgated by the U.S. Sentencing Commission. This Court should grant certiorari and reject that effort to hamstring the remedial purposes of the First Step Act.

A. The Guidelines are meant to inform courts' discretionary sentencing powers.

Congress created the U.S. Sentencing Commission in 1984 to address the "significant sentencing disparities among similarly situated offenders" that had resulted from the discretionary sentencing powers of the district courts. *Peugh*, 569 U.S. at 535; *see Mistretta v. United States*, 488 U.S. 361, 362, 366-

67 (1989). The Commission soon promulgated the U.S. Sentencing Guidelines, a detailed framework designed to achieve "*uniformity* in sentencing . . . for similar criminal conduct, as well as *proportionality* in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity." *Rita v. United States*, 551 U.S. 338, 349 (2007) (internal quotation marks omitted). The Commission developed the Guidelines to achieve the objectives of federal sentencing as set forth in 18 U.S.C. § 3553(a). *Id.* at 348. They thus "embody federal sentencing objectives 'both in principle and in practice.'" *Molina-Martinez*, 578 U.S. at 193 (quoting *Rita*, 551 U.S. at 350).

Although the Guidelines were initially binding on sentencing courts, *see United States v. Booker*, 543 U.S. 220, 233 (2005), they were rendered advisory following this Court's decision in *Booker*, *see id.* at 245. However, they retained their essential role in informing the exercise of district court discretion during sentencing. Under the current federal sentencing scheme, "a district court is still required to consult the Guidelines." *Peugh*, 569 U.S. at 536. Because the applicable sentencing range under the Guidelines "embod[ies] federal sentencing objectives," *Molina-Martinez*, 578 U.S. at 193, this Court has instructed that "a district court should begin *all* sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall v. United States*, 552 U.S. 38, 49 (2007) (emphasis added). "Failure to calculate the correct Guidelines range constitutes procedural error." *Peugh*, 569 U.S. at 537.

Of course, even after a district court correctly calculates the Guidelines range, it retains the discretion to vary from that range as long as it explains its reasons for doing so. *See Gall*, 552 U.S. at 49-50. But that does not mean that calculating the Guidelines range is a needless formality. Rather, insisting on this procedural step is a recognition that achieving the objectives of federal sentencing policy requires using the Guidelines to "anchor the [sentencing] court's discretion in selecting an appropriate sentence." *Molina-Martinez*, 578 U.S. at 204. To hold otherwise would be to return to the era prior to the formation of the Commission when district courts' discretionary sentencing powers resulted in widely varying sanctions for comparable criminal conduct.

As this Court has already recognized, those same concerns apply to resentencing proceedings under the First Step Act. "[T]he First Step Act directs district courts to calculate the Guidelines range as if the Fair Sentencing Act's amendments had been in place at the time of the offense." *Concepcion*, 142 S. Ct. at 2402 n.6. As during the initial sentencing proceeding, the Guidelines should inform the exercise of the district court's discretion to resentence under the First Step Act. That ensures that the court's judgment is not "divorced from the concerns underlying the Fair Sentencing Act." *United States v. Corner*, 967 F.3d 662, 666 (7th Cir. 2020). Neither the Eleventh Circuit nor the United States has provided any reason why a step this Court has considered "required" during the initial sentencing proceeding should become optional during resentencing.

B. Sentencing reform has enabled states to improve public safety, reduce recidivism, and save money.

Anchoring resentencing proceedings under the First Step Act in the Guidelines aligns federal sentencing with Congress's policy objectives when it undertook sentencing reform. Those policy concerns are amply illustrated by the experience of the states. A growing body of research confirms that the public-safety returns on unnecessarily lengthy criminal sentences diminish rapidly. The National Academy of Sciences has found that "lengthy prison sentences are ineffective as a crime control measure" because "the incremental deterrent effect of increases in lengthy prison sentences is modest at best." Nat'l Rsch. Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 155 (Jeremy Travis et al. eds., 2014). And in 2016, the President's Council of Economic Advisers similarly credited research concluding that "longer sentences are unlikely to deter prospective offenders or reduce targeted crime rates." Council of Econ. Advisors, Exec. Off. of the President, *Economic Perspectives on Incarceration and the Criminal Justice System* 37 (2016), https://tinyurl.com/3be4evcd. Additional studies are to the same effect. *See, e.g.*, Pew Ctr. on the States, *Time Served: The High Cost, Low Return of Longer Prison Terms* 4 (2012), https://tinyurl.com/45v9hvcx ("For a substantial number of offenders, there is little or no evidence that keeping them locked up longer prevents additional crime."); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 Crime & Just. 199, 199 (2013) ("[L]engthy prison

sentences and mandatory minimum sentencing cannot be justified on deterrence.").

Indeed, some evidence suggests that overly lengthy sentences may even produce crime. *See* Raymond V. Liedka et al., *The Crime-Control Effect of Incarceration: Does Scale Matter?*, 5 Criminology & Pub. Pol'y 245, 269-70 (2006). By removing large numbers of people from historically disadvantaged communities for extended periods of time, excessively harsh sentencing regimes can disrupt the informal networks of social control critical to local self-regulation, such as families, neighborhoods, places of worship, and schools. *See* Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory*, 36 Criminology 441, 442-43, 445-46 (1998). When this happens, the public-safety benefits of incarceration can give way to greater disorder. *See id.* at 457-58, 467-68.

What is more, longer sentences have been shown to "increase[] recidivism after release," Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 Harv. L. Rev. 200, 221 (2019), particularly for low-level drug offenders, *see* Cassia Spohn & David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 Criminology 329, 347-48 & fig.1 (2002). A breakdown of community-control mechanisms combined with increased recidivism among former inmates can give rise to a vicious "crime-enforcement-incarceration-crime cycle" in affected communities that is inimical

to their safety and stability. *See* Jeffrey Fagan et al., *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 Fordham Urb. L.J. 1551, 1553 (2003).

Consistent with this evidence, many states have dramatically reformed their sentencing regimes without experiencing a surge in crime. Since 2001, 31 states have repealed mandatory-minimum laws or otherwise reformed their automatic sentencing-enhancement regimes. *State Reforms to Mandatory Minimum Sentencing Laws*, FAMM (2020), https://tinyurl.com/8wch46ve.[5] Yet the national rates of violent and property crimes *fell* 27 percent and 42 percent, respectively, between 2001-2019. *2019 Crime in the United States: Table 1,* FBI, https://tinyurl.com/2ssupyx7 (last visited Oct. 7, 2023). For instance, Michigan significantly reformed its sentencing regime in 2002, granting 1,200 prisoners serving mandatory sentences accelerated parole eligibility, ending mandatory minimums for most drug offenses, and creating new, more tailored sentencing guidelines for drug-related crimes. *See* 2002 Mich. Pub. Acts 2455 (P.A. 665); 2002 Mich. Pub. Acts 2458 (P.A. 666); 2002 Mich. Pub. Acts 2488 (P.A. 670); *Happy Anniversary, Michigan Reforms: Ten Years After Major Sentencing Reform Victory, Michigan Residents Safer*, FAMM (Mar. 1, 2013),

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[5] Those states include Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nevada, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, and Washington. *Id.*

https://tinyurl.com/ms4zyr2y. The crime rate in Michigan fell 27 percent in the following decade. Gregory Newburn, Am. Legis. Exch. Council, *Mandatory Minimum Sentencing Reform Saves States Money and Reduces Crime Rates* 3 (2016), https://tinyurl.com/5n6nshfm.

Likewise, in 2010 South Carolina passed the Omnibus Crime Reduction and Sentencing Reform Act, which, among other things, equalized penalties for crack and powder cocaine, eliminated mandatory minimum sentences for school-zone violations and first drug-possession offenses, introduced the possibility of parole for second and third drug-possession offenses, and redirected resources to strengthening post-release community supervision mechanisms. *See* S.B. 1154, 118th Gen. Assemb., Reg. Sess., 2010 S.C. Acts 1937. One of the express goals of the law was to "reduce the risk of recidivism." *Id.* § 2. It has been successful: South Carolina now has the lowest recidivism rate in the country. Rsch.-Evaluation Unit, Va. Dep't of Corr., *State Recidivism Comparison* 1 (2023), https://tinyurl.com/pawpyp3x. South Carolina's property-crime rate has also fallen nearly 35 percent—and its violent crime rate nearly 16 percent—since 2010. S.C. State L. Enf't Div., *Crime in South Carolina* 15, 40 (2022), https://tinyurl.com/ 3ppa2nxp.

Reforms like these also make good fiscal sense. Across the states, the average annual cost per prison inmate was $33,274 in 2015. Chris Mai & Ram Subramanian, Vera. Inst. of Just., *The Price of Prisons: Examining State Spending Trends, 2010-*

2015, at 7 (2017), https://tinyurl.com/38tmbbtt.[6] Given this cost, the financial benefits of rolling back harsh and misguided sentencing policies can be significant. For example, Michigan's restructuring of its mandatory-minimum regime and reentry polices allowed it to reduce its prison expenditures by $234 million between 2006 and 2015 in inflation-adjusted terms. *Id.* at 14; Ram Subramanian & Rebecca Tublitz, Vera Inst. of Just., *Realigning Justice Resources: A Review of Population and Spending Shifts in Prison and Community Corrections* 11 (2012), https://tinyurl.com/yc2dzwme; *National Data: Implicit Price Deflators for Gross Domestic Product*, Bureau of Econ. Analysis, https://tinyurl.com/3cf3j24y (last visited Oct. 12, 2023). New York similarly cut its inflation-adjusted annual prison spending by $302 million from 2010 to 2015, in part because of its retroactive mandatory-minimum reforms, including the elimination of mandatory-minimum sentences for low-level drug offenses. Mai & Subramanian, *supra*, at 14; S.B. 56B, 198th Leg., 2009-2010 Reg. Sess., Part AAA § 4 (N.Y. 2009). And South Carolina's sentencing-reform package is estimated to have generated $491 million of savings in its first five years, some of which have been reinvested in other public-safety programs. Elizabeth Pelletier et al., The Urb. Inst., *Assessing the Impact of South Carolina's Parole and Probation Reforms* 3 (2017),

[6] The figure represents the average of the 45 states that comprise over 99 percent of the total national state prison population. Mai & Subramanian, *supra* at 7.

https://tinyurl.com/af9vkf4r.[7] In short, states' experiences show that the benefits of sentencing reform far outweigh any costs.

C. In like fashion, anchoring resentencing in the Guidelines will extend the benefits of sentencing reform and vindicate the remedial purposes of the First Step Act.

The results of federal sentencing reform have been similarly favorable. That reform has been driven in part by changes in the Guidelines. In 2007, the Commission retroactively reduced the offense levels assigned to crack cocaine offenses. U.S. Sent'g Comm'n, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment* 1 (May 2014) ("2007 Crack Cocaine Amendment"), https://tinyurl.com/ vkjxvmbr. As of 2014, recidivism rates among those who had benefited from the 2007 Crack Cocaine Amendment were lower than those among similar offenders who had served their full sentences. *Id.* at 3. And, although the Fair Sentencing Act was not made retroactive until the First Step Act was passed in 2018, in 2010 the Sentencing Commission gave retroactive effect to the Fair Sentencing Act's amendment to the Sentencing Guidelines ("the FSA Guideline Amendment"), which incorporated the Act's revised crack-cocaine penalty structure. *See Amendment 759,* U.S. Sent'g Comm'n, https://tinyurl .com/yckxnktc (last visited Oct. 12, 2023). By 2018, over 7,500 offenders had received sentence reductions

[7] South Carolina's savings estimate is not adjusted for inflation and includes both actual savings and averted costs.

under this amendment without any "difference between the recidivism rates for offenders who were released early due to retroactive application of the FSA Guideline Amendment and offenders who had served their full sentences before the FSA Guideline Amendment reduction retroactively took effect." U.S. Sent'g Comm'n, *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment* 1 (Mar. 2018), https://tinyurl.com/2apv5rk4.

There is every reason to expect that the results will be the same with the First Step Act, which has allowed over 4,200 individuals to benefit from resentencing as of September 2021. U.S. Sent'g Comm'n, *First Step Act of 2018 Resentencing Provisions Retroactivity Data Report* 4 tbl.1 (Aug. 2022) ("2018 Retroactivity Report"), https://tinyurl.com/2zxcx5a9.[8] Members of Congress certainly thought they were replicating the successes of the states, describing the Act repeatedly as a measure that would enhance public safety. *See, e.g.*, 164 Cong. Rec. S7746 (daily ed. Dec. 18, 2018) (statement of Sen. John Cornyn) (noting that sentencing reform accompanied a reduction in crime in the states and explaining that Congress was "trying to replicate those successes at the Federal level"); *id.* at S7757 (statement of Sen. Patrick Toomey) (describing the Act as "an attempt

[8] The U.S. Department of Justice's annual report on the First Step Act suggests that "the five non-mutually exclusive categories of incarcerated individuals released" under the Act total almost 30,000, when all of the Act's various reforms are taken into account. U.S. Dep't of Just., *First Step Act Annual Report* 40 (Apr. 2023), https://tinyurl.com/2m73vvw9.

to . . . reduce recidivism among offenders, and to increase public safety"). The Act's supporters in the law enforcement community agreed. *See* Int'l Ass'n of Chiefs of Police & Nat'l Fraternal Ord. of Police, Press Release, *FOP and IACP Announce a Big Step for First Step Act* (Dec. 7, 2018), https://tinyurl.com/2z574cth; Nat'l Fraternal Ord. of Police, Press Release, *FOP Partners with President Trump on Criminal Justice Reform* (Nov. 9, 2018), https://tinyurl.com/4cwh275v.

Likewise, both the First Step Act and the Fair Sentencing Act—and the Guidelines amendments that have helped to implement them—represented an effort to achieve similar fiscal gains at the federal level, where the average cost per prison inmate was almost $40,000 per year in FY 2020. Annual Determination of Average Cost of Incarceration Fee (COIF), 86 Fed. Reg. 49,060 (Sept. 1, 2021). Senator Patrick Leahy, one of the original co-sponsors of both laws, emphasized this aim repeatedly in his floor statement supporting the First Step Act, arguing that "one-size-fits-all sentencing . . . comes at a steep fiscal cost that leaves us less safe." 164 Cong. Rec. S7749 (daily ed. Dec. 18, 2018) (statement of Sen. Patrick Leahy). He noted that "[t]he cost of housing Federal offenders consumes nearly one-third of the Justice Department's budget" and explained that "because public safety dollars are finite," the exorbitant expense of lengthy sentences for "low-level offenders" "strips critical resources away from law enforcement strategies that have been proven to make our communities safer." *Id.* Ultimately, Senator Leahy contended, bills like the First Step Act could both "save . . . money and reduce crime." *Id.* Permitting resentencing courts to ignore the revised Guidelines

entirely will frustrate these fiscal goals by giving judges unfettered discretion to uphold unnecessarily lengthy sentences.

Divorcing resentencing from the Guidelines will also thwart the remedial purposes of the First Step Act itself. The Guidelines aim to achieve both "uniformity" and "proportionality" in sentencing. *Rita*, 551 U.S. at 349 (emphasis omitted). Likewise, the First Step Act was passed to correct what were widely seen as glaring injustices incompatible with these foundational principles of criminal administration. Requiring the consideration of the Guidelines when resentencing under the First Step Act will thus vindicate the Act's core remedial purposes.

First, the 100-to-1 sentencing ratio violated uniformity by treating two similar acts—possession of crack cocaine versus powder cocaine—vastly differently. That difference was racially discriminatory. While drug usage rates are roughly similar among racial and ethnic groups, the harsh sentencing regime pre-2010 affected these groups unequally. For instance, in 2021, nearly 80 percent of crack *users* in the United States were white or Hispanic. *See 2021 National Survey on Drug Use and Health (NSDUH) Detailed Tables*, Substance Abuse & Mental Health Servs. Admin., U.S. Dep't of Health & Hum. Servs. tbl.1.32A (Jan. 4, 2023), https://tinyurl.com/226psru3. That rate is roughly the same as it was in the mid-2000s. *See, e.g.*, *2005 NSDUH Detailed Tables*, Substance Abuse & Mental Health Servs. Admin., U.S. Dep't of Health & Hum. Servs. tbl.1.43A (Jan. 16, 2006), https://tinyurl.com/

2tfbzaty. As the Commission explained in its 2007 report, however, more than 80 percent of crack-cocaine *offenders* in 2006 were Black. 2007 Report, at 15. The long-term statistical impact is staggering: from 1994 to 2003, the average prison time for Black drug offenders increased by more than 77 percent, compared to an increase of less than 33 percent for white drug offenders. *Compare Compendium of Federal Justice Statistics, 1994*, Bureau of Just. Stats. 85 tbl.6.11 (Apr. 1998), https://tinyurl.com/ ynyy3s7j, *with Compendium of Federal Justice Statistics, 2003*, Bureau of Just. Stats. 112 tbl.7.16 (Oct. 2005), https://tinyurl.com/4ua96w7e.

The 100-to-1 ratio accordingly received singular attention as an engine of racial inequality in the criminal-justice system. Early on, the Commission singled out the "ratio [a]s a primary cause of the growing disparity between sentences for Black and White federal defendants." 1995 Report, at 163. The Sentencing Project concluded that "African Americans serve almost as much time in federal prison for a drug offense (58.7 months) as whites do for a violent offense (61.7 months)," a statistic "largely due to racial dispar[ities] . . . such as the 100-to-1 [ratio]." Marc Mauer & Ryan S. King, Sent'g Project, *A 25-Year Quagmire: The War on Drugs and Its Impact on American Society* 2 (Sept. 2007), https://tinyurl.com/4zpk2mbn. The Commission suggested that "[r]evising the crack cocaine thresholds would better reduce the [sentencing] gap than any other single policy change, and it would dramatically improve the fairness of the federal sentencing system." U.S. Sent'g Comm'n, *Fifteen*

Years of Guidelines Sentencing 132 (Nov. 2004), https://tinyurl.com/nhuwuyd6.

Revisions to the Guidelines have been a key part of redressing this racial injustice. Of the over 16,000 offenders granted a sentence reduction pursuant to the 2007 Crack Cocaine Amendment between November 2007 and June 2011, 93 percent were Black or Hispanic. U.S. Sent'g Comm'n, *Preliminary Crack Cocaine Retroactivity Data Report* 8 tbl.5 (June 2011), https://tinyurl.com/5t2he42f. Similarly, as of December 2014, nearly 94 percent of offenders who had benefited from the FSA Guidelines Amendment were Black or Hispanic. U.S. Sent'g Comm'n, *Final Crack Retroactivity Data Report Fair Sentencing Act* 8 tbl.5 (Dec. 2014), https://tinyurl.com/23vpeex9. No surprise, then, that 96 percent of the offenders resentenced under the First Step Act since 2018 have been Black or Hispanic. 2018 Retroactivity Report, at 7 tbl.4. The Guidelines and the statutory amendments work in tandem to achieve greater uniformity in federal sentencing and to reduce the racial disparities of the prior regime.

Second, the Guidelines also work in parallel with the First Step Act to introduce greater proportionality in federal sentencing. Although the purpose of a criminal sentence is to "adequately express[] the community's view of the gravity of the defendant's misconduct," Henry M. Hart, Jr., *The Aims of Criminal Law*, 23 Law & Contemp. Probs. 401, 437 (1958), the 100-to-1 ratio hardly fulfilled that objective. As the Commission and Congress both emphasized, the unequal ratio disproportionately criminalized the conduct of the lowest-level, least

culpable offenders. Because "[d]rug importers and major traffickers generally deal in powder cocaine, which is then converted into crack by street-level sellers," the 100-to-1 ratio led to the backwards result that high-level kingpins could receive shorter sentences than local neighborhood-corner dealers. *Kimbrough*, 552 U.S. at 98. By the time Congress passed the Fair Sentencing Act, "more than half of Federal crack cocaine offenders [were] low-level street dealers and users" and "not the major traffickers that Congress intended to target" when it passed the law creating the disparity. 155 Cong. Rec. S10492 (daily ed. Oct. 15, 2009) (statement of Sen. Patrick Leahy).

As the Commission recognized, those results "[f]ail[ed] to [p]rovide [a]dequate [p]roportionality." 2002 Report, at 100. Indeed, the Commission strikingly "acknowledged that its crack guidelines bear no meaningful relationship to the culpability of defendants sentenced pursuant to them . . . . [T]he Commission ha[d] never before made such an extraordinary mea culpa acknowledging the enormous unfairness of one its guidelines." *United States v. Anderson*, 82 F.3d 436, 449-50 (D.C. Cir. 1996) (Wald, J., dissenting) (footnote omitted). And in *Kimbrough*, this Court itself acknowledged the Commission's observations that the prior regime "'foster[ed] disrespect for and lack of confidence in the criminal justice system.'" 552 U.S. at 98 (quoting 2002 Report, at 103).

Given this backdrop, it is clear that Congress acted precisely *because* the prior framework did not ensure proportional punishment. The sponsors of the Fair Sentencing Act believed that it would "restore

fairness to Federal cocaine sentencing." Letter from Senators Richard J. Durbin and Patrick J. Leahy to Attorney General Eric H. Holder, Jr. (Nov. 17, 2010), https://tinyurl.com/mu45hf9v. But Congress soon realized its work was incomplete. Because "this new law did not apply retroactively . . . there [were] still people serving sentences under the 100-1 standard." 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Dianne Feinstein).

The purpose of Section 404 of the First Step Act was to "finally make[] the Fair Sentencing Act retroactive so that people sentenced under the old standard can ask to be resentenced under the new one." *Id.* And a key part of making the sentencing revisions retroactive, as this Court has recognized, is requiring district courts "to apply the legal changes in the Fair Sentencing Act when calculating the Guidelines" during a resentencing proceeding. *Concepcion*, 142 S. Ct. at 2402. Indeed, in 99 percent of the cases in which a defendant received a new sentence under the First Step Act, the court imposed a sentence within or below the revised Guidelines range. 2018 Retroactivity Report, at 8 tbl.5.

It would thus run contrary to the remedial purposes of the First Step Act to permit resentencing courts to ignore the revised Guidelines entirely. The Eleventh Circuit's contrary holding permits an anomalous result: in resentencing defendants under a statute designed to produce greater uniformity and proportionality in drug sentencing specifically, district courts could disregard the primary mechanism through which Congress achieves that same uniformity and proportionality in federal

sentencing generally. It is because the Guidelines are designed to accomplish these goals that consulting them is "required" during first-instance sentencing proceedings. *Peugh*, 569 U.S. at 536. This Court should grant certiorari to make clear that the same requirement holds true for resentencing under the First Step Act.

* * *

The First Step Act was a rare victory for historically marginalized communities that often lack a voice in our political process. That victory will be diminished if district courts are permitted to disregard entirely how Section 404(b) affects the sentencing ranges of defendants under the revised Guidelines. Under the Eleventh Circuit's holding, those revised Guidelines are simply an optional tool during the resentencing process. But that reading promises to undermine the First Step Act's goals of providing greater uniformity and proportionality in drug sentencing, as well as to attenuate the benefits to public safety, community health, and public finances that the Act has already provided. To avoid these harms, *Amici* States urge this Court to grant certiorari and reverse the Eleventh Circuit's erroneous decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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