No. 20-1650

IN THE

Supreme Court of the United States

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

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

BRIEF OF THE DISTRICT OF COLUMBIA AND THE STATES AND TERRITORIES OF COLORADO, GUAM, ILLINOIS, IOWA, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, VERMONT, VIRGINIA, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, when deciding if it should "impose a reduced sentence" on an individual under Section 404(b) of the First Step Act of 2018, 21 U.S.C. § 841 note, a district court must or may consider intervening legal and factual developments.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

In 2010, Congress enacted the Fair Sentencing Act to address "a bipartisan consensus" that the federal cocaine sentencing laws were "unjust." 156th Cong. Rec. S1681 (daily ed. Mar. 17, 2010) (statement of Sen. Richard Durbin). 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), extending 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 took steps to remedy the harms caused by the prior system. These legislative efforts reflected a bipartisan understanding that the old regime was excessively punitive and based on erroneous premises.

This case presents the question whether a district court must or may consider intervening legal and factual developments when assessing whether to "impose a reduced sentence" under Section 404(b) of the First Step Act. For legal developments, the question is whether defendants who otherwise qualify for resentencing must remain subject to all of the sentencing rules (apart from the crack-cocaine statutory penalties) that governed their initial

sentencings—including those that have since been revised, repealed, or held unconstitutional—or whether courts may instead take these changes into account when determining whether to impose a reduced sentence. For factual developments, the question is whether these individuals can benefit from demonstrable changes they have made to their lives and behavior while in prison.

The District of Columbia and the States and Territories of Colorado, Guam, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Vermont, Virginia, and Washington (the "*Amici* States") submit this brief as *amici curiae* in support of petitioner's contention that a court may (and indeed should) consider such developments. Given the above history, defendants who were already subject to a uniquely harsh sentencing regime—and whose plight Congress had in mind when it passed the Fair Sentencing and First Step Acts—should not be barred from the full remedial benefits of both statutes. Thus, courts should not be required to cabin the impact of the First Step Act's landmark resentencing authorization by arbitrarily blinding themselves to intervening changes in the law and a defendant's factual situation. To be sure, those who pose a danger to their communities should not be prematurely released. But permitting judges to consider updated facts and law is consistent with that concern, and a court still retains wide latitude to make the best judgment whether to reduce a sentence based on the particular circumstances of each case.

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, many states have already taken significant steps to reduce or eliminate the differential in sentences for crack and powder cocaine offenses under state law. These actions reflect a broad consensus that perpetuating the harmful effects of the prior regime would undermine public safety, generate exorbitant costs, and entrench racial inequalities. At the same time, embracing sentencing reforms and returning individuals to their communities have brought meaningful, tangible benefits to the *Amici* States and their residents.

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 versus powder cocaine when Congress passed both the Fair Sentencing and First Step Acts. Today, only a handful of states enforce any disparity between crack and powder cocaine, and those that do differentiate between the drug's forms at multiples far below the 100-to-1 ratio. These developments are part of a broader, bipartisan effort to roll back excessively harsh sentencing regimes.

2. In addition to their experience dealing with—and learning from—the crack epidemic, states know well the benefits of sentencing reform more generally. Over the past several decades, a majority of states have reformed their sentencing practices, particularly for drug-related offenses. They have eliminated or cut back on mandatory minimum sentences for drug crimes, allowed some offenders subject to life sentences to seek parole, and increased the availability of non-carceral options for low-level offenders, among other changes. Reforms such as these have improved public safety, saved billions of dollars, and helped ameliorate racial inequalities. Congress passed the First Step Act with these very benefits in mind, and the Act is already yielding similar results at the federal level, much as the Fair Sentencing Act has for over a decade. By adopting the reading of Section 404(b) that petitioner advances, this Court can both respect the intent of Congress and ensure that the benefits of right-sized sentencing can continue to accrue broadly to those sentenced under the prior regime and their communities.

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, 30 D.C. Reg. 1082 (Mar. 11, 1983), and by the

late-1980s, amended its laws 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.[1] *See* U.S. Sent'g Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 130-34 (Feb. 1995) ("1995 Report").[2]

But as the assumptions underlying the justifications for this harsh regime eroded, so too did states' appetites for heavy criminalization. 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)

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[1] The federal prison population also grew dramatically during this period. According to the Bureau of Justice Statistics, there was a 63 percent increase in the number of federal inmates incarcerated for drug offenses from 1998 and 2012, accounting for 52 percent of the overall federal prison population. 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), *available at* https://bit.ly/3wvlEB0.

[2] *Available at* https://bit.ly/2YuSV2G.

(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") (surveying the remaining "13 states [that] have some form of distinction between crack cocaine and powder cocaine in their penalty schemes").[3]

Contemporary reports reflect 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, 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 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").[4] And in 2007, this Court

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[3] *Available at* https://bit.ly/3bSUDxW.

[4] *Available at* https://bit.ly/3jZddJi.

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.[5] Among those that do, none comes close to the 100-to-1 disparity Congress had adopted.[6] By and 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 "help reduce the rate of recidivism." White House, Press Release, *President Donald J. Trump is Committed to Building on the Successes of the First Step Act* (Apr. 1,

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[5] The Sentencing 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).

[6] The most severe is New Hampshire, with less than a third of that ratio. *See* N.H. Rev. Stat. Ann. § 318-B:26(I)(a) (treating five grams of crack cocaine and five ounces of powder cocaine equally).

2019).[7] As Part II explains, similar state-level reforms, along with other initiatives to reexamine unduly long sentences, have brought significant benefits to states and their communities.

II. Cabining The First Step Act's Scope Would Needlessly Limit The Myriad Benefits Of Sentencing Reform That States Have Experienced.

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, 386-87 (1932). 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, benefits the public fisc, and promotes racial justice.

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. Because the United States' reading of Section 404(b) would hamstring this progress and is contrary to Congress's intent, this Court should reject it.

A. Sentencing reform improves public safety and decreases recidivism.

A growing body of research confirms what states know from experience: the public-safety returns on

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[7] *Available at* https://bit.ly/3H97AlO.

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. Advisers, Exec. Off. of the President, *Economic Perspectives on Incarceration and the Criminal Justice System* 37 (2016).[8] Additional studies have sounded the same theme. *See, e.g.*, Pew Ctr. on the States, *Time Served: The High Cost, Low Return of Longer Prison Terms* 4 (2012) ("For a substantial number of offenders, there is little or no evidence that keeping them locked up longer prevents additional crime.");[9] 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 the widespread application of overly lengthy sentences may even be criminogenic. *See* Raymond V. Liedka et al., *The Crime-Control Effect of Incarceration: Does Scale Matter?*, 5 Criminology & Pub. Pol'y 245, 269-70

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[8] *Available at* https://bit.ly/3GY4DEj.

[9] *Available at* https://bit.ly/3GTDSky.

(2006). By removing large numbers of people from already struggling communities for extended periods of time, excessively harsh sentencing regimes can disrupt the informal networks of social control that are 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) (finding that drug offenders sentenced to prison exhibited much higher rates of recidivism than similarly situated drug offenders sentenced to probation). 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 antithetical to those communities' 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 and experienced no increases in crime thereafter. Since 2001, 31 states have repealed certain mandatory minimum laws or otherwise reformed their mandatory minimum and/or automatic sentencing enhancement regimes. FAMM, *State Reforms to Mandatory Minimum Sentencing Laws* (2020).[10] Notably, however, between 2001 and 2019, the national rates of violent and property crimes *fell* 27 percent and 42 percent, respectively. FBI, *2019 Crime in the United State*s (2020).[11] Michigan, for instance, 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. 2002 Mich. Pub. Acts 2455 (P.A. 665); 2002 Mich. Pub. Acts 2458 (P.A. 666); 2002 Mich. Pub. Acts 2488 (P.A. 670); FAMM, Press Release, *Happy Anniversary, Michigan Reforms: Ten Years After Major Sentencing Reform Victory, Michigan Residents Safer* (Mar. 1, 2013).[12] The crime rate in Michigan fell 27 percent in the following

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[10] *Available at* https://bit.ly/3CEptq1. 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.*

[11] *Available at* https://bit.ly/3jZ4RBu.

[12] *Available at* https://bit.ly/3o6jcgt.

decade. Gregory Newburn, Am. Legis. Exchange Council, *Mandatory Minimum Sentencing Reform Saves States Money and Reduces Crime Rates* 3 (2016).[13]

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. S.B. 1154, 118th Gen. Assemb., 2010 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, alongside Virginia. Va. Dep't of Corr., *State Recidivism Comparison* 1 (2020).[14] South Carolina's property crime rate has also fallen 25 percent, and its violent crime rate nearly 18 percent, since 2010. S.C. State L. Enf't Div., *Crime in South Carolina* 6, 25 (2019).[15]

The results of federal reforms have been similarly favorable. In 2007, the Sentencing Commission retroactively reduced the offense levels assigned to crack cocaine offenses (the "2007 Crack Cocaine Amendment"). U.S. Sent'g Comm'n, *Recidivism*

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[13] *Available at* https://bit.ly/3BF7KNQ.

[14] *Available at* https://bit.ly/3EFM5H0.

[15] *Available at* https://bit.ly/3CE8hRc.

Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment 1 (May 2014).[16] 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's reduction of the 100-to-1 cocaine sentencing disparity 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. U.S. Sent'g Comm'n, *Recidivism Among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment* 1 (Mar. 2018).[17] As of 2018, over 7,500 offenders had received sentence reductions pursuant to this amendment, and there had been "no 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." *Id.*

There is every reason to expect that the results will be the same with the First Step Act, which has allowed over 3,700 individuals to benefit from resentencing as of May 2021. U.S. Sent'g Comm'n, *First Step Act of 2018 Resentencing Provisions*

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[16] *Available at* https://bit.ly/3mDnbBW.

[17] *Available at* https://bit.ly/3qfp4ab.

Retroactivity Data Report 4 tbl.1 (May 2021) ("2018 Retroactivity Report").[18] Members of Congress certainly thought they would be, describing the Act repeatedly as a measure that enhances public safety. *See, e.g.*, 164th 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 through the First Step Act"); *id.* at S7757 (statement of Sen. Patrick Toomey) (describing the Act as "an attempt to . . . reduce recidivism among offenders, and to increase public safety"). The Act's supporters in the law enforcement community, such as the Fraternal Order of Police and the International Association of Chiefs of Police, agreed. 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);[19] Nat'l Fraternal Ord. of Police, Press Release, *FOP Partners with President Trump on Criminal Justice Reform* (Nov. 9, 2018).[20]

Thus, like the state-level reforms that came before it, the First Step Act was a recognition that providing people serving harsh sentences for crack-cocaine offenses an opportunity for relief makes communities stronger, reduces recidivism, and ultimately increases public safety. It would make little sense and would be at odds with Congress's intent to adopt a reading of the Act that eliminates that opportunity

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[18] *Available at* https://bit.ly/3mF2CoM.

[19] *Available at* https://bit.ly/30tWc3l.

[20] *Available at* https://bit.ly/3Dj6JMO.

for many offenders and offers no countervailing benefits in return.

B. Sentencing reform has saved states billions of dollars, and the potential fiscal benefits of reform are even greater at the federal level.

In addition to improving public safety, decreasing the prison population through sentencing reform makes 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).[21] Given this high 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 policies 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);[22] Bureau of Econ. Analysis, *National Data: Implicit Price Deflators for Gross Domestic Product*.[23] New York similarly cut its

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[21] *Available at* https://bit.ly/3BC3tur. 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.

[22] *Available at* https://bit.ly/30EDrua.

[23] *Available at* https://bit.ly/3HIfMKb (last visited Nov. 17, 2021).

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 offenders. 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).[24] In short, states' experiences show that the benefits of sentencing reform far outweigh any costs.

The First Step Act, like the Fair Sentencing Act before it, represented an effort to achieve similar fiscal gains at the federal level, where the average cost per prison inmate is just under $37,500 per year. Annual Determination of Average Cost of Incarceration Fee (COIF), 84 Fed. Reg. 63,891 (2019). 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." 164th 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

[24] *Available at* https://urbn.is/3Bv3Ira. South Carolina's savings estimate is not adjusted for inflation and includes both actual savings and averted costs.

"[b]ecause 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.* Interpreting the First Step Act in a way that limits its scope—prohibiting courts from giving otherwise eligible offenders the benefit of current facts and current law and consequently keeping them in prison longer—frustrates Congress's purpose and impedes the federal government's long-overdue effort to bring fiscal sense to the federal sentencing regime.

C. A broad application of the First Step Act will help to ameliorate the severe racial disparities caused by the prior 100-to-1 regime.

Not only have the burdens—human and financial—of the prior sentencing practices been substantial, but they have also been shared unequally. As this Court has recognized, the 100-to-1 sentencing ratio and related policies drove severe racial disparities in the criminal justice system. *See Kimbrough*, 552 U.S. at 98. Between 1994 and 2003, the average prison time for Black drug offenders increased by more than 77 percent, while the same increased only 33 percent for white drug offenders. *Compare* Bureau of Just. Stats., *Compendium of Federal Justice Statistics, 1994*, at 85 tbl.6.11 (Apr. 1998),[25] *with* Bureau of Just. Stats., *Compendium of*

[25] *Available at* https://bit.ly/2LHaqGM.

Federal Justice Statistics, 2003, at 112 tbl.7.16 (Oct. 2005).[26] And in every year since data became available in 2014, around 75 percent of federal prisoners serving sentences for drug-related offenses have been Black or Hispanic. *See, e.g.*, E. Ann Carson, U.S. Dep't of Just., Bureau of Just. Stats., *Prisoners in 2014*, at 30 app. tbl.5 (Sept. 2015) (76 percent in 2014);[27] E. Ann Carson, U.S. Dep't of Just., Bureau of Just. Stats., *Prisoners in 2019*, at 23 tbl.16 (Oct. 2020) (74 percent in 2019).[28] Remarkably, this number likely reflects a substantial *improvement* over the past due to the Fair Sentencing Act's passage in 2010.

Rates of criminal behavior did not and cannot explain such inequality. From at least 2004 until the present, approximately 20-30 percent of drug users have been Black or Hispanic, and 60-75 percent have been white. *See, e.g.*, U.S. Dep't of Health & Hum. Servs., Substance Abuse & Mental Health Servs. Admin., *Results from the 2020 National Survey on Drug Use and Health: Detailed Tables* tbl.1.24A (2021);[29] U.S. Dep't of Health & Hum. Servs., Substance Abuse & Mental Health Servs. Admin., *Results from the 2005 National Survey on Drug Use and Health: Detailed Tables* tbl.1.28A (2006).[30] Rather, the disparity is in large part the result of sentencing laws. Specifically, as early as 1995, the Sentencing Commission concluded that the 100-to-1

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[26] *Available at* https://bit.ly/3tLbWIW.

[27] *Available at* https://bit.ly/3BEZi14.

[28] *Available at* https://bit.ly/3cpMUb8.

[29] *Available at* https://bit.ly/3EWQKod.

[30] *Available at* https://bit.ly/3ETYvLv.

ratio was "a primary cause of the growing disparity between sentences for Black and White federal defendants." 1995 Report, at 163. In the more than 25 years since, it has reiterated that view and repeatedly called for reform. *See, e.g.*, 2002 Report, at 102-07; U.S. Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing* 131-32 (Nov. 2004);[31] 2007 Report, at 7-8.

In sum, sentencing reform is a powerful tool for addressing racial disparities in the criminal justice system. Given the disproportionate rate at which racial minorities have been incarcerated for drug-related crimes, it is almost inevitable that efforts to remediate prior sentencing practices will also lead to greater racial equality. Experience has borne this out: 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).[32] 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).[33] And to date, 96 percent of offenders resentenced pursuant to the First Step Act have been Black or Hispanic. 2018 Retroactivity Report, *supra*, at 7 tbl.4. *Kimbrough* acknowledged

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[31] *Available at* https://bit.ly/3rGtSTs.

[32] *Available at* https://bit.ly/3EBWKCx.

[33] *Available at* https://bit.ly/3BGknYV.

that the racial disparities to which the 100-to-1 regime gave rise "foster[ed] disrespect for and lack of confidence in the criminal justice system," and that the "severe sentences required by the 100-to-1 ratio are imposed 'primarily upon black offenders.'" 552 U.S. at 98 (quoting 2002 Report, at 103). The First Step Act, like other reforms before it, represents a concerted effort by Congress to help restore that confidence and mitigate that imbalance.

Adopting the United States' reading of Section 404(b) would restrict the universe of offenders—largely racial minorities—who can benefit from the First Step Act's much-needed lifeline. That would be unjust and contrary to congressional intent. Congress was clear that it wanted the First Step Act to redress racial injustices and remediate the unfairness of the 100-to-1 regime. *See, e.g.*, 164th Cong. Rec. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Cory Booker) (explaining that applying the Fair Sentencing Act retroactively through the First Step Act will "address[] some of the racial disparities in our system because 90 percent of the people who will benefit from [the First Step Act] are African Americans; 96 percent are Black and Latino"); *id.* at S7749 (statement of Sen. Patrick Leahy) (describing the enactment of the First Step Act as "a glowing recognition that one-size-fits-all sentencing is neither just nor effective[, and] . . . comes at a steep human cost, especially in communities of color").

Requiring courts to subject would-be beneficiaries to sentencing rules that are no longer on the books would be a puzzling means of remedying past injustices. This Court should therefore honor

Congress's intent by holding that courts are not obligated to penalize qualifying offenders with law that Congress, the courts, and the Sentencing Commission have long since rejected. It should also clarify that these individuals can benefit from rehabilitation and good behavior while in prison.

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The First Step Act was a rare victory for marginalized communities that often lack a voice in our political process, but that victory will be diminished if Section 404(b) is not given its full and intended effect. Under the United States' reading, individuals who were subjected to one sentencing injustice—a crack-cocaine sentence under the 100-to-1 regime—may be allowed to return home. But individuals like petitioner who were subjected to both a crack cocaine sentence under the 100-to-1 regime and other now-repudiated sentencing rules often will not. As a result, their communities will be less safe and less equal, all at a steep cost to the taxpayer. While the *Amici* States have many interests in this case, those interests ultimately boil down to a fundamental stake in safe, thriving, and civically engaged communities. This Court has every reason to adopt a reading of the First Step Act that advances that interest—and no reason not to.

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

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