

No. 20-7474

IN THE
Supreme Court of the United States

EZRALEE J. KELLEY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR *AMICI CURIAE*
THE HOWARD UNIVERSITY SCHOOL OF LAW
HUMAN AND CIVIL RIGHTS CLINIC AND
THE NATIONAL ASSOCIATION FOR PUBLIC
DEFENSE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE¹

Howard University School of Law is the nation's first historically Black law school. For more than 150 years since its founding during Reconstruction, the law school has worked to train "social engineers" devoted to the pursuit of human rights and racial justice. As part of this mission, the Howard University School of Law's Human and Civil Rights Clinic advocates on behalf of clients and communities fighting for the realization of civil rights guaranteed by the U.S. Constitution. The Clinic has a particular interest in eradicating racial disparities in the criminal justice system and dismantling unjust laws and policies that contribute to mass incarceration and the prison industrial complex.

The National Association for Public Defense (NAPD) is an organization of more than 21,000 practitioners dedicated to the effective legal representation of persons accused of crimes who cannot afford to retain private counsel. The Association's membership includes all categories of professionals necessary to providing a robust public defense: lawyers, social workers, case managers, investigators, sentencing advocates, paralegals, researchers, and legislative advocates. These professionals often represent the interests of the most marginalized and stigmatized communities in the United States. NAPD aims to de-

¹ The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

stigmatize poverty, eradicate racial discrimination in the criminal justice system, and to promote constitutional principles critical to the fair administration of justice.

INTRODUCTION AND SUMMARY OF ARGUMENT

The emergence of crack cocaine in the early 1980s amid a steep economic downturn and skyrocketing unemployment devastated Black communities.² Families watched as loved ones sought to escape the trauma of poverty through the drug, only to find ruin or death instead. Then, as is the pattern with many burgeoning illicit-drug economies, the violence came: People living in the most affected communities were afraid to leave their homes. The homicide rate in major cities dramatically increased, particularly among teens and young adults.³ Parents would minimize the risk of children being shot by stray bullets by carefully positioning beds away from windows.⁴ Children and young adults raised under these acute stressors experienced post-traumatic stress syndrome similar to that of Vietnam War veterans.⁵ This multi-faceted

² The unemployment rate for Black people 16 and over nearly doubled between 1972 (11.6 percent) to 1983 (21.3 percent). See U.S. Bureaus of Labor Statistics, *Databases, Tables & Calculators by Subject*, Population Level – Black or African American, <https://bit.ly/2PPJjvf> (last visited Apr. 27, 2021).

³ See, e.g., *Homicide Trends in the United States, 1980-2008*, Dep't of Justice, Bureau of Justice Statistics, NCJ 236018 (Nov. 2011), <https://tinyurl.com/w4wpsuuh>.

⁴ NPR, *Addiction Battled Ambition for Reporter Caught in D.C.'s Crack Epidemic*, NPR, Morning Ed., July 3, 2014, <https://tinyurl.com/j2vxuvyz>.

⁵ Gina Kolata, *On Streets Ruled by Crack, Families Die*, N.Y. Times (Aug. 11, 1989), <https://tinyurl.com/f2dd8u8f>.

public-health and social crisis demanded a thoughtful legislative response.

Instead, elected officials used hyperbole, misinformation, and latent racial animus to support legislation that only compounded the devastation that crack had wrought.⁶ Building upon decades of anti-drug politicization directed toward Black people⁷ and fueled by both genuine and media-manufactured⁸ public concern,⁹ Congress promulgated a suite of draconian “tough-on-crime” laws in the 1980s and 1990s as part of its domestic war on drugs and crime. The Anti-Drug

⁶ See, e.g., 132 Cong. Rec. S8292 (daily ed. Apr. 22, 1986), <https://tinyurl.com/5f5x2pwa> (statement of Sen. Chiles).

⁷ In a 1910 report to Congress, President William Taft urged the legislative body to take action against cocaine, which he argued was “the most serious drug problem America had ever had.” See David F. Musto, *Opium, Cocaine and Marijuana in American History*, Scientific American, July 1991, at 45. The report also stoked racial fears: “it has been authoritatively stated that cocaine is often the direct incentive to the crime of rape by negroes in the South, and other sections of the country.” See David F. Musto, *America’s First Cocaine Epidemic*, The Wilson Quarterly, Summer 1989, at 64.

⁸ See United States Sentencing Commission Report to Congress on Cocaine and Federal Sentencing Policy, 122 (Feb. 1995); see also Craig Reinerman & Harry G. Levine, *Crack in Context: Politics and Media in the Making of a Drug Scare*, 16 Contemp. Drug Prob. 535, 541 (1989).

⁹ A New York Times/CBC poll asked Americans to identify “the most important problem facing this country today.” In January 1985, fewer than one percent answered drugs. However, this number jumped to 54 percent of those polled in September 1989 after President Regan’s widely watched televised speech and the subsequent onslaught of media stories regarding drugs. See Craig Reinerman & Harry G. Levine, *supra*, at 537.

Abuse Act of 1986¹⁰ (1986 Anti-Drug Act) “wage[d] an all-out war” against high-level crack cocaine *trafficking* by reintroducing mandatory minimum sentences and funding federal and state law enforcement efforts.¹¹ Subsequent provisions in the Anti-Drug Abuse Act of 1988¹² (1988 Anti-Drug Act) extended these heightened penalties to crack cocaine *users* and *low-level* drug dealers, removing the varying levels of culpability between the two sects.

Chief among the new heightened penalties was a provision penalizing crack cocaine at 100 times the rate of any other drug. This penalty lacked any penological or medical basis. In the words of a former lawyer to the House Committee: “Nobody looked at the proper ratios based on how harmful it was. It was completely detached from science. Nobody could say that crack was 100 times more dangerous than powder.”¹³ This sentencing ratio—which was “imposed primarily upon Black offenders”¹⁴—accounts for thousands of years served in federal prison and thousands of lives ruined. It has “foster[ed] disrespect for and lack of confidence in the criminal justice system”

¹⁰ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

¹¹ 132 Cong. Rec. 26,429, 26,434 (daily ed. Sept. 26, 1986), <https://tinyurl.com/xf426un3> (statement of Sen. Dole).

¹² Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4370.

¹³ Jonathan Easley, *The Day the Drug War Really Started*, Salon (June 20, 2011), <https://tinyurl.com/vp98me5h>.

¹⁴ *Kimbrough v. United States*, 552 U.S. 85, 98 (2007) (quotation marks omitted).

because of a “widely-held perception” that it “promotes unwarranted disparity based on race.”¹⁵ As a result, the crack era remains defined by lasting trauma stemming from violence, targeted policing, and mass incarceration.

In two critical pieces of legislation, Congress acted to ameliorate the injustice worked by the overly harsh crack cocaine penalties it imposed. Sections 2 and 3 of the Fair Sentencing Act of 2010, as interpreted by this Court in *Dorsey v. United States*, lowered the sentencing ratio from 100-to-1 to 18-to-1 for all incarcerated persons sentenced *after* its enactment (August 3, 2010).¹⁶ Later, Section 404 of the First Step Act of 2018¹⁷ empowered federal judges to apply the Fair Sentencing Act retroactively to those sentenced *before* August 3, 2010.

Congress intended Section 404 of the First Step Act to remedy the evil of the excessively punitive response to the crack era. Yet federal courts are deeply divided as to the appropriate scope of resentencing permitted by the Act. Some courts, like the Ninth Circuit in this case, apply a strict, backward-looking approach by analyzing the U.S. Sentencing Guidelines and caselaw in effect at the time of the original sentence, forbidding any consideration of intervening caselaw or Guideline amendments. Other courts

¹⁵ *Id.* (quotation marks omitted).

¹⁶ 567 U.S. 260, 279-81 (2012), *superseded by* Fair Sentencing Act of 2010 *as recognized by* *United States v. Bryant*, 991 F.3d 452 (2d Cir. 2021).

¹⁷ First Step Act of 2018, Pub. L. No. 115-391, §404(b), 132 Stat. 5194, 5222; 21 U.S.C. § 841.

conduct a more fulsome resentencing by imposing a new sentence under the current Sentencing Guidelines, including all interceding amendments, and applying all caselaw developments. Still other courts apply a middle-of-the-road approach, requiring consideration of intervening caselaw clarifying that a defendant's original Guidelines calculation was incorrect, but not applying intervening amendments to the Guidelines. This case presents an ideal vehicle for this Court to end this division and hold that courts conducting resentencing under Section 404 must begin with an accurate Guidelines calculation, including intervening Guidelines' amendments and clarifying caselaw.

Amici submit this brief to emphasize three points. First, *amici* believe that to fully appreciate the breadth of the remedy intended by the First Step Act, it is necessary to understand the breadth of the social and moral crisis the Act was enacted to address—and the extent of Congress's utter failure to adequately address the crisis in its initial legislation. Second, because of the magnitude of the crisis, Congress enacted Section 404 of the First Step Act on the heels of the Fair Sentencing Act to provide sweeping retroactive relief. As Petitioner explains, Pet. 20-25, the Ninth Circuit's needlessly cramped reading is inconsistent with the text and intent of the First Step Act, as well as this Court's precedent. Finally, failure to apply the First Step Act to permit the broad relief Congress intended will visit yet another injustice upon incarcerated people already subjected to a punishment that is now widely recognized as unfair and unjust.

This Court should grant the petition and reverse the Ninth Circuit's decision.

ARGUMENT

I. Anti-Drug Laws Enacted In The 1980s Imposed Unjustifiably Harsh Penalties On Crack Cocaine Offenses And Facilitated Targeted Policing And Over Prosecution Of Black People

A. The overly harsh penalties imposed by the 1986 and 1988 Anti-Drug Acts were fueled by hyperbole and hysteria rather than any valid medical or penological bases.

The confluence of economic decline and the introduction of crack cocaine produced a crippling mix of drug addiction, crime, and suffering that demanded “an appropriate mix between condemnation and compassion.”¹⁸ Congress’s response was nearly all condemnation; it was a declaration of war. The congressional record is replete with militaristic hyperbole, characterizing crack cocaine as an “elusive and deadly”¹⁹ “enemy”²⁰ in the “battle against drug abuse in America,”²¹ a “threat” that “strikes ...

¹⁸ 132 Cong. Rec. 26,429, 26,440 (daily ed. Sept. 26, 1986), <https://tinyurl.com/xf426un3> (statement by Sen. Biden).

¹⁹ *Id.* at 26,436 (statement of Sen. Hawkins).

²⁰ *Id.* at 26,444 (statement of Sen. DeConcini).

²¹ *Id.* at 26,440 (statement of Sen. Biden).

savagely”²² and is a “clear and present danger to America’s national security.”²³

Politicians compared the danger of drugs to foreign wars and terrorists. President Ronald Regan called for the support of the American public in the “new national crusade” undertaken by “wonderful individuals” against the threat of drugs, comparing the war on drugs to “when we were attacked in World War II.”²⁴ “Crime is a national defense problem,” warned then-Senator Joe Biden, “[y]ou’re in as much jeopardy in the streets as you are from a Soviet missile.”²⁵ According to Senator Alfonse D’Amato, the “drug epidemic” was “as dangerous, if not even more so, than any other terrorist that this Nation faces, including the Qadhafi’s, the Khomeini’s, because terror is being spread in the neighborhoods.”²⁶

The result of this political hysteria was the 1986 Anti-Drug Act that imposed severe mandatory minimums and punished crack cocaine trafficking offenses 100 times more than any other drug, including powder cocaine, which is pharmacologically identical to

²² *Id.* at 26,436 (statement of Sen. Hawkins).

²³ *Id.* (statement of Sen. Hawkins).

²⁴ Ronald Reagan, Address to the Nation on the Campaign Against Drug Abuse, Sept. 14, 1986, <https://tinyurl.com/4x3shftm>.

²⁵ Mary Thornton, *Senate Votes to Toughen Federal Sentencing Law*, Wash. Post, Oct. 1, 1982, <https://tinyurl.com/yexnehe7>.

²⁶ “*Crack*” Cocaine: Hearing Before the Permanent Subcomm. on Investigations of the Comm. On Governmental Affairs, 99th Cong. 12 (1986), <https://tinyurl.com/ma79k3jd> (statement of Sen. D’Amato).

crack. An individual convicted for a trafficking offense involving five grams of crack cocaine (the weight of two pennies) received the same five-year mandatory minimum sentence as someone convicted for an offense involving 500 grams of powder cocaine (the weight of three apples). And a trafficking offense involving 50 grams of crack cocaine (the weight of a candy bar) received the same ten-year minimum sentence as an offense involving 5,000 grams of powder cocaine (the weight of a gallon of paint).

This harshly disproportionate sentencing scheme was unsupported by any medical or penological research. The sentencing ratio “overstate[d] the relative harmfulness of crack cocaine compared to powder cocaine” and “overstate[d] the seriousness of most crack cocaine offenses.”²⁷ But under mounting House reelection concerns²⁸ and perceived pressure and support from constituents,²⁹ Congress passed the omnibus crime and drug bill without engaging in extensive, thoughtful debate or adequate hearings.

²⁷ U.S. Sentencing Commission, Report to the Congress: Cocaine and Federal Sentencing Policy 8 (May 2007), <https://tinyurl.com/38ryx9wa>.

²⁸ See, e.g., Edward Walsh, *House Votes Antidrug Legislation*, Wash. Post (Sept. 12, 1986), <https://tinyurl.com/rxxaf4jx> (“the antidrug effort is seen as a compelling election-year issue.”).

²⁹ See, e.g., 132 Cong. Rec. 26,429, 26,436 (daily ed. Sept. 26, 1986), <https://tinyurl.com/xf426un3> (statement of Rep. Hawkins).

“Very candidly,” Senator Charles Mathias remarked:

[N]one of us has had an ... opportunity to study this enormous package. It did not emerge from the crucible of the committee process, tempered by the heat of debate. The committees are important because, like them or not, they do provide a means by which legislation can be carefully considered, can be put through a filter, can be exposed to public view and public discussion by calling witnesses before the committee. That has not been the origin of this bill. Many of the provisions of the bill have never been subjected to committee review... If we are contemplating changes to important individual freedoms, if we are about to alter major social commitments, then those modifications simply must be discussed fully.³⁰

The abbreviated legislative process lacked critical consideration of whether crack cocaine warranted enhanced punishment compared to powder cocaine and other drugs.³¹ For example, Congress failed to genuinely analyze the addictiveness of crack cocaine, whether the drug engendered crime, violence, psychosis, and death, or if it posed a particular threat to young people compared to other drugs.³² Congress

³⁰ *Id.* at 26,462.

³¹ *See, e.g., id.* at 26,441 (statement Sen. Evans).

³² *Id.* at 24,447 (statement by Sen. Chiles) (“It can turn promising young people into robbers and thieves, stealing

appears to have instead simply regurgitated the media's skewed reporting and relied on a single police investigator as its "expert" witness.³³

Making matters worse, in the 1988 Anti-Drug Act, Congress abandoned its initial focus of arresting and punishing "major" and "serious traffickers"³⁴ and "kingpins" connected to crime syndicates and violent crime³⁵ by expanding crack cocaine penalties to drug users, including first-time offenders. The law applied the 100-to-1 crack cocaine ratio to simple possession, making crack cocaine the *only* drug to carry a mandatory minimum penalty for first offense simple possession.³⁶ Mere possession of any other drug, including powder cocaine, carried only a misdemeanor with a maximum penalty of no more than one year in prison.³⁷

anything they can to get the money to feed their habit."); *id.* at 26,436 (statement by Sen. Hawkins) ("Drug addiction turns people into walking crime machines.").

³³ Alyssa L. Beaver, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 *Fordham L. Rev.* 2531, 2533-4 (2010), <https://tinyurl.com/swmaaxen>.

³⁴ See U.S. Sentencing Commission, 2002 Report to the Congress: *Federal Cocaine Sentencing Policy* 7, <https://tinyurl.com/hj5tsr> (citing H.R. Rep. No. 99-845, pt. 1, at 11-12 (1986)).

³⁵ 132 *Cong. Rec.* 27,193-94 (1986), <https://tinyurl.com/rvnn4a6s> (statement of Sen. Byrd).

³⁶ The Sentencing Project, *Crack Cocaine Sentencing Policy: Unjustified and Unreasonable* 2, <https://tinyurl.com/3kfta2sy>.

³⁷ *Id.*

B. The 1986 and 1988 Anti-Drug Acts facilitated disparate policing and prosecution that disproportionately impacted the Black community.

The 1986 and 1988 Anti-Drug Acts launched a war on crack cocaine with an acute focus on the Black community—even though two-thirds of crack users are white or Latinx.³⁸ The congressional record provides searing clarity regarding the intended domestic warzone: “[B]ig-city ghettos”³⁹ “infested with ... crack houses;” “[the] centers of the new cocaine trade,”⁴⁰ “small cells of pushers, couriers and lookouts from the ghetto’s legion of unemployed teenagers.”⁴¹ The record is also clear as to the race of the domestic targets: “Most of the dealers, as with past drug trends, are [B]lack or Hispanic ... Whites rarely sell the cocaine rocks.”⁴² The legislation provided copious funding for law enforcement—state police, federal law-

³⁸ Danielle Kurtzleben, *Data Show Racial Disparity in Crack Sentencing* (Aug. 3, 2010), <https://tinyurl.com/pew3xce6>.

³⁹ 132 Cong. Rec. S17347 (daily ed. July 8, 1988), <https://tinyurl.com/zumbybcw> (statement of Sen. Dole) (emphasis added).

⁴⁰ 132 Cong. Rec. S4419 (daily ed. Mar. 12, 1986), <https://tinyurl.com/bb58ck9e> (statement of Sen. Hawkins) (emphasis added).

⁴¹ 132 Cong. Rec. S13,027 (daily ed. June 9, 1986), <https://tinyurl.com/yjry7yr9> (statement of Sen. Hawkins) (emphasis added).

⁴² 132 Cong. Rec. S8292 (daily ed. Apr. 22, 1986), <https://tinyurl.com/5f5x2pwa> (statement of Sen. Chiles) (emphasis added).

enforcement officers, and prosecutors—with marching orders to target low-income, mostly Black communities.

Police surveilled and terrorized Black inner-city neighborhoods, while refraining from the same tactics in predominantly white suburbs. The communities subject to the most police monitoring, of course, became “much more likely to produce bodies for the punishment industry.”⁴³ From 1986 to 1991, the number of Black people arrested for drug offenses grew by 350 percent compared to a 50 percent increase for white people.⁴⁴

On the heels of disparate police surveillance and arrests, federal prosecutors made disparate charging decisions that ushered in an era of mass incarceration that essentially “transform[ed] federal prisons into institutions increasingly dedicated to the African American community.”⁴⁵ By 1993, Black people accounted for over 88 percent of federal convictions for crack cocaine offenses.⁴⁶ In nineteen federal districts—

⁴³ Doris Marine Provine, *Unequal Under Law: Race in the War on Drugs* 18 (2007), <https://tinyurl.com/k4dbkdwt> (citing Angela Y. Davis, *Abolition Democracy: Beyond Empire, Prisons, and Torture* 41 (2005)).

⁴⁴ DJ Sifton, *U.S. Prisons and Racial Profiling: A Covertly Racist Nation Rides a Vicious Cycle*, 20 *Law & Ineq.* 53, 61 (2002), <https://tinyurl.com/bhewf8ue>.

⁴⁵ Deborah J. Vagins & Jesselyn McCurdy, ACLU, *Cracks in the System: 20 Years of the Unjust Federal Crack Cocaine Law* 3 (Oct. 2006), <https://tinyurl.com/yewe3r6a>.

⁴⁶ U.S. Sentencing Comm’n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 152, (Feb. 1995).

including those covering major metropolitan areas such as Houston and Indianapolis—no white person was convicted of a crack cocaine offense between 1991 and 1995.⁴⁷ In California, for example, “[d]espite evidence that large numbers of whites use and sell crack cocaine,” not a single white person was “convicted of a crack cocaine offense in federal courts serving Los Angeles and six Southland counties” between 1986 and 1995.⁴⁸ “Virtually all white crack offenders,” by contrast, were “prosecuted in state court, where sentences are far less.”⁴⁹

Federal prosecutors also used the new legislation to seek longer prison sentences against Black people as compared to white people.⁵⁰ Before the 1986 Anti-Drug Act, white and Black offenders received relatively comparable sentences in federal courts (a maximum of 51 months and 55 months, on average, respectively).⁵¹ That changed after the sentencing

⁴⁷ Shannon Mullen et al., *Crack vs. Heroin: An Unfair System Arrested Millions of Blacks, Urged Compassion for Whites* (Asbury Park Pres, Dec. 2, 2019), <https://tinyurl.com/czf4hckj>.

⁴⁸ Dan Weikel, War on Crack Targets Minorities over Whites: Cocaine: Records Show Federal Officials Almost Solely Prosecute Nonwhites; U.S. Attorney Denies Race is a Factor, L.A. Times (May 21, 1995), <https://tinyurl.com/ypxzy22f>.

⁴⁹ *Id.*

⁵⁰ Nat’l Rsch. Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 97 (2014), <https://tinyurl.com/4fx7tyz3> (quoting Nat’l Rsch. Council, *Research on Sentencing: The Search for Reform* 92 (1983), <https://tinyurl.com/cn287d5s>).

⁵¹ Douglas C. McDonald & Kenneth E. Carlson, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Sentencing in the Federal*

disparity between crack and powder cocaine became law. By 2003, the average sentence for a powder cocaine offense was 80.6 months, whereas the average sentence for a crack cocaine offense was 123 months, totaling 3.5 more years on average.⁵² The following year, Black incarcerated individuals served approximately 58.7 months for *drug* offenses, almost equal to the 61.7 months served by white people for *violent* offenses.⁵³ Even among those with little to no prior criminal history, Black individuals were sent to federal prison an average of 40 months longer than white people for crack and powder cocaine possession and distribution from 1991 through 2016.⁵⁴

Amid all the condemnation and punishment, those suffering with the disease of drug addiction never received the help they needed. Indeed, they were often punished as if they were no different than major traffickers. Susan Burton, a Black woman driven to crack cocaine addiction after her five-year-old son was struck and killed by a Los Angeles Police Department cruiser, recalls:

Courts: Does Race Matter? The Transition to Sentencing Guidelines, 1986-90 2 (1993), <https://tinyurl.com/b23zrc7>.

⁵² U.S. Sentencing Commission, *2003 Sourcebook of Federal Sentencing* fig.J (2003), <https://tinyurl.com/b4pmsub>.

⁵³ Dep't of Justice, Bureau of Justice Statistics, *Compendium of Federal Justice Statistics*, 2003 112, tbl7.16 (Oct. 1, 2005), <https://tinyurl.com/3tm7k58v>.

⁵⁴ Shannon Mullen et al., *Crack vs. Heroin: An Unfair System Arrested Millions of Blacks, Urged Compassion for Whites*, Asbury Park Press, Dec. 2, 2019, <https://tinyurl.com/czf4hckj>.

I was arrested for being in possession of a controlled substance, and that substance was crack. I remember my leg being pulled on about three in the morning and woken up to get dressed to be shipped off to prison. Me and about 70 other women were put into a large room, stripped out of our clothing, every part of our body looked at, and then chained together on this long chain and put on a bus early in the morning. And driven off to this place that I've never been before.

I was sentenced to prison six different times. You would have thought someone would have said that 'you don't have a criminal problem. You have an alcohol or a drug problem. And there is help for that.' But I was never offered any help. And I read the papers today, and I look at the approach to opioid use. And you hear about a health approach, not a criminal approach. I'm 21 years sober now. Wasn't I worth an investment in treatment?⁵⁵

She was. The failure of Congress to provide compassion and treatment, and the human cost of the 1986 and 1988 legislation, is indefensible.

⁵⁵ Netflix, *Crack: Cocaine, Corruption, & Conspiracy*, 1:14:10, 1:24:00 (2021), <https://tinyurl.com/yadmyd83>.

II. Congress Enacted Section 404(b) Of The First Step Act To Provide Robust Resentencing Review For Persons Subjected To Unjustly Punitive Sentences for Crack Cocaine Offenses

A. Congress intended Section 404 to provide broad retroactive relief.

Congress’s response to the crack cocaine epidemic—particularly its enactment of the 100-to-1 sentencing ratio and mandatory minimums—has been widely denounced. The U.S. Sentencing Commission urged Congress to change the severe crack cocaine penalties on at least three occasions between 1995 and 2002, concluding that the “100-to-1 crack cocaine to powder cocaine quantity ratio [was] the primary cause of the growing disparity between sentences for Black and White federal defendants.”⁵⁶ The Commission “believe[d] strongly that the disparity between penalties for the same quantities of crack and powder cocaine [was] wrong”⁵⁷ and “result[ed] in unduly severe penalties for most crack cocaine offenders, the impact of that severity f[e]ll primarily upon [B]lack offenders.”⁵⁸ This “contributed to a widely held

⁵⁶ U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 154 (Feb. 1995), <https://tinyurl.com/2d7z8b7v>.

⁵⁷ U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 5 (Apr. 1997), <https://tinyurl.com/w9htp2rp>.

⁵⁸ U.S. Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* viii (May 2002), <https://tinyurl.com/2hn8smn8>.

perception that the ... penalty structure promote[d] unwarranted disparity based on race,” finding “even the perception of racial disparity problematic because it fosters disrespect for and lack of confidence in the criminal justice system.”⁵⁹

Congress finally heeded this advice in 2010 by enacting the Fair Sentencing Act, which sought to ameliorate “the fundamental unfairness” and “longstanding injustice” between federal sentencing for crack and powder cocaine offenses.⁶⁰ The law represented the federal government’s first effort “to restore confidence in the criminal justice system – particularly in communities of color.”⁶¹ Importantly, the Fair Sentencing Act decreased the disparity between sentences for crack and powder cocaine offenses by lowering the penalty ratio from 100-to-one to 18-to-one, and it eliminated the mandatory minimum provision for simple possession of crack cocaine.

Whether the law applied retroactively, however, triggered mixed responses from the U.S. Sentencing Commission, the Department of Justice, and federal courts. This Court’s opinion in *Dorsey* ultimately settled the debate, holding that the Fair Sentencing Act benefited only incarcerated individuals sentenced for crack cocaine offenses *after* the date the law went into

⁵⁹ *Id.*

⁶⁰ Press Release, U.S. Sentencing Comm’n, *U.S. Sentencing Commission Votes Unanimously to Apply Fair Sentencing Act of 2010 Amendment to the Federal Sentencing Guidelines Retroactively*, (June 30, 2011), <https://tinyurl.com/ft3an9hn>.

⁶¹ ACLU, *Fair Sentencing Act*, <https://tinyurl.com/4dc6rjkh> (last visited May 4, 2021).

effect.⁶² The Fair Sentencing Act thus provided *no* relief to the thousands sentenced before its enactment.

Finally, more than three decades after the 1986 Anti-Drug Act took effect, Congress passed the First Step Act in 2018 “to effect comprehensive correctional, sentencing, and criminal justice reforms.”⁶³ The First Step Act made the Fair Sentencing Act’s provisions regarding crack cocaine sentencing retroactive, providing relief to those excluded by *Dorsey*. The law has been lauded as “the most substantial changes in a generation to the tough-on-crime prison and sentencing laws that ballooned the federal prison population and created a criminal justice system that many conservatives and liberals view as costly and unfair.”⁶⁴ Through the First Step Act, Congress endeavored to “make our justice system fairer, relieve our overcrowded prisons, redirect funding to our most pressing crime prevention efforts, and make our communities safer.”⁶⁵

To this end, Section 404(b) permits eligible individuals originally sentenced under the harsh crack cocaine sentencing laws of the 1980s to petition district

⁶² *Dorsey*, 567 U.S. 260, 279-81 (2012).

⁶³ Brief of Senators Richard J. Durbin, Charles E. Grassley, Cory A. Booker, and Mike Lee as Amici Curiae in support of Petitioner at 2, *Terry v. United States*, No. 20-5904 (U.S. S. Ct. Feb. 19, 2021).

⁶⁴ Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. Times, Dec. 18, 2018, <https://tinyurl.com/yk9nbvzf>.

⁶⁵ Press Release, Committee on the Judiciary, *Grassley, Durbin Statements on First Step Act Passing House*, Dec. 20, 2018, <https://tinyurl.com/6uy4dxb8>.

courts for resentencing “as if sections 2 and 3 of the Fair Sentencing Act . . . were in effect at the time the covered offense was committed.”⁶⁶ The retroactivity provision is of critical importance to Congress. Its inclusion was “key” to the Senate passing the First Step Act at all,⁶⁷ and it makes the criminal justice system “more fair” and “better reflect[s] our collective values and ideals.”⁶⁸ The Ninth Circuit’s attempt—in the absence of any textual basis—to limit the relief intended by Section 404(b) should be reversed by this Court.

B. Nothing in the text of Section 404(b) requires district courts to ignore intervening caselaw or Guidelines amendments.

Section 404(b) amended 18 U.S.C. § 3582(c)(1)(A) to empower district courts to “impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act . . . were in effect at the time the [relevant] offense was committed.”⁶⁹ As explained by the Fourth Circuit in *United States v. Chambers*,⁷⁰ Congress’s grant of

⁶⁶ First Step Act of 2018, Pub. L. No. 115-391, §404(b), 132 Stat. 5194, 5222; 21 U.S.C. § 841.

⁶⁷ E. Grassley, Cory A. Booker, and Mike Lee as Amici Curiae in support of Petitioner at 6, *Terry v. United States*, No. 20-5904 (U.S. S. Ct. Feb. 19, 2021) (citing 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Cardin)).

⁶⁸ Brief of Senators Richard J. Durbin, Charles E. Grassley, Cory A. Booker, and Mike Lee as Amici Curiae in support of Petitioner at 7, *Terry v. United States*, No. 20-5904 (U.S. S. Ct. Feb. 19, 2021) (citing 164 Cong. Rec. H10,361 (daily ed. Dec. 20, 2018) (statement of Rep. Goodlatte)).

⁶⁹ §404(b), 132 Stat. 5194, 5222.

⁷⁰ 956 F.3d 667, 672 (4th Cir. 2020).

authority to “*impose* a reduced sentence” suggests something broader than the mechanical act of simply “*modifying*” or “*reducing*” a sentence.⁷¹ It is axiomatic that the imposition of a sentence—indeed, “*all* sentencing proceedings”—must begin with “calculating the applicable Guidelines range.”⁷² It would make little sense for a district court, without statutory text requiring it to do so, to knowingly calculate a Guidelines range that is now recognized as legally incorrect—but this is precisely what the Ninth Circuit mandated in this case. Nothing in the text of Section 404(b) requires this result.

To the contrary, Section 404(b) “authorized the courts to provide a remedy for certain defendants who bore the brunt of a racially disparate sentencing scheme.”⁷³ Congress acted to permit those defendants to petition for an “individualized review of their case.”⁷⁴ Aside from the limitations imposed by Section 404(c), which are not relevant here, Congress placed no limits on the individualized resentencing review available under the Act.

This is consistent with the broad purpose of Section 404(b), which, according to co-sponsor Senator

⁷¹ *Cf.* 18 U.S.C. § 3582(c)(2) (providing for “[m]odification of an imposed term of imprisonment” and allowing courts to “reduce the term of imprisonment”).

⁷² *Gall v. United States*, 552 U.S. 38, 49 (2007).

⁷³ *Chambers*, 956 F.3d at 674.

⁷⁴ Press Release, Committee on the Judiciary, The First Step Act of 2018 (S.3649)—as introduced (Nov. 15, 2008), <https://tinyurl.com/9vcd8dzp>.

Cory Booker, was to provide “critical sentencing reform” that “w[ould] reduce mandatory minimums *and* give[] jud[icial] discretion back—not legislators but judges who sit and see the totality of the facts.”⁷⁵ The law, according to Senator Bill Nelson, also empowered federal courts to “do the job that they were appointed to do—to use their discretion to craft an appropriate sentence to fit the crime.”⁷⁶

Narrow interpretation of Section 404(b) that constricts district courts’ discretion to fashion appropriate sentences thus frustrates Congress’s fundamental purpose in promulgating the First Step Act and its reasoning for tethering the law to the Fair Sentencing Act: to significantly reduce sentences for crack cocaine offenses imposed during an era of unjustifiable and unjustly harsh penalties. This Court should grant the petition and reject such narrow interpretation.

III. Failure To Resolve The Circuit Court Split Will Continue To Disproportionately Harm Persons Imprisoned For Crack Cocaine Offenses And Their Families

Expressing his support for the First Step Act on the Senate floor, Senator Booker remarked that “[Our] system ... inflicts poverty by concentrating its attacks on low-income neighborhoods; it burdens families, hurting them economically and fracturing entire

⁷⁵ 164 Cong. Rec. S7764 (daily ed. Dec. 18, 2018), <https://tinyurl.com/uemb7sfb> (statement of Sen. Booker) (emphasis added).

⁷⁶ *Id.* at S7756 (statement of Sen. Nelson).

communities.”⁷⁷ The public—particularly the Black community, which was most harmed by the anti-drug policies of the 1980s—now deserves a less destructive course than those previously forged. The Ninth Circuit’s erroneous denial of the full measure of the relief Congress intended to provide through Section 404(b) continues an unjust punishment that harms not only those incarcerated, but also their families and communities at large.

Those wrongly denied relief under Section 404(b) face prisons that are persistently overcrowded, resulting in an increased rate of poor physical and mental health, including an increased risk of suicide and serious illness.⁷⁸ Many prisons operating over capacity are also unable to provide adequate rehabilitative programming,⁷⁹ undermining the individual’s successful reentry upon release.

Imprisonment is thus strongly correlated with curtailed social and economic efficacy for *formerly* incarcerated individuals and their families, most of whom are Black. Scholars, activists, and even federal judges have long decried the profound harm of exclusion stemming from mass incarceration “by disintegrating legions of African American men from family

⁷⁷ *Id.* at S7765 (statement of Sen. Booker).

⁷⁸ Nat’l Resch. Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 6, (2014), <https://tinyurl.com/4fx7tyz3>.

⁷⁹ *Id.*

and economic life.”⁸⁰ Three decades ago, Judge Heaney of the Eighth Circuit observed that, “[u]ntil our society begins to provide effective drug treatment and education programs, and until young [B]lack men have equal opportunities for a decent education and jobs, a bad situation will only get worse. All of us and our children will suffer.”⁸¹

In addition to the burden of reentry following extensive periods of incarceration, laws passed during the drug war of the 1980s bar formerly incarcerated persons from obtaining certain employment opportunities, government subsidized welfare and public housing benefits, and financial aid for higher education.⁸² Even if a formerly incarcerated individual can obtain a job, men with a criminal record typically experience a reduced earning potential after release, exacerbating personal and family financial hardship and likelihood of substance abuse.⁸³

There is also a strong correlation between paternal incarceration and myriad economic stressors on the family, including an increased risk of material

⁸⁰ See, e.g., Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 HARV. CIVIL RIGHTS-CIVIL L. REV. 477, 505 (2009).

⁸¹ *United States v. Willis*, 967 F.2d 1220, 1227 (8th Cir. 1992) (Heaney, J., concurring).

⁸² See generally James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. St. Thomas L.J. 387 (2006); see also Jeff Manza, Christopher Uggen, *Locked Out: Felony Disenfranchisement and American Democracy* (2006).

⁸³ Nat’l Rsch. Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 6, (2014), <https://tinyurl.com/4fx7tyz3>.

hardship to meet basic needs, housing insecurity, and child homelessness.⁸⁴ In addition, there is a connection between paternal incarceration and significant social consequences for children beyond economic well-being, including cognitive performance and academic performance issues, negative mental, emotional, and physical health changes, increased behavioral problems and delinquency, and an overarching detriment to the father-child relationship.⁸⁵

The harsh penalties imposed during the crack era ushered in the most rapid growth in the number of incarcerated parents in our nation's history.⁸⁶ The rate of children with an incarcerated father increased by 77 percent.⁸⁷ Black children are six times more likely to have an incarcerated parent than white children,⁸⁸ and one in every 14 Black minors will have an

⁸⁴ *Id.* at 267-68.

⁸⁵ *Id.* at 269-73.

⁸⁶ U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics No. NCJ 222984, *Parents in Prison and Their Minor Children* 1 (Rev. Mar. 30, 2010), <https://tinyurl.com/yem8v5rw>.

⁸⁷ See Rebecca Schlafer, Erica Gerrity, Ebony Ruhland, & Marc Wheeler, *Children with Incarcerated Parents — Considering Children's Outcomes in the Context of Complex Family Experiences* 3 Univ. of Minn. (2013), <https://tinyurl.com/enhpzhzz>.

⁸⁸ Leila Morsy & Richard Rothstein, *Mass Incarceration and Children's Outcomes* 1, Econ. Pol'y Inst. (Dec. 15, 2016), <https://tinyurl.com/5nc87a75>; see also U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics No. NCJ 222984, *Parents in Prison and Their Minor Children* 2 (Rev. Mar. 30, 2010).

incarcerated parent during their adolescence.⁸⁹ In 2007, 767,400 Black children—6.7 percent of all minor children residing in the U.S.—had an incarcerated father in state or federal prison.⁹⁰ Nearly half of those fathers lived in the same household as their children when they entered the carceral state and over half provided primary financial support.⁹¹

In 2014, the National Research Council concluded, “[t]he change in penal policy over the past four decades may have had a wide range of unwanted social costs, and the magnitude of crime reduction benefits is highly uncertain.”⁹² Those incarcerated due to Congress’s poor response to the crack cocaine crisis have paid a steep cost—and will continue to pay even after they are released. It would be profoundly unfair if district courts are compelled—after Congress finally provided long-overdue, broad retroactive relief—to inflict the terrible cost of outdated caselaw and old Sentencing Guidelines on incarcerated persons, their families, and the community at large.

⁸⁹ See Marc Mauer, *Race, Drugs Laws & Criminal Justice*, 10 Temp. Pol. & Civ. Rts. L. Rev. 321, 324 (2001).

⁹⁰ U.S. Dep’t of Justice, Office of Justice Programs, Bureau of Justice Statistics No. NCJ 222984, *Parents in Prison and Their Minor Children* (Rev. Mar. 30, 2010), <https://tinyurl.com/yem8v5rw>.

⁹¹ *Id.*

⁹² Nat’l Rsch. Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 7 (2014), <https://tinyurl.com/4fx7tyz3>.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

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