No. 20-5904

In the Supreme Court of the United States

TARAHRICK TERRY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF THE DISTRICT OF COLUMBIA AND THE STATES OF COLORADO, DELAWARE, ILLINOIS, IOWA, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether pre-August 3, 2010 crack cocaine offenders sentenced under 21 U.S.C. § 841(b)(1)(C) have a "covered offense" under Section 404 of the First Step Act.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

In 2010, Congress enacted the Fair Sentencing Act to address "a bipartisan consensus" that prior federal "cocaine sentencing laws" were "unjust." 156 Cong. Rec. S1681 (daily ed. Mar. 17, 2010) (statement of Sen. Richard Durbin). Following decades of "almost universal criticism" of "[f]ederal cocaine sentencing policy," U.S. Sent'g Comm'n, Report to the Congress: Cocaine and Federal Sentencing Policy 2 (May 2007) ("2007 Report"),[1] that landmark law "lower[ed] the 100-to-1 crack-to-powder ratio to 18-to-1" in the U.S. Criminal Code, *Dorsey v. United States*, 567 U.S. 260, 269 (2012).

This law, however, did not apply retroactively, meaning that offenders sentenced before the Fair Sentencing Act was passed were still serving sentences under the 100:1 regime. Congress therefore took steps in 2018 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." 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Dianne Feinstein). With "broad bipartisan support," 164 Cong. Rec. S7777 (daily ed. Dec. 18, 2018) (statement of Sen. Charles Grassley), Congress enacted Section 404 of the First Step Act, which allows for resentencing of anyone convicted for any "violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010." Pub. L. No. 115-391, § 404(a), 132 Stat. 5194, 5222 (2018).

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[1] *Available at* https://bit.ly/3a5JXvV.

This case presents the question whether Congress intended to provide that relief to the lowest-level, least-culpable offenders convicted under the prior regime. The District of Columbia and the States of Colorado, Delaware, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington ("*Amici* States") submit this brief as *amici curiae* in support of petitioner because the answer to that question is "yes." Congress plainly intended for low-level offenders to have the same opportunity to avoid the harsh sentences of the now-discredited 100:1 regime when it passed the First Step Act.

The *Amici* States represent jurisdictions across the United States, all of whom have confronted the crack cocaine crisis within their borders. Like the federal government, many states, including some of the *Amici* States, singled out crack cocaine for particularly harsh treatment in their criminal codes at the height of the cocaine epidemic, penalizing crack cocaine-related conduct exponentially more harshly than powder cocaine. As the *Amici* States know from their own experiences, that approach failed. States have since concluded that the extreme differential between sentences for crack cocaine and powder cocaine is both unwarranted and unwise. Today, the vast majority of states have eliminated *any* criminal disparity between crack cocaine and powder cocaine. Those that retain disparities, moreover, have done so at multiples far narrower than 100 to 1.

The states' uniform rejection of the 100:1 ratio was a part of the background consensus against which

Congress legislated. Indeed, Congress understood—like states before it—that the prior 100:1 ratio "foster[ed] disrespect for and lack of confidence in the criminal justice system" because of its extreme racial impact and its disproportionate punishment of the least serious offenders. *Kimbrough v. United States*, 552 U.S. 85, 98 (2007) (quoting U.S. Sent'g Comm'n, Report to the Congress: Cocaine and Federal Sentencing Policy 103 (May 2002) ("2002 Report").[2] Congress sought to rectify those serious flaws when it passed the First Step Act. And, with their own experiences in mind, a bipartisan coalition of states and state attorneys general supported the First Step Act's passage. *See NAAG Endorses First Step Act*, Nat'l Ass'n Att'ys Gen. (Dec. 20, 2018).[3]

The *Amici* States therefore have an interest in seeing the Act's landmark resentencing authorization applied to all individuals—but especially the least culpable—sentenced under the prior regime. As *amici* know, Congress intended to right a historic wrong and bring the federal government into conformity with state policies that reduced or eliminated the crack-powder cocaine disparity. The *Amici* States urge this Court to allow Congress to realize that intention by ensuring that the least culpable individuals can challenge their sentences imposed under the prior discredited sentencing regime.

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[2] *Available at* https://bit.ly/3a8nKxp.

[3] *Available at* https://bit.ly/2Z1YTVD.

SUMMARY OF ARGUMENT

1. When Congress was drafting the historic First Step Act, states had reached a rare consensus that severe disparities between the treatment of crack cocaine and powder cocaine—like the ones codified in the prior federal regime—were unnecessary and unwarranted. Many states followed paths similar to the District of Columbia, which initially addressed an escalating crack cocaine crisis with harsh criminal penalties singling out crack cocaine versus powder cocaine. That approach failed, however, leading the District to repeal its statutory distinctions between crack and powder forms of the drug. Today, only a handful of states enforce *any* disparity between crack cocaine and powder cocaine, and those that do differentiate between the drug's forms at multiples far below the 100:1 ratio codified in the prior federal regime.

2. The prior regime's shortcomings go beyond policy failures. As sovereigns primarily responsible for the enforcement of criminal law, states know firsthand the importance of a criminal justice system that operates with the legitimacy bestowed by the full trust of a consenting public. Although legislatures have wide discretion to enact criminal prohibitions consistent with their judgment, Congress repealed the prior 100:1 ratio regime because it was the rare enactment so disproportionate as to "foster[] disrespect for and lack of confidence in the" criminal law. *Kimbrough*, 552 U.S. at 98 (quoting 2002 Report, at 103). As the U.S. Sentencing Commission documented, the prior federal regime undermined the public's faith in the criminal justice system by creating

perceptions of race-based arbitrariness and punishing offenders with little regard for their relative culpability. Congress intended Section 404 to minimize the continued effects of that now-discredited framework. It would make little sense for Congress to have excluded the least-culpable offenders from such relief.

ARGUMENT

I. When Congress Considered And Passed The First Step Act, States Had Uniformly Concluded That The 100:1 Ratio Was Unjustified.

Like the federal government, states initially responded to the proliferation of crack cocaine in the 1980s with aggressive criminalization and heightened penalties directed at crack cocaine specifically. Faced with the harsh human toll and ineffectiveness of these provisions, however, states changed course in the decades since. Today, every state has rejected the extreme approach embodied by the prior federal regime.

The District of Columbia's experience is illustrative. Like other urban centers, the District struggled with spiraling drug and crime issues throughout the 1970s and 80s—including a spike in cocaine. *See, e.g.*, R.H. Melton & Linda Wheeler, *Once for Elite, Cocaine Now an Equal-Opportunity Vice*, Wash. Post (June 22, 1986).[4] The subsequent proliferation of crack cocaine transformed the city, leading to a flourishing black market, an influx of illegal firearms, and waves of violence. *See* Jacob Fenston, *Crack's Rapid Rise*

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[4] *Available at* https://wapo.st/2LKcy0w.

Brought Chaos to D.C., WAMU (Jan. 27, 2014).[5] *See generally* Ruben Castaneda, *S Street Rising: Crack, Murder, and Redemption in D.C.* (2014).

As the Nation's capital and one of its hardest-hit cities, the District's experience loomed large in the public conversation around crack cocaine. The District "featured prominently" in hearings leading up to the Anti-Drug Abuse Act of 1986, including in the testimony of a former dealer who—concealed behind frosted glass—warned Congress that "[crack] cocaine is everywhere in Washington." Chris Myers Asch & George Derek Musgrove, *Chocolate City: A History of Race and Democracy in the Nation's Capital* 404 (2017) (quoting Zita Arocha, *Ex-Addict Says He Cooked Cocaine at 10 Houses*, Wash. Post (July 16, 1986)[6]). Framing the District as emblematic of a nationwide scourge, President George H.W. Bush famously addressed the public from the Oval Office to warn that drugs were the "gravest domestic threat facing [the] nation," presenting a bag of "crack cocaine seized" from "a park just across the street from the White House." President George H.W. Bush, Presidential Address on National Drug Policy (Sept. 5, 1989).[7] And headlines in publications like *The New York Times Magazine* highlighted the District as an epicenter of the drug crisis. *See* Michael Massing, *D.C.'s War on Drugs, Why Bennett Is Losing*, N.Y. Times Mag. (Sept. 23, 1990)[8] ("[N]o other city, it

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[5] *Available at* https://bit.ly/2MX5nT3.

[6] *Available at* https://wapo.st/370Nk5t.

[7] *Available at* https://bit.ly/3b8gkJR.

[8] *Available at* https://nyti.ms/3cYeMV1.

seems, has been as ravaged by drugs as the nation's capital.").

The District, like the federal government, therefore responded to "a national sense of urgency surrounding drugs generally and crack cocaine specifically." 2002 Report, at 90. And, like the federal government, it did so primarily through aggressive criminalization and mass arrests. As the drug crisis began to take root, District residents overwhelmingly enacted an initiative providing severe mandatory penalties for those distributing, or possessing with intent to distribute, controlled substances, passing the measure almost three to one. *See* District of Columbia Mandatory-Minimum Sentences Initiative of 1981, 30 D.C. Reg. 1082-87 (Mar. 11, 1983). By the middle of the 1980s, the District reportedly had the highest per-capita drug arrest rate of any city in the nation. Asch & Musgrove, *supra*, at 402. Mobilizing police officers as part of "Operation Clean Sweep," the city escalated its efforts with recurring raids on open-air drug markets. *Id.* at 404-05; *see* Sari Horwitz & Linda Wheeler, *D.C. Operation Clean Sweep to Resume, Officials Say*, Wash. Post (Apr. 29, 1987).[9] Isaac Fulwood, who served as Chief of Police from 1989 to 1992, recounted "arresting, literally on the weekends, sometimes, 800 or 900 people." Fenston, *supra*.

By the end of the decade, the Council of the District of Columbia had amended the D.C. Code to treat crack cocaine ten times as seriously as powder cocaine, first through emergency legislation and then permanently. *See* Omnibus Narcotic and Abusive

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[9] *Available at* https://wapo.st/3a7Ux5y.

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). These aggressive new laws and tactics had a profound impact on the District's youth—particularly in communities of color. *See* Asch & Musgrove, *supra*, at 404-05 ("[P]olice arrested one of every four young men between the ages of eighteen and twenty-nine on drug-related charges . . . [N]early all those arrested were African American.").

However, numerous assumptions about crack cocaine—many of which informed initial legislative responses—proved to be unsound. For example, there is now consensus that crack cocaine and powder cocaine "have the same physiological and psychotropic effects." *Kimbrough*, 552 U.S. at 94. Crack cocaine is now known to be no more violence-inducing than powder cocaine; correlations between crack cocaine and violence instead stem from the illegal drug market, not crack cocaine's specific physiological effects. *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)). And—of particular concern to some legislators—prenatal exposure to crack cocaine is now understood to be "identical to the effects of prenatal exposure to powder cocaine." 2002 Report, at 21.

Faced with the effects of its harsh policies and the lack of sound justification for treating crack cocaine and powder cocaine differently, the District changed

course after just a handful of years. In 1994, the Council of the District of Columbia voted to repeal the portion of its criminal code requiring mandatory minimum sentences for nonviolent drug offenses and differentiating between crack cocaine and powder cocaine quantities. *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). The prior draconian regime, according to one Councilmember, had simply "failed to deter drug use and drug sales." Matt Neufeld, *Minimum Terms' Demise Wins Praise: But Prosecutors Say Bad Message Sent*, Wash. Times, Nov. 3, 1994, at C5 (quoting Councilmember William Lightfoot); *see* James Forman Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. Rev. 101, 119 (2012) (describing repeal).

Although not every Amici State singled out crack cocaine for differential treatment,[10] the District of Columbia's experience is not unique. Since first crafting legislative responses to the crack cocaine epidemic, numerous states have abandoned or softened regimes that harshly differentiated between the drug's crack and powder forms. *See, e.g.*, 2005 Conn. Acts 771 (Jan. Reg. Sess.) (P.A. 05-248) (equalizing penalties for crack and powder); 1995 Neb. Laws 563 (L.B. 371) (equalizing crack and powder disparities); 2000 Va.

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[10] Several of the *Amici* States, including Delaware and Washington, have consistently treated crack and powder forms of cocaine equally. *See* 2002 Report at 80-81.

Acts 2494 (H.B. 383) (reducing the disparity to 2:1); 1993 Wis. Sess. Laws 640 (93 Wis. Act 98) (same).

By the U.S. Sentencing Commission's final report in 2007, 37 states and the District had eliminated *any* differential treatment in sentencing between crack cocaine and powder cocaine. *See* 2007 Report, at 98 (surveying the remaining "13 states [that] have some form of distinction between crack cocaine and powder cocaine"). Since then, the number has fallen further still. Today, only a handful of states differentiate at all between crack cocaine and powder cocaine in their criminal codes.[11] Among those that do, none comes *close* to the 100:1 disparity Congress had adopted; the most severe is New Hampshire, at 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).

This Court has confirmed time and again that states retain the primary "responsibility of protecting the health, safety, and welfare of [their] citizens." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007). In their experience exercising that duty, states have approached the issue of drug abuse in different ways.

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[11] 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, and Oklahoma have all eliminated their disparities. *See* 2014 Cal Stat. 4922 (S.B. 1010) (equalizing crack cocaine and powder cocaine quantities); 2016 Md. Laws 6239 (S.B. 1005) (same); 2011 Ohio Laws 29 (Am. Sub. H.B. No. 86) (same); 2018 Okla. Sess. Law 679 (S.B. 793) (same).

But they have all come to the same conclusion on the issue of the severe disparities between the treatment of crack cocaine and powder cocaine; namely, that these disparities are unnecessary and unwarranted. Congress passed the historic First Step Act against the backdrop of this rare consensus among the states.

II. The 100:1 Crack-To-Powder Ratio Threatens The Respect For And Legitimacy Of The Criminal Justice System.

Under our constitutional system, "[t]he States possess primary authority for defining and enforcing the criminal law." *Engle v. Isaac*, 456 U.S. 107, 128 (1982). States, accordingly, have experience working toward the aspirational goal of a criminal justice system that operates with the legitimacy bestowed by the full trust of a consenting public. Of course, every law will have its detractors, but the public understands that legislatures have discretion to enact criminal prohibitions consistent with lawmakers' judgments, and even unpopular legislative regimes do not necessarily erode confidence in the overall legal system.

As this Court has recognized, however, the prior federal 100:1 regime was the rare enactment so disproportionate as to "foster[] disrespect for and lack of confidence in the" criminal law. *Kimbrough*, 552 U.S. at 98 (quoting 2002 Report, at 103). When Congress abolished the 100:1 ratio, it was not simply adjusting policy outcomes or reevaluating priorities in federal criminal sentencing. Instead, Congress acted to correct what were widely seen as fundamental injustices incompatible with foundational principles of criminal administration.

First, the 100:1 ratio violated the precept that similar cases should be treated similarly. Justice "is traditionally thought of as maintaining or restoring a balance or proportion, and its leading precept is often formulated as 'Treat like cases alike.'" H.L.A. Hart, *The Concept of Law* 159 (3d ed. 2012). The 100:1 ratio, however, treated two similar acts—possession of crack cocaine versus powder cocaine—vastly differently, and that difference impacted individuals along racial lines. In the words of Representative Daniel E. Lungren—who "helped to write" the 1986 legislation—the "racial sentencing disparities . . . simply cannot be ignored in any reasoned discussion of this issue." 156 Cong. Rec. H6202 (daily ed. July 28, 2010) (statement of Rep. Daniel Lungren).

Specifically, while drug usage rates are roughly similar among racial and ethnic groups, racial groups were unequally affected by the harsh drug sentencing regime. Nearly 80 percent of crack *users* in the United States are white or Hispanic. U.S. Dep't of Health & Hum. Servs., Substance Abuse & Mental Health Servs. Admin., *Results from the 2019 National Survey on Drug Use and Health*: *Detailed Tables* tbl.1.31A (Aug. 2020).[12] That rate is roughly the same as it was in the mid-2000s. *See, e.g.*, 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.1.43A (Jan. 2006).[13] As the Sentencing Commission explained in its 2007 report, however, more than

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

[13] *Available at* https://bit.ly/2NI0H3K.

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* Bureau of Just. Stat., *Compendium of Federal Justice Statistics, 1994*, at 85 tbl.6.11 (Apr. 1998),[14] *with* Bureau of Just. Stat., *Compendium of Federal Justice Statistics, 2003*, at 112 tbl.7.16 (Oct. 2005).[15]

The 100:1 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." U.S. Sent'g Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 154 (Feb. 1995) ("1995 Report").[16] 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).[17] The Commission suggested that "[r]evising the crack cocaine thresholds would better reduce the [sentencing] gap than any

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

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

[16] *Available at* https://bit.ly/3rAyM4a.

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

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).[18]

To be sure, the racial dynamics of contemporary incarceration are complex, and the disproportionate imprisonment of Americans of color cannot be explained by any one cause. But sentencing disparities like the 100:1 ratio clearly play a role in exacerbating racial disparities, and the Sentencing Commission's findings to that effect had an indelible effect as Congress considered ending the prior regime. As the Commission explained to Congress, even "[p]erceived improper racial disparity fosters disrespect for and lack of confidence in the criminal justice system." 2002 Report, at 103. The 100:1 ratio came to signify that disparity; as Senator Patrick Leahy explained on the Senate floor in 2010, the ratio stood as "one of the most notorious symbols of racial discrimination in the modern criminal justice system." 156 Cong. Rec. S1683 (daily ed. Mar. 17, 2010) (statement of Sen. Patrick Leahy) (quoting letter to the Senate Judiciary Committee from John Payton, then-President of NAACP Legal Defense & Educational Fund, Inc.). Eliminating that disparity was therefore an important step to restoring respect for and the legitimacy of the criminal justice system.

Second, while the goal 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 &

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

Contemp. Probs. 401, 437 (1958), the 100:1 ratio hardly fulfilled that objective.

This Court has explained that the goal of the federal drug sentencing regime was to target "major drug traffickers." *Kimbrough*, 552 U.S. at 98. But as the Commission and Congress both emphasized, the quantities codified in the 100:1 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 100:1 ratio led to the backwards result that high-level kingpins could receive shorter sentences than local neighborhood-corner dealers. *Id.* Unsurprisingly, even by the time of the Commission's initial report to Congress, it was clear that "[t]he majority of crack defendants . . . [we]re street-level." 1995 Report, at 158. Over the years, the Commission continued to emphasize that the "penalties swe[pt] too broadly and appl[ied] most often to lower level offenders." 2002 Report, at 97. Indeed, at 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 Congress intended to target" when it passed the 1986 law. 155 Cong. Rec. S10492 (daily ed. Oct. 15, 2009) (statement of Sen. Patrick Leahy).

As the Commission explained, these results did not simply fail to achieve the policy ends of the original enactments; they "[f]ail[ed] to [p]rovide [a]dequate [p]roportionality," undermining respect for the criminal law. 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 of its guidelines." *United States v. Anderson*, 82 F.3d 436, 449-50 (D.C. Cir. 1996) (Wald, J., dissenting) (footnote omitted).

This Court has long been aware of the serious defects of the 100:1 regime. Before the passage of the Fair Sentencing Act, "[f]ederal cocaine sentencing policy . . . c[a]me under almost universal criticism from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups." 2007 Report, at 2. 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' because of a 'widely-held perception' that it 'promote[d] unwarranted disparity based on race.'" 552 U.S. at 98 (quoting 2002 Report, at 103).

The dissonance between the prior federal regime and the goal of targeting more serious drug offenders is especially relevant in this case because "[a] fair reading of legislation demands a fair understanding of the legislative plan." *King v. Burwell*, 576 U.S. 473, 498 (2015). And these fundamental issues with the prior sentencing regime were critical to Congress's decision to make retroactive the Fair Sentencing Act.

In 2010, Congress faced "a bipartisan consensus" that the prior "cocaine sentencing laws" were "unjust," leading "the Senate Judiciary Committee [to] report[] the Fair Sentencing Act by a unanimous 19-to-0 vote." 156 Cong. Rec. S1681 (daily ed. Mar. 17,

2010) (statement of Sen. Richard Durbin). The sponsors "believe[d]" the Act "w[ould] decrease racial disparities," and would address the relative culpability of low-level offenders in order "to 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).[19] But Congress 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.*

Given this backdrop, it is clear that Congress acted precisely *because* the prior framework disproportionately punished the least culpable individuals, often arbitrarily. Under the government's reading of Section 404, however, Congress carved out the least-culpable offenders—and *only* the least-culpable offenders—from eligibility for retroactive relief. In addition to serving little purpose, that construction would violate the very principles Congress invoked when abolishing the prior framework. Excluding the least-serious offenses would fail to treat like offenders alike (by differentiating between otherwise-identical low-weight offenders pre- and post-2010) and would undermine the statute's otherwise-consistent view that sentences should reflect the conduct's severity.

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

This Court should reject that implausible reading. Doing so would comport with Congress's intent when it passed the First Step Act, a "historic achievement" meant to finally eradicate the continued effects of the discredited 100:1 regime. 164 Cong. Rec. S7749 (daily ed. Dec. 18, 2018) (statement of Sen. Patrick Leahy).

CONCLUSION

This Court should reverse the judgment below.

Respectfully submitted,

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