No. 20-5904

IN THE

Supreme Court of the United States

TARAHRICK TERRY,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Under Supreme Court Rule 37.3(a), Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas are the separation of powers and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF is part of a transpartisan coalition of organizations that advocate for a broad array of consensus-based criminal justice reforms, such as the First Step Act ("FSA"), Pub. L. No. 115-391,132 Stat. 5194 (2018). As Professor Shon Hopwood has explained, "with the efforts of the criminal justice reform community pushing from all sides of the political aisle, Congress finally broke the logjam and passed meaningful reform" via the FSA. Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 Yale L.J. F. 791, 817 (2019).

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[1] All parties have consented to the filing of this brief. *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

"Republicans and Democrats worked together to pass . . . [this] historic bill that eliminated some of the worst injustices in the federal criminal justice system. The First Step Act makes it possible for thousands of people with criminal records to rejoin society and start to realize their potential." Charles Koch with Brian Hooks, *Believe in People: Bottom-Up Solutions for a Top-Down World*, 224 (2020). "Because of provisions in the law, as of the one-year anniversary of its passage [in December 2019], more than 3,000 incarcerated individuals have been released, and more than 2,000 had their sentences reduced." Ivan J. Dominguez, et al., *NACDL and Charles Koch Foundation Mark the One-Year Anniversary of the First Step Act with the NACDL First Step Act Resource Center*, 44 Champion 10 (2020).

AFPF supports the FSA and strongly believes in second chances—*everyone* has a gift and something to offer to society, people can change, and incarcerated persons who do not pose a danger to public safety and have paid their debt to society deserve to have a chance to rejoin their families and communities and become contributing members of society. Examples abound of individuals who despite being incarcerated have managed to grow from whatever mistakes they made, overcome obstacles, and use their unique experiences and gifts to benefit society. *See Believe in People*, 109–116, 205–06, 214–16; Shon Hopwood, *Second Looks & Second Chances*, 41 Cardozo L. Rev. 83, 84–88 (2019); Tarra Simmons, *Transcending the Stigma of a Criminal Record: A Proposal to Reform State Bar Character and Fitness Evaluations*, 128 Yale L.J. F. 759 (2019).

After all, "[c]haracter is not static, people change, and the law must recognize this reality." Hopwood, 41 Cardozo L. Rev. at 119. Many incarcerated persons have the potential to make significant contributions to our society. Indeed, landmark Supreme Court precedent has flowed from pro se cert petitions. *See, e.g., Gideon v. Wainwright,* 372 U.S. 335 (1963). The world should not be deprived of untapped talent just because the judiciary's hands are tied from looking at the merits of an individual plea for leniency many years after a sentence was first imposed.

Draconian sentencing schemes untethered to the four traditional rationales for punishment—retribution, incapacitation, rehabilitation, and deterrence—lead to cruel, unjust penalties for individual defendants, harm their families, damage communities, and undermine the legitimacy of our criminal justice system, all at taxpayer expense. Instead, judges should have discretion to treat incarcerated persons as individuals, not just numbers, and ensure their sentences are proportionate to their offenses, particularly with respect to non-violent *malum prohibitum* offenses. Backend sentencing reforms, like the FSA, that allow courts to account for an incarcerated person's efforts at rehabilitation while determining whether a sentence reduction is warranted are not only sound public policy but a moral imperative.

To be sure, the FSA is just that—a first step toward criminal justice reform. AFPF supports further transpartisan consensus- and evidence-based efforts to build on the success of the FSA. Congress can, and should, do more to address the twin problems

of overincarceration and overcriminalization, including by ending the failed War on Drugs, ending mandatory minimums, and granting judges greater sentencing discretion. Congress should not purport to permit federal agencies to engage in the constitutionally dubious practice of criminalizing innocuous conduct via regulations. The public policy decisions Congress enacted in the text of the FSA should not be narrowed or tinkered with by the other branches of government.

SUMMARY OF ARGUMENT

The question presented here is whether Section 404 of the FSA grants low-level crack offenders sentenced before August 3, 2010 the *ability* to *ask* a district court to exercise its discretion to reduce their sentences in accordance with the 2010 Fair Sentencing Act, which partially addressed the crack-to-powder cocaine sentencing disparity. In other words, this case is about whether individuals who have languished in prison for committing low-level crack offenses deserve a *chance* at a second chance more than a decade after they were originally sentenced. We believe the answer must be "yes."

It bears noting that nothing in Section 404 *requires* district courts to grant sentence reductions in inappropriate cases, such as where an incarcerated person would pose a danger to the community. No one questions that this is a feature, not a bug, of Section 404. There are circumstances where a prisoner eligible to file a motion for a reduced sentence under Section 404(b) is not an appropriate candidate for relief based on individual circumstances and conduct while incarcerated. But Section 404 does allow

federal courts to take a *second look* at sentences imposed over a decade ago under an unjust, draconian penalty scheme that has since been repealed. And Section 404 grants district courts the discretionary *option* of reducing the sentences of deserving individuals—those whose continued incarceration is unsupported by a legitimate penological justification.

Yet under the government's reading, Section 404 narrowly carves out from eligibility to petition for this relief offenders sentenced under 21 U.S.C. § 841(b)(1)(C) for low-level crack offenses, while granting relief to crack kingpins *and* crack offenders sentenced for simple possession. The government suggests, without textual evidence, that Congress intended to draw this counterintuitive distinction because the FSA was solely meant to benefit those sentenced under mandatory-minimum provisions.

That cannot be, and is not, the law. This is so for the reasons Petitioner ably explains, *see* Pet. Br. 14–34, as the FSA's plain language, structure, and history squarely foreclose such a construction. This revisionist history also ignores that Section 2 of the Fair Sentencing Act itself targeted crack-to-powder cocaine sentencing disparities by raising the threshold quantities needed to trigger the mandatory minimums, which were left intact. Indeed, it would be difficult to conceive of a rational basis for surgically carving out of Section 404 of the FSA a select group of low-level offenders, while granting relief to those who were convicted of both more *and* less serious crimes of the exact same nature. At the least, this would raise difficult questions whether such a construction might implicate the equal protection component of the Due

Process Clause of the Fifth Amendment. It would also flip the rule of lenity on its head.

Therefore, even if the text of Section 404 did not unambiguously resolve this case, any lingering doubts should be resolved in favor of Petitioner and those similarly situated, consistent with principles of lenity, constitutional avoidance, and common sense.

ARGUMENT

I. SECTION 404 PROVIDES A *CHANCE* AT A SECOND CHANCE—NOT A GET-OUT-OF-JAIL-FREE CARD.

A. Section 404 Relief is Discretionary.

While this Court is not in the business of setting public policy, it bears mentioning that the decision below *both* misconstrues the statute *and* frustrates Congress's efforts to implement consensus- and evidence-based transpartisan measures to partially address the overincarceration epidemic plaguing the federal criminal justice system. The decision below is contrary to the commonsense policy decisions Congress has made. And for no good reason.

All that is at issue here is whether federal district courts' hands are tied to exercise discretion on a case-by-case basis to reduce sentences for a finite, ever-dwindling universe of individuals society has all but

given up on.[2] And only a subset of these individuals should receive a reduced sentence. But that does not mean that this subset of incarcerated persons that Section 404 was intended to benefit—who have been incarcerated for over a decade—do not deserve to have a court take a second look at their sentence, taking into account post-sentencing conduct. *Cf. United States v. Bendolph*, 409 F.3d 155, 177 (3d Cir. 2005) (en banc) (Nygaard, J., concurring in part and dissenting in part) ("I constantly counsel myself and my law clerks that somewhere in the mass of . . . pro se habeas petitions, there is another Clarence Earl Gideon, or one of the other faceless names for whom we do issue the Great Writ. Searching for those meritorious petitions is not only our duty, it is one of our most important."). Allowing these individuals to languish in prison even one more day than they should is simply wrong. *See Glover v. United States,* 531 U.S. 198, 203 (2001); *see also Rosales-Mireles v. United States,* 138 S. Ct. 1897, 1907 (2018) ("prospect of additional time behind bars is not some theoretical or mathematical concept" and "has exceptionally severe consequences for the incarcerated individual and for society" (citations omitted)).

It is important to understand that Section 404 of the FSA does *not* require federal district courts to

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[2] The government agrees that "the question presented concerns only the antecedent issue of eligibility for a sentence reduction. The First Step Act makes any sentence reduction for a covered offense discretionary[.]" BIO 28. Underscoring the absence of floodgates concerns here if this Court reverses the decision below, the government itself has highlighted "the shrinking set of defendants to whom the question could be relevant." BIO 23.

reduce sentences. *See* FSA § 404(b), 132 Stat. at 5222 ("A court . . . *may* . . . impose a reduced sentence[.]" (emphasis added));[3] *see also id.* § 404(c) ("Nothing in this section shall be construed to require a court to reduce any sentence[.]"). Section 404 thereby preserves the district courts' gatekeeping function, ensuring that federal judges retain the ability to protect the public when necessary. Accordingly, federal district courts regularly deny Section 404(b) motions *on the merits* where there *is* evidence that an offender continues to pose a danger to society, has a history of serious violent conduct, has not pursued rehabilitation, or in other appropriate cases.[4] And even where federal district courts elect to grant some relief, retain discretion to determine the appropriate scope of sentence modifications.[5] *But cf. United States v. Boulding*, 960 F.3d 774, 784 (6th Cir. 2020) ("While district courts have wide discretion in the [FSA] context, the resentencing decision must be procedurally reasonable and supported by a sufficiently compelling justification.").

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[3] *Cf. Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1609 (2020) ("[T]he word 'may' *clearly* connotes discretion." (cleaned up)).

[4] *See, e.g., United States v. Moore,* 975 F.3d 84, 92–93 (2d Cir. 2020) (affirming denial of Section 404(b) motion based on defendant's post-conviction disciplinary record); *United States v. Spells*, No. 19-3205-cr, 2020 U.S. App. LEXIS 35201 (2d Cir. Nov. 6, 2020) (same); *United States v. Ruffin*, No. 17 CR 136 (VM), 2020 U.S. Dist. LEXIS 63231, at *8–9 (S.D.N.Y. Apr. 9, 2020); *United States v. Mehmeti*, No. 09-CR-00165 (ILG), 2020 U.S. Dist. LEXIS 92505 (E.D.N.Y. May 26, 2020).

[5] *See, e.g., United States v. Hardnett,* 417 F. Supp. 3d 725, 743–46 (E.D. Va. 2019).

This is consistent with Section 404's plain text and structure. Section 404 was not meant to provide a get-out-of-jail-free card for inmates who have shown a pattern of continuing to commit violent acts or other significant disciplinary infractions while in prison, or who were also convicted of other serious violent acts, merely because by happenstance they were also convicted of a "covered offense."[6]

But Section 404 does provide a procedural mechanism that partially addresses at least two interrelated problems with the federal sentencing regime: shameful sentencing disparities that disproportionately and arbitrarily impact certain communities, *see also Dorsey v. United States,* 567 U.S. 260 (2012), as well as the general inability of federal district courts to do anything to modify unjust sentences (including but not limited to those driven by mandatory minimums) to account for changes in the law and, perhaps more importantly, changes in the defendant's character evidencing rehabilitation.

Generally, federal district "court[s] may not modify a term of imprisonment once it has been imposed[.]" 18 U.S.C. § 3582(c); *see also Dillon v. United States*, 560 U.S. 817, 824 (2010). As a result, prior to the FSA's enactment in 2018, "in federal cases, judges rarely had the chance to take a second look at the prison sentences they (or their colleagues) imposed."

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[6] The FSA's full title underscores the Act's emphasis on *both* rehabilitation and protecting public safely. *See United States v. Vigneau*, 473 F. Supp. 3d 31, 2020 U.S. Dist. LEXIS 129768, at *5 (D.R.I. 2020) (noting full title: "Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act").

Sarah French Russell, *Second Looks at Sentences Under the First Step Act*, 32 Fed. Sent. R. 76 (2019). The problem with this "truth-in-sentencing" regime is that federal district courts generally lack discretion to modify sentences on the back-end to account for defendants' rehabilitation, even though rehabilitation is one of the four traditional justifications for punishment and incorporated into the Section 3553(a) factors. *See id.*; 18 U.S.C. § 3553(a)(1).

The FSA *partially* solved this problem in at least two respects. First, the FSA amended 18 U.S.C. § 3582(c)(1)(A) to allow inmates to directly petition federal district courts for compassionate release after exhausting administrative remedies. *See United States v. Brooker,* 976 F.3d 228, 233 (2d Cir. 2020); Hopwood, 41 Cardozo L. Rev. at 100–111. Second, Section 404 grants incarcerated persons sentenced for "covered offenses" the ability to petition for a reduced sentence. *See* FSA § 404(b), 132 Stat. at 5222.

B. Section 404 Authorizes District Courts to Apply the Section 3553(a) Factors Afresh, Taking Into Account Post-Sentencing Conduct and Efforts at Rehabilitation.

So long as an incarcerated person was sentenced in connection with a "covered offense,"[7] Section 404

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[7] The weight of authority suggests that Section 404 relief should be available in cases involving hybrid convictions. *See United States v. Gravatt,* 953 F.3d 258, 264 (4th Cir. 2020) ("If Congress intended for the Act not to apply if a covered offense was

provides a procedural vehicle to seek a reduced sentence based, in part, on *post-sentencing rehabilitative conduct*. *See, e.g., United States v. Rose,* 379 F. Supp. 3d 223, 233 (S.D.N.Y. 2019) ("The text of the First Step Act, read in conjunction with other sentencing statutes, requires the Court to consider all relevant facts, including developments since the original sentence."). *Cf. United States v. White*, 984 F.3d 76, 2020 U.S. App. LEXIS 40546, at *28–31 (D.C. Cir. 2020) (district court erred by failing to consider post-incarceration rehabilitation efforts). This makes sense because, as this Court has explained, "evidence of postsentencing rehabilitation may be highly relevant to several of the Section 3553(a) factors that Congress has expressly instructed district courts to consider at sentencing. For example, evidence of postsentencing rehabilitation may plainly be relevant to 'the history and characteristics of the defendant.'" *Pepper v. United States*, 562 U.S. 476, 491 (2011) (quoting 18 U.S.C. § 3553(a)(1)).[8]

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combined with an offense that is not covered, it could have included that language. But it did not."); *United States v. Hudson*, 967 F.3d 605, 611 (7th Cir. 2020); *United States v. Mitchell*, No. 19-1984, 2020 U.S. App. LEXIS 32726, at *8-9 (6th Cir. Oct. 16, 2020) (Stranch, J., concurring) ("[O]ur sister circuits that have considered it have uniformly found defendants with hybrid convictions eligible for First Step Act relief.").

[8] To be sure, there are instances where post-sentencing rehabilitative conduct may not outweigh the severity of the underlying criminal conduct apart from the "covered offense." *See, e.g., United States v. Morales,* No. 3:94-cr-112 (SRU), 2020 U.S. Dist. LEXIS 151584, at *15 (D. Conn. Aug. 20, 2020) (denying § 404(b) motion on the merits based on defendant's multiple murder convictions).

In other words, Section 404 does not operate mechanistically to automatically reduce sentences but rather offers a *chance* at a second chance—a second look—which is all that Mr. Terry is asking for. *See also United States v. Beamus*, 943 F.3d 789, 792 (6th Cir. 2019) ("The First Step Act ultimately leaves the choice whether to resentence to the district court's sound discretion."). Section 404 allows courts to apply the § 3553(a) factors afresh, as well as take into account what the defendant has done *after* being sentenced to rehabilitate him or herself and make amends. *See also White*, 2020 U.S. App. LEXIS 40546, at *27–28 ("Every circuit court that has examined the issue has held that a district court may, or must, consider the 18 U.S.C. § 3553(a) sentencing factors[,] . . . includ[ing] consideration of the defendant's post-sentencing behavior." (citations omitted)). Indeed, "the First Step Act contemplates a baseline of process that must include," among other things, "renewed consideration of the 18 U.S.C. § 3553(a) factors[.]"*Boulding*, 960 F.3d at 784–85; *see also United States v. Easter,* 975 F.3d 318, 323 (3d Cir. 2020) ("The text of both § 3582(c)(1)(B) and § 404(b) of the First Step Act support the holding that when deciding a motion for a reduced sentence pursuant to the First Step Act, a District Court must consider the § 3553(a) factors.").

This is a feature, not a bug. As one federal district court persuasively explained:

> A sentencing court must sentence the *defendant*, not the crime . . . . When resentencing is permitted by statute, allowing a court to look only at the covered offense, and not the entirety of

> the circumstances, undermines the great responsibility a sentencing court undertakes—to impose a fair sentence upon the defendant.

United States v. Medina, No. 05-58, 2019 U.S. Dist. LEXIS 137521, at *15–16 (D. Conn. July 17, 2019) (cleaned up). *See also United States v. Hudson*, 967 F.3d 605, 611 (7th Cir. 2020) ("Sentences for covered offenses are not imposed in a vacuum, hermetically sealed off from sentences imposed for non-covered offenses. Nor could they be.").[9]

Thus, Section 404 does not operate as a get-out-of-jail-free card, automatically granting reduced sentences. But by providing defendants like Mr. Terry a *chance* at a second chance, Section 404 authorizes courts to reduce disproportionate and fundamentally unjust sentences in appropriate cases. *See, e.g., United States v. Benson,* No. 08-135, 2020 U.S. Dist. LEXIS 241722, at *14 (E.D. Tenn. Dec. 23, 2020) (reducing sentence to time served and three years supervised release "[i]n light of defendant's post-sentencing conduct and his seemingly low risk of recidivism"); *United States v. Fields,* No. 08-11, 2020 U.S. Dist. LEXIS 102769, at *11–13 (N.D. Ind. June

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[9] The Circuits are divided on the extent to which Section 404 grants courts discretion to engage in plenary resentencing. *See* Sarah E. Ryan, *Judicial Authority Under the First Step Act: What Congress Conferred Through Section 404*, 52 Loy. U. Chi. L.J. 67, 92–109 (2020); Pet. for a Writ of Certiorari, *Bates v. United States*, 20-535 (filed Oct. 20, 2020). This Court should grant cert in *Bates* to resolve this related Circuit split.

11, 2020) (similar); *United States v. Young,* No. 02-078, 2020 U.S. Dist. LEXIS 217894, at *14 (E.D. Tenn. Nov. 20, 2020); *United States v. Davis,* 423 F. Supp. 3d 13, 17 (W.D.N.Y. 2019).

C. The Government's Reading of Section 404 is Difficult to Square with the Section 3553(a) Factors.

A proper textual construction of Section 404(a) to extend to Mr. Terry and those similarly situated is not only consistent with the FSA's plain language but also provides a mechanism to better align their sentences with the Section 3553(a) factors.[10] This is at least a small step toward better tethering certain sentences to the four traditional justifications for imposing punishment in the first place: rehabilitation, deterrence, retribution, and incapacitation.

First, imposition of a new sentence allows a court to take into account what, if any, steps an incarcerated person has taken to rehabilitate while in prison. *See also* 18 U.S.C. § 3553(a)(1) ("The court . . . shall consider . . . the history and characteristics of the defendant[.]"). Someone like Mr. Terry who has been incarcerated for over a decade may well be a very different person today. After all, he was arrested when he was only 19 years old, and his sentence was dramatically enhanced based on two drug-related convictions when he was a minor. *See* Pet. Br. 10–11. Since then, he has earned his GED as well as

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[10] Section 3553(a) requires courts to impose "a sentence sufficient, but not greater than necessary" based on consideration of statutorily specified factors. 18 U.S.C. § 3553(a).

completed substance abuse coursework, and, by all indications, has strong family support and a job lined up, as he studied for his commercial truck driving license. *See* Dist. Ct. Dkt. No. 47 at 7–9 & Ex. 1.

Incarcerated persons who have made mistakes (even many or very bad mistakes) in their teenage years or early twenties often, though not always, are able to change for the better over time, and when they are in their thirties or forties have addressed the issues that led them to make those mistakes. *See* Marc Mauer, *Long Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. Rev. 114 (2018) (discussing "aging out" of crime).[11] Put simply, they have long ago learned their lesson, and continued incarceration would have no rehabilitative benefit. Indeed, as Professor Hopwood has observed: "Several studies have concluded that more prison time doesn't equal more success; longer terms of imprisonment do not reduce the likelihood of reoffending. . . . Long sentences of incarceration can actually increase crime because incarceration is criminogenic[.]" Hopwood, 41 Cardozo L. Rev. at 93. "By imprisoning so many people for so long, we've made it harder for them to develop skills and find employment after their release—controlling, rather than empowering, or at least rehabilitating, them." *Believe in People*, 211.

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[11] *See also* Office of the Inspector General, U.S. DOJ, The Impact of an Aging Inmate Population on the Federal Bureau of Prisons, i, iii (Rev. Feb. 2016) (finding that "aging inmates are more costly to incarcerate than their younger counterparts due to increased medical needs" and that "the rate of recidivism of aging inmates is significantly lower").

Second, it is hard to see how allowing Mr. Terry and those similarly situated to continue to languish in prison based on an outdated sentencing scheme long ago repealed would in any way have a deterrent effect. *Cf.* 18 U.S.C. § 3553(a)(2)(B) (requiring consideration of "the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct"). As a federal district court recently observed in the compassionate-release context, there is "an ever-increasing body of research that questions the effectiveness of imprisoning convicted defendants for a period greater than reasonably necessary." *United States v. Vigneau*, 473 F. Supp. 3d 31, 2020 U.S. Dist. LEXIS 129768, at *17 (D.R.I. July 21, 2020) (citing Mauer, 87 UMKC L. Rev. at 114 (collecting governmental and non-governmental works on the minimal effect of long federal prison sentences)). It is increasingly evident that "lengthy prison terms for federal offenses have become counterproductive for promoting public safety"; "punitive sentences add little to the deterrent effect of the criminal justice system; and mass incarceration diverts resources from program and policy initiatives that hold the potential for greater impact on public safety." Mauer, 87 UMKC L. Rev. at 121. Indeed, "economists and scholars are increasingly clear that there is little convincing evidence that at today's margins in the US, increasing the frequency or length of sentences deters aggregate crime." Hopwood, 41 Cardozo L. Rev. at 98.

Third, as to incapacitation, true enough, in some cases, where, for example, a defendant with a "covered offense" has shown a recent propensity toward engaging in misconduct and violence while incarcerated, federal judges have discretion to take

into account any further need to incapacitate a truly dangerous defendant in determining whether to grant a sentence reduction. *See* 18 U.S.C. § 3553(a)(2)(C) (requiring consideration of need "to protect the public from further crimes of the defendant"). And, as discussed above, not every Section 404(b) motion involving a "covered offense" should be granted. "But to the extent that incarceration is imposed primarily for incapacitation, judges and policymakers should be cognizant that each successive year of incarceration is likely to produce diminishing returns for public safety." Mauer, 87 UMKC L. Rev. at 122. And again, Section 404 provides a mechanism for judges to take this consideration into account on the back end, factoring in post-incarceration conduct, on a case-by-case basis and deny Section 404(b) motions in appropriate cases to protect the public.

Fourth, courts must consider "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense[.]"[12] 18 U.S.C. § 3553(a)(2)(A). But the retributive purpose of punishment can also be addressed on a case-by-case basis. *See Morales*, 2020 U.S. Dist. LEXIS 151584, at *15 (denying Section 404(b) motion despite defendant's rehabilitative efforts, in light of severity of underlying criminal conduct). And it is hard to see

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[12] While some period of incarceration was warranted in Mr. Terry's case, by all appearances the sentence he received was anything but just, particularly given that the enhancements that rendered his Guidelines range substantially higher were drug offenses he committed as a minor. *See* Pet. Br. 10–11. And he was caught with less than four grams of crack. Pet. App. 8a n.3.

how that justification would apply here to bar *less culpable* low-level crack offenders from relief that is available to *more culpable* crack kingpins.

More broadly, as Professor Hopwood has observed:

> It is difficult, if not impossible, to determine who, after having been convicted of a serious crime, has the capacity to become rehabilitated and redeemed. . . .
>
> There is little reason to continue warehousing people who have been adequately punished by serving long sentences, and who are no longer a danger to society. The social costs to the families left behind, the loss of human capital and productivity, and the need to give people a second chance at redemption all favor identifying [these] people . . . and releasing them.

Hopwood, 41 Cardozo L. Rev. at 119. This resonates here and captures a core theme of the FSA as a whole. On top of these societal costs caused by the problem of overincarceration, it is also a waste of resources.[13]

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[13] *See* U.S. DOJ, Federal Prison System FY 2019 Performance Budget, at 2 (FY 2016 chart showing that cost per inmate ranges between over $20,000 per year to well above $60,000 per year, depending on nature of facility), https://www.justice.gov/jmd/page/file/1034421/download.

"We all benefit when people are given a second look at an opportunity for a second chance." Hopwood, 41 Cardozo L. Rev. at 119–120. "About 95 percent of those who are incarcerated will be released, and it's in everyone's interest that they be able to succeed, rather than blocked from contributing." *Believe in People*, 211. But fortunately, Mr. Terry's interpretation of Section 404 is not merely good public policy that Congress *should* enact, it is good public policy that Congress *did* enact, as reflected in the statute's plain language and structure. That should end the matter.

II. SECTION 404 COVERS 21 U.S.C. § 841(B)(1)(C) CRACK OFFENDERS.

The government has mistakenly advocated for a cramped reading of Section 404 to add atextual limitations that are foreclosed by its plain text.[14] This Court should reject the government's reading of Section 404 as a straightforward matter of statutory interpretation. *See* Pet. Br. 14–34. *See also United States v. Woodson*, 962 F.3d 812 (4th Cir. 2020); *United States v. Smith*, 954 F.3d 446 (1st Cir. 2020); *United States v. Hogsett*, 982 F.3d 463 (7th Cir. 2020). *Cf. White*, 984 F.3d 76, 2020 U.S. App. LEXIS 40546, at *18–19. There is no evidence, textual or otherwise, that Congress cryptically and illogically excluded a subclass of low-level crack dealers, while granting relief to both more culpable and less culpable crack offenders, all of whom were sentenced prior to the

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[14] Oddly, the government also advocates for sweepingly broad interpretations of criminal statutes. *See, e.g., Kelly v. United States,* 140 S. Ct. 1565 (2020); *Yates v. United States*, 574 U.S. 528, 536 (2015); *Bond v. United States*, 572 U.S. 844, 862 (2014).

enactment of the Fair Sentencing Act. The point of Section 404, after all, was to grant district courts discretion to remedy arbitrary sentencing disparities.

For the reasons set forth in Petitioner's principal brief, this should not be a close case, and the Government's atextual interpretation of Section 404 should be rejected. However, even if it were otherwise, and the Government's reading of Section 404 was at all plausible, application of the traditional tie-breaker canons of lenity and constitutional avoidance resolve any doubts in favor of Petitioner.

A. The Government's Interpretation of Section 404 is so Arbitrary as to Raise Equal Protection Questions.

As a thought experiment, consider the implications of the government's interpretation of Section 404(a) through the lens of equal protection. By way of analogy, the government's position that the FSA treats low-level crack dealers worse than crack kingpins would be as if the felony-murder doctrine not only exposed the get-away driver from an armed robbery gone wrong to the same liability as the robber who killed someone, but would perversely treat the get-away driver worse than the shooter. Or consider the *Pinkerton* doctrine:[15] even if one accepts that doctrine's premise, it would seem odd to expose a person tangentially involved in a conspiracy to *worse* criminal consequences than the ringleaders who committed the majority of the overt acts. That makes no sense. The extent to which the government's

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[15] *See generally Pinkerton v. United States*, 328 U.S. 640 (1946).

preferred construction of Section 404(a) is at odds with the statutory text, context, and structure, and in tension with common sense, is underscored when the implications are explored through this lens.

If Section 404(a) of the FSA is construed to apply to more serious crack distribution offenses but not the most minor crack distribution offenses, there is a serious question whether such a construction might implicate the Fifth Amendment Due Process Clause's equal protection component.[16] *See generally Chapman v. United States*, 500 U.S. 453, 464–65 (1991). While the Due Process Clause precludes imposition of punishment based on entirely arbitrary distinctions, a federal sentencing statute survives an equal protection challenge so long as "Congress had a rational basis for its choice of penalties." *Id.* at 465. That is not a demanding standard. Nor should it be. "[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," and "a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns*, 508 U.S. 307, 313 (1993).

Accordingly, this Court has found imposition of harsher sentences based upon distribution of *larger*

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[16] AFPF is not suggesting that the government's interpretation of Section 404 would necessarily rise to the level of a constitutional violation. Rather, AFPF seeks to underscore why the most natural reading of the statute supports Petitioner.

quantities of drugs passes muster under the rational basis test. *See Chapman*, 500 U.S. at 465 ("Congress had a rational basis for its choice of penalties for LSD distribution. . . . *It assigns more severe penalties to the distribution of larger quantities of drugs*." (emphasis added)). And this Court has suggested Congress may, consistent with the equal protection component of the Due Process Clause, assign *the same* penalties for possession of *any* quantity of drug, eschewing any individual culpability analysis. *See id.* at 466–67. But that is not the distinction drawn here under the government's interpretation, which would treat offenders sentenced under the 1986 Anti-Drug Abuse Act's penalty scheme for distributing *greater* quantities of crack *more favorably* than the lowest level offenders caught with *smaller* quantities.

In an effort to explain away this anomalous result, the government suggests the rationale for Section 404's disparate treatment of lower-level crack offenders was that the FSA solely concerned individuals sentenced to mandatory minimums. *See* BIO 12–14. But that makes no sense. To begin with, "Congress did not limit the First Step Act to statutes imposing mandatory minimums or to offenders sentenced to mandatory minimums." *Woodson*, 962 F.3d at 817.[17] If it were otherwise, this would mean

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[17] Congress is presumed to legislate against the backdrop of existing law. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 698–99 (1979). Sections 2 of the Fair Sentencing Act, which is referenced in Section 404(a), was not aimed at mandatory minimums per se but rather partially remedying the 100:1 crack-to-powder cocaine

that the most culpable crack kingpins sentenced under 21 U.S.C. § 841(b)(1)(A)(iii) would be eligible for relief, while low-level dealers sentenced under 21 U.S.C. § 841(b)(1)(C) would not. And as the First Circuit put it: "[W]e think it most unlikely that Congress intended to deny sentencing relief to defendants guilty of distributing small quantities of crack cocaine while allowing relief for those defendants guilty of distributing larger amounts whose original sentences were not driven by the mandatory minimum." *Smith,* 954 F.3d at 451.

Such an anomalous result is even more counterintuitive given that Section 404 does not operate mechanistically to automatically reduce crack-related penalties to post-Fair Sentencing Act levels even for defendants whose sentences *were* driven by mandatory minimum penalties. Instead, it unshackles the district courts to holistically apply the Section 3553(a) factors, taking into account post-sentencing conduct. After all, Section 404(b) relief is *discretionary*: a district court "may . . . impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed." FSA § 404(b).

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sentencing disparities. Hence, its title: "Cocaine Sentencing Disparity Reduction." *See* Fair Sentencing Act § 2(a), Pub. L. No. 111-220, 124 Stat. 2372, 2372 (2010). Tellingly, Section 2 did not alter or eliminate *any* of the mandatory minimum penalties in 21 U.S.C. § 841(b)(1) but instead only raised the quantities necessary to trigger those penalties. *See Dorsey*, 567 U.S. at 269.

Buttressing this conclusion, Section 404 also applies to the least serious crack offense of simple possession.[18] Therefore, to accept the government's conclusion that 21 U.S.C. § 841(b)(1)(C) is not a "covered offense," one must conclude—without any textual evidence—that a statute granting relief to more culpable *and* less culpable offenders but somehow singling out a middle category of low-level dealers reflects a rational choice. It doesn't.

It is hard to conceive of a more arbitrary distinction. Why would Congress enact a statute that swept broadly enough to grant relief to crack kingpins, on the one hand, and crack users, on the other, but narrowly excised low-level crack dealers? It makes no sense for Congress to have silently singled out a random subset of lower-level crack offenders to bar from a *chance* to even petition the courts to take a second look at their sentences through the lens of the Section 3553(a) factors. And why would it do so in such a cryptic fashion, diverging sharply from the traditional approach to assigning harsher penalties based on possession of greater quantities of drugs? Whether this approach would rise to the level of an equal protection violation under the rational basis standard is far from clear. There is no need to reach this question, as the Government's cramped reading

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[18] Section 3 of the Fair Sentencing Act did eliminate the 5-year mandatory minimum for simple possession in violation of 21 U.S.C. § 844(a). *See Dorsey*, 567 U.S. at 269. But this simply reflects Congress's decision to partially remedy the crack-to-powder cocaine sentencing disparity, and is not evidence that Section 404 cuts off relief for those sentenced under 21 U.S.C. § 841(b)(1)(C).

of Section 404(a) is contrary to the statute's plain language, structure, purpose, and context, and should be rejected on that basis. But if Congress wanted to draw this arbitrary distinction, it should be expected to have clearly said so. It did not.[19]

B. The Rule of Lenity and Constitutional Avoidance Canon Resolve Any Lingering Doubts in Favor of Petitioner.

This case should be resolved in Petitioner's favor based on a straightforward reading of the text, structure, and context of Section 404. But to the extent there are lingering doubts as to why the Government's interpretation of the FSA should be rejected, both the rule of lenity and the constitutional avoidance canon weigh in favor of interpreting Section 404 to extend to sentences imposed pursuant to 21 U.S.C. § 841(b)(1)(C).

To the extent Section 404 is sufficiently ambiguous to be plausibly interpreted to curiously excise 21 U.S.C. § 841(b)(1)(C) from the definition of "covered offense," that reading should be rejected under the

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[19] Section 404(c) of the FSA is titled "LIMITATIONS," FSA § 404(c), 132 Stat. 5194 at 5222. *See also Yates*, 574 U.S. at 552 (Alito, J., concurring in the judgment) ("Titles can be useful devices to resolve doubt about the meaning of a statute." (cleaned up)). It carves out circumstances ineligible for relief under Section 404(b), yet it makes no mention of 21 U.S.C. § 841(b)(1)(C). *See* FSA § 404(c), 132 Stat. 5194 at 5222. *See also* Antonin Scalia & Bryan Garner, Reading Law 107 (2012) ("The expression of one thing implies the exclusion of others[.]"). The district court appears to have recognized that Section 404(c) does not apply here. *See* Pet. App. 10a n.6.

rule of lenity. "[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Yates*, 135 S. Ct. at 1088 (cleaned up). "[T]his principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *see, e.g., United States v. Granderson*, 511 U.S. 39, 56–57 (1994); *see Taylor v. United States*, 495 U.S. 575, 596 (1990). The rule of lenity thus applies with full force to Section 404 to the extent there is any doubt or ambiguity as to whether pre-August 3, 2010 crack offenders sentenced under 21 U.S.C. § 841(b)(1)(C) have a "covered offense."[20]

Under the rule of lenity, "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor. That rule is 'perhaps not much less old than' the task of statutory 'construction itself.'" *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (quoting *United States v. Wiltberger*, 18 U.S. 76, 5 Wheat. 76, 95 (1820) (Marshall, C. J.)).

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[20] Numerous federal district courts have also found the rule of lenity applicable to the FSA. *See, e.g., United States v. Day,* No. 1:05-cr-460-AJT-1, 2020 U.S. Dist. LEXIS 133586, at *19 n.20 (E.D. Va. July 23, 2020) (lenity principle would apply to the FSA); *United States v. McDonald*, No. 09-268, 2020 U.S. Dist. LEXIS 133592, at *9 n.2 (W.D. Pa. July 28, 2020); *United States v. Martin*, No. 03-CR-795 (ERK), 2019 U.S. Dist. LEXIS 103559, at *5 (E.D.N.Y. June 20, 2019) ("Multiple district courts interpreting . . . [§ 404(a)] of the First Step Act have applied the rule of lenity."); *United States v. Holman*, No. 5:04-964, 2020 U.S. Dist. LEXIS 167604, at *5-6 (D.S.C. Sep. 10, 2020).

"This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 178 (1958). Thus, "when there are two rational readings of a criminal statute, one harsher than the other, [courts] are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359–60 (1987). As Justice Scalia explained: "This venerable rule not only vindicates the fundamental principle that no citizen should be . . . subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *United States v. Santos*, 553 U.S. 507, 514 (2008).

Buttressing this conclusion is the doctrine of constitutional avoidance, which often works in a synergistic tandem with the rule of lenity to counsel toward a constitutionally permissible reading of a criminal statute.[21] Under the avoidance canon, "what Congress has written . . . must be construed with an

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[21] "The rule of lenity . . . applies only when, after consulting traditional canons of statutory construction, . . . [the Court is] left with an ambiguous statute." *United States v. Shabani*, 513 U.S. 10, 17 (1994). Likewise, "[t]he canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as a means of choosing between them." *Clark v. Suarez Martinez*, 543 U.S. 371, 385 (2005).

eye to possible constitutional limitations so as to avoid doubts as to its validity." *United States v. Rumely*, 345 U.S. 41, 45 (1953) (cleaned up). "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Applying constitutional avoidance here would be concordant with lenity.

Application of these venerable background rules should be unnecessary. As Petitioner ably explains, *see* Pet. Br. 14–34, the plain language, context, structure, purpose, and history of Section 404 shows that Congress unambiguously mandated that 21 U.S.C. § 841(b)(1)(C) is covered. However, even if it were otherwise, this Court should nonetheless adopt an at least equally textually permissible construction, in line with the U.S. Constitution.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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