No. 20-5904

In the Supreme Court of the United States

TARAHRICK TERRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The court-appointed amicus curiae agrees with many aspects of the government's interpretation of Section 404 of the First Step Act of 2018 (First Step Act), Pub. L. No. 115-391, 132 Stat. 5222. He agrees that a defendant has a "covered offense" so long as Sections 2 or 3 of the Fair Sentencing Act of 2010 (Fair Sentencing Act), Pub. L. No. 111-220, 124 Stat. 2372, "modified" the "statutory penalties" for the defendant's "violation of a Federal criminal statute," First Step Act § 404(a), 132 Stat. 5222. See Court-Appointed Amicus Br. (Amicus Br.) 12-17; Gov't Br. 23. He also agrees that, for a defendant convicted of a drug-distribution crime under 21 U.S.C. 841, the "violation of a Federal criminal statute" includes drug type and quantity trigger under 21 U.S.C. 841(b). See Amicus Br. 7-8; Gov't Br. 23. He further agrees that "[p]etitioner's 'violation' was possession with intent to distribute an unspecified amount of crack cocaine, a violation of 21 U.S.C. §§ 841(a) and

(b)(1)(C)." Amicus Br. 26; see Gov't Br. 23. And—most significantly—he agrees that Section 2 of the Fair Sentencing Act "modified" the "statutory penalties" for "violation[s] of a Federal criminal statute" not by altering any statutory sentencing range as such, but instead by increasing the drug-quantity thresholds necessary to trigger the preexisting ranges. See Amicus Br. 17-20; Gov't Br. 27.

The logical implication of all of those areas of agreement is that Section 2's amendments to the drug-quantity thresholds "modified" the "statutory penalties" not only for offenses under Subparagraphs (A) and (B), but also for the textually and logically intertwined offenses under Subparagraph (C). Amicus implicitly acknowledges (Br. 7-8)—by recognizing that all crack-cocaine offenses under Subparagraphs (A) and (B) are "covered" irrespective of whether they actually involved the reclassified quantities—that an entire class of crack-cocaine offenses is "covered" so long as it includes at least some reclassified quantities. And the class of Subparagraph (C) offenses, which involve an "unspecified amount"—*i.e.*, any amount—of crack cocaine, includes reclassified quantities. The statutory penalties for the entire class were inherently and necessarily affected by the changes to the drug-quantity thresholds, which eliminated enhanced penalties previously applicable to offenses involving 5 to 28 (or 50 to 280) grams of crack cocaine, expanded the exclusive scope of Subparagraph (C), and reshaped the statutory penalties for Section 841 offenses overall.

As this Court recognized in *Dorsey* v. *United States*, 567 U.S. 260 (2012), the Fair Sentencing Act accordingly required changes to sentencing practices under

Subparagraphs (A), (B), *and* (C). Making Subparagraph (C) the only provision applicable to a much wider class of offenders was a critical component of Congress's project to eradicate all traces of the racially disproportionate 100:1 crack-to-powder ratio—the project that Section 404 of the First Step Act is designed to complete. Neither retrospective application of the revised Sentencing Guidelines under 18 U.S.C. 3582(c)(2) nor any other remedy aside from Section 404 is sufficient to accomplish Congress's goal, which applies with even *more* force to low-level offenders like petitioner. This Court should accordingly make clear that petitioner is eligible to be considered for a discretionary sentence reduction.

A. The Fair Sentencing Act Modified The Statutory Penalties For A Violation Of 21 U.S.C. 841(a) And (b)(1)(C)

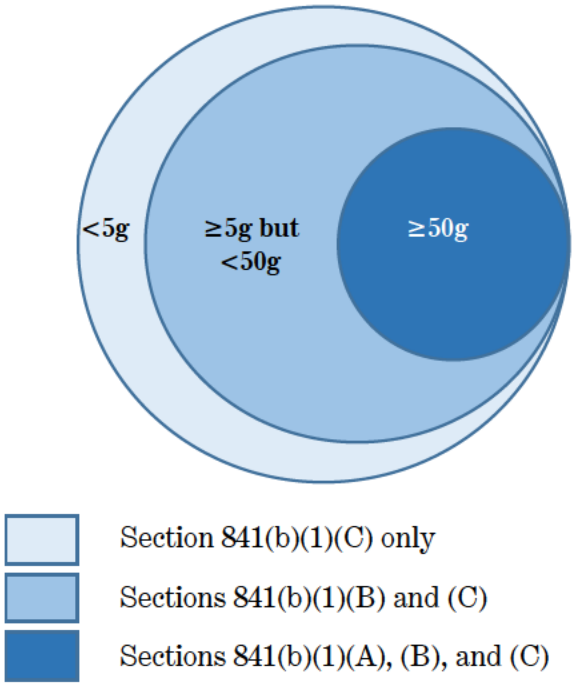
The disagreement between amicus and the government focuses on one issue. Both amicus and the government boil the question in this case down to the same thing—namely, whether the "statutory penalties" for "possession with intent to distribute an unspecified amount of crack cocaine" were "modified" by Section 2 of the Fair Sentencing Act. Amicus Br. 26. The answer to that question is yes.

1. Section 841(b)(1) creates a nested scheme of statutory penalties for drug-distribution offenses. See Gov't Br. 4-5. Subparagraph (C) provides statutory penalties for any violation of Section 841(a) involving a Schedule I or II controlled substance, "except as provided in subparagraphs (A), (B), and (D)." 21 U.S.C. 841(b)(1)(C). Subparagraph (B) authorizes enhanced penalties for offenses otherwise punishable under Subparagraph (C) that involve certain minimum quantities of specified

controlled substances. 21 U.S.C. 841(b)(1)(B). Subparagraph (A) similarly authorizes even further enhanced penalties for offenses otherwise punishable under Subparagraphs (B) or (C) that involve even greater minimum quantities of the same substances. 21 U.S.C. 841(b)(1)(A).

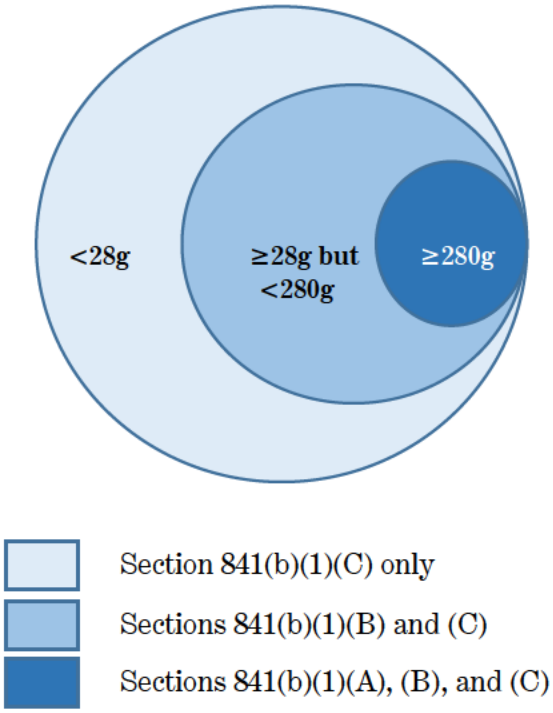
Before the Fair Sentencing Act, offenses involving "50 grams or more" of crack cocaine were punishable under Subparagraphs (A), (B), or (C), and offenses involving "5 grams or more" of crack cocaine were punishable under Subparagraphs (B) or (C). 21 U.S.C. 841(b)(1)(A)(iii) and (B)(iii) (2006). The following Venn diagram illustrates the "statutory penalties" for Section 841 offenses involving an unspecified amount of crack cocaine—*i.e.*, any possible amount of crack cocaine—at that time:

Pre-Fair Sentencing Act



Congress set the equivalent thresholds for powder-cocaine offenses 100 times higher. See 21 U.S.C. 841(b)(1)(A)(ii) and (B)(ii). That stark 100-to-1 disparity had a dramatic, and racially disproportionate, effect on drug sentencing, and Congress ultimately concluded that it had been unwarranted. Gov't Br. 7-11, 32-34. To ameliorate the disparity, Section 2 of the Fair Sentencing Act "reduced the statutory penalties for crack cocaine offenses," U.S. Sent. Comm'n, *Report to the Congress: Impact of the Fair Sentencing Act of 2010*, at 3 (Aug. 2015), by increasing the drug quantities necessary to trigger the enhanced penalties in Subparagraphs (A) and (B) to 280 grams and 28 grams, respectively. 21 U.S.C. 841(b)(1)(A)(iii) and (B)(iii); see Fair Sentencing Act § 2(a), 124 Stat. 2372. The next Venn diagram illustrates the "statutory penalties" for Section 841 offenses involving an unspecified amount of crack cocaine—*i.e.*, any possible amount of crack cocaine—following the Fair Sentencing Act's enactment:

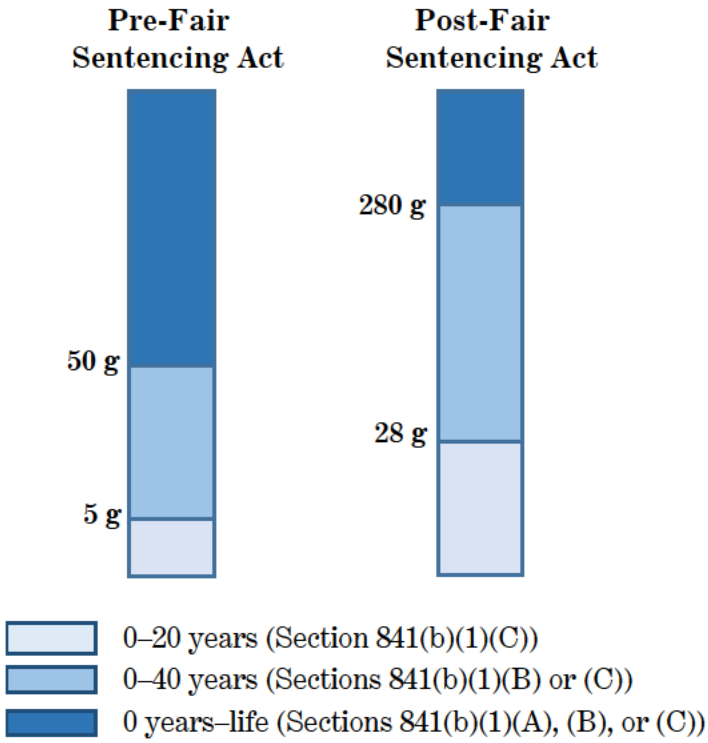
Post-Fair Sentencing Act



Those statutory penalties are different from the prior ones. Before the Fair Sentencing Act, nonrecidivist offenses involving at least 5 grams of crack cocaine (absent a resulting death or serious bodily injury) were punishable by up to 40 years of imprisonment—and, potentially, a 5-year statutory minimum—because *both* Section 841(b)(1)(B) and Section 841(b)(1)(C) could apply. The Fair Sentencing Act raised that threshold from 5 grams to 28 grams. Gov't Br. 10. Similarly, before the Fair Sentencing Act, nonrecidivist offenses involving at least 50 grams of crack cocaine were punishable by up to life imprisonment—and, potentially, a 10-year or 5-year statutory minimum—because *all three* of Sections

841(b)(1)(A), (B), and (C) could apply. After the Fair Sentencing Act, however, those heightened penalties covered only offenses involving 280 grams or more of crack cocaine.

The following bar graph illustrates the shift:



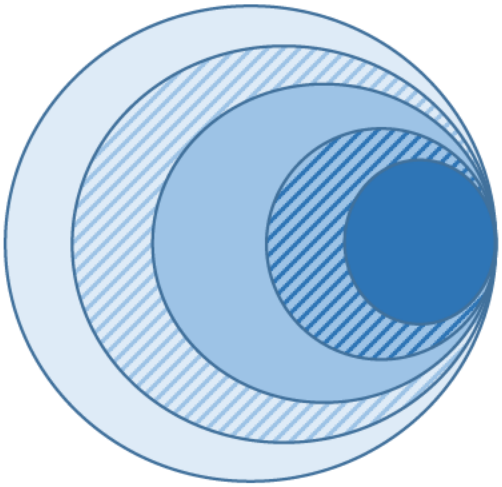
That is, by any reasonable definition of the word, a "modified" set of "statutory penalties." See, *e.g.*, *Webster's Third New International Dictionary of the English Language* 1452 (2002) (defining "modify" as "change[] in the form or structure"). Cf. Amicus Br. 23 n.9 (agreeing that a textual amendment to a particular provision is unnecessary for its statutory penalties to have been modified).

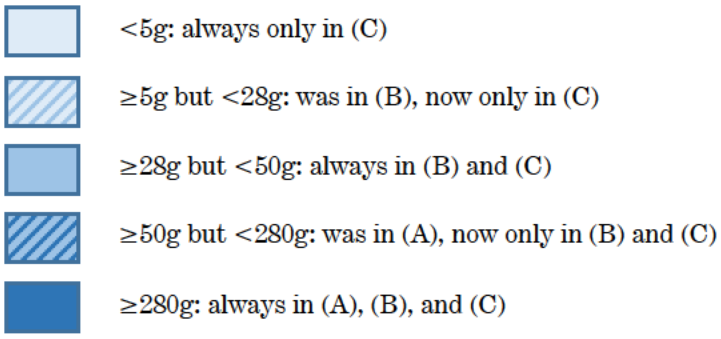
2. Amicus recognizes (Br. 20) that the Fair Sentencing Act "modified" the "statutory penalties" in Section 841(b)(1) not by changing "the prison terms recited in the statutory text" but instead by "moving offenses between the subsections of § 841(b)(1)" through changes in the drug quantities that separate them. But he limits his recognition to offenses covered by Subparagraphs (A) and (B). That limitation is unsound. The same logic that supports including *all* Subparagraph (A) and (B) offenses, even though the Fair Sentencing Act moves only a *portion* of them, compels inclusion of Subparagraph (C) offenses as well.

The only portions of Subparagraph (A)'s and (B)'s coverage that the Fair Sentencing Act directly altered were Subparagraph (B)'s coverage of offenses involving 5 to 28 grams, and Subparagraph (A)'s coverage of offenses involving 50 to 280 grams, of crack cocaine. Both before and after the Fair Sentencing Act, Section 841(b)(1) authorized a sentence anywhere from 0 to 40 years of imprisonment for a basic first-time offense involving 28 to 50 grams of crack cocaine, which was and is covered by both Subparagraph (C), authorizing 0 to 20 years of imprisonment, and Subparagraph (B), authorizing 5 to 40 years of imprisonment. Similarly, first-time offenses involving more than 280 grams of crack cocaine remain within the scope of all three Subparagraphs—(A), (B), or (C)—and thus carry the same possible sentencing range of zero years to life imprisonment (0-20 years under Subparagraph (C), 5-40 years under Subparagraph (B), or 10 years to life under Subparagraph (A)).

The area of pre- and post-Fair Sentencing Act overlap is illustrated in the Venn diagram below:

Pre-Fair Sentencing Act
& Post-Fair Sentencing Act





Only the striped areas have changed; all of the solid areas remain the same.

Even though much of the coverage of Subparagraphs (A) and (B) remains in place, amicus, like every court of

appeals to consider the issue, acknowledges that pre-Fair Sentencing Act offenses under those subparagraphs are nevertheless categorically eligible for a discretionary sentence reduction under the First Step Act. Amicus Br. 7-8; see, *e.g.*, *United States* v. *Boulding*, 960 F.3d 774, 782 (6th Cir. 2020); *United States* v. *Shaw*, 957 F.3d 734, 739 (7th Cir. 2020); *United States* v. *Wirsing*, 943 F.3d 175, 186 (4th Cir. 2019). That makes sense, as it is impossible to determine the precise quantity involved in an offense solely from the language of the statutory provisions supporting the conviction and sentence. The only findings or admissions necessary to bring Subparagraphs (A) or (B) into play were that the "violation * * * involv[ed] * * * 50 grams *or more*," 21 U.S.C. 841(b)(1)(A)(iii) (2006) (emphasis added), or that the "violation * * * involv[ed] * * * 5 grams *or more*," 21 U.S.C. 841(b)(1)(B)(iii) (2006) (emphasis added), of a mixture or substance containing cocaine base. See Amicus Br. 7-8. Because those findings or admissions do not enable specific quantity distinctions among included offenses, amicus's "elements"-focused approach (*e.g.*, Br. 6) encompasses all of them.

The same mode of analysis, which is identical to the government's own in all material respects, applies with full force to offenses under Subparagraph (C).[*] Amicus

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[*] Amicus faults the government for not using the word "element" to describe the drug type and quantity requirements of Section 841(b). See Amicus Br. 22. That does not, however, reflect any substantive disagreement with amicus, but instead the government's efforts at terminological precision. As a threshold matter, although this Court's decisions in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Alleyne* v. *United States*, 570 U.S. 99 (2013), have now clarified that drug type and quantity must be treated as elements for constitutional purposes, Congress would not necessarily have

agrees with the government that Subparagraph (C) does not have a drug-quantity "ceiling." See Amicus Br. 21-22; Gov't Br. 29-31. As a result, a pre-Fair Sentencing Act conviction for a Subparagraph (C) crack-cocaine offense could have involved *any* quantity of crack cocaine. And it is undisputed that the "statutory penalties" for the general class of Section 841 crack-cocaine offenses was "modified" by the Fair Sentencing Act, which altered the boundaries between Subparagraphs (A), (B), and (C) and thus the statutory sentencing exposure for all such offenses.

Amicus's exclusion of Subparagraph (C) offenses as "covered offenses" under Section 404 of the First Step Act is sustainable only if a pre-Fair Sentencing Act Subparagraph (B) or (A) plea or verdict is effectively treated as establishing *only* 5 or 50 grams of crack cocaine. But both subparagraphs expressly include not only those threshold amounts, but also "more." 21 U.S.C. 841(b)(1)(A)(iii) and (B)(iii) (2006). A pre-Fair Sentencing Act defendant could well have been convicted under Subparagraph (B) if his offense involved not just 5 grams, but 100 grams, of crack cocaine—an

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anticipated that when it originally codified them as sentencing factors. In addition, although amicus describes proof of an unspecified amount of crack cocaine as an "element[]" of a Subparagraph (C) offense, *e.g.*, Amicus Br. 8, that is not technically accurate. As relevant here, Section 841(b)(1)(C) requires only proof of "a controlled substance in schedule I or II," 21 U.S.C. 841(b)(1)(C); the exact identity of the substance is thus not an element, but a means through which an element is proved. See *Mathis* v. *United States*, 136 S. Ct. 2243, 2249 (2016) (explaining difference). But the government and amicus agree in substance that the involvement of crack cocaine should be treated as an element for purposes of the crack-focused analysis required by Section 404 of the First Step Act. See Gov't Br. 40-41; Amicus Br. 8.

amount that would still expose him to penalties under Subparagraph (B). But because the precise quantity cannot be determined from the judgment alone, he is eligible for a reduced sentence. See Gov't Br. 16 n.*. As amicus recognizes, so long as a subset of Subparagraph (B) crack-cocaine offenses involve shifted quantities, the "statutory penalties" for the offense as a whole were "modified," and *all* Subparagraph (B) defendants are eligible for a reduced sentence.

On that logic, which the amicus embraces as to Subparagraphs (A) and (B), the "statutory penalties" under Subparagraph (C) were necessarily "modified" as well. An indeterminable subset of Subparagraph (C) crack-cocaine offenses involved shifted quantities. To the extent that amicus would distinguish Subparagraphs (A) and (B) from Subparagraph (C) on the ground that at least some offenders in the former two could no longer remain there today, see Amicus Br. 26, that is a distinction without a difference. Section 404 of the First Step Act does not require the possibility of such reclassification, nor even authorize it as a remedy. Section 404 gives a district court discretion to impose a reduced sentence, not a different conviction. Subparagraph (A) convictions remain Subparagraph (A) convictions, Subparagraph (B) convictions remain Subparagraph (B) convictions, and Subparagraph (C) convictions remain Subparagraph (C) convictions no matter what. And the sentences can remain the same, even if they would be impermissible today—*e.g.*, a life sentence for a first-time offender with only 50 grams of crack cocaine. See First Step Act § 404(c), 132 Stat. 5222. Section 404 simply allows a judge to consider a case-specific, discretionary sentence reduction for a defendant with a "covered of-

fense," defined as a "violation of a Federal criminal statute, the statutory penalties for which were modified" by Section 2 of the Fair Sentencing Act.

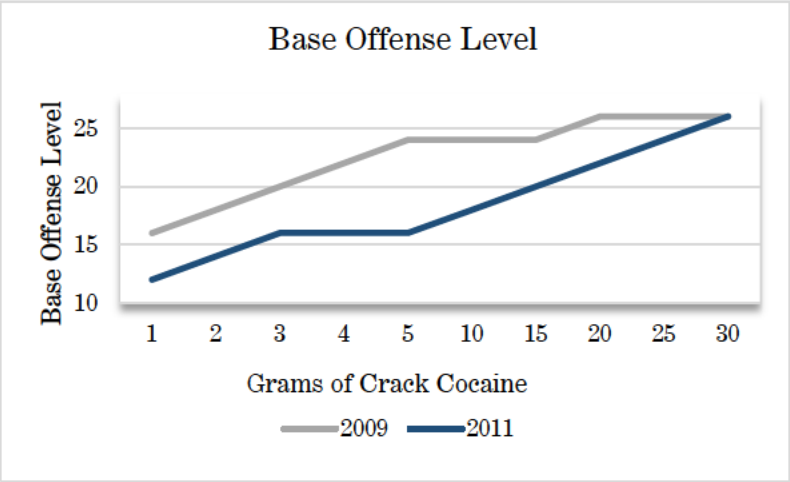
By altering the boundaries between Subparagraphs (A), (B), and (C), Section 2 of the Fair Sentencing Act modified the statutory penalties for crack-cocaine offenses falling within each of those interrelated provisions. The range of offenses covered by Subparagraphs (A) and (B) became smaller, and the range of offenses covered exclusively by Subparagraph (C) became correspondingly larger—a relationship expressly captured by the statutory text of Subparagraph (C), which specifies that its penalties apply "except as provided" in Subparagraphs (A) and (B). 21 U.S.C. 841(b)(1)(C). Amicus never even mentions that explicit textual connection, let alone justifies his unsound Subparagraph (C) carve-out more generally.

3. The Fair Sentencing Act's changes "modif[ying]" the "statutory penalties" for Subparagraph (C) offenses are not just semantic—they have considerable practical import. As a result of those changes, Subparagraph (C) is now the exclusive penalty provision—the provision that applies "except as provided" in Subparagraphs (A) and (B)—for crack-cocaine offenses involving up to 28 grams, rather than up to 5 grams.

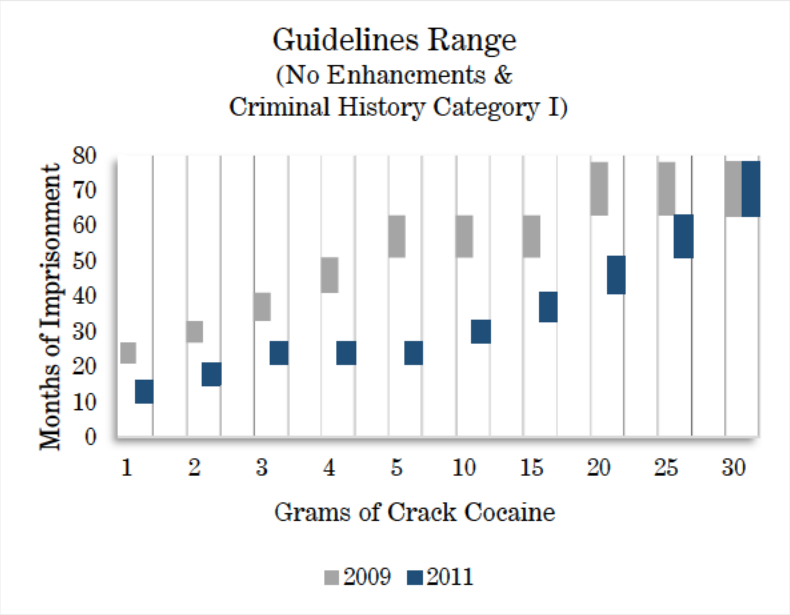
This Court not only recognized, but specifically relied on, the significance of that modification in *Dorsey*. The Court held there that the Fair Sentencing Act's changes to the statutory drug-quantity thresholds applied to every sentencing proceeding after the Act's enactment, irrespective of whether the offense itself was committed before that date. See *Dorsey*, 567 U.S. at 264. One consideration that led the Court to that holding was that a contrary conclusion "would create new

anomalies—new sets of disproportionate sentences—not previously present." *Id.* at 278. That was because the Fair Sentencing Act "require[d] the [Sentencing] Commission to write new Guidelines consistent with the new law," and the "Commission therefore wrote new Guidelines that" affected not only offenses under Subparagraphs (A) and (B), but also offenses under Subparagraph (C). *Ibid.* The Court observed that immediately applying the required across-the-board changes to the Guidelines, while delaying the changes to the statute itself, "would produce a crazy quilt of sentences" that would exacerbate disparities between similar offenders. *Id.* at 279; see *id.* at 278-280.

The Court's understanding that the Guidelines changes mandated by the Fair Sentencing Act would apply to *all* crack-cocaine offenses—under Subparagraphs (A), (B), *and* (C)—reflects the significance of the statutory modification expanding Subparagraph (C)'s exclusive scope. The following graph shows the changes to base offense levels for first-time offenders that the Sentencing Commission "determine[d] necessary to achieve consistency with other guideline provisions and applicable law," Fair Sentencing Act § 8(2), 124 Stat. 2374, once Subsection (C) was the exclusive provision for offenses involving 0-28 grams of crack cocaine, rather than just 0-5 grams:



Those changes to the base offense levels produced stark changes to the basic guidelines ranges, as illustrated in the next graph:



Congress would not have mandated such overarching changes to the guidelines ranges presumptively applicable to all Section 841 crack-cocaine offenses, see Fair Sentencing Act § 8, 124 Stat. 2374, unless it understood the new statutory penalties to encompass all of those offenses—not just Subparagraph (A) and (B) offenses. That same understanding should apply to Section 404 of the First Step Act, which extends the Fair Sentencing Act's modifications to offenders sentenced before the Fair Sentencing Act's enactment. Amicus Br. 31.

B. Categorically Precluding Relief For Low-Level Crack-Cocaine Offenders Would Be Contrary To The Statutory Design And History

Excluding Section 841(b)(1)(C) offenses from eligibility under Section 404 would also be at odds with the statutory design and history of the First Step Act. See Gov't Br. 31-37. Amicus recognizes that Section 404 was "designed to make the Fair Sentencing Act's new ratio *fully* retroactive." Amicus Br. 4 (emphasis added). But amicus errs in contending (Br. 27-34) that Section 404's goal can be achieved if the statute precludes the possibility of discretionary sentence reductions for low-level crack-cocaine offenders who fell within Subparagraph (C). That is because some defendants sentenced for crack-cocaine offenses under Subparagraph (C), like some defendants sentenced under Subparagraphs (A) and (B), would have received a lower sentence if the Fair Sentencing Act had been in effect at the time of their sentencing. While retroactive Guidelines changes afforded some relief in some cases, many defendants sentenced under Subparagraphs (A), (B), and (C) were unable to receive complete relief that way. In enacting Section 404, Congress did not treat those Subparagraph

(A) and (B) offenders *better* than it treated the Subparagraph (C) offenders.

1. The 100-to-1 crack-to-powder ratio affected pre-Fair Sentencing Act sentences in several ways. First, the 100-to-1 ratio was codified in the statutory penalty ranges for crack-cocaine trafficking offenses. Second, the ratio provided the basis for the drug-quantity table that determined the guidelines range for many crack-cocaine offenders. See Sentencing Guidelines § 2D1.1(a)(5) and (c). And third, the ratio informed district courts' exercise of discretion under 18 U.S.C. 3553(a), which directs sentencing courts to consider, among other things, "the nature and circumstances of the offense," "the kinds of sentences available," "the kinds of sentence and the sentencing ranges established" for the crime of conviction, and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(1), (3), (4), and (6).

Each manifestation of the 100-to-1 ratio could have affected, either directly or indirectly, a district court's determination of the appropriate sentence for a Section 841 crack-cocaine offense, whether that offense was punished under Subparagraph (A), (B), or (C). Particularly because Subparagraph (C) may be—and often is—used to prosecute crack-cocaine offenses involving amounts of crack cocaine that could also be prosecuted under Subparagraphs (A) and (B), the ranges and threshold quantities associated with those subparagraphs provided important context for all Section 841 crack-cocaine sentencing. See Gov't Br. 36-37. Most directly, the drug-quantity table determined the advisory guidelines range for many crack-cocaine offenders. See

id. at 6-7. And the 100-to-1 ratio reflected in the enhanced statutory ranges was often relevant to a district court's consideration of the Section 3553(a) factors, such as the sentences of comparable offenders to whom the ratio had been applied. See *id.* at 35.

As the government's opening brief explains (at 9-10), Congress has now recognized that the rationales for the 100:1 ratio were unsound, and that the ratio produced unjustifiable racially disproportionate effects. Fully expunging the explicit and implicit effects of that now-discredited ratio from federal drug sentences requires allowing district courts to consider reducing the sentences of Subparagraph (C), as well as Subparagraph (A) and (B), crack-cocaine offenders. Congress did not limit relief under Section 404 solely to those defendants who were sentenced at or near—or even solely to those subject to—Section 841(b)'s statutory-minimum terms of imprisonment. The First Step Act refers broadly to "statutory penalties," not "minimum" penalties. Section 404 was not directed exclusively at 5-year and 10-year minimum terms (many of which would have run their course by 2018), but instead on *all* of the various ways in which an ongoing crack-cocaine sentence might have been affected by the previous scheme, a concern that applies to Subparagraph (A), (B), *and* (C) offenses.

2. Amicus errs in suggesting (Br. 28) that any effect the now-discredited 100-to-1 ratio had on Section 841(b)(1)(C) defendants' sentences was fully remediated by the Commission's retroactive Fair Sentencing Act amendments to the Sentencing Guidelines. As a threshold matter, had Congress shared that view, it would presumably have included offenders who had sought or received retroactive Guidelines-based sentence reductions under 18 U.S.C. 3582(c)(2) among the

categories of offenders excluded from seeking First Step Act relief. Instead, Congress "explicitly enumerat[ed] certain" exclusions in Section 404(c), but notably omitted the category of offenders who had already sought retroactive Guidelines-based reductions, indicating that an "additional exception[]" encompassing that group of offenders should not be "implied." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001); see Gov't Br. 42. Thus, it is the "most natural reading" of Section 404(c) under well-established principles of statutory interpretation, *TRW*, 534 U.S. at 28, and not some "secret message," Amicus Br. 33 n.10, that counsels in favor of applying Section 404 to offenders who sought or received retroactive relief under the Guidelines. In any event, such application would be warranted even in the absence of Section 404(c), because a Guidelines-based reduction under Section 3582(c)(2) is objectively not an adequate substitute for a possible reduction under Section 404 of the First Step Act.

First, many Section 841(b)(1)(C) offenders were categorically ineligible for relief under Section 3582(c)(2), which is available only when a sentence was "based on" a sentencing range that has subsequently been lowered by the Sentencing Commission. 18 U.S.C. 3582(c)(2). Petitioner's sentence, for example, was not formally "based on" such a range, because his range was calculated under the career-offender guideline, Sentencing Guidelines § 4B1.1, rather than the retroactively amended drug-quantity table, *id.* § 2D1.1. But an inability to satisfy the "based on" prerequisite does not mean that the retroactive Guidelines amendments removing the 100-to-1 ratio were necessarily "irrelevant" (Amicus Br. 30) to such a sentence. When assessing the

appropriate sentence for a drug-trafficking offense, district courts regularly consider the difference between the career-offender guideline range and the range that would apply under the drug-quantity table. As the Sentencing Commission has informed Congress, "[d]rug trafficking only career offenders were most likely to receive a sentence below the guideline range (often at the request of the government), receiving an average sentence (134 months) that is nearly identical to the average guideline minimum (131 months) that would have applied to those offenders through the normal operation of the guidelines." See U.S. Sent. Comm'n, *Report to the Congress: Career Offender Sentencing Enhancements* 3 (Aug. 2016).

Sentencing courts regularly make the discretionary determination that the appropriate sentence for a career offender should more closely track the drug-quantity table. See, *e.g.*, *United States* v. *Williams*, 435 F.3d 1350, 1354-1355 (11th Cir. 2006) (per curiam) (affirming 52% downward variance from the career-offender guideline range in light of the drug-quantity table); *United States* v. *Vigorito*, No. 04-cr-11, 2007 WL 4125914, at *7 (N.D. Ohio Nov. 20, 2007) (finding "tripling effect" of career-offender guideline "contrary to the purposes of § 3553(a)(2)"); Sent. Tr. at 16, *United States* v. *Givens*, No. 08-cr-293 (M.D. Fla. Feb. 24, 2009) (reasoning that "the career offender provisions in the guidelines really overstate the seriousness of the offense and the defendant's criminal history" because otherwise "the sentencing range would have been 24 to 30 months"). In at least some of those cases, the district court presumably would have imposed an even shorter sentence had it compared the career-offender range to the post-Fair

Sentencing Act drug-quantity table, rather than the drug-quantity table that incorporated the old 100-to-1 ratio.

Second, some Section 841(b)(1)(C) offenders whose sentences were directly based on the drug-quantity table, and therefore were eligible for a Section 3582(c)(2) reduction, were nevertheless precluded from fully remediating the effects of the 100-to-1 crack-to-powder ratio. Any reduction under Section 3582(c)(2) must be "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(2). And at the same time that it made the Fair Sentencing Act changes to the Guidelines retroactive, the Commission also "confine[d] the extent of the reduction authorized," *Dillon* v. *United States*, 560 U.S. 817, 827 (2010), by prohibiting a reduction below the bottom of the amended guidelines range unless the defendant provided substantial assistance to the government. See Sentencing Guidelines § 1B1.10(b)(2)(B) (2011); *id.* App. C, Amend. 759 (Nov. 1, 2011). As a result, many defendants whose original sentences varied below the guidelines range that incorporated the 100:1 ratio could not, in a Section 3582(c)(2) proceeding, receive a comparable variance from the amended guidelines range that had been scrubbed of that ratio.

Consider, for example, a crack-cocaine offender originally sentenced below the pre-Fair Sentencing Act drug-quantity table guideline because his criminal history category overstated the seriousness of his prior crimes. If he later sought a sentence reduction under Section 3582(c)(2) to account for the Fair Sentencing Act amendments to the Guidelines, he could not receive a similar reduction below the amended guidelines range. See, *e.g.*, *United States* v. *Berberena*, 694 F.3d 514, 519 (3d Cir. 2012) ("Berberena's motion was denied

because his original sentence of 135 months was at the bottom of the new range."), cert. denied, 568 U.S. 1201 (2013); *United States* v. *Colon*, 707 F.3d 1255, 1258 (11th Cir. 2013) (district court "concluded that Amendment 759 prevented the use of Amendment 750 to reduce Colon's sentence any further below the amended guidelines range"). The district court would instead be limited to a sentence higher than the sentence that it would have the discretion to impose on a post-Fair Sentencing Act offender. See, *e.g.*, *United States* v. *Montanez*, 717 F.3d 287, 294 (2d Cir.) (per curiam) (noting that a "criminal history category that exaggerates a defendant's past crimes during an initial sentencing will continue to do so at a reduction proceeding"), cert. denied, 517 U.S. 963, and 134 S. Ct. 447 (2013).

Finally, until the enactment of the First Step Act, all Section 3582(c)(2) proceedings for crack-cocaine trafficking offenses occurred in the shadow of the *pre*-Fair Sentencing Act statutory penalty ranges. See Gov't Br. 42-43. Although amicus would dismiss (Br. 31) the potential effect of those ranges on Subparagraph (C) offenders as "evidence-free speculation," numerous federal judges—including amici here, see Retired Fed. Judges Amici Br. 6-9—have explained that "statutory benchmarks likely have an anchoring effect on a sentencing judge's decision making." *United States* v. *White*, 984 F.3d 76, 87 (D.C. Cir. 2020) (citation omitted); see *United States* v. *Woodson*, 962 F.3d 812, 817 (4th Cir. 2020); *Shaw*, 957 F.3d at 741-742; *United States* v. *Smith*, 954 F.3d 446, 451 (1st Cir. 2020). That first-hand evidence is consistent with Section 3553(a)'s command that district courts consider "the kinds of sentences available" and "the need to avoid unwarranted sentence disparities among defendants with similar records who

have been found guilty of similar conduct." 18 U.S.C. 3553(a)(3) and (6). Yet amicus's approach would preclude a court from even considering whether an anchoring effect from the old 100:1 ratio continues to distort a particular defendant's sentence.

3. In enacting Section 404 of the First Step Act, Congress "purposefully excised reductions related to the Fair Sentencing Act from the realm of [S]ection 3582(c)(2), thereby relieving [S]ection 404(b) proceedings" from the constraints of Section 3582(c)(2). *United States* v. *Concepcion*, 991 F.3d 279, 291 (1st Cir. 2021). Because Section 404 does not turn on whether the previous sentence was "based on" the drug-quantity table, it permits relief for career offenders. See, *e.g.*, *United States* v. *Beamus*, 943 F.3d 789, 791 (6th Cir. 2019) (per curiam). Because Sentencing Commission policy statements do not control the scope of Section 404 reductions, a "district court considering [a Section 404] motion is not constrained" by the new amended guidelines range. *United States* v. *Holloway*, 956 F.3d 660, 667 (2d Cir. 2020). And because any sentence reduction occurs "as if" the Fair Sentencing Act was in effect when the defendant's offense was committed, the district court need not consider how the previous statutory ranges affected other crack-cocaine offenders, or former sentencing practices in general.

In practice, more than half of the defendants—Subparagraph (A) or (B) offenders, or in some circuits, Subparagraph (C) offenders—who have received a reduced sentence under Section 404 have been career offenders, and 28.7% have received below-guidelines sentences. See U.S. Sent. Comm'n, *First Step Act of 2018 Resentencing Provisions Retroactivity Data Report* 7, Tbl. 5 (Oct. 2020); see also *United States* v. *Chambers*,

956 F.3d 667, 674 (4th Cir. 2020) (citing similar statistics from October 2019). Indeed, in some cases, district courts have exercised their discretion to grant Section 404 sentence reductions to career offenders whose actual drug quantities would subject them to the same guidelines and statutory penalty ranges as before the Fair Sentencing Act. See, *e.g.*, *United States* v. *Brown*, No. 01-cr-1109, 2020 WL 6482397 (D.S.C. Nov. 4, 2020); *United States* v. *Young*, No. 09-cr-36, 2020 WL 5237523 (W.D. Va. Sept. 2, 2020).

Yet amicus's reading of Section 404 would preclude even the possibility of any similar relief for Subparagraph (C) offenses—meaning that a Subparagraph (C) offender could now see a Subparagraph (A) or (B) offender with the same guidelines range (possibly a career-offender range) receive a reduction *below* what would be possible for him. That makes little sense.

4. One district court, explaining its decision to impose a reduced sentence, observed that "[t]he Career Offender provision approximately doubled the bottom of the guideline range for [the defendant] at the time he was sentenced," but that after the Fair Sentencing Act the defendant's "sentence at the bottom of the Career Offender guideline range [wa]s more than triple the bottom of his otherwise-applicable guideline range." *United States* v. *Ray*, No. 09-cr-238, 2020 WL 4043079, at *2 (S.D. W. Va. July 17, 2020). That is precisely the kind of factor that petitioner hopes the district court will consider in his own Section 404 proceeding. See D. Ct. Doc. 47, at 7 (Dec. 6, 2019) (arguing that "[a]t the time of his original sentencing, the career offender enhancement increased his sentence at the low end approximately five-fold—from 37 months to 188 months,"

but that after the Fair Sentencing Act, "[t]he career offender enhancement creates a more than ten-fold increase in his sentence—from 18 to 188 months").

The district court is not required to accept his argument, or to reduce petitioner's sentence at all. First Step Act § 404(c), 132 Stat. 5222 ("Nothing in this section shall be construed to require a court to reduce any sentence."). But amicus provides no sound basis for interpreting Section 404(a) to preclude petitioner—along with every other Section 841(b)(1)(C) crack-cocaine offender—from the opportunity even to *ask* that his sentence be examined for, and rid of, the pernicious influence of an unjust sentencing scheme.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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