No. 20-291

IN THE
Supreme Court of the United States

JAMELL BIRT,
Petitioner,

v.

UNITED STATES,
Respondent.

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

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, up to 40,000 with affiliate members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court, and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL submits this brief in support of the petition for certiorari because the issue presented in this case—whether individuals convicted for possessing less than 5 grams (or an unspecified amount) of crack cocaine are eligible for resentencing under the First Step Act of 2018, Pub. L. 115-391, 132 Stat. 5194—is one of great concern to criminal defendants throughout the country.

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[1] No counsel for a party authored any part of this brief; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Counsel for petitioner and respondent received timely notice of this filing, and both parties consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

For nearly a quarter of a century, federal law punished the possession of crack cocaine far more severely than it did the possession of powder cocaine, exposing defendants who possessed *one* gram of crack cocaine to the same onerous, potentially decades-long, sentence that applied to those who possessed *100* grams of powder cocaine. *See* Anti-Drug Abuse Act of 1986, Pub. L. 99-570 § 1002, 100 Stat. 3207 (codified at 21 U.S.C. § 841(b)(1)(B) (2010)).[2] This draconian sentencing regime flooded federal prisons with non-violent, low-level crack offenders, and was particularly damaging to the Black community. While Black Americans comprised approximately 30 percent of persons incarcerated for powder-cocaine offenses, they comprised over *80 percent* of those incarcerated for crack-related offenses.

Congress sought to remedy these injustices by enacting the Fair Sentencing Act of 2010, which reduced the sentencing disparity between crack and powder cocaine from 100:1 to 18:1,[3] and the First Step Act of 2018,[4] which made that change retroactive so that thousands of predominately Black-American defendants serving lengthy prison sentences for crack-related offenses could have a "second chance at life."[5] *See* 164 Cong.

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[2] The 1986 law provided for drug-quantity ranges of (1) less than 5 grams; (2) 5-49 grams; and (3) 50 or more grams, with corresponding sentencing ranges of (1) 0-20 years; (2) 5-40 years; and (3) 20 years to life. *See* 21 U.S.C. § 841(b) (2010).

[3] Pub. L. 111-220 § 1, 124 Stat. 2372.

[4] Pub. L. 115-391 § 404, 132 Stat. 5194.

[5] The Fair Sentencing Act retained the sentencing ranges from the 1986 law, but adjusted the corresponding drug-quantity thresholds

Rec. H10362 (daily ed. Dec. 20, 2018) (statement of Rep. Goodlatte).

This Court's review is urgently needed to resolve the conflict in the courts of appeals concerning whether the "second chance" afforded by the First Step Act is available to all crack offenders sentenced under the pre-2010 regime, or whether it excludes those with the most minor crack-cocaine offenses. Under the rule adopted by the Third Circuit below—consistent with the law in the Sixth, Tenth, and Eleventh Circuits—defendants whose drug quantities were within the lowest range under the 1986 law (less than 5 grams or an unspecified amount) are categorically barred from resentencing under the First Step Act. Pet. 21-24. Meanwhile, identically situated defendants in the First, Fourth, and Seventh Circuits qualify for resentencing under the First Step Act, and hence are eligible for potentially enormous sentencing reductions. Pet. 17-20. Without this Court's intervention, thousands of the lowest-level crack offenders will be forced to spend years longer in prison based solely on the circuit in which they were convicted.

The fact that geographic happenstance currently drives significant and widespread sentencing disparities is alone reason for this Court to promptly grant review to resolve the circuit conflict. But the conflict here is unusually pernicious because the Third Circuit's rule harms those crack offenders who are *least* culpable—the Third Circuit's decision provides relief for those who possessed the most crack cocaine while categorically barring resentencing of those who possessed only minimal (or uncertain) amounts of crack cocaine. Moreo-

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to (1) less than 28 grams; (2) 28-279 grams; and (3) 280 or more grams. *See* 21 U.S.C. § 841(b) (2018).

ver, by excluding a substantial portion of crack-cocaine offenders from resentencing eligibility, the Third Circuit's rule frustrates Congress's goal of reducing the racial disparities in incarceration caused by the 1986 law.

The Third Circuit's justification for denying any chance at resentencing for those who possessed the least (or an uncertain) amount of crack cocaine was its understanding that the provision under which those defendants were sentenced was not "modified" by the Fair Sentencing Act, even though that Act dramatically expanded the relevant drug-quantity range from less than 5 grams to less than 28 grams. According to the Third Circuit, this more than five-fold expansion of the drug-quantity range was not a modification because those sentenced under the narrower, pre-2010 drug-quantity range fell within the same sentencing range—0 to 20 years—as those sentenced under the expanded, post-2010 drug-quantity range. As the petition explains, this conclusion makes no sense as a textual matter. Pet. 27-35. Among other things, the relevant question is whether the "statutory penalties" for the "criminal statute" were "modified," not whether any defendants would have automatically been entitled to a lower sentence under the post-2010 regime. Pet. 27-28.

Even accepting the Third Circuit's framing of the question, however, the fact that defendants convicted of possessing less than 5 grams of crack cocaine prior to 2010 would have fallen within the same 20-year sentencing *range* under the pre- and post-Fair Sentencing Act regimes does not mean that the Fair Sentencing Act did not "modif[y]" the *actual sentences* those defendants would have received. To the contrary, as both the First and Fourth Circuits have recognized, the drug-quantity and sentencing ranges in § 841 have an "anchoring ef-

fect" on judges' sentencing decisions. A defendant whose drug quantity was near the top of the prior drug-quantity range (*e.g.*, 4.9 grams) was likely to be sentenced near the top of the applicable sentencing range—*i.e.*, 20 years of incarceration. Now that Congress has raised the drug-quantity ceiling for that provision from 5 to 28 grams, a defendant who was near the top of the prior drug-quantity range is now near the *bottom* of the new drug-quantity range, and so likely would be resentenced at the lower end of the 0-20 year sentencing range. In fact, defendants in the First, Fourth, and Seventh Circuits who were sentenced in the lowest drug-quantity range prior to 2010 are already receiving substantial sentencing reductions under the First Step Act, even as that relief is categorically denied to identically situated defendants in other circuits. The Third Circuit's understanding that the "statutory penalties" for those convicted of possessing the least (or an uncertain) amount of crack cocaine have not been "modified" is simply wrong.

Given the dramatic inequities that follow from the circuit conflict and the transparent deficiencies in the Third Circuit's decision, NACDL respectfully urges this Court to grant the petition.

ARGUMENT

I. The Court's Review Is Urgently Needed To Ensure That Thousands Of Defendants Receive The Second Chance Congress Sought To Provide Through The First Step Act.

A. The Third Circuit's Rule Will Force Thousands Of Defendants To Spend Years Longer In Prison While Identically Situated Defendants In Other Circuits Obtain Relief.

This Court's review is urgently needed to ensure that thousands of crack offenders convicted in the Third, Sixth, Tenth, and Eleventh Circuits are eligible for the second chance that Congress sought to provide defendants sentenced under the draconian 1986 law, and which defendants are receiving in other circuits.

Under the rule adopted by the Third, Sixth, Tenth, and Eleventh Circuits, defendants whose drug quantities were within the lowest range under the 1986 law (less than 5 grams or an unspecified amount) are categorically ineligible to be resentenced under the First Step Act. *See* Pet. App. 14a-18a. Meanwhile, defendants convicted in the First, Fourth, and Seventh Circuits based on identical drug quantities are eligible to receive substantial sentence reductions. Without this Court's review, thousands of low-level, non-violent crack offenders will be forced to serve years longer in prison than they otherwise would, while identically situated defendants will not suffer that fate.

The Third Circuit's rule is particularly perverse because it disfavors defendants whose convictions were based on possessing the least amounts of crack cocaine. Under the Third Circuit's decision, a defendant whose

sentence was based on possessing 5 or more grams of crack cocaine—placing him in one of the top two drug-quantity ranges under the 1986 law, *see* note 2, *supra*—is eligible to be resentenced under the First Step Act. By contrast, a defendant convicted for possessing *fewer* than 5 grams of crack-cocaine—placing him in the lowest drug-quantity bracket, *see* note 2, *supra*—is categorically ineligible for resentencing. Pet. App. 14a-16a. Worse still, by favoring defendants who possessed greater quantities of crack cocaine, the Third Circuit's rule makes it likely that some of those defendants will (after resentencing) serve *shorter* prison terms than the lowest-level crack offenders. For example, under the 1986 law a defendant who possessed 45 grams of crack cocaine was eligible for a 40-year sentence. 21 U.S.C. § 841(b)(1)(B) (2010). That defendant is now eligible to have his sentence reduced to as few as 5 years. *Id.* § 841(b)(1)(B) (2018). But, under the Third Circuit's rule, a defendant who was sentenced to 15 or even 20 years for possessing 4.5 grams of crack cocaine—*i.e.*, a *tenth* of 45 grams—is categorically ineligible to *even try* to have his sentence reduced.

This perverse regime contradicts one of Congress's stated goals in passing the Fair Sentencing Act and the First Step Act: providing relief to low-level drug offenders. 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. Leahy). Through the Fair Sentencing Act and the First Step Act, Congress sought to "return the focus of Federal cocaine sentencing policy to drug kingpins, rather than [these] street level dealers." *Id.*; *see also, e.g.*, 164 Cong. Rec. S7748

(daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar) (explaining that the First Step Act moved away from a "one-size-fits-all" approach and sought to use "more creative and evidence-based ways to deal with [low-level drug offenders] than longer prison sentences"). The Third Circuit's rule undercuts this objective by forcing the lowest-level crack offenders to serve years longer in prison, while the "drug kingpins" Congress sought to target are given a second chance. *See* 155 Cong. Rec. S10492 (daily ed. Oct. 15, 2009) (statement of Sen. Leahy).

This Court's review is thus urgently needed to prevent thousands of defendants in the Third, Sixth, Tenth, and Eleventh Circuits from being forced to remain incarcerated for years longer while identically situated defendants in the First, Fourth, and Seventh Circuits (and defendants in all circuits who were convicted for possessing far greater quantities of crack-cocaine) receive a second chance.

Even a short delay in this Court's review could be enormously harmful. Many of the thousands of defendants sentenced under the 1986 law's regime are nearing the end of their lengthy sentences. Thus, absent immediate action from this Court, many defendants in the Third, Sixth, Tenth, and Eleventh Circuits will be forced to serve out the remainder of their sentences without any chance of obtaining the resentencing that would be available to them in other circuits. To avoid depriving so many defendants of even the chance to benefit from the First Step Act, this Court should grant certiorari and resolve the circuit conflict now.

B. The First Step Act Offers Substantial Sentencing Reductions For Defendants Who Fall Within The Same Sentencing Range Under Either Regime.

The Third Circuit attempted to justify denying resentencing to defendants who possessed less than 5 grams (or an unspecified amount) of crack cocaine on the ground that those defendants remain subject to the same sentencing range "before and after the passage of the Fair Sentencing Act." Pet. App. 15a.[6] As an initial matter, that argument proves too much, as many of the defendants eligible for resentencing under the Third Circuit's decision *also* remain subject to the same sentencing range as before the Fair Sentencing Act.[7]

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[6] The lowest drug-quantity range under the 1986 law was less than 5 grams, which resulted in a 0-20 year sentencing range. 21 U.S.C. § 841(b)(1)(C) (2010). The lowest drug-quantity range under current law is less than 28 grams, which still carries the same 0-20 year sentence. *Id.* § 841(b)(1)(C) (2018). Thus, a defendant who was sentenced for possessing fewer than 5 grams under the 1986 law remains subject to the same 0-20 year sentencing range under current law.

[7] Under the 1986 law, a defendant who possessed between 5 and 49 grams of crack cocaine was subject to a sentencing range of 5-40 years, *id.* § 841(b) (2010), but now that range applies to those who possessed between 28 and 279 grams of cocaine, *id.* § 841(b) (2018). Thus, under the Fair Sentencing Act, a defendant who possessed between 28 and 49 grams of crack cocaine is eligible for the same 5-40 year sentence as he would have been under the prior regime.

Similarly, under the 1986 law, a defendant who possessed 50 or more grams of crack cocaine was subject to a sentence of 20 years to life, *id.* § 841(b) (2010), but now that range applies to those who possess 280 grams or more of crack cocaine, *id.* § 841(b) (2018). Thus, under the Fair Sentencing Act, a defendant who possessed 280 grams or more of crack cocaine is subject to the same 20-year-to-life sentence.

More fundamentally, though, the Third Circuit's assumption that the same sentencing *range* means the same *sentence* is simply wrong. Although defendants who possessed less than 5 grams of crack cocaine (or an unspecified amount) remain *eligible* for their original sentence, a change in the applicable drug-quantity range will often change the actual sentence that a defendant receives because of the strong "anchoring effect" the drug-quantity and sentencing ranges in § 841 have on judges' sentencing decisions. This anchoring effect has already led to sentence reductions for defendants in at least the First Circuit—reductions that would have been categorically unavailable in the circuits on the other side of the conflict.

"Anchoring" is a well-documented phenomenon, which describes decisionmakers' tendency to make final conclusions that are "strongly biased" in favor of "an initial starting value" that is given to them. *See* Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 Yale L.J. Pocket Part 137, 138 (2006).[8] Thus, "[w]hen anchoring affects decisionmaking, different starting points yield different estimates, which are biased toward the initial values." *Id*. (citation and quotation marks omitted). "[T]he anchoring effect is so

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[8] *See also* Daniel M. Isaacs, *Baseline Framing in Sentencing*, 121 Yale L.J. 426, 439 (2011) ("Anchoring is overreliance on an initial numerical reference point that causes absolute judgments to assimilate toward the initial value." (citation, quotation marks and alterations omitted)); Mark W. Bennett, *Confronting Cognitive 'Anchoring Effect' and 'Blind Spot' Biases in Federal Sentencing: A Modest Solution for Reforming A Fundamental Flaw*, 104 J. Crim. L. & Criminology 489, 495 (2014) ("Anchoring is a cognitive bias that describes the human tendency to adjust judgments or assessments higher or lower based on previously disclosed external information—the 'anchor.'" (citation omitted)).

strong that even when people are told to ignore it in subsequent judgments, the effect remains powerful." Bennett, *Confronting Cognitive 'Anchoring Effect'*, *supra*, at 529.

Federal law utilizes anchors as a means of guiding judicial sentencing decisions and ensuring a degree of uniformity in sentencing. Perhaps most notably, the U.S. Sentencing Guidelines "provide[] ready-made anchors." Isaacs, *Baseline Framing in Sentencing*, *supra*, at 441. The "most significant" of these "is the sentencing baseline," which provides an "initial reference point from which all other sentencing inquiries are conducted." *Id.*; *accord Peugh v. United States*, 569 U.S. 530, 541 (2013) ("The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review.").

The drug-quantity ranges and the corresponding sentencing ranges in § 841 have a similar anchoring effect on judges' sentencing decisions. For example, a defendant convicted for possessing 4.9 grams of crack cocaine under the prior 100:1 crack-to-powder sentencing regime was at the very top of the drug-quantity range (fewer than 5 grams). *See* note 2, *supra*. In that case, the sentencing judge would have been more inclined to impose a sentence at the high end of the corresponding sentencing range (0-20 years). A markedly different dynamic exists under the revised drug-quantity range enacted in the Fair Sentencing Act and made retroactive by the First Step Act. Under the new regime, a defendant convicted of possessing 4.9 grams of crack cocaine is still subject to the same sentencing range (0-20 years), but the 4.9 grams is close to the bottom of the

revised drug-quantity range (less than 28 grams). *See* note 5, *supra*. In that scenario, the defendant's drug quantity is only 17.5 percent of the drug-quantity ceiling, rather than the 98 percent it was under the prior drug-quantity range. Thus, if a sentencing judge simply mapped those percentages onto the sentencing range, she would sentence the same defendant to *19.6 years* of incarceration under the pre-2010 regime, but only *3.5 years* of incarceration under the post-2010 regime.

Both the First and Fourth Circuits have recognized that defendants sentenced under the lowest drug-quantity range can receive significant sentence reductions under the First Step Act even though their sentencing range was not changed by the Fair Sentencing Act. The First Circuit explained that the increase in the ceiling from 5 to 28 grams for the lowest drug-quantity range "is no small point, even for defendants guilty of distributing less than five grams of crack, because the statutory benchmarks likely have an anchoring effect on a sentencing judge's decision making." *United States v. Smith*, 954 F.3d 446, 451 (1st Cir. 2020). The defendant in that case was convicted for possessing 1.69 grams of crack cocaine, which was 34 percent of the prior 5 gram ceiling, but only 6 percent of the new 28 gram ceiling. *Id.* The First Circuit concluded that the same quantity "looks less significant and thus perhaps less worthy of as long of a sentence . . . as the statute exists now than as it existed at the time of [the defendant's] sentencing." *Id.* The Fourth Circuit similarly recognized the importance of anchoring in *United States v. Woodson*, explaining that the "modification of the range of drug weights to which the relevant subsection applies may have an anchoring effect on their sentence," and that a "district court may find this shift relevant to determining the appropriate sen-

tence for a particular offender." 962 F.3d 812, 817 (4th Cir. 2020).

The proceedings on remand in *Smith* prove this analysis correct. The defendant in *Smith* had been sentenced to a 17½ year term for distributing less than 2 grams of crack cocaine. *See* 954 F.3d at 446. After the First Circuit held that Smith was eligible to be resentenced under the First Step Act, he received a new sentence of "time served"—shaving 4½ years off his time in prison, which is nearly a quarter of his original sentence. *See* No. 1:05-cr-259 (D.N.H. Apr. 9, 2020), ECF 84.

Smith highlights not just the necessity, but also the *urgency*, of this Court's review. Smith's sentence reduction could have been even greater if more of his sentence was still to be served. Similarly, for every day in which the circuit split persists, defendants in circuits that categorically bar resentencing for low-level crack offenders lose their statutory eligibility to be freed from what Congress recognized to be unduly harsh and inequitable sentences—relief for which they would be eligible now if they had only been convicted in another circuit.

Under the rule adopted by the Third, Sixth, Tenth, and Eleventh Circuits, the defendant in *Smith* would have been categorically barred from resentencing and would have been forced to serve another 4½ years in prison for possessing less than 2 grams of crack cocaine. And that is precisely the predicament thousands of defendants in those circuits are now in. This Court's review is thus urgently needed to prevent thousands of low-level crack offenders from being incarcerated for years longer, even as identically situated defendants in the First, Fourth, and Seventh Circuits—and defend-

ants nationwide who were convicted for possessing greater quantities of crack cocaine—are given the second chance Congress sought to provide in the First Step Act.

II. The Court's Review Is Necessary To Ensure That Congress's Goal Of Remedying The Disproportionate Incarceration Of Black Americans Is Realized.

This Court's review is also needed to ensure that Congress's goal of remedying the disproportionate harms the 1986 law caused to the Black community can be realized.

Congress adopted the 100:1 crack-to-powder cocaine sentencing regime in 1986 as a response to "a national sense of urgency surrounding drugs generally and crack cocaine specifically." U.S. Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* 90, 103 (May 2002) ("2002 Report"). Congress was particularly concerned with "protect[ing] poor and minority neighborhoods that were most afflicted by crack cocaine trafficking and its associated secondary harms." *Id.*; *see also* 156 Cong. Rec. H6198 (daily ed. July 28, 2010) (statement of Rep. Clyburn) ("When the current law was passed, Congress felt that crack cocaine was a plague that was destroying minority communities.").

Although Congress instituted these harsh penalties for crack cocaine with the goal of safeguarding minority communities, the 100:1 crack-to-powder sentencing ratio proved disastrous for the Black community, with Black Americans comprising an overwhelming majority of those convicted of crack-related offenses. In 1993, Blacks, Hispanics, and Whites accounted for approxi-

mately equal proportions of overall drug offenses, with Blacks comprising 33.9 percent, Hispanics comprising 33.8 percent, and Whites comprising 30.8 percent. *See* U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 152 (Feb. 1995) ("1995 Report"). However, Black Americans consistently made up an "overwhelming majority" of those incarcerated for crack-cocaine offenses. 2002 Report at 102. Black defendants constituted 91.4 percent of the 2,294 convicted crack offenders in 1992, 2002 Report at 63 & tbl. 3, and 88.3 percent of the more than 3,000 crack offenders in 1993, 1995 Report at 152; U.S. Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* 12 fig. 2–1 (May 2007) ("2007 Report"). This trend persisted over the next decade and a half, with Black Americans comprising 84.7 percent of the 4,805 convicted crack offenders in 2000, and 81.8 percent of the 5,393 defendants convicted in 2006. *See* 2007 Report at 16 tbl. 2–1; *accord* 155 Cong. Rec. S10491 (daily ed. Oct. 15, 2009) (statement of Sen. Durbin) ("While African Americans constitute less than 30 percent of crack users, they make up 82 percent of those convicted of Federal crack offenses."). Over this same time period, Black Americans made up a significantly smaller proportion—approximately 30 percent—of powder-cocaine offenders. *See* 2007 Report at 16 tbl. 2–1.

Predictably, the disproportionate number of Black Americans convicted for crack-related offenses, coupled with the severe penalties imposed for such offenses, resulted in both the "rate and the average length of imprisonment for federal offenders increas[ing] for Blacks in comparison to Whites." 1995 Report at 153; *see also id.* at 154 ("The 100-to-1 crack cocaine to powder cocaine quantity ratio is the primary cause of the growing

disparity between sentences for Black and White federal defendants."); 2002 Report at 34 ("Federal crack cocaine offenders consistently have received significantly longer sentences than powder cocaine offenders, and this difference has increased since 1992."). "In great part because of the difference in quantity-based penalties, in 2000 the average sentence for a crack cocaine offense was *44 months longer* than the average sentence for a powder cocaine offense, 118 months compared to 74 months." *See* 2002 Report at iv-v, 90 (emphasis added). This resulted in Black defendants serving "almost as much time in Federal prison for . . . drug offense[s] . . . as whites [were] for . . . violent offense[s]." H. Rept. 111-670, *Fairness in Cocaine Sentencing Act of 2009*, H. Comm. on the Judiciary 4 (Dec. 1, 2010).

These disproportionate incarceration rates and penalties had a devastating effect on Black communities, placing significant financial, social, and emotional strain on the families of incarcerated persons, which "reverberate[d] throughout the communities where the families of prisoners are congregated," and "strain[ed] the extended networks of kin and friends that have traditionally sustained poor African American families in difficult times." Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 Stan. L. Rev. 1271, 1282 (2004). This, in turn, fostered the perception that the federal drug laws were targeting Black Americans for harsher punishment—a perception that predictably undermined confidence in the integrity and fairness of the criminal justice system. *See, e.g.*, 155 Cong. Rec. S10492 (daily ed. Oct. 15, 2009) (statement of Sen. Leahy) (stating that the 100:1 sentencing ratio "has . . . undermined citizens' confidence in the justice system"); 2002 Report at 103 ("Perceived improper racial disparity fosters disre-

spect for and lack of confidence in the criminal justice system among the very groups that Congress intended would benefit from the heightened penalties for crack cocaine.").

Bipartisan majorities in both chambers of Congress passed the First Step Act to alleviate these harms, seeking to reduce "the racial disparities in [the federal prison] system" by offering "thousands of Americans who have more than served their time" a second chance. 164 Cong. Rec. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Booker); *see also* 164 Cong. Rec. S7645 (daily ed. Dec. 17, 2018) (statement of Sen. Durbin) (stating that the First Step Act was meant to "give a chance to thousands of people still serving sentences for nonviolent offenses involving crack cocaine under the 100-to-1 standard"); 164 Cong. Rec. S7745 (daily ed. Dec. 18, 2018) (statement of Sen. Blumenthal) ("This bill . . . [will] mak[e] it possible for nearly 2,600 Federal prisoners sentenced on racially discriminatory drug laws to petition for a reduced sentence."). The Third Circuit's decision frustrates these efforts. "[Ninety] percent of the people who w[ould] benefit from [resentencing under the First Step Act] are African Americans," 164 Cong. Rec. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Booker), but in the Third, Sixth, Tenth, and Eleventh Circuits many of those individuals are now categorically barred from resentencing under that Act and will be forced to serve years longer in prison. The Third Circuit's rule thus perpetuates the racial disparities in incarceration Congress strove to remedy in passing the First Step Act.

This Court's review is thus needed to prevent thousands of predominately Black defendants from being forced to spend years longer in prison than identically

situated defendants in the First, Fourth, and Seventh Circuits and to ensure that Congress's goal of alleviating the racial disparities in sentencing caused by the 1986 law's harsh sentencing regime is realized. The Court should grant the petition.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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