

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 OF SENATORS RICHARD J. DURBIN,
CHARLES E. GRASSLEY, CORY A. BOOKER,
AND MIKE LEE AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI*¹

Amici curiae Senators Richard J. Durbin, Charles E. Grassley, Cory A. Booker, and Mike Lee are Members of the United States Senate who were lead sponsors of the First Step Act of 2018 (the “Act”) and lead drafters of the Act’s sentencing reforms. Those sentencing reforms included Section 404, which authorized district courts to grant retroactive relief to individuals sentenced for crack-cocaine offenses before the Fair Sentencing Act of 2018 eliminated the now-infamous 100-to-1 disparity between crack and powder cocaine.

Amici take great pride in the across-the-aisle support the First Step Act earned. As *Amicus* then-Senate Judiciary Committee Chairman Grassley observed, Congress had rarely seen “legislation like this before,” with “such diverse groups of people and organizations that support the bill.” 164 Cong. Rec. S7778 (daily ed. Dec. 18, 2018) (statement of Sen. Grassley). The “extraordinary political coalition,” both inside and outside Congress, that came together to support the Act rendered it “not just bipartisan” but “nearly nonpartisan.” *Id.* at S7645 (daily ed. Dec. 17, 2018) (statement of Sen. Durbin); *Id.* at S7749 (daily ed. Dec. 18, 2018) (statement of Sen. Leahy).

Amici are also acutely aware that the Act succeeded in achieving this broad support only because of the sentencing reforms it made. It is no exaggeration to say that without them, much of the Act’s support would have

¹ All parties received notice of and consented to this filing. No party or party’s counsel wholly or partially authored this brief. Only *amici* and counsel for *amici* funded its preparation and submission.

fallen away. The Act might not have passed at all. *Amici* thus have a strong interest in ensuring that the First Step Act is interpreted correctly. Section 404’s plain text authorizes relief for any individual with an offense whose “statutory penalties ... were modified by ... the Fair Sentencing Act.” The Fair Sentencing Act “modified” the statutory penalties for crack-cocaine offenses across the board by altering each of the three penalty tiers in § 841(b), including the penalty tier that applies to individuals with low-level drug offenses in § 841(b)(1)(C). Judges Rushing, Kayatta, and Kanne have correctly read Section 404’s text to dictate that conclusion. *United States v. Woodson*, 962 F.3d 812, 816 (4th Cir. 2020); *United States v. Smith*, 954 F.3d 446, 451 (1st Cir. 2020); *United States v. Hogsett*, 982 F.3d 463, 467-68 (7th Cir. 2020).

Amici submit this brief to urge the Court to reverse the Eleventh Circuit’s judgment and to interpret Section 404 in line with its clear text.

SUMMARY OF ARGUMENT

I. Congress enacted the First Step Act of 2018 to effect comprehensive correctional, sentencing, and criminal justice reforms. The Act’s historic bipartisan coalition—the likes of which, over the last several decades, Congress has rarely seen—came together to bring greater fairness and justice to the Nation’s criminal justice system. Critical to that coalition was the Act’s sentencing reforms, including Section 404 and the retroactive relief it provides for individuals sentenced based on the old 100-to-1 crack-to-powder ratio that Congress repudiated in the Fair Sentencing

Act. Without the First Step Act’s sentencing-reform provisions, the Act might never have passed.

II. Section 404 authorizes relief to everyone who had been sentenced for crack-cocaine offenses before the Fair Sentencing Act became effective, including individuals with low-level crack offenses sentenced under 21 U.S.C. § 841(b)(1)(C). Section 404’s unambiguous text compels this conclusion. It ties eligibility to whether an individual was sentenced for “a violation of a Federal criminal statute, the penalties for which were modified by ... the Fair Sentencing Act.” As the First, Fourth, and Seventh Circuits have all recognized, the Fair Sentencing Act modified the penalties for *all* crack-cocaine offenses by altering each of the three penalty tiers in § 841(b)(1). That includes the lowest tier in § 841(b)(1)(C), which changed from covering zero to five grams of crack cocaine (before the Fair Sentencing Act) to covering zero to 28 grams (after).

ARGUMENT

I. THE FIRST STEP ACT WAS A LANDMARK BIPARTISAN EFFORT TO ALLEVIATE UNFAIR SENTENCING DISPARITIES.

The First Step Act of 2018 was the culmination of an unprecedented bipartisan effort, both within and outside Congress, to undertake comprehensive sentencing and criminal justice reform. Central to the Act, and central to the bipartisan support it earned, were its reforms to reduce the sentencing disparities for individuals convicted of crack-cocaine offenses. Under the Anti-Drug Abuse Act of 1986, 21 U.S.C. § 841, thousands of people—“90 percent [of them] African Americans; 96

percent [of them] Black and Latino”—received harsh crack-cocaine sentences under a system that treated crack offenses 100 times more severely than equivalent powder-cocaine offenses. 164 Cong. Rec. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Booker).

Over the last several decades, Congress has coalesced around a bipartisan consensus that these sentencing disparities are both unjustified and unfair. In 2010, Congress took the first step to end these disparities by passing the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, which lowered the penalties for crack-cocaine offenses in order to eliminate the 100-to-1 ratio. *Id.* § 2.

The Fair Sentencing Act, however, applied only to sentences imposed after the legislation’s effective date. As a result, as *Amicus* Senator Booker explained, it left thousands of “people sitting in jail ... for selling an amount of drugs equal to the size of a candy bar”—even though those individuals have now “watched people come in and leave jail for selling enough drugs to fill a suitcase.” 164 Cong. Rec. at S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Booker). Treating past and future defendants so differently, *Amicus* Senator Durbin noted, did not “make any sense.” *See id.* at S7645 (daily ed. Dec. 17, 2019) (statement of Sen. Durbin). *Amicus* Senator Lee likewise underscored the need to apply “current law” “equally to all those convicted of cocaine and crack offenses regardless of when they were

convicted,” explaining that such parity would yield a “huge improvement over the current system.”²

A broad bipartisan coalition catalyzed a fix, which would become Section 404 of the First Step Act. *Amici* Senator Durbin and then-Judiciary Committee Chairman Grassley took the pen and led the initial push for sentencing reform in the Senate.³ They proposed fulfilling the Fair Sentencing Act’s promise by making its sentencing reforms retroactive.⁴ This retroactivity fix would allow Americans “who have more than served their time” to petition the court for a sentence reduction. 164 Cong. Reg. S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Booker). The Durbin-Grassley bill—which contained a suite of sentencing reforms, including the retroactivity provision—passed the Senate Judiciary Committee in February 2018.⁵

² The Chairman’s Note: *Time for Senate to Act on Criminal Justice Reform*, Office of Sen. Mike Lee (Nov. 16, 2018), <https://www.lee.senate.gov/public/index.cfm/2018/11/time-for-senate-to-act-on-criminal-justice-reform>.

³ See Press Release, Office of Sen. Dick Durbin, *Senate & House Lawmakers Release Updated First Step Act* (Dec. 12, 2018), <https://www.durbin.senate.gov/newsroom/press-releases/senate-and-house-lawmakers-release-updated-first-step-act->.

⁴ See *id.*

⁵ Sentencing Reform and Corrections Act of 2017, S. 1917, 116th Cong. (as approved by S. Comm. on Judiciary, Feb. 15, 2018), <https://www.congress.gov/bill/115th-congress/senate-bill/1917/all-actions>; Press Release, Office of Sen. Dick Durbin, *Judiciary Committee Advances Sentencing Reform And Corrections Act* (Feb. 15, 2018), <https://www.durbin.senate.gov/newsroom/press-releases/judiciary-committee-advances-sentencing-reform-and-corrections-act>.

These sentencing reforms were critical to the Senate’s support. In May, the House of Representatives passed a different criminal-justice bill that focused on rehabilitation reforms and did not include the Senate’s retroactivity provision.⁶ That bill, however, could not earn sufficient support in the Senate. The Senate declined to take up the House bill until *Amici* Senators Grassley and Durbin—along with Senators Lindsey Graham, Sheldon Whitehouse, and *Amici* Mike Lee and Cory Booker—introduced a revised version in December 2018 containing sentencing reforms, including the provision making the Fair Sentencing Act retroactive.⁷

This change was “key” to the First Step Act’s success. 164 Cong. Rec. S7774 (daily ed. Dec. 18, 2018) (statement of Sen. Cardin). Across the political spectrum, the Act’s supporters stressed that the retroactivity provision was necessary to achieve the Act’s purpose—to make it, in the words of Senator Blumenthal, a true “*first step* toward a fairer, more humane system.” *Id.* at S7745 (statement of Sen. Blumenthal) (emphasis added). Senators described the Act’s “retroactive application of the Fair Sentencing

⁶ FIRST STEP Act, H.R. 5682, 115th Cong. (as passed by House, May 22, 2018), <https://www.congress.gov/bill/115th-congress/house-bill/5682/text/rh>.

⁷ See 164 Cong. Rec. S7645 (daily ed. Dec. 17, 2018) (statement of Sen. Durbin); First Step Act, S. 3649, 115th Cong. (as introduced Nov. 15, 2018), <https://www.congress.gov/bill/115th-congress/senate-bill/3649/all-actions>; see Press Release, S. Comm. on the Judiciary, *Senators Unveil Revised Bipartisan Prison, Sentencing Legislation* (Nov. 15, 2018), <https://www.judiciary.senate.gov/press/rep/releases/senators-unveil-revised-bipartisan-prison-sentencing-legislation>.

Act” as a “historic achievement,” *id.* at S7749 (statement of Sen. Leahy), that “allowed judges to use their discretion to craft an appropriate sentence to fit the crime,” *id.* at S7756 (statement of Sen. Nelson). *Amicus* then-Chairman Grassley agreed: The sentencing reforms furthered Congress’s goal of ensuring that criminal sentences would “not be unjustly harsh.” *Id.* at S7649 (daily ed. Dec. 17, 2018) (statement of Sen. Grassley). After all, he explained, “[s]entences should not destroy the opportunity of redemption for inmates willing to get right with the law.” *Id.*; *see also id.* at S7764 (daily ed. Dec. 18, 2018) (statement of Sen. Booker) (describing sentencing reforms as “critical” to ensuring that the criminal justice system is “more fair” and “better reflect[s] our collective values and ideals”); *id.* at H10,361 (daily ed. Dec. 20, 2018) (statement of Rep. Goodlatte) (“[T]he bill reduces some of the harsher sentences for Federal drug offenders. We want to punish repeat offenders, but we do not want our Federal prisons to become nursing homes.”).

These sentencing reforms were also essential to the support the Act garnered from outside stakeholders. Several groups, including the American Civil Liberties Union and the Sentencing Project, initially opposed the House bill because it had “failed to address harsh sentencing laws”; they conditioned their support on the Senate’s inclusion of sentencing reforms and the retroactivity fix.⁸ But once the Senate added those

⁸ Charlotte Resing, *How the FIRST STEP Act Moves Criminal Justice Reform Forward*, ACLU (Dec. 3, 2018), <https://www.aclu.org/blog/smart-justice/mass-incarceration/how-first-step-act-move-s-criminal-justice-reform-forward> (citing Letter from ACLU to

reforms, the First Step Act earned support from all sides, “from conservative organizations,” “law enforcement organizations,” and “liberal organizations,” including “[t]he Fraternal Order of the Police, the American Civil Liberties Union, the American Conservative Union, and the International Association of Chiefs of Police.” 164 Cong. Rec. S7777 (daily ed. Dec. 18, 2018) (statement of Sen. Grassley); *see id.* at H10,361 (daily ed. Dec. 20, 2018) (statement of Rep. Goodlatte) (highlighting “the overwhelming bipartisan support from outside interest groups” and explaining that “[n]umerous organizations on both the left and the right have enthusiastically endorsed the bill”).

The Act became “not just bipartisan,” but “nearly nonpartisan.” *Id.* at S7749 (daily ed. Dec. 18, 2018) (statement of Sen. Leahy); *see id.* at S7742 (statement of Sen. Durbin) (“I can’t remember another bill that has had this kind of support, left and right, liberal, conservative, Republican, Democrat.”). It passed both Houses of Congress by overwhelming margins. In the Senate, the bill was introduced in virtually its current form on December 13, 2018, and cloture was invoked four days later by a vote of 82 to 12. *See id.* at S7650 (daily ed. Dec. 17, 2018). The Senate passed the Act the next day by a landslide vote of 87 to 12. *See id.* at S7781 (daily ed. Dec. 18, 2018). Two days later, the House approved

Majority Leader McConnell and Minority Leader Schumer (July 11, 2018), <https://www.aclu.org/letter/aclu-letter-senate-federal-sentencing-reform>); Letter from Sentencing Project to Majority Leader McConnell and Minority Leader Schumer (June 25, 2018), <http://www.sentencingproject.org/publications/letter-to-senate-on-advancing-sentencing-reform-legislation>.

the bill, 358 to 36. *See id.* at H10,430 (daily ed. Dec. 20, 2018).

On December 21, President Trump signed the First Step Act into law, describing it as “an incredible moment” for “criminal justice reform.” *Remarks by President Trump at Signing Ceremony for S. 756, the “First Step Act of 2018” and H.R. 6964, the “Juvenile Justice Reform Act of 2018,”* 2018 WL 6715859, at *16, White House (Dec. 21, 2018). In particular, President Trump praised the Act’s comprehensive sentencing reforms, lauding that “Americans from across the political spectrum can unite around prison reform legislation that will reduce crime while giving our fellow citizens a chance at redemption, so if something happens and they make a mistake, they get a second chance at life.” Tucker Higgins, *President Trump Announces His Support For Criminal Justice Reform Legislation, Saying It’s ‘The Right Thing To Do,’* CNBC (Nov. 14, 2018), <https://www.cnbc.com/2018/11/14/trump-criminal-justice-reform-legislation-the-right-thing-to-do.html>.

Members of Congress immediately recognized the Act as “historic” and “the most significant criminal justice reform bill in a generation.” 164 Cong. Rec. at S7649 (daily ed. Dec. 17, 2018) (statement of Sen. Grassley). As *Amicus* then-Chairman Grassley observed, Congress had rarely seen “legislation like this before,” with “such diverse groups of people and organizations that support the bill.” *Id.* at S7778 (daily ed. Dec. 18, 2018) (statement of Sen. Grassley). As *Amicus* Senator Durbin put it: “Every once in a while—it doesn’t happen very often—the stars line up and the Democrats and Republicans and the conservatives and the progressives and the President and the Congress

agree on something. I am not talking about Flag Day or apple pie or whether Lassie was a collie dog. It really comes down, occasionally, to something that is meaningful.” *Id.* at S7644 (daily ed. Dec. 17, 2018) (statement of Sen. Durbin).

Many Members echoed that sentiment, recognizing the historic change the First Step Act represented. *E.g.*, *id.* at S7646 (statement of Sen. Durbin) (describing the Act as “one of the most historic changes in criminal justice legislation in our history”); *id.* at S7765 (statement of Sen. Booker) (“I am proud to have been a part of what can be a historic step in the right direction.”); *id.* at H10,364 (daily ed. Dec. 20, 2018) (statement of Rep. Sensenbrenner) (“Congress has spent years talking about reducing crime, enacting fair sentencing laws, and restoring lives. Today, we are putting our words into action, and this is historic.”); *id.* at H10,362 (statement of Rep. Collins) (“President Trump recently said this is an issue that unifies people, and it has unified a broad range of my colleagues in this Congress. Speaker Ryan has led on this issue for a long time. ... [M]any legislators have worked to reach this compromise.”); Press Release, Office of Sen. Mike Lee, *Sen. Lee Applauds Passage of the First Step Act* (Dec. 18, 2018), <https://www.lee.senate.gov/public/index.cfm/press-releases?ID=0FA5DB35-C4CD-4431-8024-D720C9B5E88F>.

II. UNDER SECTION 404'S PLAIN TEXT, INDIVIDUALS SENTENCED PURSUANT TO § 841(B)(1)(C) HAVE A "COVERED OFFENSE" AND ARE ELIGIBLE FOR DISCRETIONARY RELIEF.

The text Congress enacted makes retroactive relief broadly available to all individuals sentenced for crack-cocaine offenses before the Fair Sentencing Act. Section 404 authorizes district courts, in their discretion, to provide relief to anyone with “a sentence for a covered offense”—meaning “a violation of a Federal criminal statute, the statutory penalties for which were modified by Sections 2 or 3 of the Fair Sentencing Act ... that was committed before August 3, 2010.” First Step Act of 2018, Pub. L. No. 115-391, § 404(a)-(b), 132 Stat. 5194, 5222. The Fair Sentencing Act “modified” the statutory penalties applicable to individuals sentenced under § 841(b)(1)(C). Petitioner thus has a “covered offense” within the meaning of Section 404.

This Court’s “consideration ... starts with the text—and “given the clarity [of Section 404],” it “could end there as well.” *Tapia v. United States*, 564 U.S. 319, 326-27 (2011). By pegging eligibility to whether the Fair Sentencing Act “modified” the relevant statutory penalties, Congress chose a term that was deliberately broad. As Judge Rushing recognized, “the ordinary meaning of the term ‘modified,’ ... ‘includes any change, however slight.’” *Woodson*, 962 F.3d at 816. It simply means to “make partial changes in” something. 9 *Oxford English Dictionary* 952 (2d ed. 2004). A “modification” thus means even to “make minor changes,” “to alter without transforming,” *Webster’s Third New*

International Dictionary 1452 (2002), “to change somewhat the form or qualities,” *Random House Dictionary of the English Language* 1236 (2d ed. 1987), or to “make somewhat different” by “mak[ing] small changes,” *Black’s Law Dictionary* 1157 (10th ed. 2014); accord *Hogsett*, 982 F.3d at 467 (adopting the same definition); *Smith*, 954 F.3d at 450 (same).

Hence, the key textual question is: Did the Fair Sentencing Act make a change—even if “slight”—to the statutory penalties for individuals sentenced under § 841(b)(1)(C)? The answer is yes. As Judge Rushing explained, the “Fair Sentencing Act ‘modified’ Subsection 841(b)(1)(C) by altering the crack cocaine quantities to which its penalty applies.” *Woodson*, 962 F.3d at 816. “Before the Fair Sentencing Act, Subsection 841(b)(1)(C)’s penalty applied only to offenses involving less than 5 grams of crack cocaine (or an unspecified amount).” *Id.* But due to the Fair Sentencing Act, “the penalty in Subsection 841(b)(1)(C) now covers offenses involving between 5 and 28 grams of crack cocaine as well.” *Id.*

The Eleventh Circuit treated as dispositive that the Fair Sentencing Act did not directly amend § 841(b)(1)(C)’s text. But as Judge Rushing again explained, “Congress did not need to amend the text of Subsection 841(b)(1)(C) to make [a] change” to its statutory penalties. *Woodson*, 962 F.3d at 816. Rather, Congress in the Fair Sentencing Act leveraged § 841(b)’s structure to modify crack-cocaine penalties across the board by making just two textual amendments. As Petitioner’s brief sets forth, § 841(b)

creates three penalty tiers. Before the Fair Sentencing Act, those penalty tiers were:

- (1) 50 grams or more (in § 841(b)(1)(A)(iii));
- (2) from 5 to 50 grams (in § 841(b)(1)(B)(iii)); and
- (3) less than 5 grams (in § 841(b)(1)(C)).

One quantity threshold in § 841(b)(1)(A)(iii) marked the line between the first and second tiers; another in § 841(b)(1)(B)(iii) divided the second tier from the third. Meanwhile, § 841(b)(1)(C) was (and remains) a residual, defined to provide the penalties for all offenses “except as provided in subparagraphs (A) [and] (B).”

Because those two quantity thresholds drive all crack-cocaine sentences, Congress could alter all crack-cocaine penalties by amending just those two quantity thresholds. Hence, after the Fair Sentencing Act, the three penalty tiers became:

- (1) 280 grams or more (in § 841(b)(1)(A)(iii));
- (2) from 28 to 280 grams (in § 841(b)(1)(B)(iii)); and
- (3) less than 28 grams (in § 841(b)(1)(C)).

Under the plain meaning of the word “modified,” “[t]his is a modification.” *Woodson*, 962 F.3d at 816; *accord Hogsett*, 982 F.3d at 467-68.

The Eleventh Circuit also departed from basic principles of interpretation by ignoring § 841(b)(1)(C)’s express textual cross-references. *See Barton v. Barr*, 140 S. Ct. 1442, 1451 (2020) (Kavanaugh, J.) (looking to statute’s “shorthand cross-references” to interpret its plain meaning). Section 841(b)(1)(C) expressly cross-references § 841(b)(1)(A) and § 841(b)(1)(B). *See* 21

U.S.C. § 841(b)(1)(C) (applying “except as provided in subparagraphs (A) [and] (B)”). Replacing those cross-references with their referents, the Fair Sentencing Act modified § 841(b)(1)(C) as follows:

except [in the case of a violation of subsection (a) of this section involving ~~50 grams~~ 280 grams or more of ... cocaine base] [and] [in the case of a violation of section (b) of this section involving ... ~~5 grams~~ 28 grams or more of ... cocaine base], such person shall be sentenced to a term of imprisonment of not more than 20 years.

By making these changes, the Fair Sentencing Act “modified” § 841(b)(1)(C)’s statutory penalties.

Indeed, the Eleventh Circuit effectively faulted Congress for not legislating surplusage, contrary to basic tenets of statutory interpretation. Because § 841(b)(1)(C) contained these cross-references, the Fair Sentencing Act did not need to expressly amend its text in order to alter its statutory penalties. Yet because the Fair Sentencing Act did not make an unnecessary textual change to § 841(b)(1)(C), the Eleventh Circuit declined to give effect to the Fair Sentencing Act’s modification of § 841(b)(1)(C)’s penalty range. This Court “presum[es] that each word Congress uses is there for a reason.” *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017) (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174-79 (2012)). That presumption accurately reflects how Congress aspires to legislate—concisely and precisely, using neither more nor fewer words than necessary to accomplish its goals.

See Off. of the Leg. Counsel, U.S. Senate, *Legislative Drafting Manual* § 102 (1997), https://law.yale.edu/sites/default/files/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual%281997%29.pdf. The Eleventh Circuit disregarded this principle by according dispositive weight to Congress's decision not to undertake a textual amendment to § 841(b)(1)(C) that Congress had no need to make.

Notably, the Sentencing Commission did not make the Eleventh Circuit's mistake in interpreting the Fair Sentencing Act. Instead, it correctly read the Fair Sentencing Act to modify crack-cocaine penalties across the board. Shortly after the Fair Sentencing Act was enacted, the Sentencing Commission "consistently and proportionally reflected" the Act's changes "throughout the Drug Quantity Table at all drug quantities," including the quantities applicable to individuals sentenced under § 841(b)(1)(C). U.S.S.G. App. C, Amend. 750 (2011). Noting that the Fair Sentencing Act increased "[t]he quantity threshold required to trigger the 5-year mandatory minimum term of imprisonment ... from 5 grams to 28 grams," the Sentencing Commission moved up to 28 grams the threshold for applying the base offense level that had previously applied at 5 grams. U.S.S.G. App. C, Amend. 750, Part A (2011). The Sentencing Commission then established "other offense levels ... by extrapolating proportionally upward and downward on the Drug Quantity Table." *Id.* For example, a 5-gram offense would no longer yield "a guideline sentencing range of 51 to 63 months" but only "a guideline sentencing range of 21 to 27 months." *Id.* The Sentencing Commission thus properly gave effect to

the wholesale changes in statutory penalties that the Fair Sentencing Act made.

The Eleventh Circuit also departed from basic principles of statutory interpretation by reading the word “modify” to mean “amend.” As Petitioner explains, to “amend” means to “change the wording of” a statute “by striking out, inserting, or substituting words.” *Black’s Law Dictionary* 89 (8th ed. 2004); see Pet’r Br. 21. If Congress had intended to require an express textual change, it would at minimum have chosen the word “amended.” Indeed, Congress used the word “amendment” in Section 404(c). But in Section 404(a)’s definition of “covered offense,” Congress instead selected the word “modified”—with the broader meaning that word imports. By disregarding the difference between those two words, the Eleventh Circuit again flouted basic principles of interpretation that Congress expects courts to follow. See *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (quotation marks omitted)).

Had Congress intended to exclude individuals with low-level crack offenses from relief, Congress of course could have done so. Indeed, in Section 404(c), Congress enacted other “Limitations” on the relief the First Step Act authorizes. But Congress nowhere excepted § 841(b)(1)(C) from the definition of “covered offense.” The Eleventh Circuit erred by engrafting its own non-textual exception. See *United States v. Johnson*, 529

U.S. 53, 58 (2000) (“When Congress provides exceptions in a statute, it does not follow that courts have authority to create others.”).

CONCLUSION

The Court should reverse the decision below.

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Respectfully submitted,

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