Nos. 11-5683 & 11-5721

IN THE

Supreme Court of the United States

EDWARD DORSEY, SR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

COREY A. HILL,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF ILLINOIS, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE SENTENCING PROJECT, FAMILIES AGAINST MANDATORY MINIMUMS, THE OPEN SOCIETY INSTITUTE, THE DRUG POLICY ALLIANCE, AND STOPTHEDRUGWAR.ORG, IN SUPPORT OF PETITIONERS

Lisa M. Bornstein
The Leadership Conference
on Civil and Human Rights
1629 K Street, NW
Washington, DC 20006
(202) 466-3311

Steven R. Shapiro
Counsel of Record
Ezekiel R. Edwards
Dennis D. Parker
American Civil Liberties
Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
sshapiro@aclu.org

(*Counsel continued on inside cover*)

Kim M. Keenan
Anson Asaka
The National Association
for the Advancement of
Colored People
4805 Mount Hope Drive
Baltimore, MD 21215
(410) 580-5777

Daniel N. Abrahamson
Theshia Naidoo
Tamar Todd
Drug Policy Alliance
Office of Legal Affairs
918 Parker Street,
Building A21
Berkeley, CA 94710
(510) 229-5211

David Borden
StoptheDrugWar.org
P.O. Box 18402
Washington, DC 20036
(202) 293-8340

Marc Mauer
Kara Gotsch
The Sentencing Project
1705 DeSales Street NW,
8th Floor
Washington, DC 20036
(202) 628-0871

Mary Price
Families Against Mandatory
Minimums
1612 K Street, NW
Washington, DC 20006
(202) 822-6700

Nkechi Taifa
Open Society Institute
1730 Pennsylvania Ave. NW,
7th Floor
Washington, DC 20006
(202) 721-5600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & REGULATIONS

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF *AMICI*[1]

This *amicus curiae* brief is submitted on behalf of the American Civil Liberties Union, the ACLU of Illinois, The Leadership Conference on Civil and Human Rights, The National Association for the Advancement of Colored People, The Sentencing Project, Families Against Mandatory Minimums, Open Society Institute, The Drug Policy Alliance, and StoptheDrugWar.org. Each organization has special interest and/or expertise in criminal justice matters. Their statements of interest are set forth in an appendix to this brief.

SUMMARY OF ARGUMENT

Congress intended the Fair Sentencing Act of 2010 ("FSA"), which reduced the crack/powder ratio from 100:1 to 18:1, to apply to all sentences after its enactment. The statute's text and legislative history evince Congress's clear intent that the new crack/powder ratio immediately replace the old and discredited 100:1 ratio. *Amici* therefore join Petitioners and the United States in urging the Court to hold that Petitioners should not have been sentenced under the 100:1 ratio after Congress repudiated it as unfair and discriminatory.

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* states that no party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Amici write separately to provide the Court with a history of the cocaine sentencing disparity—including how and why Congress created it, and the prodigious opposition it inspired from bench and bar for nearly two and a half decades as its irrationality and racially discriminatory consequences became increasingly clear. When Congress passed the FSA, it was widely accepted that the 100:1 ratio had no "penological or scientific justification," *U.S. v. Smith*, 359 F.Supp.2d 771, 777 (E.D.Wis. 2005), and "result[ed] in a disparate impact along racial lines, with black offenders suffering significantly harsher penalties." *U.S. v. Hamilton*, 428 F. Supp. 2d 1253, 1258 (M.D. Fla. 2006) (footnote omitted). This historical context is indispensable to understanding Congress's motivations in enacting the FSA, and it should bear on the Court's assessment of Congressional intent behind reducing the crack/powder disparity from 100:1 to 18:1. Moreover, the Court's presumption that Congress seeks to avoid unnecessarily vindictive punishment, as well as the rule of lenity, favor applying the reduced ratio to all sentences after the FSA's enactment.

ARGUMENT

I. Congress Intended The Fair Sentencing Act To Apply In All Sentencing Proceedings That Occur After Its Enactment.

Congress passed the FSA "[t]o restore fairness to Federal cocaine sentencing."[2] As the bill's chief sponsor stated on the floor of the Senate,"[e]very day that passes without taking action to solve this

[2] Pub. L. No. 111-220, 124 Stat. 2372 (2010).

problem is another day that people are being sentenced under a law that virtually everyone agrees is unjust."[3] Senator Dick Durbin (D-Ill.) further explained that when the FSA was "enacted into law, it w[ould] immediately ensure that every year, thousands of people are treated more fairly in our criminal justice system."[4] The "restor[ation]" of fair sentencing was necessary because the Anti-Drug Abuse Act of 1986[5] had created a sentencing scheme that unequally punished comparable offenses involving crack and powder cocaine—two forms of the same drug. Relying on perceived differences in the harmfulness and dangerousness of crack versus powder cocaine, the 1986 Congress created a 100:1 disparity between the amounts of crack versus powder cocaine necessary to trigger particular sentences. Thus, for example, someone convicted of an offense involving just five grams of crack cocaine was subject to the same five-year mandatory minimum federal prison sentence as someone convicted of an offense involving 500 grams of powder cocaine.

There are two particularly glaring flaws of the 1986 Act which the 2010 Congress sought to remedy in the FSA when it reduced the 100:1 ratio. First, since the passage of the 1986 Act, empirical evidence has demonstrated that there is no scientific basis to support the supposed differences between crack and powder cocaine which Congress had initially relied

---

[3] 156 Cong. Rec. S1680-02, *S1681 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin).

[4] *Id.*

[5] Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended, in pertinent part, at 21 U.S.C. § 841(b) *inter alia* (2000)).

upon in devising the 100:1 ratio. Second, the ratio, coupled with government enforcement priorities, gave rise to a racially discriminatory sentencing scheme. Under the 100:1 ratio, African American crack cocaine offenders were routinely given much harsher sentences than other cocaine offenders for comparable conduct. Indeed, by 2004, African Americans served virtually as much time in prison for a non-violent drug offense (58.7 months) as whites did for a violent offense (61.7 months).[6] Having become acutely aware of the discriminatory effects of the 100:1 ratio, Congress passed the FSA and reduced the ratio to 18:1. The sponsors "believe[d] this w[ould] decrease racial disparities and help restore confidence in the criminal justice system, especially in minority communities."[7]

The FSA's text and legislative history demonstrate that Congress intended all crack cocaine offenders sentenced after the FSA's enactment on August 3, 2010, to be sentenced in accordance with the new law—even if their offense conduct occurred before the FSA.[8] To conclude otherwise would

---

[6] Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2003, Table 7.16, at 112 *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs03.pdf.

[7] Letter from Senators Durbin and Leahy to Attorney General Eric Holder (Nov. 17, 2010) *available at* http://www.fd.org/pdf_lib/fair-sentencing-act-ag-holder-letter-111710[1].pdf.

[8] The questions presented to the Court in Petitioners' cases differ only in that Petitioner Hill was sentenced after both the FSA and U.S. Sentencing Commission's Emergency Amendments—promulgated to implement the FSA, as required by that law—went into effect, whereas Petitioner Dorsey was sentenced after the enactment of the FSA but before the Guidelines Amendments went into effect.

eviscerate Congress's actual intent, and mistakenly impute to Congress the intention to "restore fairness to Federal cocaine sentencing"[9] only for some defendants while allowing others to be sentenced under the old repudiated ratio even after the FSA went into effect.

That conclusion cannot be reconciled with either the FSA's overriding purpose or its specific provisions mandating speedy implementation. In particular, Section 8 of the FSA[10] requires the U.S. Sentencing Commission to "make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law" no later "than 90 days after the date of enactment of this Act."[11] As the Third Circuit explained, "'applicable law' must be the FSA, not the 1986 Act, because Congress sought to bring the Guidelines in conformity with the 18:1 ratio . . . ." *U.S. v. Dixon*, 648 F.3d 195, 200 (3d Cir. 2011). By directing the Sentencing Commission to issue prompt emergency guideline amendments implementing the new 18:1 ratio, Congress "evince[d] an intent to apply the FSA to sentences given as of its effective date." *Id.* at 201.

Section 10 of the FSA further confirms Congress's intent. Section 10 requires the Sentencing Commission to "study and submit to Congress a report regarding the impact of the changes in Federal sentencing law under this Act"

---

[9] Pub. L. No. 111-220, 124 Stat. 2372.
[10] *Id.* at § 8.
[11] *Id.*

not later than five years after the FSA's enactment.[12] But because the relevant statute of limitations for charging cocaine offenses is five years,[13] if the FSA did not to apply to conduct prior to its passage, many defendants over the next five years would be sentenced under pre-FSA mandatory minimums. The illogical result, then, would be that the Sentencing Commission would be unable to compile a meaningful report requested by Congress within five years on the FSA's impact on federal sentences. As the Third Circuit has observed, if district courts continue to apply the old 100:1 ratio to all pre-FSA conduct, the report will be "incomplete, at best, and incomprehensible, at worst" because the FSA would "not yet be[ ] uniformly applied until after the report was due." *Dixon,* 648 F.3d at 202 (internal quotation marks omitted). In short, the only way the five-year report would be of any use to Congress is if Congress intended the FSA to apply to all sentences after its enactment.

Despite this uniform evidence of legislative intent, apparent in both the text and legislative history of the FSA, the Seventh Circuit held that Petitioners should be sentenced under the repudiated 100:1 ratio. The Seventh Circuit reasoned that the general federal savings statute, 1 U.S.C. § 109, prevents the FSA from applying to people whose offense conduct predates the FSA—even if they are sentenced after the FSA's passage. Section 109, which Congress initially passed in 1871 and has reenacted and recodified several times since, provides that "[t]he repeal of any statute shall not

---

[12] *Id*. at § 10.

[13] *See* 18 U.S.C. § 3282(a) (2006).

have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act so shall expressly provide . . . ." According to the Seventh Circuit, Congress did not "expressly provide" that the FSA applies to people like Petitioners Hill and Dorsey whose conduct predated the new law. The Seventh Circuit's error was in focusing on the language of § 109 rather than the language of the FSA. In so doing, it ignored the axiomatic constitutional principle that one legislature "'cannot abridge the powers of a succeeding legislature.'" *Lockhart v. U.S.*, 546 U.S. 142, 147 (2005) (Scalia, J. concurring) (quoting *Fletcher v. Peck*, 6 Cranch 87, 135 (1810)). "Among the powers of a legislature that a prior legislature cannot abridge is, of course, the power to make its will known in *whatever fashion it deems appropriate*." *Id.* at 148 (emphasis added). This Court has therefore held that § 109 "cannot justify a disregard of the will of Congress as manifested, either expressly *or by necessary implication*, in a subsequent enactment." *Great Northern Ry. Co. v. U.S.*, 208 U.S. 452, 465 (1908) (emphasis added).

The Seventh Circuit disregarded this Court's guidance when it held that absent an express provision, Congress could not have intended the FSA to apply to defendants like Petitioners. Under *Lockhart*, the FSA's text and history provide the "necessary implication" that Congress intended the FSA to apply to all sentences after its enactment. Moreover, to the extent that the Court perceives any ambiguity in the FSA, insofar as its intended applicability is concerned, the "rule of lenity" requires the Court to "resolve the ambiguity in [Petitioner Hill and Dorsey's] favor." *U.S. v.*

Granderson, 511 U.S. 39, 54 (1994). *See* Part IV, *infra.* For the foregoing reasons, *amici* join Petitioners and the United States in urging the Court to reverse the Seventh Circuit's decisions upholding Petitioners' sentences under the discriminatory and empirically bereft 100:1 ratio.[14]

II. Congress Created The 100:1 Ratio In Response To A Media Frenzy And Without Any Evidentiary Basis.

Crack cocaine began to appear in urban areas like New York, Miami, and Los Angeles between 1984 and 1985. By 1986, crack was widely available in large U.S. cities and relatively inexpensive. Upon entering the mainstream drug culture, crack "immediately absorbed the media's attention. . . . [A]ccounts of crack-user horror stories appeared daily on every major channel and in every major

[14] The Court recently held in *Reynolds v. U.S.*, No. 10-6549, slip op. at 6 (Jan. 23, 2012), that the federal Sex Offender Registration and Notification Act ("SORNA"), 120 Stat. 590, 42 U.S.C. §16901 *et seq.* (2006), does not require offenders convicted before the Act became law "to register before the Attorney General validly specifies that the Act's registration provisions apply to them." *Reynolds* is distinguishable from the present cases. First, the text of SORNA delegated to the Attorney General the "authority to specify the applicability of the requirements . . . to sex offenders convicted before the enactment of this chapter." 42 U.S.C. § 16913(d). In addition, when Congress passed SORNA, it acted against a patchwork quilt of conflicting state rules and it explicitly included a grace period providing the States with at least three years to bring their systems into compliance with federal standards. *Reynolds*, slip op. at 7; 42 U.S.C. §16924. There is no comparable evidence in the FSA or the circumstances surrounding its passage indicating that Congress did not intend the FSA to be immediately effective.

newspaper." *U.S. v. Clary*, 846 F. Supp. 768, 783 (E.D. Mo. 1994) (footnotes omitted) *rev'd*, 34 F.3d 709 (8th Cir. 1994)). The late Judge Clyde S. Cahill of the Eastern District of Missouri recounted that "[i]mages of young black men daily saturated the screens of our televisions. These distorted images branded onto the public mind and the minds of legislators that young black men were *solely* responsible for the drug crisis in America. The media created a stereotype of a crack dealer as a young black male, unemployed, gang affiliated, gun toting, and a menace to society." *Id.* Indeed, "[b]etween 1985 and 1986, over 400 reports had been broadcast by the networks." *Id.*

In June 1986, the nation's simmering fear of crack reached a tragic crescendo. On June 17, 1986, the defending NBA champion Boston Celtics selected African American college basketball star Len Bias as the second overall pick in the NBA Draft. Two days later, Bias died of a drug overdose. His death sparked a national media frenzy largely precipitated by a mistaken assumption that his death had been caused by crack cocaine.[15] In fact, Bias died of a powder cocaine overdose,[16] but the inaccurate reports identifying crack as the cause of death, combined with the public's already potent association between crack and African Americans, created an

---

[15] Marc Mauer, *The Disparity on Crack-Cocaine Sentencing*, Boston Globe, July 5, 2006, http://www.boston.com/news/globe/editorial_opinion/oped/articles/2006/07/05/the_disparity_on_crack_cocaine_sentencing/.

[16] U.S. Sentencing Comm'n, Special Report to Congress: Cocaine and Federal Sentencing Policy 123 (1995) (issued after a review of cocaine penalties as directed by Pub. L. No. 103-322, § 280006, 108 Stat. 1796) [hereinafter 1995 USSC REPORT].

irrepressible momentum against this new form of cocaine.

In the aftermath of Bias's death and with midterm elections quickly approaching, Congress set aside the regular legislative process[17] and expedited consideration of the Anti-Drug Abuse Act of 1986. At the time, the late Senator Charles Mathias (a Republican from Bias's home state of Maryland) lamented that the bill "did not emerge from the crucible of the committee process, tempered by the heat of debate. . . . Many of the provisions of the bill have never been subjected to committee review."[18] Reflecting on this history, Judge Myron H. Bright of the Eighth Circuit explained that "[t]he political climate surrounding the enactment of the [Anti-Drug Abuse Act of 1986] provides the first glimpse at how Congress and the Sentencing Commission created a crack cocaine sentencing scheme untethered to the goals of sentencing." *U.S. v. Brewer*, 624 F.3d 900, 911 (8th Cir. 2010) (Bright, J., concurring in part and dissenting in part). As a consequence of the Act's expedited schedule, there was no committee report to document Congress's intent in passing the Act or to analyze the legislation. The House of Representatives held few hearings on the enhanced penalties for crack offenders, and the Senate conducted only a single hearing on the 100:1 ratio, which lasted only a few hours.[19] The abbreviated legislative history of the 1986 Act does not provide a

---

[17] 132 Cong. Rec. S13741-01 (daily ed. Sept. 26, 1986) (statement of Sen. Mathias).

[18] *Id.*

[19] William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1253 (1996).

single consistently cited rationale for the lopsided crack/powder penalty structure. According to Representative Dan Lungren (R-CA), who helped write the law in 1986, Congress "didn't really have an evidentiary basis for [the 100:1 disparity]."[20]

President Reagan signed the bill into law on October 27, 1986.[21] The Act[22] established mandatory minimum sentences for federal drug trafficking crimes and created the 100:1 sentencing disparity between powder and crack cocaine.[23] To punish "major" and "serious" cocaine traffickers,[24] the Act provided that individuals convicted of trafficking crimes involving 500 grams of powder cocaine—which yields between 2,500 and 5,000 doses[25]—must be sentenced to at least five years imprisonment.[26] But the corresponding amount of crack necessary to trigger the Act's same five-year mandatory minimum was just five grams (the weight of two pennies), which yields between 10 and 50 doses.[27] The Act also provided that those individuals convicted of distribution crimes involving 5000 grams of powder cocaine receive at least 10 years' imprisonment,[28]

---

[20] 156 Cong. Rec. H6196-01, *H6202 (daily ed. July 28, 2010) (statement of Rep. Lungren).

[21] *See* Congressional Quarterly Almanac, *Congress Clears Massive Anti-Drug Measure,* 99th Cong., 2d Sess., Vol. 42 at 92 (1986) [hereinafter CQ Almanac].

[22] Pub. L. No. 99-570, 100 Stat. 3207.

[23] *See* 1995 USSC REPORT at 116.

[24] *Id.* at 117-18.

[25] U.S. Sentencing Comm'n, Report to Congress: Federal Cocaine Sentencing Policy 63 (2007) [hereinafter 2007 USSC REPORT].

[26] *Id.* at 2-3.

[27] *Id*. at 63.

[28] 1995 USSC REPORT, at 116.

whereas a mere 50 grams of crack triggered the same 10-year mandatory minimum.[29] Two years later, Congress intensified its war against crack cocaine: the Omnibus Anti-Drug Abuse Act of 1988[30] created a five-year mandatory minimum sentence for simple possession[31] of five grams or more of crack cocaine. Meanwhile, the maximum penalty for simple possession of any amount of powder cocaine (as for controlled substances generally) remained a misdemeanor punishable by no more than one year in prison.

A. Both Scientific And Sociological Evidence Demonstrate That There Was No Justification For The 100:1 Ratio.

Soon after Congress enacted the 100:1 ratio, objective evidence began mounting that the disparity could not be justified. Indeed, as early as 1993, then-Chief Judge Lyle E. Strom of the District of Nebraska wrote that "the evidence is clear that the cocaine molecule is the same whether the drug being used is powder form or in crack form, and is not inherently more dangerous in crack form." *U.S. v. Majied*, No. 8:CR91-00038(02), 1993 WL 315987 *5 (D. Neb. 1993). In 1996, the Journal of American Medical Association (JAMA) published a study concluding that the physiological and psychoactive

---

[29] Pursuant to its mandate to ensure that the federal sentencing guidelines are consistent with all federal laws, the U.S. Sentencing Commission in 1987 applied this same 100:1 ratio to the then-mandatory Sentencing Guidelines.

[30] Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered sections of U.S.C.).

[31] The 1986 Act's five-year mandatory minimum did not apply to simple possession of crack cocaine.

effects of cocaine are similar regardless of whether it is in the form of powder or crack.[32] In any composition, cocaine is a potent stimulant of the central nervous system, and, as this Court has previously recognized, both powder and crack produce the same types of physiological and psychotropic effects on the human brain. *Kimbrough v. U.S.*, 552 U.S. 85, 94 (2007).[33] Indeed, crack is neither significantly more addictive than powder cocaine nor more immediately addicting.[34] Crack and powder cocaine are simply the same drug prepared differently.[35] The 1996 JAMA study finding similar physiological and psychoactive effects of cocaine regardless of its form[36] concluded that cocaine's propensity for dependence varies by the method of use, amount used, and frequency—*not* by the form of the drug.[37]

By the time Congress passed the FSA, the undeniable consensus in the scientific and legal community was that none of Congress's earlier rationales for the disparity were supported by reliable empirical evidence.[38] As the Sentencing

---

[32] D. K. Hatsukami & M. W. Fischman, *Crack Cocaine And Cocaine Hydrochloride: Are The Differences Myth Or Reality?,* 276 Journal of Am. Med. Ass'n, No. 19, 1580 (Nov. 1996).

[33] *See also* U.S. Sentencing Comm'n, Report to Congress: Cocaine and Federal Sentencing Policy 17 (2002) [hereinafter 2002 USSC REPORT].

[34] D. K. Hatsukami & M. W. Fischman, at 1580.

[35] Crack is formed by dissolving powder cocaine in water and treating it with an alkali such as baking soda.

[36] D. K. Hatsukami & M. W. Fischman, at 1580.

[37] *Id.*

[38] *U.S. v. Smith*, 359 F. Supp.2d 771, 777 (E.D. Wis. 2005) ("[c]ourts, commentators and the Sentencing Commission have

Commission stated in 2007, "[c]rack cocaine and powder cocaine are both powerful stimulants, and both forms of cocaine cause *identical effects*."[39] In short, there is now widespread recognition that the 1986 Congress, in its haste, created a cocaine sentencing scheme that lacked any rational relationship to reality.

III. The 100:1 Ratio Resulted In Extreme Racial Disparities In Federal Cocaine Sentencing.

The most catastrophic consequence of the senseless 100:1 ratio has been the disparate and discriminatory impact on African Americans. Even though the majority of crack users are white and Hispanic, African Americans comprise the vast majority of those convicted of crack cocaine offenses. For example, in 2010, whites constituted 7.3% and African Americans an astonishing 78.5% of the defendants sentenced under the federal crack cocaine laws.[40] Moreover, despite Congress's intention to punish major and serious cocaine traffickers,[41] the five-year mandatory minimums for offenses involving just five grams of crack—which can yield as little as

---

long criticized this disparity, which lacks persuasive penological or scientific justification.").

[39] 2007 USSC REPORT, at 62 (emphasis added).

[40] U.S. Sentencing Comm'n, 2010 Sourcebook of Federal Sentencing Statistics, Table 34 (2010) *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/SBtoc10.htm [hereinafter 2010 Sourcebook of Federal Sentencing Statistics].

[41] *See* 1995 USSC REPORT at 117-18.

10 doses[42]—punished enormous numbers of very low-level offenders.

The enforcement against and prosecution of African Americans for crack cocaine offenses, combined with the 100:1 ratio, has resulted in African Americans serving substantially more time in prison for crack cocaine offenses than defendants for powder cocaine offenses. The average sentence for a crack cocaine offense in 2010 was 111 months, while the average sentence for a powder cocaine offense was 84.9 months.[43] From 1994 to 2003, the average time African American drug offenders served in prison increased by 77%, compared to an increase of 33% for white drug offenders.[44] By 2004, African Americans served virtually as much time in prison for a nonviolent drug offense (58.7 months) as whites did for a violent offense (61.7 months).[45] Before the enactment of federal mandatory minimum sentencing for crack cocaine offenses, the average federal drug sentence for African Americans was 11% higher than for whites; four years later, it was 49% higher.[46] Indeed, in large part due to the crack

---

[42] 2007 USSC REPORT at 63.

[43] 2010 Sourcebook of Federal Sentencing Statistics, at Figure J.

[44] Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 1994, Table 6.11, at 85; Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2003, Table 7.16, at 112.

[45] Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2003, Table 7.16, at 112.

[46] B.S. Meierhoefer, Federal Judicial Center, *The General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentences Imposed* 20 (1992), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/geneffmm.pdf/$file/geneffmm.pdf.

mandatory minimums, the African American prison population reached staggering proportions.[47]

Congress's misinformed assumptions that there are inherent differences between two forms of the same drug, when in fact crack and powder cocaine have the same effects, resulted in a system that treated comparable conduct unequally with African Americans bearing the brunt of such stark inequality. Given that a defendant's race was the factor most commonly and obviously correlated with harsher penalties, the 100:1 ratio came to represent the modern torchbearer of racism in our criminal justice system.

---

[47] *See* Bureau of Justice Statistics, Prison Inmates at Midyear 2008—Statistical Tables, Table 16, at 17 *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pim08st.pdf (In 2008 there were approximately 846,000 African American men held in state or federal prison or in local jails.); Justice Policy Institute, *Cellblocks or Classrooms?: The Funding of Higher Education and Corrections and its Impact on African American Men* 10 (2002), *available at* http://www.justicepolicy.org/images/upload/0209_REP_CellblocksClassrooms_BB-AC.pdf (In 2000, there were approximately 791,600 African American men in prisons and jails, and only 603,032 African American men enrolled in higher education); *see also* Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-Five Years After the Stanford Prison Experiment*, 53 American Psychologist, No. 7, at 716 (July 1998) (At the beginning of the 1990s, the United States had more African American men between the ages of 20 and 29 in the criminal justice system than in college); Marc Mauer, *Race, Drugs Laws & Criminal Justice, from Symposium: U.S. Drug Laws: The New Jim Crow?*, 10 Temp. Pol. & Civ. Rts. L. Rev. 321, 324 (2001) (One of every 14 African American children has a parent in prison or jail); ACLU et al, *Caught in the Net: The Impact of Drug Policies on Women and Families* 49 (2005) (African American children are nine times more likely than white children to have a parent incarcerated).

A. The Racial Disparities Resulting From The 100:1 Ratio Have Had A Devastating Impact on Individual Lives.

The story of Hamedah Hasan[48] epitomizes the unduly harsh devastation that the 100:1 ratio has wreaked on individuals and their families. When Ms. Hasan was 21 years old, she was in a horribly abusive relationship with a man in Portland, Oregon. This man repeatedly cursed at, slapped, punched and kicked Ms. Hasan. Eventually, Ms. Hasan, the mother of two young children, fled to live with a cousin in Omaha, Nebraska, where she found sanctuary—a safe place to live hundreds of miles from her abuser.

Unfortunately, Ms. Hasan's cousin dealt crack cocaine. With few resources, and indebted to her cousin for helping her escape her abusive relationship, Ms. Hasan agreed to run various errands and transfer some money in connection with her cousin's drug trafficking. Knowing this was not a place for her two young daughters, Ms. Hasan found the strength to move back to Portland to get away from the drug operation, to create a better life for her daughters, and to earn an honest living.

---

[48] Letter from Hamedah Hasan to President Barack Obama (Feb. 2010) *available at* http://www.dearmrpresidentyesyoucan.org/2010.02%20HH%20personal%20Commutation%20Letter%20to%20President.pdf; *see also* ACLU Profile from the War on Drugs: Hamedah Hasan (Jun. 15, 2011) *available at http://www.aclu.org/blog/criminal-law-reform/profile-war-drugs-hamedah-hasan.*

However, Ms. Hasan was indicted and convicted of conspiracy to distribute crack cocaine during her time in Omaha. Despite her previously clean record, her sentencing judge found his hands tied by a combination of mandatory minimums for crack cocaine and the then-mandatory sentencing guidelines. *U.S. v. McMurray*, 833 F. Supp. 1454, 1485 (D. Neb. 1993) ("For whatever value it may have, it is my strongly felt opinion that . . . [Ms. Hasan] ought [not] to spend the rest of [her] days in prison. . . . Since my disagreement with these sentences is with many of the normative values underlying them, I am justified only in voicing that disagreement."). Ms. Hasan received a life sentence, which was later reduced to 27 years. Had she been convicted of an offense involving powder cocaine, she would have returned to her family years ago.[49] In a letter she wrote to President Obama in 2010 seeking clemency, Ms. Hasan explained that during her more than 17 years of incarceration, she had "taken long, hard looks at [her]self. [She has] done everything within [her] power to redeem [her]self for [her] past transgressions by learning and demonstrating what it means to be a community asset versus a liability."[50] Ms. Hasan's story is not unique. She is one of many who have suffered under the unjustified 100:1 ratio, and her story demonstrates the urgent need to end the imposition of sentences under that fundamentally unfair scheme.

---

[49] Because the U.S. Sentencing Commission's FSA Guideline Amendments are fully retroactive, Ms. Hasan was able to apply for a reduction in her sentence on November 1, 2011.

[50] Letter from Hamedah Hasan to President Barack Obama (Feb. 2010).

B. The United States Sentencing Commission Has Recognized The Discriminatory Impact Of The 100:1 Ratio Since 1995 And Urged Its Repeal.

The Sentencing Commission, a bipartisan agency within the judicial branch, recognized the crack/powder disparity's distressing discriminatory impact beginning in 1995. The Commission reported to Congress that the "100-to-1 crack cocaine to powder cocaine quantity ratio is a primary cause of the growing disparity between sentences for Black and White federal defendants."[51] Based largely on these discriminatory consequences, the Commission told Congress on four occasions that there was no basis for the 100:1 ratio. In its 1995, 1997, 2002, and 2007 reports to Congress, the Commission recommended increasing the crack quantity thresholds necessary to trigger mandatory minimum sentences.

On February 28, 1995, the Commission unanimously recommended that changes be made to the cocaine sentencing structure, including a reduction in the 100:1 ratio.[52] On May 1, 1995, the Commission submitted to Congress proposed legislation and amendments to its sentencing guidelines which would have equalized the penalties for crack and powder cocaine possession and distribution at the level of powder cocaine, and provided sentencing enhancements for violence or

---

[51] 1995 USSC REPORT, at 154.

[52] U.S. Sentencing Comm'n, Special Report to the Congress: Cocaine and Federal Sentencing Policy 1 (1997) [hereinafter 1997 USSC REPORT].

other harms.[53] The Commission "acknowledged that its crack guidelines bear no meaningful relationship to the culpability of defendants sentenced pursuant to them. . . .[T]he Commission has never before made such an extraordinary mea culpa acknowledging the enormous unfairness of one of its guidelines." *U.S. v. Anderson*, 82 F.3d 436, 449-50 (D.C. Cir. 1996) (Wald, J., dissenting) (footnotes omitted).

Later that year, Congress and the President rejected the Commission's recommended guideline amendment equalizing the powder and crack penalties.[54] In addition, Congress explicitly directed the Commission to provide new recommendations in which "the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine."[55]

In April 1997, the Commission issued a second report urging the reduction of the 100:1 ratio, which again highlighted the ratio's discriminatory impact. Indeed, the report's very first paragraph states that "[c]ritics [of the cocaine sentencing disparity] have focused on the differences in federal penalty levels between the two principal forms of

---

[53] *See* Amendments to the Sentencing Guidelines for the United States Courts, 60 Fed. Reg. 25074, amend. No. 5 (proposed May 10, 1995).

[54] Act of Oct. 30, 1995, Pub. L. No 104-38, § 1, 109 Stat. 334 (1995) (an Act to disapprove of amendments to the Federal Sentencing Guidelines relating to lowering of crack sentences). This marked the first time in the guidelines' history that Congress and the President rejected a guideline amendment that the Commission had approved. *Anderson*, 82 F.3d at 449-50 (Wald, J., dissenting).

[55] § 2(a)(1)(A), 109 Stat. at 334.

cocaine . . . and on the disproportionate impact the more severe crack penalties have had on African-American defendants."[56] The Commission stated that it was "firmly and unanimously in agreement that the current penalty differential for federal powder and crack cocaine cases should be reduced by changing the quantity levels that trigger mandatory minimum penalties for both powder and crack cocaine."[57]

In 2002, the Commission examined the disparity for a third time. The Commission held hearings with a wide range of experts who overwhelmingly concluded that there is no valid scientific or medical distinction between powder and crack cocaine.[58] After the 2002 hearings, the Commission issued a new report on crack and powder cocaine disparities and once again found that the 100:1 ratio is unjustified.[59] Specifically, the Commission found that the crack penalties: 1) exaggerated the relative harmfulness of crack cocaine; 2) swept too broadly and applied most often to lower level offenders; 3) overstated the seriousness of most crack cocaine offenses and failed to provide adequate proportionality; and 4) mostly affected minorities.[60] Accordingly, the Commission recommended that Congress increase the five-year mandatory minimum threshold quantity for crack cocaine offenses.[61]

---

[56] 1997 USSC REPORT, at 1.
[57] 1997 USSC REPORT, at 2.
[58] 2002 USSC REPORT, at Appendix E, E-1–E-6.
[59] *Id.* at v.
[60] *Id.* at v-viii.
[61] *Id.* at 104-06.

In 2007, the Commission reiterated its objections to federal cocaine sentencing policy and urged Congress to act. The Commission stated that "[f]ederal cocaine sentencing policy, insofar as it provides substantially heightened penalties for crack cocaine offenses, continues to come under almost *universal criticism* from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups, and inaction in this area is of increasing concern to many, including the Commission."[62] In this report, the Commission repeated its four findings from the 2002 report, including that the "severity of crack cocaine penalties mostly impacts minorities."[63] Thus, while it was the 111th Congress that finally reduced the 100:1 ratio, the Commission had implored every Congress since the 104th to reform the discriminatory law.

C. Federal Judges Have Condemned The Racially Discriminatory 100:1 Ratio For Decades.

The Commission's zealous opposition to the 100:1 ratio has been matched by that of federal district and circuit court judges across the country from all ideological backgrounds. Recognizing that the 100:1 ratio resulted in disturbing racial disparities, numerous federal judges expressed their distress and frustration over this discredited policy for many years. The judicial outcry over the 100:1 ratio appears to be unprecedented in our history—perhaps no other single sentencing policy has inspired such harsh condemnation by so many

---

[62] 2007 USSC REPORT, at 2 (emphasis added).
[63] *Id.* at 8.

federal judges. In 1997, 27 federal judges, all of whom had previously served as U.S. Attorneys, sent a letter to the U.S. Senate and House Judiciary Committees stating that "[i]t is our strongly held view that the" 100:1 ratio "can not be justified and results in sentences that are unjust and do not serve society's interest."[64]

Judge Myron H. Bright of the Eighth Circuit has been condemning the 100:1 ratio since 1992, when he wrote that "[g]iven the precedents of this court, I find myself obliged to concur in that holding. . . . I write separately to note the racial injustice flowing from this policy." *U.S. v. Williams*, 982 F.2d 1209, 1214 (8th Cir. 1992) (Bright, J., concurring). By 2010, Judge Bright insisted that "[t]he disproportionate impact of the crack cocaine guidelines on minorities should concern every federal judge." *U.S. v. Brewer*, 624 F.3d 900, 913 n. 14 (8th Cir. 2010) (Bright, J., concurring in part and dissenting in part).

Another early and passionate critic of the ratio was Judge Nathaniel R. Jones of the Sixth Circuit. In 1996, Judge Jones pointedly noted that "the African-American community has borne the brunt of enforcement of the 100:1 ratio." *U.S. v. Smith*, 73 F.3d 1414, 1418 (6th Cir. 1996) (Jones, J., concurring). Judge Jones urged his colleagues to revisit the constitutionality of the ratio, arguing that "[t]he longer the policies exist, the greater the risk

---

[64] Letter from Judge John S. Martin, Jr. to Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, and Congressman Henry Hyde, Chairman of the House Judiciary Committee (Sept. 16, 1997), *reprinted in* 10 FED. SENT'G RPTR. No. 4, at 194 (Jan./Feb. 1998).

that we send a message to the public that the lives of white criminals are considered by the U.S. justice system to be at least 100 times more valuable and worthy of preservation than those of black criminals." *Id.* at 1422 (internal quotation marks omitted).

Judges of the Second, Seventh, and Ninth Circuits echoed Judge Jones' condemnation of the ratio. In 1995, Judge Guido Calabresi of the Second Circuit asserted that the "disproportionate impact that the 100–to–1 crack/cocaine sentencing ratio has on members of minority groups is deeply troubling. . . . the statistical evidence demonstrating the discriminatory impact of the current sentencing differential is now irresistible." *U.S. v. Then*, 56 F.3d 464, 467 (2d Cir. 1995) (Calabresi, J., concurring) (internal quotation marks omitted). The late Judge Robert Boochever of the Ninth Circuit explained that "[a]lthough I find the result in this case to be shocking, in that the punishment for the crack cocaine offense is the same as the punishment that would have been imposed for a comparable offense involving 100 times as much powder cocaine, and the evidence indicates that 92% of federal prosecutions for crack cocaine, which require the enormously higher terms of imprisonment, involve African-Americans, I am compelled to concur." *U.S. v. Dumas*, 64 F.3d 1427, 1432 (9th Cir. 1995) (Boochever, J., concurring). In 1996, Judge Richard D. Cudahy of the Seventh Circuit wrote that "the extraordinary impact of the 100:1 ratio will provoke examination and reexamination however many efforts are made to lay the matter to rest." *U.S. v. Reddrick*, 90 F.3d 1276, 1284 (7th Cir. 1996) (Cudahy, J., concurring).

Starting in the early 1990s, district court judges sitting at the front lines of federal cocaine sentencing likewise renounced the ratio's discriminatory impact. In 1993, Judge Spencer Letts of the Central District of California protested, "I, for one, do not understand how it came to be that the courts of this nation, which stood for centuries as the defenders of the rights of minorities against abuse at the hands of the majority, have so far abdicated their function that this defendant must serve a ten year sentence. . . In upholding mandatory minimum sentences, the courts have instituted racial disparity in sentencing." *U.S. v. Patillo*, 817 F. Supp. 839, 843, n.6 (C.D. Cal. 1993). The same year, then-Chief Judge Lyle E. Strom of the District of Nebraska explained that "[a] by-product of this inordinate disparity is that members of the African American race are being treated unfairly in receiving substantially longer sentences than caucasian[s]." *U.S. v. Majied*, No. 8:CR91-00038(02), 1993 WL 315987 *5 (D. Neb. 1993).

When Judge Richard G. Kopf of the District of Nebraska sentenced Hamedah Hasan in 1993, he lamented "the nearly overwhelming statistical evidence that blacks are prosecuted much more frequently and 'disproportionately' for 'crack' violations than whites and that blacks are consequently much more likely than whites to be subjected to harsh sentences under the 'crack' guidelines." *U.S. v. McMurray*, 833 F. Supp. 1454, 1461 (D. Neb. 1993). Two years later, he wrote that "it is now beyond doubt that the 100–to–1 ratio creates unnecessary and unintended sentencing disparity . . . . For example, there is the very troubling problem of unintentional but nevertheless

unwarranted disparity insofar as ethnic or racial minorities are concerned." *U.S. v. Thompson*, 905 F. Supp. 676, 679 (D. Neb. 1995).

In 1994, the late Judge Clyde S. Cahill Jr. of the Eastern District of Missouri held that the 100:1 ratio violated the Equal Protection rights of an African American crack defendant. *U.S. v. Clary*, 846 F. Supp. 768 (E.D. Mo. 1994) *rev'd*, 34 F.3d 709, (8th Cir. 1994). Judge Cahill asserted "that this one provision, the crack statute, has been directly responsible for incarcerating nearly an entire generation of young black American men for very long periods, usually during the most productive time of their lives." 846 F. Supp. at 770. He found the "disparity . . . so significantly disproportional that it shocks the conscience of the Court and invokes examination." *Id.*

Ten years later, district court judges continued to criticize the disparity. In 2005, Judge Lynn S. Adelman of the Eastern District of Wisconsin called the ratio "notorious," and summarized that "[c]ourts, commentators and the Sentencing Commission have long criticized this disparity, which lacks persuasive penological or scientific justification, and creates a racially disparate impact." *U.S. v. Smith*, 359 F. Supp. 2d 771, 777 (E.D. Wis. 2005). Judge William E. Smith of the District of Rhode Island recounted that "approximately 85% of the offenders sentenced for crack cocaine violations are black . . . and that this leads to, at the very least, a perception that the crack/powder disparity is racially-motivated." *U.S. v. Perry*, 389 F. Supp. 2d 278, 302 (D.R.I. 2005). Judge Shira A. Scheindlin of the Southern District of New York wrote that "the heavy crack cocaine sentences .

. . are disproportionately imposed on young black males." *U.S. v. Fisher*, 451 F. Supp. 2d 553, 561 (S.D.N.Y. 2005) (footnote omitted) (vacated and remanded *U.S. v. Thompson*, 528 F.3d 110 (2d Cir. 2008)).

In 2006, Judge Gregory A. Presnell of the Middle District of Florida explained that "the crack/powder disparity results in a disparate impact along racial lines, with black offenders suffering significantly harsher penalties." *U.S. v. Hamilton*, 428 F. Supp. 2d 1253, 1258 (M.D. Fla. 2006) (footnote omitted). In 2009, Judge Joan B. Gottschall of the Northern District of Illinois departed from the Sentencing Guidelines' ratio, citing "ample evidence that the crack-to-powder ratio is unjustifiable and unjust, is racially discriminatory in impact and is not proportionate." *U.S. v. Edwards*, No. 04-CR-1090-5, 2009 WL 424464,*3 (N.D. Ill. 2009). Judge Kimba M. Wood of the Southern District of New York wrote that the ratio "fosters disrespect for the criminal justice system because of its racial impact." *U.S. v. Monroe*, No. 05-CR-1042-01, 2009 WL 1448959, *1 n.1 (S.D. N.Y. 2009). Similarly, Judge Mark W. Bennett of the Northern District of Iowa argued in 2009 that the ratio's "disproportionate impact on black offenders fosters disrespect for and lack of confidence in the criminal justice system." *U.S. v. Gully*, 619 F. Supp. 2d 633, 641 (N.D. Iowa 2009).

Circuit Court judges also continued to criticize the discriminatory ratio. In 2006, Judge Rosemary Barkett of the Eleventh Circuit wrote that "[t]he ratio has been subject to widespread criticism almost since its inception. . . . This differential in sentencing creates an unwarranted disparity that has been

correlated with racial disparities and that undermines the public confidence in the criminal justice system." *U.S. v. Williams*, 472 F.3d 835, 846 n.4 (11th Cir. 2006) (dissent from denial of rehearing en banc). In 2009, Judges Carlos F. Lucero, Timothy M. Tymkovich, and Jerome A. Holmes of the Tenth Circuit, in a per curiam order, noted "that the implementation of the 100-to-1 quantity ratio more greatly impacts African-Americans across the justice system as a whole." *U.S. v. Lasley*, 331 Fed. Appx. 600, 602 (10th Cir. 2009) (per curiam). Last year, Judge Andre M. Davis of the Fourth Circuit concluded that the "ballooning of the percentage of blacks incarcerated over the past 25 years directly corresponds with the disparate treatment of crack and powder cocaine." *U.S. v. Gregg*, 435 Fed. Appx. 209, 221 (4th Cir. 2011) (Davis, J., concurring).

This Court, too, has grappled with the 100:1 ratio and its discriminatory impact. As early as 1996, Justice Stevens characterized as "undisputed" the fact "that the brunt of the elevated federal penalties falls heavily on blacks." *U.S. v. Armstrong*, 517 U.S. 456, 479 (1996) (Stevens, J., dissenting). In *Kimbrough v. U.S.,* 552 U.S. 85 (2007), the Court reviewed the history of the 100:1 ratio and noted that the Commission had found that the disparity in cocaine sentencing "fosters disrespect for and lack of confidence in the criminal justice system because of a widely-held perception that it promotes unwarranted disparity based on race." *Id.* at 98 (internal quotation marks omitted). The Court acknowledged that the Commission had long objected to the ratio in part because "[a]pproximately 85 percent of defendants convicted of crack offenses in federal court are black; thus the severe sentences required

by the 100-to-1 ratio are imposed primarily upon black offenders." *Id.* (internal quotation marks omitted).

D. Congress Understood The Discriminatory Consequences Of The 100:1 Ratio When It Passed The FSA And Explicitly Sought To Redress This Longstanding Injustice.

The landscape within which Congress passed the FSA was dominated by resounding criticism of a policy that had no "penological or scientific justification," *U.S. v. Smith*, 359 F. Supp. 2d 771, 777 (E.D. Wis. 2005), and had become "one of the most notorious symbols of racial discrimination in the modern criminal justice system."[65]

The successful legislative effort followed an Executive call to action. The Obama administration repeatedly and publicly condemned the 100:1 ratio, citing its discriminatory effects. Attorney General Eric Holder asserted that "[i]t is the view of this Administration that the 100-to-1 crack-powder sentencing ratio is simply wrong. It is plainly unjust to hand down wildly disparate prison sentences for materially similar crimes. It is unjust to have a sentencing disparity that disproportionately and illogically affects some racial groups."[66] Similarly,

---

[65] 156 Cong. Rec. S1680-02, *S1683 (daily ed. Mar. 17, 2010) (statement of Sen. Leahy) (quoting letter to the Senate Judiciary Committee from John Payton, the president of the NAACP Legal Defense Fund).

[66] Attorney General Eric Holder, Remarks as Prepared for Delivery at the D.C. Court of Appeals Judicial Conference (June 19, 2009) (available at www.usdoj.gov/ag/speeches/2009/ag-speech-090619.html); *see also* Attorney General Eric Holder,

Assistant Attorney General Lanny Breuer recounted that "Sentencing Commission data confirms that in 2006, 82 percent of individuals convicted of federal crack cocaine offenses were African American, while just 9 percent were White. . . . The impact of the [crack/powder ratio] has fueled the belief across the country that federal cocaine laws are unjust."[67] Having heard from the Obama Administration, the Sentencing Commission, and numerous members of the federal judiciary that the 100:1 ratio was discriminatory, a bipartisan coalition of the 111th Congress sought to correct the injustice with the FSA: "There is a bipartisan consensus that current cocaine sentencing laws are unjust. Now Democrats and Republicans have come together to address the issue in a bipartisan way. . . . [T]he Senate Judiciary

---

Remarks at the National Black Prosecutors Association's Profiles in Courage Luncheon (July 22, 2009) (available at http://www.justice.gov/ag/speeches/2009/ag-speech-0907221.html) ("I have seen first-hand the effect that disparities in drug sentences have had on our communities. In my career as a prosecutor and as a judge, I saw too often the cost borne by the community when promising, capable young people sacrificed years of their futures for *non*-violent offenses."); Attorney General Eric Holder, Testimony before the United States House of Representatives Committee on the Judiciary (May 14, 2009) (available at http:www.usdoj.gov/ag/testimony/2009/ag-testimony-090514.html); Attorney General Eric Holder, Remarks at Charles Hamilton Houston Institute for Race and Justice and Congressional Black Caucus Symposium (June 24, 2009) (available at http://www.justice.gov/ag/speeches/2009/ag-speech-0906241.html).

[67] Assistant Attorney General Lanny Breuer, Statement before the United States Senate Committee on the Judiciary Subcommittee on Crime and Drugs (Apr. 29, 2009) (available at http://www.judiciary.senate.gov/pdf/09-04 29BreuerTestimony.pdf).

Committee reported the [FSA] by a unanimous 19-to-0 vote."[68]

On the day the FSA passed in the Senate, Senator Dick Durbin explained that "the net result of" the crack/powder disparity "was that the heavy sentencing we enacted . . . took its toll primarily in the African-American community. . . . It was the same cocaine, though in a different form, and [African Americans] were being singled out for much more severe and heavy sentences."[69] Senator Durbin later said that "[t]his disparity was one of the most significant causes of unequal incarceration rates between African Americans and Caucasians. The following statistic is chilling: In this country, African Americans are incarcerated at approximately six times the rate of Caucasians."[70]

Similarly, on the day the FSA passed in the House of Representatives, Representative Dan Lungren (R-CA), who "helped to write the Drug Control Act of 1986," told his colleagues that "one of the sad ironies . . . is that a bill which was characterized by some as a response to the crack epidemic in African American communities has led to racial sentencing disparities which simply cannot be ignored in any reasoned discussion of this issue."[71] Representative Henry C. Johnson, Jr. (D-GA) urged his colleagues to vote for the FSA because "[t]here is

---

[68] 156 Cong. Rec. S1680-02, *S1681 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin).
[69] *Id*. at *S1680-81.
[70] 157 Cong. Rec. S4209-02, **S4209-10* (daily ed. June 29, 2011) (statement of Sen. Durbin).
[71] 156 Cong. Rec. H6196-01, *H6202 (daily ed. July 28, 2010) (statement of Rep. Lungren).

absolutely no justification for this racial disparity in federal cocaine sentencing policy."[72] Speaking in support of the FSA, Representative Sheila Jackson Lee (D-TX) stated, "[i]t is time for us to realize that the only real difference between these two substances is that a disproportionate number of the races flock to one or the other."[73] Representative Steny Hoyer (D-MD) asserted that "[i]t has long been clear that 100-to-1 disparity has had a racial dimension . . . helping to fill our prisons with African Americans disproportionately put behind bars for longer. The 100-to-1 disparity is counterproductive and unjust."[74]

There can be little doubt that Congress overwhelmingly voted for the FSA in order to redress the profound racial disparities that the 100:1 ratio created. The legislative history confirms that "[i]t is the instinctive distaste against men and women, but

---

[72] 156 Cong. Rec. E1498-02, *E1498-99 (daily ed. July 28, 2010) (statement of Rep. Johnson).

[73] 156 Cong. Rec. H6196-01, *H6199 (daily ed. July 28, 2010) (statement of Rep. Jackson Lee).

[74] 156 Cong. Rec. H6196-01, *H6203 (daily ed. July 28, 2010) (statement of Rep. Hoyer); *see also* 156 Cong. Rec. H6196-01, *H6198 (daily ed. July 28, 2010) (statement of Rep. Clyburn) ("Equally troubling is the enormous growth in the prison population, especially among minority youth. The current drug sentencing policy is the single greatest cause of the record levels of incarceration in our country. One in every 31 Americans is in prison or on parole or on probation, including one in 11 African Americans."); 156 Cong. Rec. H6196-01, *H6197 (daily ed. July 28, 2010) (statement of Rep. Scott) ("This disparity is particularly egregious when you consider that the Sentencing Commission has concluded that there is no pharmacological difference between the two forms of cocaine, and that 80 percent of the crack defendants are black, whereas only 30 percent of the powder cocaine defendants are black.").

mainly African-American men . . . languishing in prison for committing crimes of crack rather than powder cocaine, that led Congress to pass the Fair Sentencing Act." *U.S. v. Holcomb*, 657 F.3d 445, 460-61 (7th Cir. 2011) (Williams, J., dissenting from denial of rehearing en banc).

IV. This Court's Presumption That Congress Seeks To Avoid Unnecessarily Vindictive Punishments, Along With The Rule Of Lenity, Weigh In Favor Of Applying The New Crack/Powder Ratio To Petitioners.

The principle underlying this Court's holding in *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964), weighs in Petitioners' favor. *Hamm* held that state trespass convictions arising from the petitioners' participation in lunch counter sit-ins had to be vacated as a result of the subsequent Civil Rights Act. *Id.* at 307, 317. The principle reflected in that holding "takes the . . . form of imputing to Congress an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose, and would be unnecessarily vindictive." *Id.* at 313. The Court directed that this "general principle . . . is to be read wherever applicable as part of the background against which Congress acts." *Id.* at 313-14.

The *Hamm* principle is applicable here, where Congress acted against the background of unprecedented opposition to a sentencing policy widely acknowledged to have discriminatory effects. As a result, an intention must be imputed to Congress that the old crack/powder ratio, which "no longer further[s] any legislative purpose," *id.* at 313,

should not be imposed on any defendant after the FSA's enactment. The purpose of the FSA, like the Civil Rights Act, "was to obliterate the effect of a distressing chapter in our history," *id.* at 315, during which African American citizens of this country were effectively subject to legal discrimination based on their race. Even though the FSA did not "substitute[ ] a right for a crime," *id.* at 314, this Court's reasoning in *Hamm* applies in the extraordinary context of the new federal cocaine sentencing scheme. When Congress replaces a discriminatory legal regime, there is no justification for gradually tearing down the old regime—rather, the old law must immediately yield to the new law. It would be "unnecessarily vindictive," *id.* at 313, to sentence Petitioners Hill and Dorsey under a 100:1 ratio that science has rejected as unsound and Congress has repudiated as unfair.

Amici perceive no ambiguity in Congress's intent to remedy the racially disparate consequences of the 100:1 ratio when it passed the FSA. However, to the extent that the Court is not persuaded that the "text, structure, and history" of the FSA "unambiguously" establishes this intent, the "rule of lenity" requires the Court to "resolve the ambiguity in [Petitioner Hill and Dorsey's] favor." *U.S. v. Granderson*, 511 U.S. 39, 54 (1994). As this Court recently reiterated, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. U.S.*, 561 U.S. ---, 130 S. Ct. 2896, 2932 (2010) (internal quotation marks omitted). This rule favors applying the FSA to all sentences after its enactment.

To deny Petitioners the benefit of the FSA's less discriminatory ratio would undermine the Act's self-proclaimed objective "[t]o restore fairness to Federal cocaine sentencing."[75] Congress's pressing concerns with racial equality and proportionality in sentencing apply with equal force to conduct committed prior to the passage of the FSA as to conduct committed afterwards. It would be inconsistent with Congress's purpose to end the legacy of inequitable cocaine sentencing for this Court to allow the defunct and flawed 100:1 ratio to govern any sentence imposed after the FSA's enactment.

[75] Pub. L. No. 111-220, 124 Stat. 2372 (2010).

CONCLUSION

For the reasons stated above, the judgments of the court of appeals should be reversed.

Respectfully submitted,

Steven R. Shapiro
Counsel of Record
Ezekiel R. Edwards
Dennis D. Parker
American Civil Liberties Union Foundation
125 Broad Street
New York, N.Y. 10004
(212) 549-2500
sshapiro@aclu.org

Lisa M. Bornstein
The Leadership Conference on Civil and Human Rights
1629 K St. NW
Washington, DC 20006
(202) 466-3311

Kim M. Keenan
Anson Asaka
The National Association for the Advancement of Colored People
4805 Mount Hope Drive
Baltimore, MD 21215

Marc Mauer
Kara Gotsch
The Sentencing Project
1705 DeSales Street NW,
8th Floor
Washington, DC 20036
(202) 628-0871

Mary Price
Families Against
Mandatory Minimums
1612 K Street, NW
Washington, DC 20006
(202) 822-6700

Nkechi Taifa
Open Society Institute
1730 Pennsylvania Ave.
NW, 7th Floor
Washington, DC 20006
(202) 721-5600

Daniel N. Abrahamson
Theshia Naidoo
Tamar Todd
Drug Policy Alliance
Office of Legal Affairs
918 Parker Street,
Building A21
Berkeley, CA 94710
(510) 229-5211

David Borden
StoptheDrugWar.org
P.O. Box 18402
Washington DC 20036
(202) 293-8340

Dated: January 30, 2012

APPENDIX

STATEMENTS OF INTEREST

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Illinois is a statewide affiliate of the national ACLU. Since its founding more than 90 years ago, the ACLU has appeared before this Court in numerous cases, both as direct counsel and as *amicus curiae*, including *Kimbrough v. U.S.,* 552 U.S. 85, 94 (2007), which is pertinent to the issue presented in this case.

The Leadership Conference on Civil and Human Rights is a diverse coalition of more than 200 national organizations charged with promoting and protecting the rights of all persons in the United States. The Leadership Conference was founded in 1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory Council. The Leadership Conference works to build an America that's as good as its ideals, and towards this end, is dedicated to eliminating all forms of discrimination from our criminal justice system. Fairness and equality in the administration of justice is a fundamental civil and human right, but the extreme racial disparities that exist within the criminal justice system deny this right to the most vulnerable segments of society. Since the passage of the Anti-Drug Abuse Act of 1986, courts, legislators, and the United States Sentencing Commission have repeatedly noted the inequity in sentencing for crack

cocaine offenders, who receive harsher and longer prison terms for the same conduct as powder cocaine offenders, which disproportionately affects African Americans. Thus Congress passed the Fair Sentencing Act to remedy this stark disparity in sentencing, noting its intent "to restore fairness to Federal cocaine sentencing." The Leadership Conference supports application of the Fair Sentencing Act to all defendants whose conduct predates the enactment of the Fair Sentencing Act, but were sentenced after.

The National Association for the Advancement of Colored People (NAACP) is a non-profit membership corporation incorporated in the State of New York in 1909. The NAACP is the nation's oldest and largest civil rights organization. The mission of the NAACP is to ensure the political, educational, social and economic equality of all persons and to eliminate racial hatred and racial discrimination. The NAACP has been at the forefront of the struggle to end racial disparities in the criminal justice system.

The Sentencing Project is a national non-profit organization established in 1986 to engage in public policy research and education on criminal justice reform. The Sentencing Project has produced a broad range of scholarship assessing the effects of federal crack cocaine policy, and members of its staff have been invited to present testimony before Congress, the United States Sentencing Commission, and professional audiences on the topic. Because of its particular expertise and interest in this issue, The Sentencing Project also filed a brief *amici curiae* (jointly with the Center for the Study of Race and

Law at the University of Virginia School of Law) specifically addressing the crack-powder cocaine disparity in *Kimbrough v. United States* (2007).

Families Against Mandatory Minimums (FAMM) is a national nonprofit, nonpartisan organization. FAMM's mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. By mobilizing thousands of individuals whose lives have been affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform.

FAMM, whose membership includes many prisoners previously sentenced under the now repudiated crack cocaine sentencing structure, worked since the early 1990s to reform the law. Today, FAMM membership includes dozens of individuals sentenced since the Fair Sentencing Act was enacted to pre-FSA mandatory minimum sentences. They include Mario Anthony Herrera, sentenced at the age of 19 in the Southern District of Iowa on September 24, 2010 for his role in distributing 13.4 grams of crack cocaine. The judge departed from the pre-Amendment guideline range of 70-87 months but could not reduce Herrera's sentence further due to the five year mandatory minimum. Herrera suffered significant substance abuse problems as a youth and had a very tough childhood that included absent and incarcerated parents and membership in a youth gang. But, following his release from the state training school, he voluntarily left the gang and engaged in a committed relationship with the mother of his son,

whose birth forced him to grow up. Herrera's son was 23 months old when Herrera was incarcerated. If petitioners prevail, Herrera's sentence can be corrected to a just and fair term.

The Open Society Institute is a part of the Open Society Foundations, which work to improve the lives of the world's most vulnerable people and to promote human rights, justice, and accountability. To achieve this mission, the Foundations seek to shape public policies that assure greater fairness in political, legal, and economic systems and safeguard fundamental rights. In the United States, the Open Society Foundations implement a range of initiatives to advance justice, education, public health, and independent media. At the same time, the Foundations build alliances across borders and continents on issues such as corruption and freedom of information. The Foundations place a high priority on protecting and improving the lives of people in marginalized communities. The Washington, D.C. Office of the Open Society Institute supports fair and responsible criminal justice policies in the United States. In furtherance of this aim and our goal of eliminating racial disparities and securing a fair and equitable system of justice, the Washington Office has long worked to heighten public discourse on the unwarranted disparity between crack and powder cocaine sentencing, and has played a pivotal role in raising awareness of the issue before the U.S. Sentencing Commission, the U.S. Congress, and the Executive Branch.

The Drug Policy Alliance ("the Alliance") is the nation's leading advocacy organization dedicated

to broadening the public debate over drug use and regulation and to advancing pragmatic drug laws and policies, grounded in fairness, equality, public health and respect for civil and human rights. The Alliance is a non-profit, non-partisan organization with more than 30,000 members and active supporters nationwide. The Alliance has actively taken part in cases in state and federal courts across the country in an effort to reduce the disparate impact of the nation's drug laws and was an active supporter of the Fair Sentencing Act of 2010.

StoptheDrugWar.org is an organization devoted to reform of drug policy through the establishment of new approaches that are not based on criminalization. Since its founding 18 years ago, StoptheDrugWar.org has reached millions of people through educational programs that highlight the harms, injustices and failures of current drug policies, including mandatory and disproportionate sentencing; and through grassroots and coalition advocacy in Congress.