Nos. 11-5683 & 11-5721

In the
Supreme Court of the United States

EDWARD DORSEY, SR.,
Petitioner,
v.
THE UNITED STATES OF AMERICA,
Respondent.

COREY A. HILL,
Petitioner,
v.
THE UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW, NEW YORK UNIVERSITY SCHOOL OF LAW, SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Center on the Administration of Criminal Law, New York University School of Law (the "Center")[2] is dedicated to defining and promoting best practices in the administration of criminal justice through academic research, litigation, and participation in the formation of public policy. The Center's litigation component aims to use its empirical research and experience with criminal justice practices to assist in important criminal justice cases.

Following the enactment of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 ("the ADAA"), federal offenses involving specific quantities of drugs were subject to mandatory minimum sentences. The ADAA created a vast sentencing disparity between crack and powder cocaine, "treat[ing] every gram of crack cocaine as the equivalent of 100 grams of powder cocaine." *Kimbrough v. United States*, 552 U.S. 85, 96 (2007). As Petitioners and the United States explain, Congress amended this "100-to-1 ratio" in the Fair

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* represent that they authored this brief in its entirety and that none of the other parties or their counsel, or any person or entity other than *amicus curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties were notified of *amicus curiae*'s intention to file this brief in accordance with Supreme Court Rule 37, and all parties consent to the filing of this brief.

[2] New York University School of Law ("the Law School") is named here solely to identify the Center's affiliation. The views expressed in this brief should not be regarded as the position of the Law School.

Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 ("the FSA") with the express intent to apply the amendment to all pending cases. The Center's brief supports this argument by demonstrating that the 100-to-1 ratio lacked any evidentiary basis at the time Congress enacted it, and that 26 years of subsequent empirical data conclusively refute the purported justifications for that ratio. It would be manifestly unjust, and Congress could not possibly have intended, to apply the old, discredited ratio to *any* defendant.

SUMMARY OF ARGUMENT

Under the ADAA's 100-to-1 ratio, five grams or more of cocaine base (the most common form of which is crack) was "penalized as severely as 100 times that amount" of powder cocaine. *DePierre v. United States*, 131 S. Ct. 2225, 2229 (2011). For example, although 500 grams or more of powder cocaine (cocaine hydrochloride) triggered the ADAA's five-year mandatory minimum, only five grams of crack cocaine triggered the same penalty. 21 U.S.C. § 841(b)(1)(B)(ii) (2006); *id.* § 841(b)(1)(B)(iii). The ADAA's legislative history reflects that Congress rushed to impose this grossly disparate sentencing regime because it wanted to target major drug traffickers, feared that crack caused more violence and other harms to society than powder cocaine, and believed that crack was unusually dangerous and addictive. Yet because the crack phenomenon was still new and poorly understood at the time, Congress had no empirical data or research to support these assumptions, let alone the choice of a 100-to-1 ratio. By all accounts, that figure was

plucked from thin air to make a political point that Congress was "serious" about crimes involving crack.

Moreover, in the 26 years following Congress's rush to judgment in enacting the ADAA, a vast amount of research, evidence, and criminal justice experience conclusively undermines the purported justifications for the old ratio. In particular, the data demonstrate that:

- The ADAA's ratio did not lead to increased punishment of major crack traffickers. To the contrary, the ratio, together with the statute's low crack-quantity trigger for mandatory minimums, led to markedly increased prosecutions of small-time street dealers, whose sentences were comparable to or even greater than those of much higher-level distributors of powder cocaine.
- Crack does not impose 100 times more harm upon society than powder cocaine. For example, in the past 15 years, there has been no significant difference between the social harms caused by crack and those caused by powder cocaine. Federal offenses for both types of the drug have been linked to violence in only a modest fraction of cases. Moreover, the ADAA regime has itself caused harm, by promoting a stark racial disparity in conviction and incarceration, and systematically over-punishing low-level defendants.
- Crack is not demonstrably more dangerous to the user than powder cocaine. The two chemicals have equally deleterious health effects and rates of addiction.

In light of this evidence, Congress determined that a substantial reduction of the crack-powder ratio was necessary "[t]o restore fairness to Federal cocaine sentencing." FSA pmbl., 124 Stat. at 2372. Having made that determination, Congress could not have concluded that the 100-to-1 ratio it expressly repudiated could still be imposed on pipeline defendants. Indeed, given the bankrupt justifications for the old ratio, and the pervasive harms and injustice it has caused, it would be manifestly unfair to continue to apply that ratio to *any* defendant.

Finally, the federal criminal justice system's prior experience teaches that a limited application of the FSA to pipeline defendants will present no administrative hardship.

ARGUMENT

I. CONGRESS ADOPTED THE ADAA CRACK PROVISIONS IN UNDUE HASTE AND WITHOUT EMPIRICAL SUPPORT

Congress enacted the mandatory minimum crack provisions without adequate time to properly consider the implications of creating such a wide gulf between the punishment of crack and the punishment of powder cocaine. In fact, the legislative record reveals a breakdown of the deliberative process, leading to the imposition of an arbitrary and unduly punitive 100-to-1 ratio simply to make a political point that Congress was taking the crack problem seriously. Moreover, the legislative record shows that Congress's stated goals for imposing extraordinary penalties upon crack defendants were not supported by any empirical evidence.

1. The ADAA went from initial proposal to enactment in just four months. The first bill was proposed in late June 1986, following media accounts of a rising crack epidemic. David A. Sklansky, Essay, *Cocaine, Race, and Equal Protection*, 47 Stan L. Rev. 1283, 1293-94 (1995). Then, over the Fourth of July recess, constituent outrage flared over the cocaine-related deaths of two sports stars. U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 117, 122-23 (1995) ("1995 Report"); *and see, e.g.*, 132 Cong. Rec. 19,249 (1986) (Sen. Leahy) ("The country was shaken recently when cocaine killed two talented young athletes—Len Bias of the University of Maryland and Don Rogers of the Cleveland Browns."); *id.* at 22,660 (Rep. Michel) ("The death of basketball star Len Bias shocked us into action.").[3] Party leadership quickly exerted pressure to pass "comprehensive drug legislation" by fall midterm elections. Sklansky, *supra*, at 1294 n.55. The ADAA was enacted October 27, 1986. 100 Stat. at 3207.

Eric Sterling, then counsel for the House Judiciary Committee, later testified that "the intensity of the climate of legislative haste," including an extraordinary five-week deadline for committee work, caused "[t]he careful deliberative practices of the Congress" to be "set aside." U.S. Sentencing Comm'n, *Public Hearing on Proposed Guideline Amendments* (Mar. 22, 1993) (written testimony of Eric E. Sterling) ("Sterling Testimony")

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[3] Contemporaneous media reports erroneously linked Bias's death to crack; he had in fact used powder cocaine. 1995 Report 122-23.

at 1-2, *available at* http://www.src-project.org/resources/ussc-materials/testimony/written-testimony-for-public-hearing-on-proposed-guideline-amendments-mar-22-1993/. The bill's supporters admitted as much at the time. One Senator "[v]ery candidly" observed that "none of us has had an adequate opportunity to study" the bill because "[i]t did not emerge from the crucible of the committee process, tempered by the heat of debate." 132 Cong. Rec. 26,462 (1986) (remarks of Sen. Mathias). Senator Dole conceded it was "probably correct" that Congress was "rushing a judgment on the drug bill." *Id.* at 26,434. And another member went so far as to compare "the sanctimonious election stampede of the House of Representatives" to "a congressional lynch mob." *Id.* at 26,441 (Sen. Evans).

2. The Congressional Record contains no empirical justification for the 100-to-1 ratio.[4] Indeed, the floor statements do not address that figure at all. 1995 Report 117. Nor was the 100-to-1 ratio discussed at the single four-hour Senate hearing dedicated to the crack issue. "Although the 1986 Congressional hearing with respect to crack cocaine . . . was filled with general statements about the dangers of crack and the economics of crack distribution, Congress had no hard evidence before it to support the contention that crack is 100 times

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[4] Because the committee process for the ADAA was curtailed, "[t]he only record of congressional intent is contained in the statements made on the floors of the House and Senate in favor of the Act." William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 Ariz. L. Rev. 1233, 1252 (1996).

more potent or dangerous than powder cocaine." *United States v. Willis*, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., concurring).[5] To the contrary, Sterling admitted that, in the rushed atmosphere that summer, numbers were simply plucked from thin air. For example, the 50-to-1 ratio proposed in an earlier version of the bill "was arbitrarily doubled" in the final act "simply to symbolize redoubled congressional seriousness;" it "reflects no actual calculation of the relative harmfulness to society or an individual of a given number of doses of an illegal drug." Sterling Testimony 4, 6.

3. The legislative record does reflect that Congress had three general justifications for being especially tough when it came to crack quantities:

- *First*, the goal of the ADAA was to target "major drug traffickers." *Kimbrough*, 552 U.S. at 98. After "consulting with law enforcement professionals but without holding hearings," Congress believed the low quantities triggering mandatory minimum penalties "generally would be associated with major and serious traffickers" in crack. 1995 Report

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[5] Moreover, during the single brief discussion of mandatory minimum sentences, one law enforcement witness could not "honestly answer" whether the penalties would deter crime, and the other recommended a one-year mandatory term of imprisonment—far lower than the provisions that ultimately became law. *"Crack" Cocaine: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs*, 99th Cong. 65 (1986) (testimony of Deputy Inspector Martin Boyle, New York Policy Department); *id.* (testimony of Sheriff James Adams, Sumter County, Florida).

120-21 (citing floor statements and subcommittee work on a prior bill).

- *Second*, unnamed reports were cited attributing crack to unusually high levels of violence and other social harms. For example, one Member of Congress alleged that "crack use" had "engendered increased crime in several cities" because "[u]sers become so deranged from its psychotic effects that they may perpetrate brutal crimes." 132 Cong. Rec. 22,991 (1986) (Rep. Dorgan); *see also* 1995 Report 180-81 ("[M]embers perceived crack cocaine to be '[c]ausing crime to go up at a tremendously increased rate. . . .'" (citation omitted)).
- *Third*, Congress thought crack required special treatment "because of the especially lethal characteristics of this form of cocaine." 132 Cong. Rec. 26,447 (1986) (Sen. Chiles); *see also, e.g.*, *id.* at 22,993 (1986) (Rep. LaFalce) ("Crack is thought to be even more highly addictive than other forms of cocaine or heroin.").

But it clear from the legislative record that Congress based these conclusions on isolated anecdotes, and had no empirical data to support these justifications. That is perhaps unsurprising because the crack phenomenon was still new in 1986. Marcia R. Chaiken, U.S. Dep't of Justice, Nat'l Inst. of Justice, *Identifying and Responding to New Forms of Drug Abuse: Lessons Learned from "Crack" and "Ice"* 33 (1993). Accordingly:

- The "drug enforcement experts" who provided Congress with information about appropriate

crack quantities were largely working in the dark on a market that "was just emerging." U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 4-5 (1997) ("1997 Report").

- As late as 1995 there were still only a "handful" of localized, contradictory studies on the correlation between cocaine and crime. 1995 Report 94-97, 106-07. One suggested that "the current focus on crack-related violence may be more the result of a media event than an emergent trend." *Id.* at 97 (citation omitted).
- One medical expert who testified at the Senate hearing conceded that researchers had yet to "find out the results of cocaine use . . . [or] the basic mechanisms of addiction." *"Crack" Cocaine: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs*, 99th Cong. 21 (1986) (statement of Dr. Robert Byck, Professor of Psychiatry and Pharmacology, Yale University School of Medicine). Even by 1990 "[r]elatively little ha[d] been published describing the human pharmacology of cocaine smoking under controlled or semicontrolled laboratory conditions." Reese T. Jones, *The Pharmacology of Cocaine Smoking in Humans*, *in National Institute on Drug Abuse Research Monograph No. 99: Research Findings on Smoking of Abused Substances* 30, 32 (C. Nora Chiang & Richard L. Hawks eds., 1990) (citations omitted).

Put simply, Congress's general decision to punish crack more harshly than powder cocaine had no more evidentiary basis than its specific decision to use the 100-to-1 ratio to implement that policy objective. That is reason enough to reject any further imposition of the ratio against any defendant.

II. SUBSEQUENT EMPIRICAL DATA CONCLUSIVELY UNDERMINE THE JUSTIFICATIONS FOR THE OLD RATIO

Following Congress's passage of the AADA in 1986, every expert of whom we are aware who considered the 100-to-1 ratio concluded that it could not be justified and needed to be substantially reduced. The most prominent example is the Sentencing Commission, which considered and rejected the ratio in 1995, 1997, 2002, and 2007. 1995 Report 195-98; 1997 Report 9; U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 104 (2002) ("2002 Report"); U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 8 (2007) ("2007 Report"). Numerous federal judges,[6]

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[6] *See, e.g.*, Letter from Judge John S. Martin, Jr. and 26 other judges of the United States Circuit Courts of Appeals and District Courts to Senator Orrin Hatch, Chairman of the Senate Judiciary Comm., and Congressman Henry Hyde, Chairman of the House Judiciary Comm. (Sept. 16, 1997), *reprinted in* 10 Fed. Sent'g Rep. 194, 194 (1998) ("It is our strongly held view that the current disparity between powder cocaine and crack cocaine . . . can not be justified and results in sentences that are unjust and do not serve society's interest."); *United States v. Singleterry*, 29 F.3d 733, 741 (1st Cir. 1994); *United States v. Moore*, 54 F.3d 92, 102 (2d Cir. 1995); *United States v. Ricks*, 494 F.3d 394, 400 (3d Cir. 2007); *United States*

commentators,[7] and various organizations reached the same conclusion.[8] Most notably, of course,

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v. Washington, 127 F.3d 510, 518 (6th Cir. 1997) (Jones, J., concurring in part and dissenting in part); *Willis*, 967 F.2d at 1226 (Heaney, J., concurring); *United States v. Pruitt*, 502 F.3d 1154, 1171 n.2 (10th Cir. 2007) (McConnell, J., concurring); *United States v. Williams*, 472 F.3d 835, 845 n.4 (11th Cir. 2006) (Barkett, J., dissenting from denial of rehearing en banc); *United States v. Williams*, 481 F. Supp. 2d 1298, 1301-02 & n.5 (M.D. Fla. 2007); *United States v. Walls*, 841 F. Supp. 24, 31 (D.D.C. 1994); *United States v. Clay*, No. 2:03CR73, 2005 WL 1076243, at *4-5 (E.D. Tenn. May 6, 2005); *United States v. Perry*, 389 F. Supp. 2d 278, 307 (D.R.I. 2005); *United States v. Fisher*, 451 F. Supp. 2d 553, 559 (S.D.N.Y. 2005); *United States v. Smith,* 359 F. Supp. 2d 771, 780-81 (E.D. Wis. 2005); *and cf. Minnesota v. Russell*, 477 N.W.2d 886, 888 (1991).

[7] *See, e.g.*, William J. Stuntz, *Race, Class, and Drugs*, 98 Colum. L. Rev. 1795, 1835 (1998); Alfred Blumstein, *The Notorious 100:1 Crack: Powder Disparity—The Data Tell Us that It Is Time To Restore the Balance*, 16 Fed. Sent'g Rep. 87, 87 (2003); Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. Rev. 1751, 1787 (1999); Spade, Jr., *supra* n.4, at 1238, 1287-88; Sklansky, *supra*, at 1288-89.

[8] *See, e.g.*, Letter from Hon. Paul Cassell, Chair, Committee on Criminal Law of the Judicial Conference of the United States, to Hon. Richardo H. Hinojosa, Chair, United States Sentencing Commission (Nov. 2, 2007) (reiterating opposition of the Judicial Conference to "the existing sentencing difference between crack and powder sentences"); Letter from Karen J. Mathis, President, Am. Bar Ass'n, to Rep. Bobby Scott, Chairman, and Rep. Randy Forbes, Ranking Member, Subcomm. on Crime, Terrorism and Homeland Security of the House Comm. on the Judiciary (July 3, 2007), *available at* http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/crimlaw/2007jul03_minimumsenth_l.authcheckdam.pdf (describing ABA's longstanding judgment "that there are no arguments supporting the draconian sentencing of crack cocaine offenders as compared to powder cocaine offenders"); Barbara R. Arnwine et al., Open Letter to the United States

Congress itself repudiated the 100-to-1 ratio in the FSA in order to restore basic fairness to federal cocaine sentencing.

Unlike Congress's original passage of the ADAA, this unanimity of opinion is based on a considerable body of data and experience gathered over the last 26 years. As we demonstrate below, that data and real-world experience conclusively undermine the original, purported justifications for the now-discredited 100-to-1 ratio. In fact, it is now beyond serious dispute that the old ratio failed to accomplish, and in numerous respects critically undermined, its intended purposes. For these reasons, it is clearer now than ever before that *any* imposition of the 100-to-1 ratio would be manifestly unjust, and that Congress could not have intended to allow such unfair sentences to be imposed after passage of the FSA.

A. The 100-to-1 Penalty Ratio Failed To Prioritize Federal Prosecutions Of Major Cocaine Traffickers

The principal goal of the ADAA's mandatory sentencing scheme was to "create the proper incentives for the Department of Justice to direct its 'most intense focus' on 'major traffickers' and 'serious traffickers.'" 1995 Report 119 (citing committee report on "an earlier version of the bill"); *see also* 132 Cong. Rec. S14,301 (Sen. Robert Byrd) (daily ed. Sept. 30, 1986) (the goal of the mandatory minimum

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Congress, Open Society Policy Center (Oct. 2, 2007), http://opensocietypolicycenter.org/wp-content/uploads/Open-Letter-on-Crack-Reform.pdf (letter from over 50 civic and religious leaders urging Congress to eliminate the unwarranted crack sentencing disparity).

structure generally was to impose ten years' imprisonment upon "the kingpins—the masterminds who are really running these operations," and five upon "middle-level dealers"). But the 100-to-1 ratio, together with the low quantities that triggered mandatory minimums for crack cocaine under the ADAA, did just the opposite. They effectively guaranteed that the focus of federal law enforcement would be on street-level dealers, who could and would be punished as much, or even more, than cocaine kingpins.

As noted above, when Congress enacted the ADAA, it believed that the low crack-quantity levels triggering mandatory minimums were consistent with its overall goal of targeting crack traffickers. But this belief—which was not based on any actual evidence—proved to be seriously mistaken. Contrary to Congress's stated objective, the lowest crack-quantity level targets "retail or street-level dealer[s]." 1997 Report 5. And when the 100-to-1 ratio was applied against those low-level dealers, they were subject to the same penalties as those Congress intended for "serious traffickers who deserve the five-year statutory penalty." *Id.* In other words, the ADAA enacted an absurd penalty structure under which crack defendants playing minor roles could be punished as or even more severely than the powder-cocaine traffickers ultimately responsible for the crack that the street-level defendants sold. *See* 1995 Report 67-68.

Moreover, what federal law enforcement actually focused on was the exact opposite of what the ADAA intended: imprisoning low-level participants in the crack trade. A consistent majority of federal crack defendants have been street-level dealers or even

lower-level players, including crack *users*. 2007 Report 19 & fig. 2-4 (summarizing 2005 data reflecting that more than 60% of crack cocaine defendants were street-level dealers, couriers, low-level assistants, or users); *id.* at 21 fig. 2-6 (summarizing 2000 data reflecting that 66.5% of federal crack defendants were street-level dealers, and over 6% more were couriers, low-level assistants, or users); 1995 Report 158 ("The majority of crack defendants . . . are street-level."). And in 2005 street-level dealers of crack were serving an average of 97 months in prison, nearly *20 months longer on average* than the wholesaler who supplied the powder that the street dealer cooked into crack. 2007 Report 30 fig. 2-14. Indeed, the penalties imposed on street-level crack dealers and crack *couriers* historically *exceeded* those of the *highest-level importers*—the kingpins—of powder cocaine. *See* 2002 Report 43 fig. 9 (104 month average sentence for street-level dealer, 107 month average for couriers, but 101 month average for highest-level powder trafficker). Moreover, as one might expect, the vast majority of such low-level crimes were confined within a neighborhood or were similarly local, 2007 Report 22 fig. 2-7, meaning that federal resources were being diverted away from national and international crimes to the traditional jurisdiction of local law enforcement.[9]

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[9] Indeed, as differential penalties for crack over powder disappeared in the state system, *see* 2007 Report 98-99, the outlier federal scheme became the preferred jurisdiction for prosecution of crack offenses in this country. *See* Marc Mauer & Ryan King, The Sentencing Project, *A 25 Year Quagmire: The War on Drugs and Its Impact on American Society* 8 (2007)

By contrast, federal prosecutions of Congress's highest-level intended targets (importers, high-level suppliers, manufacturers, organizers, etc.) have remained stubbornly infrequent. *Id*. at 20-21 figs. 2-5, 2-6 (less than 13% of powder offenders and less than 9% of crack offenders in 2005, and even smaller numbers in 2000). And in 2005, even the largest category of traffickers above the street level (the "wholesalers") still only represented about one in five crack defendants overall. *Id.* This persistent focus on low-level offenders is not only directly contrary to Congress's stated policy objective, it is extremely inefficient.[10]

Finally, the 100-to-1 ratio presented perverse incentives leading to prosecutions that had nothing to do with deterring crack trafficking. In particular, because of the widely disparate penalties for crack

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(attributing "a rise of 144%" in the number of federal drug prosecutions "in the period of 1985-2002" to increasing numbers of state-case transfers "in order for the defendant to face stiffer penalties in the federal system"); *accord* 2007 Report 107 n.173.

[10] Jonathan P. Caulkins et al., RAND Corp., *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?* xxii-xxiii (1997) ("[M]andatory minimums would be the most cost-effective alternative [as compared to conventional enforcement and treatment] only . . . at dollar values [that] would typify only those dealers at a fairly high level in the cocaine trade and who are unusually difficult to arrest."); *see also* Anne Morrison Piehl & John J. Dilulio, Jr., "*Does Prison Pay?" Revisited*, The Brookings Rev., Winter 1995, at 25 (concluding from prisoner survey data that the "number of drug sales prevented by incarcerating a drug dealer" for a non-violent drug crime is "zero," and therefore valuing "drug crimes (sales and possession) at zero social cost" and citing other analysts as reaching "similar conclusions").

cocaine, the government went so far as to fabricate crack cases targeted at dealers who would otherwise sell powder cocaine, simply to increase the chances that the powder-cocaine defendant might plead guilty. For example, law enforcement officers would direct informants and undercover agents to insist upon delivery of crack even when the target had historically dealt only in powder. *E.g.*, *United States v. Fontes*, 415 F.3d 174, 177-79 (1st Cir. 2005); *United States v. Williams*, 372 F. Supp. 2d 1335, 1339 (M.D. Fla. 2005) ("[I]t was the government that decided to arrange a sting purchase of crack cocaine. Had the government decided to purchase powder cocaine (consistent with [defendant's] prior drug sales), the base criminal offense level would have been only 14 . . . ." (footnote omitted)).[11]

B. Crack Is Not 100 Times More Harmful To Society Than Powder Cocaine

As discussed above, the ADAA's enhanced penalties for crack were partly motivated by fear that crack, more than other drugs, "engendered increased crime." 132 Cong. Rec. 22,991 (1986) (Rep. Dorgan). Although Congress had no evidence to support this fear at the time, it is now clear that crack is not significantly more harmful to society than powder cocaine, and certainly not anything close to 100 times more harmful. In fact, the current view is that the ADAA *itself* causes substantial harm to society.

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[11] *Williams* was vacated and remanded on appeal, 456 F.3d 1353 (11th Cir. 2006), in a decision abrogated by *Kimbrough*.

1. There is some evidence that societal harms increased in the mid-1980s, at the same time crack became broadly available to the market.[12] But by the early 1990s the spike in crimes was over, even though rates of crack use remained constant. Roland G. Fryer, Jr. et al., *Measuring The Impact Of Crack Cocaine* 3-4, 27 (Nat'l Bureau of Econ. Research, Working Paper 11318, 2005), *available at* http://www.nber.org/papers/w11318 ("By the early 1990s . . . . the relationship between crack and unwelcome social outcomes had largely disappeared. Thus, though crack use persisted at high levels, it did so with relatively minor measurable social consequences."). Moreover, it turns out that the increased violence of concern to the ADAA Congress was not "engendered" by crack after all. Rather, that spike in violence, and the subsequent dip in the 1990s while crack use remained constant, were attributable to the newness of the crack market in the mid-1980s. *See, e.g.*, 2007 Report 86 & n.129; 1995 Report 96. In any event, it is clear that that early violence has now dissipated.

2. Over the last 15 years, there has been no significant difference between the social harms once associated with crack and those associated with powder cocaine.[13] It is now quite rare for crack or powder-cocaine offenses to be associated with

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[12] *See, e.g.*, Blumstein, *supra* n.7, at 88-89.

[13] This is not to suggest that there was no social cost to crack's entry into poor communities. But all drugs impose social costs. That is true for crack sold in poor communities and for powder cocaine sold in wealthier communities, although the wealthy have resources that allow them to mitigate the injuries. *See* Stuntz, *supra* n.7, at 1815.

"violent conduct," and to the modest extent such an association exists,[14] there is no statistically significant difference between powder cocaine and crack. *See* 2007 Report 37 & fig. 2-19 (in 2005, only 6.2% of powder cases and 10.4% of crack cases involved "violent conduct;" in 2000, 9.0% of powder cases and 11.6% of crack cases did); 2002 Report 57 fig. 19 (summarizing data reflecting homicide in 3.4% of both crack and cocaine cases). This evidence calls into question the legitimacy of any sentencing disparity between crack and powder cocaine based on the supposed risk of societal harms caused by crack, and certainly the extreme 100-to-1 disparity.

3. In fact, it is now well understood that the ADAA's exceptionally harsh treatment of crack offenses *itself* imposed social harm, for two reasons:

First, as *amici curiae* the American Civil Liberties Union ("ACLU") and other organizations explain, Congress has now embraced the widely held view that the 100-to-1 ratio has contributed to the unjustifiably disproportionate prosecution and incarceration of African Americans in this country. This unjust regime is extremely harmful to the lives of those citizens and society generally. "[A] broad array of recent empirical studies" suggests that "[w]hen citizens perceive the state to be furthering injustice . . . they are less likely to obey the law, assist law enforcement, or enforce the law themselves." Donald Braman, *Punishment and Accountability: Understanding and Reforming*

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[14] The most recent empirical review shows that approximately 90% of federal powder *and* crack offenses involve *no violence by any party*. 2007 Report 38 fig. 2-20 (2005 data).

Criminal Sanctions in America, 53 UCLA L. Rev. 1143, 1165 (2006).

Second, it is unjust to impose a massive sentence upon low-level crack defendants *solely* because of social harms they themselves are not directly responsible for. Yet for the crimes proscribed by the ADAA, crack quantity—the alleged proxy for those social harms—is the overriding determinant of the defendant's sentence, whether or not he has committed violence or engaged in other acts that could harm other people. *Cf.* Jon O. Newman, *The New Commission's Opportunity*, 10 Fed. Sent'g Rep. 44, 44 (1995) ("[W]ith respect to narcotics offenses . . . there is no good reason to make drug quantity the overriding determinant of punishment. . . . A better system would recognize that role in the offense is a far more significant measure of culpability than quantity.").

C. Crack Is Not 100 Times More Harmful To An Individual User Than Powder Cocaine

The 100-to-1 ratio vastly overstates the alleged pharmacological differences between crack and powder cocaine that Congress invoked in enacting the ADAA. As *amicus curiae* the ACLU explains,

- Crack and powder cocaine "have the same active ingredient and produce the same physiological and psychotropic effects." *DePierre*, 131 S. Ct. at 2228; *see also Kimbrough*, 552 U.S. at 94 (same).
- Exposure to crack and powder cocaine *in utero* also produces similar effects, and few, if any, long-term effects (after controlling for exposure to independent factors, like alcohol

and tobacco). *See* 2007 Report 68-69; Barry Zuckerman et al., *Cocaine Exposed Infants and Developmental Outcomes: "Crack Kids" Revisited*, 287 J. Am. Med. Ass'n 1990, 1990-91 (2002).

- The risk of cocaine dependence is similarly high among both crack cocaine smokers and those who inject cocaine hydrochloride. *See* Dorothy K. Hatsukami & Marian W. Fischman, *Crack Cocaine and Cocaine Hydrocloride: Are the Differences Myth or Reality?*, 279 J. Am. Med. Ass'n 1580, 1582-83 (1996).

Thus, in the long run, crack and powder cocaine have substantially equivalent effects upon the user. *See id.* at 1581.

Although smoking cocaine (the typical administration of crack) may present more risk of addiction than insufflating (*i.e.*, snorting) cocaine (the typical administration of powder), the 100-to-1 ratio is based on the chemical form of cocaine, not how it is administered. As a result, the ratio guarantees unjust sentences. For example, a small-time dealer caught with, say, 50 grams of powder cocaine who supplies intravenous users does not receive a mandatory minimum sentence, whereas a small-time dealer in crack caught with the same amount would receive a ten-year mandatory minimum sentence, even though the harm to the users is the same.[15]

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[15] Over 12% of the population of powder cocaine users inject the drug, by one estimate. *See* Dep't of Health & Human Servs., *Treatment Episode Data Set (TEDS) 1993-2003: National*

III. CORRECTING THE ERRONEOUS POST-FSA SENTENCES WILL NOT BURDEN THE FEDERAL CRIMINAL JUSTICE SYSTEM

Applying the FSA's provisions to defendants sentenced on or after August 3, 2010 will require new sentencing proceedings for a proportion of the pipeline defendants. The exact number is unclear; it might reach the thousands, but it is certainly substantially fewer than 5,000. *See Frequently Asked Questions: The Fair Sentencing Act of 2010, S.1789 Federal Crack Reform Bill*, Families Against Mandatory Minimums 3 (Aug. 3, 2011), http://www.famm.org/Repository/Files/FSA%20FAQ%208.3.11.pdf (estimating that approximately 3,800 pipeline defendants had been sentenced to mandatory minimums in the year following the FSA's enactment); U.S. Sentencing Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 205-06 (2011) (3,905 crack defendants were convicted in fiscal year 2010 of offenses subject to a mandatory minimum; only 64% of those remained subject to a mandatory minimum at sentencing). A concern that these proceedings would somehow unduly tax the federal judiciary cannot justify perpetuating a sentencing regime that should have ended on August 2, 2010, as Congress intended. *Cf. United States v. Booker*, 543 U.S. 220, 244 (2005). But, in any case, recent experience has shown that this concern is unwarranted.

Admissions to Substance Abuse Treatment Services tbl. 3.4 (Nov. 2005), *available at* http://wwwdasis.samhsa.gov/teds03/teds_03_tbl3.4.htm.

The federal criminal justice community can efficiently and effectively manage a temporary increase in cases requiring similar review. Indeed, since the 2007 Guideline amendment that retroactively lowered the base offense level applicable for crack offenses, federal courts have received more than 25,000 requests for sentence reductions pursuant to 18 U.S.C. § 3582(c) and granted more than 16,000 of them. Sentencing Guidelines for the United States Courts, 76 Fed. Reg. 41,332, 41,333-34 (July 13, 2011). Speaking on behalf of the Criminal Law Committee of the Judicial Conference of the United States, Judge Walton remarked that "this workload was managed surprisingly well."[16] Information systems and operating procedures were put in place.[17] The courts, probation departments, prosecutors, and defense attorneys collaborated to identify, prioritize, and process cases.[18] The Bureau of Prisons expanded inmate access to legal resources and

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16 *Testimony of Judge Reggie B. Walton Presented to the U.S. Sentencing Commission on June 1, 2011 on the Retroactivity of the Crack Cocaine Guideline Amendment*, U.S. Sentencing Comm'n (June 1, 2011), at 3, http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110601/Testimony_Reggie_Walton.pdf.

17 *Id.*

18 *See, e.g.*, *Testimony of James E. Felman on behalf of the Am. Bar Ass'n before the U.S. Sentencing Commission for the Hearing Regarding Retroactivity of Amendments Implementing The Fair Sentencing Act of 2010*, U.S. Sentencing Comm'n (June 1, 2011), at 4, http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110601/Testimony_ABA_James_Felman.pdf.

created systems to ensure new sentences were implemented "rapidly and accurately."[19] The end result, in the words of Judge Castillo, a former member of the Sentencing Commission, was the "greatest untold success story" in federal sentencing. Transcript of Hearing Before the U.S. Sentencing Comm'n, New York, N.Y. (July 9, 2009), at 204 (statement of Judge Ruben Castillo), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090709-10/Public_Hearing_Transcript.pdf.

This experience created valuable institutional knowledge that can be used in future instances of Guideline retroactivity, or, as in this case, the retroactivity of a statutory penalty scheme. And unlike a case of Guideline retroactivity, which can implicate cases decided decades ago,[20] new sentencing proceedings for pipeline defendants will only implicate recently concluded cases. The same judge, prosecutor, defense counsel, and probation officer will be available in many instances. Factfinding essential to the sentencing will, in all likelihood, have already occurred. There is therefore every reason to conclude that it will be seamless and

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[19] *Statement of Thomas R. Kane, Acting Director, Federal Bureau of Prisons, Before the U.S. Sentencing Commission Hearing on Retroactive Application of the Proposed Amendment to the Federal Sentencing Guidelines Implement the Fair Sentencing Act of 2010*, U.S. Sentencing Comm'n 2 (June 1, 2011), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110601/Testimony_Thomas_Kane.pdf.

[20] U.S. Sentencing Comm'n, *Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive* 4 (2007).

swift to correct the erroneous sentences received by some pipeline defendants.

CONCLUSION

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

Respectfully submitted,

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