

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2011

EDWARD DORSEY SR.,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PROOF OF SERVICE

State of Illinois)
)
County of Sangamon) ss

DANIEL T. HANSMEIER, being first duly sworn on oath, deposes and states as follows:

1. That on August 1, 2011, the original and ten copies of the petition for writ of certiorari and motion to proceed in forma pauperis in the above-entitled case were deposited with Federal Express in Springfield, Sangamon County, Illinois, properly addressed to the Clerk of the United States Supreme Court and within the time for filing said petition for writ of certiorari;

2. That an additional copy of the petition for writ of certiorari and motion to proceed

in forma pauperis were served upon the following counsel of record for Respondent:

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EDWARD DORSEY SR., Petitioner

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Date: August 1, 2011

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UNITED STATES OF AMERICA,

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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Now comes the Petitioner, EDWARD DORSEY SR., by his undersigned federal public defender, and pursuant to 18 U.S.C. § 3006A, and Rule 39.1 of this Court, respectfully requests leave to proceed in forma pauperis before this Court, and to file the attached Petition For Writ Of Certiorari to the United States Court of Appeals for the Seventh Circuit without prepayment of filing fees and costs.

In support of this motion, Petitioner states that he is indigent and was sentenced to a term of imprisonment in the United States Bureau of Prisons, and was represented by the undersigned counsel pursuant to 18 U.S.C. § 3006A in the United States Court of Appeals for the Seventh Circuit.

EDWARD DORSEY SR., Petitioner

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EDWARD DORSEY SR.,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

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

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QUESTION PRESENTED

Did the Seventh Circuit err when, in conflict with the First and Eleventh Circuits, it held that the Fair Sentencing Act of 2010 does not apply to all defendants sentenced after its enactment?

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RESPONDENT.

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

Petitioner, EDWARD DORSEY SR., respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit, issued on March 11, 2011, and published at 635 F.3d 336, affirming the Petitioner's conviction and sentence. Petitioner sought rehearing *en banc*, but the Seventh Circuit denied rehearing *en banc* in a published decision issued on May 25, 2011, with two Judges dissenting, – F.3d. –, 2011 WL 2022959 (7th Cir. May 25, 2011).

OPINION BELOW

The Seventh Circuit's decision is published at 635 F.3d 336 (7th Cir. 2011), and

appears in Appendix A to this Petition. The Seventh Circuit's denial of rehearing *en banc*, and the dissent from the denial of rehearing *en banc*, is awaiting publication, although it is available at 2011 WL 2022959 (7th Cir. May 25, 2011). It appears in Appendix B to this Petition.

JURISDICTION

1. The Central District of Illinois originally had jurisdiction pursuant to 18 U.S.C. § 3231, which provides exclusive jurisdiction of offenses against the United States.

2. Thereafter, Petitioner timely appealed his conviction and sentence to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The Seventh Circuit affirmed Petitioner's conviction and sentence on March 11, 2011, and denied Petitioner's Petition for Rehearing *en banc* on May 25, 2011.

3. Petitioner seeks review in this Court of the Seventh Circuit's published opinion affirming his conviction and sentence pursuant to 28 U.S.C. § 1254(1). This Petition is filed within 90 days of the Seventh Circuit's denial of the Petition for Rehearing *en banc*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010), with text set forth in Appendix C pursuant to Sup.Ct.R. 14(1)(f).

1 U.S.C. § 109 provides:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty,

forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

STATEMENT OF THE CASE

On January 7, 2009, a federal grand jury in the Central District of Illinois returned a one-count indictment against Petitioner Dorsey, charging him with possession with intent to distribute five grams or more of crack cocaine on August 6, 2008, in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(B)(iii) ("Count One"). (R-1). On April 20, 2009, the government filed an information, pursuant to 21 U.S.C. § 851, seeking enhanced penalties in light of Petitioner's prior felony drug convictions. (R-10). On June 3, 2010, Petitioner pleaded guilty to Count One. (R-30 at 38-39). He admitted that he possessed with intent to distribute approximately 5.5 grams of crack cocaine. (Id. at 16-17, 32).

On July 29, 2010, the probation officer prepared the Presentence Investigation Report ("PSR"). Using the November 1, 2009 Guidelines Manual, the probation officer first set Petitioner's base offense level at 24, pursuant to U.S.S.G. § 2D1.1(c)(8), because Petitioner was responsible for 5.5 grams of crack cocaine. (PSR at 5). With a two-level reduction for acceptance of responsibility, U.S.S.G. § 3E1.1(a), Petitioner's total offense level was 22. (Id.). With an offense level of 22 and a criminal history category of VI, Petitioner's advisory guidelines range was 84 to 105 months' imprisonment. (Id. at 14). Because Count One involved more than 5 grams of crack cocaine, and because the government filed the § 851 information, however, Petitioner faced a mandatory minimum 10-year sentence, which became the guidelines range, U.S.S.G. § 5G1.1(b).

One day prior to the sentencing hearing, on September 9, 2010, Petitioner filed a sentencing memorandum, asking the district court to sentence him under the Fair Sentencing Act of 2010, which was signed into law on August 3, 2010. (R-20); Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 8, 124 Stat. 2372 (2010) (available at Appendix C). Petitioner asked to be sentenced under the Fair Sentencing Act because, under the Act, he would not have been subject to a 10-year mandatory minimum sentence. That is so because the Fair Sentencing Act increased the quantities of crack cocaine necessary to trigger the mandatory minimum penalty provisions for drug trafficking offenses in 21 U.S.C. § 841(b)(1)(A)(iii) & 21 U.S.C. § 841(b)(1)(B)(iii). § 2, 124 Stat. at 2372.¹ Because Petitioner possessed less than 28 grams of crack cocaine, he was not subject to a mandatory minimum sentence under the Fair Sentencing Act. Id.

At the sentencing hearing on September 10, 2010, the district court adopted the PSR and overruled Petitioner's request to be sentenced under the Fair Sentencing Act

¹As discussed in detail below, the Fair Sentencing Act did a number of other things, two of which are particularly relevant to this appeal: (1) in Section 8, Congress ordered the Sentencing Commission, "as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act," to promulgate amendments to the United States Sentencing guidelines to conform with the new statutory mandatory minimums in the Act; and (2) in Section 10, Congress ordered the Sentencing Commission to submit to Congress a report, "[n]ot later than 5 years after the date of enactment," "regarding the impact of the changes in Federal sentencing law under this Act and the amendments made by this Act." The Act also: (3) increased the quantity of crack cocaine necessary to trigger the penalty provisions in 21 U.S.C. § 960(b)(1)(C) & (2)(C); (4) eliminated the 5-year mandatory minimum sentence for possession of crack cocaine in 21 U.S.C. § 844(a); (5) increased the fines for violations of 21 U.S.C. §§ 841(b)(1)(A), (B) & 960(b)(1), (2); (6) ordered the Commission to amend the drug trafficking guidelines to include a number of specific-offense-characteristic increases and decreases; and (7) ordered the Comptroller General to submit a report to Congress on the effectiveness of drug court programs. 124 Stat. at 2372-75.

because Petitioner committed the underlying criminal conduct prior to the Act's enactment. (R-31 at 13, 16-17). The district court sentenced Petitioner to the 10-year mandatory minimum sentence, to be followed by a mandatory minimum 8-year term of supervised release, and imposed a \$100 mandatory special assessment. (Id. at 29-30).

On September 13, 2010, Petitioner filed a timely Notice of Appeal. (R-26). On November 12, 2010, Petitioner filed a motion to consolidate his appeal with another criminal defendant's appeal. (App. R-9). That defendant, Anthony Fisher², who was also represented by the Federal Public Defender for the Central District of Illinois, had recently filed a brief arguing that the Fair Sentencing Act applied to all appeals pending on the date of the Act's enactment. (See Appeal No. 10-2352). Although Fisher was sentenced prior to the date of the Act's enactment, and Petitioner was sentenced after the date of the Act's enactment, Petitioner sought consolidation to adopt the arguments raised by Fisher in his brief. (App. R-9 at 8). The Seventh Circuit granted the motion and consolidated the cases on November 19, 2010. (App. R-11).

On December 6, 2010, Petitioner filed his Opening Brief. (App. R-15). Petitioner adopted the arguments raised in Fisher's brief. (Id. at 14-16). Those arguments were two-fold. Petitioner first asserted that, because the Fair Sentencing Act did not contain a savings clause, and because it was penal in nature, it applied to cases pending on appeal and cases pending sentencing on the date of the Act's enactment. (Id.; Fisher Opening

²Because Mr. Fisher was sentenced prior to the Fair Sentencing Act's enactment, rather than after its enactment like Petitioner, he will file a separate Petition for a Writ of Certiorari in this Court.

Br. at 11-20). Petitioner then presented the following four reasons why the general savings statute, 1 U.S.C. § 109, did not save the prior statute: (a) Petitioner did not seek a technical abatement of his conviction; (b) the Fair Sentencing Act did not “release or extinguish” any penalty, but rather remedied a flawed definition in § 841(b); (c) nothing indicated that Congress intended to save the former legislation; and (d) the Fair Sentencing Act’s purpose--to right a racially discriminatory wrong--precluded the general savings statute’s application (Id. at 20-35).

Petitioner also presented two arguments that the Fair Sentencing Act applied to his case because he was sentenced after the Act’s enactment. First, relying on the logic expressed in *United States v. Douglas*, 746 F.Supp.2d 220 (D. Me. 2010) (Hornby, J.), *aff’d*, – F.3d. –, 2011 WL 2120163 (1st Cir. May 31, 2011), Petitioner asserted that Section 8 of the Fair Sentencing Act necessarily implied that Congress intended the Act to apply to all those sentenced after its enactment. (App. R-15 at 17-20, 27-31). This was so because Section 8 granted emergency authority to the Sentencing Commission to enact amendments to the crack cocaine guidelines to conform with the new statutory mandatory minimum penalties in the Fair Sentencing Act. § 8, 124 Stat. at 2374.³ In light of this emergency authority, it was clear that “Congress did not want federal judges to

³In response to Section 8, the Commission drafted an emergency amendment to U.S.S.G. § 2D1.1, effective November 1, 2010. United States Sentencing Commission, Supplement to the 2010 Guidelines Manual, intro. letter dated Oct. 18, 2010. That amendment will apply retroactively absent Congressional action to the contrary. Press Release, U.S. Sentencing Commission, *U.S. Sentencing Commission Votes Unanimously to Apply Fair Sentencing Act of 2010 Amendment to the Federal Sentencing Guidelines Retroactively* (June 30, 2011), available at: http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases

continue to impose harsher mandatory sentences after enactment merely because the criminal conduct occurred before enactment.” *Douglas*, 746 F.Supp.2d at 231.

Second, citing *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244 (1994), Petitioner argued that the relevant retroactivity event for purposes of the Fair Sentencing Act was the date of sentencing, not the date of the underlying criminal conduct. (*Id.* at 22-24, 28). Because Petitioner was sentenced after the Act’s enactment, he asserted that the Act applied to his case. (*Id.*).

In its Response Brief, the government disagreed, citing the general savings statute, 1 U.S.C. § 109. (App. R.-16 at 13-22). Petitioner filed a Reply Brief, rebutting the government’s arguments. (App. R-17). The case was argued orally on February 15, 2011.

On March 11, 2011, a panel of the Seventh Circuit affirmed. *United States v. Fisher*, 635 F.3d 336 (7th Cir. 2011) (available at Appendix A). After opining that the “Fair Sentencing Act of 2010 (FSA) might benefit from a slight name change: The Not Quite as Fair as it could be Sentencing Act of 2010 (NQFSA),” the Seventh Circuit held: “the FSA does not apply retroactively, and [we] further find that the relevant date for a determination of retroactivity is the date of the underlying criminal conduct, not the date of sentencing.” *Id.* at 338, 340. The Seventh Circuit rejected Petitioner’s argument that the plain language of the Fair Sentencing Act suggested otherwise, noting its belief that, “if Congress wanted the FSA or the guideline amendments to apply to not-yet-sentenced defendants convicted on pre-FSA conduct, it would have at least dropped a hint to that effect somewhere in the text of the FSA, perhaps in its charge to the

Sentencing Commission.” *Id.* at 339-40. It reached this conclusion despite its candid admission that Petitioner (and Fisher) “were sentenced under a structure which has now been recognized as unfair.” *Id.* at 340. This decision was the first published decision by a Court of Appeals to address the issue presented by Petitioner.⁴

On March 23, 2011, Petitioner filed a timely Petition for Rehearing *en banc*. (App. R-33). The Seventh Circuit ordered the government to file an Answer, which it did on April 19, 2011. (App. R-34, 36). On May 25, 2011, the Seventh Circuit denied rehearing *en banc*, with two Judges dissenting in a published decision. *United States v. Fisher*, – F.3d –, 2011 WL 2022959 (7th Cir. May 25, 2011) (available at Appendix B). In dissent, Judge Williams, joined by Judge Hamilton, concluded that the Fair Sentencing Act should apply to all defendants sentenced after the date of its enactment, citing Section 8 of the Act. *Id.*, 2011 WL 2022959 at *2-3. This timely Petition follows.

REASONS FOR GRANTING THE WRIT

Petitioner seeks a writ of certiorari from this Court because the Seventh Circuit’s published decision in this case conflicts with published decisions from the First and Eleventh Circuits, as well as decisions of at least 45 district courts. Moreover, as of July 15, 2011, the United States Government now agrees with Petitioner that the Seventh Circuit’s decision in this case (*Fisher*) is incorrect. The following explains the reasons for granting this Petition. Section A explores the ineluctable conflict that has arisen on the

⁴For those criminal defendants sentenced prior to the Fair Sentencing Act’s enactment, the Courts of Appeals have unanimously rejected their requests to be resentenced under the Act, citing the general savings statute, 1 U.S.C. § 109. See *United States v. Powell*, – F.3d –, 2011 WL 2712969 at *6 (7th Cir. July 13, 2011) (collecting cases).

issue presented in this Petition: whether the Fair Sentencing Act of 2010 applies to all individuals sentenced after its enactment. Section B explains why the Seventh Circuit erred when it held that the Fair Sentencing Act does not apply to all individuals sentenced after its enactment.

A. This Court should grant the writ because the Seventh Circuit’s published decision in this case conflicts with published decisions from the First and Eleventh Circuits, as well as decisions of at least 45 district courts, and the United States Government, which now agrees with Petitioner that the Seventh Circuit’s decision in this case is incorrect.

“A petition for a writ of certiorari will be granted only for compelling reasons.”

Sup.Ct.R. 10. One such reason is when “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.” Sup.Ct.R. 10(a). Such is this case. The Seventh Circuit’s published decision in this case, *United States v. Fisher*, 635 F.3d 336 (7th Cir. 2011), is in conflict with published decisions from the First and Eleventh Circuits. *United States v. Vera Rojas*, – F.3d –, No. 10-14662, 2011 WL 2623579 (11th Cir. July 6, 2011); *United States v. Douglas*, – F.3d –, No. 10-2341, 2011 WL 2120163 (1st Cir. May 31, 2011).

In *Fisher*, the Seventh Circuit rejected Petitioner’s argument that the Fair Sentencing Act of 2010 applies to all defendants sentenced after its enactment. 635 F.3d at 339. The Seventh Circuit held that the Fair Sentencing Act “does not apply retroactively, and [we] further find that the relevant date for a determination of retroactivity is the date of the underlying criminal conduct, not the date of sentencing.” *Id.* at 340.

In conflict, the First Circuit has now held that the Fair Sentencing Act applies to all

criminal defendants sentenced on or after November 1, 2010, regardless of when the defendant committed the underlying criminal conduct. *Douglas*, 2011 WL 2120163 at *3-5. The First Circuit so held based on Section 8 of the Fair Sentencing Act, which directed the United States Sentencing Commission to promulgate new guidelines conforming to the Fair Sentencing Act, and to do so within 90 days of the Act's enactment. *Id.* at *1-2. Although the First Circuit did not consider the Fair Sentencing Act's application to a defendant, like Petitioner, who was sentenced "between August 3, 2010, when the FSA went into effect, and November 1, 2010, when the new 18:1 guidelines became effective", *id.* at *6, its ultimate holding, that the Act's application turns not on the date of the underlying criminal conduct, but on the date of sentencing, conflicts with the Seventh Circuit's decision in this case. Indeed, with respect to defendants like Petitioner, the First Circuit suggested that the Fair Sentencing Act applied, "especially if the Commission decides to make its guidelines changes retroactive," *id.*, which it did on June 30, 2011. Press Release, cited at n.3.

Similarly, as the Eleventh Circuit acknowledged, its published decision in *Vera Rojas* is in direct conflict with the Seventh Circuit's decision in this case. 2011 WL 2623579 at *2. In *Vera Rojas*, also relying on Section 8 of the Fair Sentencing Act, the Eleventh Circuit held that the Act applies "to sentencings conducted after its August 3, 2010, enactment", regardless of the date of the underlying criminal conduct. *Id.* at *1, 4-5. Accordingly, the Eleventh Circuit held that the defendant in that case was subject to a 5-year, rather than a 10-year, mandatory minimum sentence and remanded for

resentencing under the Fair Sentencing Act. *Id.* at *2.

As a practical matter, *Fisher* cannot coexist with *Vera Rojas* and *Douglas*. As it now stands, district courts in the Seventh Circuit cannot sentence a defendant under the Fair Sentencing Act if that defendant committed the underlying criminal conduct prior to August 3, 2010. *Fisher*, 635 F.3d at 339-40. In contrast, district courts in the Eleventh Circuit must sentence all defendants initially sentenced on or after August 3 under the Fair Sentencing Act, regardless of when the defendant committed the underlying criminal conduct. *Vera Rojas*, 2011 WL 2623579 at *4-5. Similarly, district courts in the First Circuit must sentence all defendants sentenced on or after November 1, 2010 (and arguably on or after August 3) under the Fair Sentencing Act, regardless of when the defendant committed the underlying criminal conduct. *Douglas*, 2011 WL 2120163 at *4.

In light of this Circuit split, this Court should grant this Petition. The issue is of exceptional importance. Criminal defendants should not receive higher sentences simply because they were sentenced in Illinois instead of Florida (as one example). The Fair Sentencing Act's application should not turn on geography; it should apply to all defendants sentenced after August 3, 2010, regardless of the location of a federal courthouse. Only this Court can resolve the conflict, and it should do so in this case.

That is especially true in light of the overwhelming disagreement with the Seventh Circuit's approach in this case. In line with *Douglas* and *Vera Rojas*, two Judges in the Seventh Circuit dissented from the denial of rehearing *en banc* in this case. *Fisher*, 2011 WL 2022959 (7th Cir. May 25, 2011) (Williams, J., dissenting). Those Judges also

concluded that, in light of Section 8 of the Fair Sentencing Act, the Act applied to all defendants sentenced after its enactment. *Id.* at *3. Similarly, there are at least 45 district court judges who have issued opinions or orders in conflict with the Seventh Circuit's decision in this case.⁵

⁵*United States v. Fowlkes*, 2011 WL 2650016 (C.D. Cal. July 1, 2011) (Snyder, J.); *United States v. Shull*, -- F.Supp.2d --, 2011 WL 2559426 (S.D. Ohio June 29, 2011) (Marbley, J.); *United States v. Brown*, 2011 WL 2457933 (W.D. Pa. June 16, 2011) (Lancaster, C.J.); *United States v. Burns*, No. 1:10-cr-80 (S.D. Miss. June 13, 2011) (Gex, J.); *United States v. Ned*, No. 10-cr-546 (N.D. Cal. May 10, 2011) (Seeborg, J.); *United States v. Watts*, -- F.Supp.2d --, 2011 WL 1282542 (D. Mass. Apr. 5, 2011) (Ponsor, J.); *United States v. Brown*, No. 09-cr-10281 (D. Mass. Mar. 28, 2011) (Gertner, J.); *United States v. Harris*, 2011 WL 1134983 (D. Minn. Mar. 25, 2011) (Tunheim, J.); *United States v. Foster*, No. 09-cr-35 (M.D. La. Mar. 25, 2011) (Brady, J.); *United States v. Beach*, 2011 WL 977766 (D. Kan. Mar. 17, 2011) (Melgren, J.); *United States v. Baltimore*, No. 3:09-cr-00032 (M.D. Tenn. Mar. 4, 2011) (Haynes, J.); *Holloman*, 765 F.Supp.2d 107 (C.D. Ill. 2011) (Mills, J.); *United States v. Newborn*, 09-cr-433-WYD (D. Colo. Feb. 24, 2011) (Daniel, C.J.); *United States v. Hodges*, 765 F.Supp.2d 1369 (M.D. Ga. 2011) (Sands, J.); *United States v. White*, 2011 WL 587100 (D. S.C. Feb. 9, 2011) (Anderson Jr., J.); *United States v. McKenzie*, No. 2:10-cr-00079 (E.D. Wash. Feb. 9, 2011) (Peterson, C.J.); *United States v. Jackson*, No. 1:10-cr-20 (N.D. Fla. Feb. 7, 2011) (Mickle, C.J.); *United States v. Robinson*, 763 F.Supp.2d 949 (E.D. Tenn. 2011) (Collier, J.); *United States v. Rolle*, No. 6:09cr103 (M.D. Fla. Feb. 4, 2011) (Antoon, J.); *United States v. Elder*, 2011 WL 294507 (N.D. Ga. Jan. 27, 2011) (Story, J.); *United States v. Francis*, No. 08-cr-271 (M.D. Fla. Jan. 26, 2011) (Scriven, J.); *United States v. Duncan*, 2:10-cr-0089-WFN (E.D. Wash. Jan. 26, 2011) (Nielsen, J.); *United States v. Cruz*, No. 10-cr-613 (N.D. Ill. Jan. 20, 2011) (Conlon, J.); *United States v. Cox*, 2011 WL 92071 (W.D. Wis. Jan. 11, 2011) (Conley, J.); *United States v. Vreen*, No. 6:10-CR-119 (M.D. Fla. Jan. 10, 2011) (Conway, C.J.); *United States v. Johnson*, No. 6:08-cr-270-Orl-31KRS (M.D. Fla. Jan. 4, 2011) (Presnell, J.); *United States v. Jones*, No. 4:10-cr-00233, docket entry #21 (N.D. Ohio Jan. 3, 2011) (Dowd, J.); *United States v. English*, 757 F.Supp.2d 900 (S.D. Iowa 2010) (Pratt, J.); *United States v. Parks*, 2010 WL 5463743 (D. Neb. Dec. 28, 2010) (Bataillon, J.); *United States v. Curl*, No. 09-cr-734-ODW (C.D. Cal. Dec. 22, 2010) (Wright, J.); *United States v. Whitfield*, No.2:10-cr-00013, docket #28 (N.D. Miss. Dec. 21, 2010) (Mills, J.); *United States v. Holloway*, No. 04-cr-00090, docket #72 (S.D. W.Va. Dec. 20, 2010) (Chambers, J.); *United States v. Ross*, 755 F.Supp.2d 1261 (S.D. Fla. 2010) (King, J.); *United States v. Gutierrez*, 4:06-cr-40043 (D. Mass. Dec. 17, 2010) (Saylor, J.); *United States v. Johnson*, No. 3:10-cr-00138, docket entry # 26 (E.D. Va. Dec. 6, 2010) (Payne, J.); *United States v. Gillam*, 753 F.Supp.2d 683 (W.D. Mich. 2010) (Neff, J.); *United States v. Spencer*, No. 5:09-cr-00400, docket entry #81 (N.D. Cal. Nov. 30, 2010) (Ware, J.); *United States v. Jaimespimentz*, No. 09-cr-488-3 (E.D. Pa. Nov. 24, 2010) (Baylson, J.); *United States v. Favors*, No. 1:10-cr-00384, docket entry 34 (W.D. Tex. Nov. 23, 2010) (Yeakel, J.); *United States v. Carter*, No. 08-cr-299 (N.D.N.Y. Nov. 22, 2010) (Scullin, J.); *United States v. Garcia*, No. 09-cr-1054 (S.D.N.Y. Nov. 15, 2010) (Scheidlin, J.); *United States v. Shelby*, No. 2:09-cr-00379, docket entry #49 (E.D. La. Nov. 10, 2010) (Barbier, J.);

Finally, there is one more reason why this Court should grant this Petition: the government now agrees that the Fair Sentencing Act applies to Petitioner's case. (See Memorandum For All Federal Prosecutors, from Attorney General Eric H. Holder Jr., dated July 15, 2011) (hereinafter Holder Memorandum) (available at Appendix D). In at least one appeal in the Seventh Circuit, the government has filed a Notice of Changed Position, informing the court that it now believes that this case (*Fisher*) was wrongly decided. See *United States v. Holcomb*, No. 11-1558, docket entry #19. In a Memorandum to all federal prosecutors, the Attorney General, noting "the serious impact on the criminal justice system of continuing to impose unfair penalties", now agrees "with those courts that have held that Congress intended the Act not only to 'restore fairness in federal cocaine sentencing policy' but to do so as expeditiously as possible and to all defendants sentenced on or after the enactment date." (Holder Memorandum at 2).

As a practical matter, the government's concession amplifies the Circuit split in a number of ways. First, neither the First nor Eleventh Circuits will be asked to rehear the issue *en banc*, meaning that, as long as *Fisher* remains good law, the Circuit split on this issue will exist in perpetuity. Second, defendants sentenced by one of the many district court judges outside of the Seventh Circuit who apply the Fair Sentencing Act to all post-enactment sentencings are guaranteed to receive fairer sentences under the Act, rightly or wrongly, as the government will not appeal those sentences. (See n.5).

United States v. Angelo, No. 1:10-cr-10004, entry 10/29/2010 (D. Mass. Oct. 29, 2010) (Zobel, J.); *Douglas*, 746 F.Supp.2d 220; *United States v. Dixon*, No. 8:08-cr-00360, docket entry #33 at 33 (M.D. Fla. Sept. 20, 2010) (Covington, J.).

For instance, a first-time offender responsible for 5.5 grams of crack cocaine and sentenced by Judge Snyder in the Central District of California will likely receive a sentence below the now-repealed 5-year mandatory minimum sentence (the guidelines range would be 12 to 18 months' imprisonment). *Fowlkes*, 2011 WL 2650016. In contrast, if that same defendant were sentenced by any district court judge within the Seventh Circuit, the judge would have to impose the 5-year mandatory minimum sentence. Moreover, if that defendant were sentenced by a district court judge outside of the First and Eleventh Circuits that does not apply the Fair Sentencing Act, that defendant would also receive the unfair 5-year mandatory minimum sentence.

To highlight the intractable nature of the current state of the law, consider the Western District of Pennsylvania. One judge applies the Fair Sentencing Act to all those sentenced after its enactment, *United States v. Brown*, 2011 WL 2457933 (W.D. Pa. June 16, 2011) (Lancaster, C.J.); other judges do not, see *United States v. Gadson*, No. 08-248, 2011 WL 542433 at *3 (W.D. Pa. Feb.8, 2011) (McVerry, J.). Practically speaking, this means that two defendants, sentenced on the same day in the same courthouse for the exact same amount of crack cocaine, will arguably receive widely divergent sentences simply because of the judge who imposes sentence in each case. For instance, using the hypothetical above, the first-time offender who distributes 5.5 grams of crack cocaine would face an advisory guidelines range of 12 to 18 months' imprisonment before Chief Judge Lancaster, while a similarly situated defendant sentenced by Judge McVerry will receive no less than the now-repealed 5-year mandatory minimum sentence.

But enough of hypotheticals. As a practical matter in this case, Petitioner received a 10-year mandatory minimum sentence under § 841's repealed penalty provisions, despite the fact that his guidelines range under the Fair Sentencing Act would be 37 to 46 months' imprisonment (5.5 grams of crack cocaine = Level 16, minus 2 for acceptance, with criminal history category VI). Clearly, this issue is of exceptional importance to Petitioner and countless others like him.

In the end, as of now, because of its published decision in this case, the Seventh Circuit stands alone as the only Court of Appeals to refuse to apply the Fair Sentencing Act to individuals sentenced after its enactment. Moreover, two Judges from the Seventh Circuit disagree with the Seventh Circuit's decision in this case, as do at least 45 district court judges and the United States Government. The scope of the Fair Sentencing Act's application is of exceptional importance. Petitioner, and numerous others like him⁶, should not be denied the benefit of a fairer sentencing scheme merely because he was sentenced within the Seventh Circuit's jurisdiction. In light of the Circuit split on this issue and the overwhelming authority in disagreement with the Seventh Circuit's position, this Court should grant this Petition. Sup.Ct.R. 10(a).

⁶Although undersigned counsel has no idea how many criminal defendants within the Seventh Circuit would be eligible for a reduced sentence under the Fair Sentencing Act if *Fisher* were overruled, he knows of at least 18, including Petitioner, because that is how many individuals he represents on this issue in the Seventh Circuit. If one attorney in the Central District of Illinois represents 18 criminal defendants on this one issue, the number of defendants affected by this issue nationwide is obviously substantial.

B. This Court should grant the writ because the Seventh Circuit's published decision in this case is unsound.

The Seventh Circuit relied on the general savings statute, 1 U.S.C. § 109, to reject Petitioner's argument and to hold that the Fair Sentencing Act does not apply to any defendant who committed the underlying criminal conduct prior to the Act's enactment. *Fisher*, 635 F.3d at 339-40. This was error for a number of reasons. As Petitioner asserted below, the general savings statute has no application to his case because: (1) the Fair Sentencing Act necessarily implies that it applies to all individuals sentenced on or after its enactment; (2) Petitioner does not seek a technical abatement of his conviction; (3) the Act did not "release or extinguish" any penalty, but rather remedied an unfair definition in § 841(b); (4) because Petitioner was sentenced after the Act's enactment, he did not incur a penalty under the old provision; and (5) the Fair Sentencing Act's purpose – to right a racially discriminatory wrong – precludes the general savings statute's application. Each reason is discussed below.

Before doing so, however, it is important to note that, absent the general savings statute, the Fair Sentencing Act would undoubtedly apply to this case. As with all issues of statutory interpretation, such an inquiry would begin with the Act's plain language. *Dean v. United States*, 129 S.Ct. 1849, 1853 (2009). The Fair Sentencing Act, however, does not contain an "effective date" clause or a clause that saves the former legislation (i.e., a "savings clause"). 124 Stat. 2372. As such, because the issue concerns a new or amended statute's application, and because the statute is penal in nature, under the common law rule, there is a presumption that the new statute applies in all pending cases. *Kaiser*

Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 841 n.1 (1990) (Scalia, J. concurring); *Yeaton v. United States*, 5 Cranch 281, 283 (1809) (Marshall, C.J.) (“it has been long settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute.”).

That is so because a “contrary congressional intent” does not exist. *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 432 (1972). Nowhere in the text of the Fair Sentencing Act did Congress evince an intent that the Act not apply to those sentenced after its enactment. *Fisher*, 2011 WL 2022959 at *2 (Williams, J., dissenting). As discussed below, Section 8 of the Fair Sentencing Act implies that Congress intended for the Act to apply immediately. *Id.*; *Vera Rojas*, 2011 WL 2623579 at *5; *Douglas*, 2011 WL 2120163 at *3-5; Holder Memorandum. The legislative history confirms this intent. *See, e.g., Douglas*, 2011 WL 2120163 at *4 (noting that Congress expressed no concern over sentencing individuals under the Fair Sentencing Act in the first instance); 155 Cong. Rec. S10491-S10493 (daily ed. Oct. 15, 2009); 156 Cong. Rec. S1680-S1683 (daily ed. Mar. 17, 2010); 156 Cong. Rec. H6196-6204 (daily ed. July 28, 2010).

Moreover, the only other similar legislation passed by Congress, the Comprehensive Drug Abuse Prevention and Control Act of 1970, contained a savings clause. *Bradley v. United States*, 410 U.S. 605, 608 (1973) (“[p]rosecutions for any violation of law occurring prior to the effective date of (the Act) shall not be affected by the repeals or amendments made by (it) . . . or abated by reason thereof.”) “The absence of comparable

language in the [Fair Sentencing Act] cannot realistically be attributed to oversight or to unawareness of the retroactivity issue.” *Landgraf*, 511 U.S. at 256. The present Congress was obviously aware of the 1970 Act. 156 Cong. Rec. S1681 (statement of Sen. Durbin) (“if this bill is enacted into law, it will be the first time since 1970—forty years ago—that Congress has repealed a mandatory minimum sentence”).⁷

Yet, unlike the 1970 Act, Congress did not include a savings clause in the Fair Sentencing Act. “Had Congress had a similar intention here, it would have been so easy to have said so.” *United States v. Obermeier*, 186 F.2d 243, 255 (2d Cir. 1950); see also *Hui v. Castaneda*, 130 S.Ct. 1845, 1851 (2010) (“Given Congress’ awareness of pre-existing immunity provisions like § 233 when it enacted the Westfall Act, it is telling that Congress declined to enact a similar exception to the immunity provided by § 233(a)”).

And so, because Congressional intent is consistent with the general common law presumption favoring the immediate application of penal legislation, the relevant question centers squarely on whether the general savings statute saves the former legislation. *Pipefitters Local*, 407 U.S. at 432. The general savings statute provides:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

⁷ Similarly, legislation nearly identical to the Fair Sentencing Act, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2009, HR 265, actually included a savings clause (“[t]here shall be no retroactive application of any portion of this Act”). 156 Cong. Rec. H6202. And so, if Congress wanted to save § 841(b)’s penalty provisions, it could have passed this Act instead, or it could have added a savings clause to the Fair Sentencing Act.

1 U.S.C. § 109. Congress originally enacted this statute in 1871. *Hamm v. City of Rock Hill*, 379 U.S. 306, 314 (1965). “It was meant to obviate mere technical abatement”, and it was arguably in response to this Court’s decision in *United States v. Tynen*, 78 U.S. 88 (1870). *Hamm*, 379 U.S. at 314.

In *Tynen*, the defendant was indicted for submitting a false naturalization form and faced a term of imprisonment or a fine. 78 U.S. at 90. The statute was amended, however, while the case was pending in this Court. *Id.* at 91. The amendment reduced the penalties, but also provided that the court could impose both a prison sentence and a fine. *Id.* This Court held that the amended statute repealed the prior law, applied the common law rule, and dismissed the indictment, holding, “[t]here can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offence be at the time in existence. By the repeal the legislative will is expressed that no further proceedings be had under the act repealed.” *Id.* at 95. And so, when the 1871 Congress enacted the general savings statute in response to *Tynen*, it determined that “a substitution of a new statute with a greater schedule of penalties” should not “abate the previous prosecution.” *Hamm*, 379 U.S. at 314.

While the general savings statute was a response to *Tynen*, it was not a complete abandonment of the general common law rule. If it were, the general savings statute would preclude the application of new or amended statutes to all non-final cases. Yet, Supreme Court precedent since 1871 makes clear that the general rule is still very much alive. Indeed, of the nine Supreme Court cases involving amended or repealed criminal

statutes, four favor the general rule over the general savings statute, *Hamm*, 379 U.S. at 316-17; *Bridges v. United States*, 346 U.S. 209, 221 (1953); *Massey v. United States*, 291 U.S. 608 (1934); *United States v. Chambers*, 291 U.S. 217, 226 (1934), and, of the other five, four involved statutes that contained specific savings clauses, *Bradley*, 410 U.S. at 608; *Warden v. Marrero*, 417 U.S. 653, 710 (1974); *Great Northern Ry. Co. v. United States*, 208 U.S. 452, 466 (1908); *United States v. Reisinger*, 128 U.S. 398, 400 (1888). In the other case, the issue was whether the prosecutions should abate. *Pipefitters Local*, 407 U.S. at 399 n.10.

This case law is consistent with the statutory canon that favors strict construction of statutes that are in derogation of the common law. See *Pasquantino v. United States*, 544 U.S. 349, 359 (2005). It also conforms with Congress's inclusion of savings clauses in some, but not all, legislation. Indeed, if the general savings statute applied as a general matter to all cases involving a repealed statute, there would be no reason for Congress ever to include specific savings clauses. Yet, Congress often includes such clauses, as it did in the 1970 Act.⁸ With this history in mind, Petitioner reiterates the five reasons he presented below as to why the general savings statute does not preclude the Fair Sentencing Act's application to all individuals sentenced after its enactment.

⁸*Bradley*, 410 U.S. at 608. For other examples of savings clauses, see *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 335-36 (2003) (ERISA); *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 62-63 (2002) (Federal Boat Safety Act of 1971); *Sec'y of the Interior v. California*, 464 U.S. 312, 341 n.21 (1984) (Coastal Zone Management Act); *Carpenter v. Wabash Ry. Co. et al.*, 309 U.S. 23 (1940) (bankruptcy statute); *Great Northern Ry. Co. v. United States*, 208 U.S. 452, 466 (1908) (Hepburn Act); *Skowronek v. Brennan*, 896 F.2d 264, 268 (7th Cir. 1990) (Sentencing Reform Act of 1984); *United States v. Marachowsky*, 213 F.2d 235, 241 (7th Cir. 1954); (bankruptcy statute); *Lovely v. United States*, 175 F.2d 312, 316 (4th Cir. 1949) (rape statute).

(1) The Fair Sentencing Act necessarily implies that it applies to all individuals sentenced after its enactment.

Below, Petitioner asserted that the text of the Fair Sentencing Act necessarily implied that it should apply to his case, citing Section 8 of the Act and this Court's decision in *Great Northern Ry. Co.*, 208 U.S. 452. The Seventh Circuit rejected the argument, stating, "if Congress wanted the FSA or the guideline amendments to apply to not-yet-sentenced defendants convicted on pre-FSA conduct, it would have at least dropped a hint to that effect somewhere in the text of the FSA, perhaps in its charge to the Sentencing Commission." *Fisher*, 635 F.3d at 339-40. In reaching this conclusion, the Seventh Circuit referred to the Fair Sentencing Act as "compromise legislation" with "strong rhetoric to be found on either side" of the debate. *Id.* at 339.

There are three noticeable flaws in the Seventh Circuit's decision. The first is its erroneous premise that the Fair Sentencing Act was "compromise legislation." That is inaccurate. In reality, the Fair Sentencing was bipartisan legislation, "negotiated and drafted by Democratic and Republican members of the Senate Judiciary Committee." 156 Cong. Rec. H6197 (daily ed. July 28, 2010) (statement of Rep. Scott). The Act had near-unanimous support; it passed the Senate by unanimous consent and the House of Representatives by a voice vote. S.1789: Fair Sentencing Act of 2010, at <http://www.govtrack.us/congress/bill.xpd?bill-s11-1789>. During debate, only one Congressman spoke against the Act. 156 Cong. Rec. H6197 (daily ed. July 28, 2010) (statement of Rep. Smith). To the extent that the Act was "compromise legislation," the compromise centered not on the need to reduce the disparity between crack and

powder cocaine, but on the extent of the reduction. *United States v. Williams*, – F.Supp.2d –, 2011 WL 1336666 at *25 (N.D. Iowa, Apr. 7, 2011). That compromise is irrelevant to this issue.

The second flaw is that the Seventh Circuit misunderstood the limited reach of the general savings statute. See *Fisher*, 2011 WL 2022959 at *3 (Williams, J., dissenting). The Seventh Circuit erroneously required a “direct statement” of Congressional intent, refusing to “read in by implication anything not obvious in the text of the FSA.” *Fisher*, 635 F.3d at 339-40. The general savings statute, however, does not require a direct statement. “[I]ts provisions 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.*, 208 U.S. at 465; see also *Fletcher v. Peck*, 10 U.S. 87, 135 (1810) (“one legislature cannot abridge the powers of a succeeding legislature”). If a subsequent enactment “necessarily, or by clear implication, conflicts with [the general savings statute], the latest expression of the legislative will must prevail.” *Hertz v. Woodman*, 218 U.S. 205, 218 (1910); see also *Lockhart v. United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring) (“an express-reference or express-statement provision cannot nullify the unambiguous import of a subsequent statute.”).

The third, and most serious, flaw in the Seventh Circuit’s decision is its conclusion that Congress did not “drop[] a hint” that it intended the Fair Sentencing to apply immediately. *Fisher*, 635 F.3d at 339-40. In fact, that is exactly what Congress did, in an emergency fashion, in Section 8 of the Act. *Id.* at *3; *Vera Rojas*, 2011 WL 2623579 at *4;

Douglas, 2011 WL 2120163 at *4. In Section 8, Congress ordered the Sentencing

Commission to:

promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event *not later than 90 days after the date of enactment of this Act . . . and . . . make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.*

124 Stat. at 2374 (emphasis added). In response, the Commission drafted an emergency amendment to U.S.S.G. § 2D1.1, effective November 1, 2010. United States Sentencing Commission, Supplement to the 2010 Guidelines Manual, intro. letter dated Oct. 18, 2010. That amendment, which will be made retroactive absent Congressional action to the contrary, increased the quantities of crack cocaine enumerated in the Drug Quantity Table, U.S.S.G. § 2D1.1(c), to reflect the increased quantities codified in 21 U.S.C.

§ 841(b) pursuant to the Fair Sentencing Act. *Id.*; U.S.S.G. § 2D1.1(c); Press Release, n.3.

In light of the guidelines, Section 8 of the Fair Sentencing Act necessarily implies that Congress intended the Act to apply immediately. *Vera Rojas*, 2011 WL 2623579 at *4. Pursuant to 18 U.S.C. § 3553(a)(4)(A)(ii), district courts must apply the guidelines that are in effect on the date of sentencing, not on the date of the underlying criminal conduct. *Vera Rojas*, 2011 WL 2623579 at *4; *Douglas*, 746 F.Supp.2d at 229 (“during the past two decades of the Guidelines’ existence, whenever the Commission has adopted Guideline amendments, those amendments have applied to all defendants sentenced thereafter, regardless of when the crime was committed.”).

If Congress wanted the *repealed* statute to apply to *future* sentencing proceedings,

Section 8's requirement that the Commission draft *conforming* amendments to the guidelines in order to achieve *consistency* with *applicable law* would make little sense. *Id.*; *Douglas*, 2011 WL 2120163 at *4; *Fisher*, 2011 WL 2022959 at *2-3 (Williams, J., dissenting). Congress obviously knew of § 3553(a)(4)(A)(ii) when it drafted the Fair Sentencing Act, and, yet, Congress ordered the Commission to draft guidelines amendments without delay. § 8, 124 Stat. at 2374. Indeed, given Section 8's directive, to amend the guidelines "not later than 90 days" after the Act's enactment, the Commission could have amended the guidelines at any time thereafter, including the next day after enactment. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) ("It is well established that, absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment.").

In light of this, Congress must have intended that the Commission would use the Fair Sentencing Act's revised statutory penalties as the "applicable law" when it drafted the "conforming" guidelines amendments. And that is precisely what the Commission did. United States Sentencing Commission, Supplement to the 2010 Guidelines Manual, intro. letter dated Oct. 18, 2010. Yet, under the Seventh Circuit's rationale, the term "applicable law" in Section 8 would vary depending on when the defendant committed the underlying criminal conduct. That reading is untenable. Only if the Fair Sentencing Act is itself the "applicable law" in future sentencing proceedings does there exist consistency and conformity with the Fair Sentencing Act's guidelines amendments.

The emergency nature of Section 8's directive amplifies this point. Congress ordered

the Commission to draft amended guidelines “as soon as practicable” and “not less than 90 days” after the Act’s enactment. § 8, 124 Stat. at 2374. If Congress did not intend the new statutory penalties to apply immediately, this emergency authority would be seriously undermined. *Vera Rojas*, 2011 WL 2623579 at *4; *Douglas*, 2011 WL 2120163 at *4; *Fisher*, 2011 WL 2022959 at *2-3 (Williams, J., dissenting). Almost all crack cocaine offenders sentenced within a few months of the Fair Sentencing Act’s enactment would have committed their crimes prior to the Act’s enactment. See, e.g., Administrative Office of the Courts, Judicial Business of the United States Courts 270-71, tbl. D-10 (2010) (median time from filing to disposition in federal drug cases is 9.7 months). If the “applicable law” in those cases was the repealed statutory penalties, then the Commission’s “conforming” amendments would provide no benefit at all. Moreover, to “conform” with the old statutory penalties, courts would have to apply the old guidelines ranges, which is at odds with § 3553(a)(4)(A)(ii).

This is why both the First and Eleventh Circuits have held that the Fair Sentencing Act applies to those sentenced after its enactment (or at least after November 1, 2010). As the Eleventh Circuit concluded, “[b]y granting the Sentencing Commission the emergency authority to amend the Sentencing Guidelines by November 1, 2010, Congress necessarily indicated its intent for the FSA to apply immediately. To ask district courts to consider the date the offense was committed to determine the statutory minimum, but the date of sentencing to determine the guidelines range, would lead to an incongruous result that is inconsistent with Congressional intent.” *Vera Rojas*, 2011

WL 2623579 at *4. “[S]uch an interpretation of the FSA would run afoul of the policies motivating its enactment and render ineffectual Congress’s express directive to the Sentencing Commission.” *Id.* It “would set the legislative mind at naught by giving effect to the savings statute, and prevent the consistency and conformity that the statute expressly seeks.” *Fisher*, 2011 WL 2022959 at *3 (Williams, J., dissenting) (alterations, citation, and quotations omitted).

As many have recognized, “the new Guidelines cannot be ‘conforming’ and ‘achieve consistency’ (Congress’s express mandate) if they are based upon statutory minimums that cannot be effective to a host of sentences over the next five years until the statute of limitations runs on pre-August 3, 2010 conduct.” *Douglas*, 746 F.Supp.2d at 228. “It would be a strange definition of ‘conforming’ and ‘consistency’ to have these new amended Guidelines go into effect while the old and therefore inconsistent statutory minimums continue.” *Id.* at 229. As the Eleventh Circuit concluded, “Congress could not have intended this result.” *Vera Rojas*, 2011 WL 2623579 at *4.

Moreover, such an outcome would produce absurd results. *Parks*, 2010 WL 5463743 at *7; *see also Vera Rojas*, 2011 WL 2623579 at *4; *Fisher*, 2011 WL 2022959 at *2 (Williams, J., dissenting). If the Fair Sentencing Act does not apply to individuals like Petitioner, high-level crack cocaine dealers will receive sentences similar to low-level dealers because the amended guidelines yield sentences closer to the heightened mandatory minimums. *Id.*; *Gillam*, 753 F.Supp.2d at 690-91; *English*, 757 F.Supp.2d at 904.

Other aspects of the Fair Sentencing Act confirm Congress’s intent that it apply to

cases like Petitioner's, including its Title and its Preamble, which indicates that the Act's goal was to "restore fairness to Federal cocaine sentencing." *Douglas*, 746 F.Supp.2d at 229. Indeed, the Act was a response to § 841(b)'s now-infamous 100-to-1 ratio between cocaine base and cocaine. *DePierre v. United States*, 131 S.Ct. 2225, 2229 (2011). That ratio primarily applied to punish those who traffic in crack cocaine 100 times harsher than those who traffic in powder cocaine. See United States Sentencing Commission: Report to Congress: Cocaine and Federal Sentencing Policy (2007) (hereinafter Commission Report). Since its inception, this ratio has come under attack, primarily by the United States Sentencing Commission, which repeatedly found that the ratio was "generally unwarranted." *Kimbrough v. United States*, 552 U.S. 85, 97 (2007). In 1985, 1997, 2002, and 2007, the Commission recommended that Congress lower the 100-to-1 ratio, *id.* at 99-100, which it finally did, to an 18-to-1 ratio, in the Fair Sentencing Act.

The 100-to-1 ratio was criticized because crack cocaine and powder cocaine, "two forms of the same drug", are "chemically similar", with the identical active ingredient and "the same physiological and psychotropic effects." *Kimbrough*, 552 U.S. at 94. It is also true that the majority of crack cocaine offenders are Black (81.8% in 2006), while the majority of powder cocaine offenders are Hispanic/White (71.8%). Commission Report at 15-16; *Kimbrough*, 552 U.S. at 98. The legislative history confirms that this racial disparity was a primary reason why Congress passed the Fair Sentencing Act.⁹ And so,

⁹155 Cong. Rec. S10491-S10493 (daily ed. Oct. 15, 2009) (statements of Sen. Durbin, Leahy, & Specter) (a sample of quotes: "the crack/powder disparity disproportionately affects African-Americans"; "When one looks at the racial implications of the crack-powder disparity, it has bred disrespect for our criminal justice system"; "fixing the crack-powder disparity

because a Court must not interpret a statute to undercut its primary objective, *Abbott v. United States*, 131 S.Ct. 18, 27 (2010), and because the Fair Sentencing Act's primary objective was to "restore fairness to Federal cocaine sentencing," any argument "to limit the applicability of the new statute [is] less than compelling." *Gillam*, 753 F.Supp.2d at 690-91.

'would better reduce the [sentencing] gap [between African Americans and whites] than any other single policy change"; the Act "will finally enable us to address the racial imbalance that has resulted from the cocaine sentencing disparity"; "the criminal justice system has unfair and biased cocaine penalties that undermine the Constitution's promise of equal treatment for all Americans"; "this policy has had a significantly disparate impact on racial and ethnic minorities"; "I do not believe that the 1986 Act was intended to have a disparate impact on minorities but the reality is that it does"); 156 Cong. Rec. S1680-S1683 (daily ed. Mar. 17, 2010) (statements of Sen. Durbin & Leahy) (a sample of quotes: "Disproportionately, African-Americans who are addicted use crack cocaine. . . . So the net result of this was that the heavy sentencing we enacted years ago took its toll primarily in the African-American community."; "The racial imbalance that has resulted from the cocaine sentencing disparity disparages the Constitution's promise of equal treatment of all Americans."; "These disproportionate punishments have had a disparate impact on minority communities. This is unjust and runs contrary to our fundamental principles of equal justice under law."; quoting John Payton, president of the NAACP Legal Defense Fund, who called the disparity "one of the most notorious symbols of racial discrimination in the modern criminal justice system."; "I believe the Fair Sentencing Act moves us one step closer to reaching the important goal of equal justice for all."); 156 Cong. Rec. H6196-6204 (daily ed. July 28, 2010) (statements of Rep. Scott, Clyburn, Sensenbrenner, Jackson Lee, Lungren, Ellison, Paul, & Hoyer) (a sample of quotes: "This disparity is particularly egregious when you consider that . . . 80 percent of the crack defendants are black, whereas only 30 percent of the powder cocaine defendants are black"; "This is unjust and runs contrary to our fundamental principles of equal protection under the law."; "The unwarranted sentencing disparity . . . disproportionately affects the African-American community." "one of the sad ironies in this entire episode 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. When African-Americans, low-level crack defendants, represent 10 times the number of low-level white crack defendants, I don't think we can simply close our eyes."; "It has long been clear that 100-to-1 disparity has had a racial dimension as well, helping to fill our prisons with African Americans disproportionately put behind bars for longer."); 156 Cong. Rec. E1498 (daily ed. July 30, 2010) (statement of Rep. Johnson); 156 Cong. Rec. S6867 (daily ed. Aug. 5, 2010) (statement of Sen. Kaufman); see also *Parks*, 2010 WL 5463743 at *4 (quoting Attorney General Holder).

Section 10 also bolsters the necessary implication that Congress intended the Act to apply immediately. That section orders the Commission to submit a report to Congress within five years detailing the “impact of the changes in Federal sentencing law under this Act and the amendments made by this Act.” 124 Stat. at 2375. This directive makes clear that Congress intended the Act to apply immediately. If Congress expected the repealed statutory minimums to apply until the statute of limitations ran in five years, it would make little sense to order the Commission to issue a report at this five-year mark; clearly, the continued application of the repealed statute would frustrate the Commission’s ability to decipher the full effect of the Fair Sentencing Act.

Finally, the rule of lenity “adds a measure of further support” to Petitioner’s argument. *Douglas*, – F.3d. –, 2011 WL 2120163 at *5. Under this rule, “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” *Skilling v. United States*, 130 S.Ct. 2896, 2932 (2010). “[T]he rule has been applied not only to resolve issues about the substantive scope of criminal statutes, but to answer questions about the severity of sentencing”. *United States v. R.L.C.*, 503 U.S. 291, 305 (1992). It is “rooted in the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.” *Id.* (quotations omitted). Of course, the rule “only applies if, after considering text, structure, history, and purpose, there remains a ‘grievous ambiguity or uncertainty in the statute.’” *Barber v. Thomas*, 130 S.Ct. 2499, 2508 (2010). While Petitioner believes that the statute is sufficiently certain in his favor, to the extent this Court thinks otherwise, any ambiguity would be “grievous,” and the rule of

lenity would apply to resolve this issue in Petitioner's favor. *Id.*; *Skilling*, 130 S.Ct. at 2932; *R.L.C.*, 503 U.S. at 305; *Douglas*, – F.3d. –, 2011 WL 2120163 at *5; *Parks*, 2010 WL 5463743 at *6, 8 (invoking rule of lenity on this very issue).

In the end, the First and Eleventh Circuits, two Judges from the Seventh Circuit, over 40 district court judges, and the United States government have found this argument persuasive. The Seventh Circuit erred when it rejected the argument and refused to apply the Fair Sentencing Act to Petitioner's case.

(2) Petitioner does not seek a technical abatement of his conviction.

Below, Petitioner asserted that the general savings statute did not apply in this case because he did not seek a technical abatement of the prosecution. The Seventh Circuit ignored the argument, and no other Court of Appeals has addressed it. The argument is premised on four unassailable propositions, as discussed above: (1) Congress enacted the general savings statute “to obviate mere technical abatement”, *Hamm*, 379 U.S. at 314; (2) the general savings statute is in derogation of the common law, *Bonjorno*, 494 U.S. at 841 n.1 (Scalia, J., concurring); (3) because it is in derogation of the common law, it must be strictly construed, *Pasquantino*, 544 U.S. at 359; and (4) Petitioner does not seek technical abatement of his conviction, but rather the application of a new law.

From these premises, this conclusion follows: the general savings statute has no application to this case. Petitioner does not seek technical abatement, and the general savings statute, which is in derogation of the common law, only exists to preclude technical abatements. A strict construction of the statute means that it applies only in

cases where the defendant has asked the court to dismiss the charges. Accordingly, the Seventh Circuit's decision in this case is in error.

(3) The Act did not “release or extinguish” any penalty, but rather remedied an unfair definition in § 841(b).

Both before and after the Fair Sentencing Act's enactment, § 841(b)'s mandatory minimum penalty provisions remain unchanged. 21 U.S.C. § 841(b); 124 Stat. 2372. Thus, as a practical matter, the Act did not “extinguish or release” any punishment provided for in § 841(b). See *United States v. Kolter*, 849 F.2d 541, 544 (11th Cir. 1988); but see *Martin v. United States*, 989 F.2d 271 (8th Cir. 1993). “It does not wipe clean the defendant's penal obligation.” *United States v. Stephens*, 449 F.2d 103, 106 (9th Cir. 1971). Rather, the Fair Sentencing Act altered the quantity of crack cocaine necessary to trigger § 841(b)'s penalty provisions. 124 Stat. at 2372. In doing so, the Act “merely altered the class of persons” subject to those penalties. *Kolter*, 849 F.2d at 544. By providing steeper penalties for greater drug quantities, Congress intended to punish major drug traffickers more harshly than minor drug traffickers.¹⁰ As such, the Act simply redefines “serious” and “major” drug traffickers in the crack cocaine context because the former

¹⁰See, e.g., 156 Cong. Rec. H6199 (statement of Rep. Jackson Lee) (noting that statistics confirmed that the then-mandatory minimum sentences “sweep in low-level crack cocaine users and dealers” and “diverts federal resources from high-level drug traffickers,” and citing HR 265's findings that “One of the principal objectives of the Anti-Drug Abuse Act of 1986, which established different drug quantities, which were intended to serve as proxies for identifying offenders who were ‘serious’ traffickers . . . and ‘major’ traffickers”); 156 Cong. Rec. S1683 (statement of Sen. Leahy) (“The primary goal underlying the crack sentence structure was to punish the major traffickers and drug kingpins who were bringing crack in to our neighborhoods.”); Moreover, Section 4 of the Fair Sentencing Act is entitled, “Increased Penalties for Major Drug Traffickers.”

statute's definitions were flawed.

In *Kolter*, the Eleventh Circuit reversed the defendant's conviction for unlawful possession of a firearm in light of an amendment to the statute. 849 F.2d at 542. The amendment redefined the term "convicted felon," and the defendant did not fall under the new definition. *Id.* at 542-43. "[E]ven if [the new statute] had repealed a statute, § 109 would not apply as the redefinition of 'convicted felon' did not 'release or extinguish any penalty, forfeiture, or liability.'" *Id.* at 544. If a new definition of "convicted felon" does not extinguish or release a penalty, then a new definition of serious and major drug traffickers does not extinguish or release a penalty either.

But even absent *Kolter*, this Court has never applied the general savings statute in a situation where an amended statute did not alter the penalty provisions. *See, e.g., Pipefitters Local*, 407 U.S. at 433; *Reisinger*, 128 U.S. at 401-02. Again, the general savings statute must be strictly construed, *Pasquantino*, 544 U.S. at 359, and a strict construction of the terms "release or extinguish" does not extend to the Fair Sentencing Act's amendment of the quantity of crack cocaine necessary to trigger the penalty provisions in § 841(b). Such an amendment does not liberate, discharge, or set free from restraint or confinement, Black's Law Dictionary 1159 (5th Ed. 1979) (definition of "release"), nor does it bring or put an end to, terminate, or cancel the relevant penalties, *Id.* at 525 (definition of "extinguish").

The amendment redefined serious and major crack cocaine traffickers; it did not release major, or even minor, crack cocaine traffickers from § 841(b)'s penalties. It is still

illegal to traffic crack cocaine, and those who do so are still subject to punishment if convicted in federal court. 21 U.S.C. § 841(b). The Fair Sentencing Act did not amend the punishment portion of 21 U.S.C. § 841. The punishments remain the same. Accordingly, the general savings statute has no application in this case.

This logic finds support in this Court's decisions on "matters of remedy and procedure." *Bridges*, 346 U.S. at 227 n.25. In such matters, the general savings statute has no application. *Id.* For instance, in *Bridges*, this Court dismissed an indictment on statute of limitations grounds after refusing to apply the general savings statute to save a former statute's lengthier limitations period. *Bridges*, 346 U.S. at 227.

And so, the Fair Sentencing Act has not released or extinguished a penalty, but rather has remedied a flawed definition. That remedy seeks to punish major drug traffickers similarly, regardless of the type of drug trafficked. Because the prior law failed in this regard with respect to one drug type, cocaine base, the Fair Sentencing Act concerns a matter of procedure or remedy and does not "release or extinguish" a penalty, and, therefore, the general savings statute has no application to this case. *Bridges*, 346 U.S. at 227 n.25; *see also Bruner v. United States*, 343 U.S. 112, 117 (1952) (general savings statute held inapplicable because "Congress has not altered the nature or validity of petitioner's rights or the Government's liability but has simply reduced the number of tribunals authorized to hear and determine such rights and liabilities"); *Ex parte Collett*, 337 U.S. 55, 71 (1949) (amended venue provisions applied to cases pending on appeal because they remedied the prior statute's absence of *forum non*

coveniens); *Obermeier*, 186 F.2d at 253 (statute-of-limitations case); *United States v. Mechem*, 509 F.2d 1193 (10th Cir. 1975) (jurisdiction-shifting amendment); *United States v. Blue Sea Line*, 553 F.2d 445 (5th Cir. 1977) (same).

(4) Because Petitioner was sentenced after the Act’s enactment, he did not incur a penalty under the old provision.

By its own terms, the general savings statute operates to save a penalty “incurred” under a repealed statute. 1 U.S.C. § 109. Below, Petitioner asserted that he did not incur a penalty under the Fair Sentencing Act because the Act’s relevant retroactivity event was the imposition of sentence, and Petitioner was sentenced after the Act’s enactment. At least one district court judge has found this argument persuasive. *Holloman*, 765 F.Supp.2d at 1090-91. The Seventh Circuit, however, rejected the argument without discussion, summarily concluding that “the relevant date for a determination of retroactivity is the date of the underlying criminal conduct, not the date of sentencing,” and that the Act, therefore, did not apply “retroactively” to Petitioner’s case. *Fisher*, 635 F.3d at 340.

Under either of this Court’s tests for retroactivity, a “vested rights” approach or a “temporal application” approach, the application of the Fair Sentencing Act to individuals, like Petitioner, who were sentenced after the Act’s enactment is not a retroactive exercise; it is a prospective exercise. *Holloman*, 765 F.Supp.2d at 1090-91. After all, “[a] statute does not operate ‘retrospectively’ merely because it is applied in a case arising from conduct antedating the statute’s enactment, or upsets expectations based in prior law.” *Landgraf*, 511 U.S. at 269.

Under a “vested rights” approach, a statute operates retroactively only if it “takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.” *Id.* at 268. This test derives from this Court’s *Ex Post Facto Clause* jurisprudence, *Id.* at 290 (Scalia, J. concurring), and its aim is to alleviate “the unfairness of imposing new burdens on persons after the fact,” *Id.* at 270. A statute that “merely remove[s] a burden on private rights by repealing a penal provision” is not a retroactive statute. *Id.* Because that is essentially what the Fair Sentencing Act does, it does not fall within the definition of a retroactive statute. *Id.* at 270, 280.

This conclusion also follows if one looks at the “temporal application” of the Fair Sentencing Act. *See, e.g., Landgraf*, 511 U.S. at 291-92 (Scalia, J. concurring). The critical issue posed under this theory is:

what is the relevant activity that the rule regulates. Absent clear statement otherwise, only such relevant activity which occurs after the effective date of the statute is covered. Most statutes are meant to regulate primary conduct, and hence will not be applied in trials involving conduct that occurred before their effective date. But other statutes have a different purpose and therefore a different relevant retroactivity event.

Id. For instance, “a new rule of evidence governing expert testimony . . . is aimed at regulating the conduct of trial, and the event relevant to retroactivity of the rule is introduction of the testimony.” *Id.* Or, “[i]f attorney’s fees can be awarded in a suit involving conduct that antedated the fee-authorizing statute, it is because the purpose of the fee award is not to affect that conduct, but to encourage suit for the vindication of certain rights—so that the retroactivity event is the filing of suit.” *Id.* at 292. With respect

to jurisdiction-conferring statutes, the relevant event for retroactivity purposes is the moment at which jurisdiction is sought to be exercised. *Id.* With respect to an injunction, because it operates in the future, “the relevant time for judging its retroactivity is the very moment at which it is ordered.” *Id.* at 293.

In *Martin v. Hadix*, this Court held that a section of the Prison Litigation and Reform Act that places limits on attorney’s fees for postjudgment monitoring only limited such fees with respect to services performed after the statute’s effective date. 527 U.S. 343, 361-62 (1999). “[T]he relevant retroactivity event [was] the doing of the work for which the incentive was offered.” *Id.* at 364 (Scalia, J. concurring). In *Rep. of Austria v. Altmann*, this Court held that the Foreign Services Intelligence Act applied to claims that were based on conduct that preceded the enactment of the Act because the claims, rather than the underlying conduct initiating the claims, were “the relevant conduct regulated by the Act.” 541 U.S. 677, 681, 697 n.17, 697-98 (2004).

As applied in this case, the relevant retroactivity event is the imposition of sentence, as the Fair Sentencing Act obviously regulates sentencing. *Holloman*, 765 F.Supp.2d at 1090-91; *Landgraf*, 511 U.S. at 291-92 (Scalia, J. concurring). Indeed, as relevant here, the Act amended the quantity of crack cocaine necessary to trigger the mandatory minimums set forth in 21 U.S.C. § 841, and drug type and quantity are not elements of the offense. *See, e.g., United States v. Martinez*, 301 F.3d 860, 865 (7th Cir. 2002). Rather, they are sentencing factors. *Id.* Thus, because drug quantity, for mandatory minimum purposes, is a sentencing factor and not an element of the offense, the relevant

retroactivity event in this case must be the date of sentencing, not the date of the offense conduct. *Holloman*, 765 F.Supp.2d at 1090-91; *see also Landgraf*, 511 U.S. at 291-92 (Scalia, J. concurring). The relevant retroactivity event is the imposition of sentence because only then does drug quantity, a sentencing factor, control for purposes of the mandatory minimum. *See id.*; *Hadix*, 527 U.S. at 364 (Scalia, J. concurring); *Altmann*, 541 U.S. at 681, 697-98. “When the FSA changed the applicability of mandatory minimum sentences, it did not alter the penalty for committing the offense. A mandatory minimum merely cabins the discretion of the sentencing judge.” *Holloman*, 765 F.Supp.2d at 1090-91. “Therefore, the relevant retroactivity event is the sentencing date, not the date the offense was committed” *Id.* at 1091.

In the end, under either a “vested rights” approach or a “temporal application” approach, the application of the Fair Sentencing Act to individuals, like Petitioner, who were sentenced after the Act’s enactment is not a retroactive exercise. Rather, it is prospective, and a prospective application of a statute avoids any need to refer to the general savings statute because no penalty is incurred under a repealed statute when current law is applied prospectively. *Id.* Because the Fair Sentencing Act was current law at the time Petitioner was sentenced, it applied to his case.

(5) The Fair Sentencing Act’s purpose--to right a racially discriminatory wrong--precludes the general savings statute’s application.

Finally, the general savings statute does not apply to save a repealed statute when that statute undermines important public policy. *Hamm*, 379 U.S. at 313-16. Rather, courts apply new legislation “to avoid inflicting punishment at a time when it can no

longer further any legislative purpose, and would be unnecessarily vindictive.” *Id.* at 313. Indeed, “the government should accord grace to private parties disadvantaged by an old rule when it adopts a new and more generous one.” *Landgraf*, 511 U.S. at 276 n.30. And so, when the Twenty-First Amendment repealed the Eighteenth Amendment, prosecutions under the National Prohibition Act “immediately fell with the withdrawal by the people of the essential constitutional support.” *Chambers*, 291 U.S. at 222.

The continuance of the prosecution of the defendants after the repeal of the Eighteenth Amendment . . . would involve an attempt to continue the application of the statutory provisions after they had been deprived of force. This consequence is not altered by the fact that the crimes in question were alleged to have been committed while the National Prohibition Act was in effect.

Id. at 222-23.

While *Chambers* was of constitutional magnitude, this Court extended its reasoning to the statutory realm in *Hamm*. There, the Court held that state convictions for trespass, based on sit-in demonstrations at segregated lunch counters, abated with the passage of the Civil Rights Act of 1964. 379 U.S. at 307-08.

The Civil Rights Act of 1964 forbids discrimination in places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities. Although the conduct in the present cases occurred prior to the enactment of the Act, the still-pending convictions are abated by its passage.

Id. at 308. This Court refused to save the convictions under the general savings statute because the Civil Rights Act “substitutes a right for a crime. So drastic a change is well beyond the narrow language of amendment and repeal.” *Id.* at 314. In so holding, this Court relied on the “great purpose of the civil rights legislation”, which “was to

obliterate the effect of a distressing chapter of our history” (i.e., racial segregation). Because there was “no public interest to be served in the further prosecution of the petitioners,” the Court vacated the convictions and dismissed the charges. *Id.* at 317.

The Fair Sentencing Act has not substituted a right for a crime, and so the specific holdings in *Chambers* and *Hamm* are not dispositive in this appeal. Yet, these cases certainly provide a measure of support for Petitioner’s argument. *Douglas*, – F.3d. –, 2011 WL 2120163 at *4. Indeed, the principles underlying those specific holdings are dispositive in this appeal, especially those in *Hamm*. As discussed above, it is beyond dispute that Congress enacted the Fair Sentencing Act primarily to redress a racially discriminatory disparity between the treatment of crack and powder cocaine. Indeed, a number of lawmakers referred to the disparity in terms of an Equal Protection violation. (See n.9, supra). The President of the NAACP’s Legal Defense Fund is quoted as describing the disparity as “one of the most notorious symbols of racial discrimination in the modern criminal justice system.” 156 Cong. Rec. S1683. Thus, the same underlying principle that led to the enactment of the Civil Rights Act of 1964--the eradication of racial discrimination-- also led to the passage of the Fair Sentencing Act.

It is of course true that trafficking in crack cocaine is not an act of civil disobedience, and Petitioner realizes that his conduct is much different than that of the civil rights protesters in *Hamm*. That is why Petitioner does not seek abatement of his conviction. His actions are as illegal today as they were a year ago. But that does not mean that he should have been sentenced under an unfair and already-repealed law that

discriminates on the basis of race. This is especially true when that now-repealed law admittedly had no evidentiary basis, 156 Cong. Rec. H6202 (statement of Rep. Lungren), and was founded on since-discredited assumptions, 155 Cong. Rec. S10491 (statement of Sen. Durbin); *Kimbrough*, 552 U.S. at 97-98. When a statute is repealed or amended because it discriminates on the basis of race, the general savings statute should not save that statute. *Hamm*, 379 U.S. at 314-16. To hold otherwise would be “unnecessarily vindictive.” *Hamm*, 379 U.S. at 313. It would mistakenly save a statute since “deprived of force.” *Chambers*, 291 U.S. at 222.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the published decision of the United States Court of Appeals for the Seventh Circuit, affirming the Petitioner’s conviction and sentence.

Respectfully submitted,
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