Nos. 11-5683 and 11-5721

In The Supreme Court of the United States

EDWARD DORSEY, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

COREY HILL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF FORMER UNITED STATES DISTRICT COURT JUDGES PAUL G. CASSELL AND NANCY GERTNER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are two former United States District Court Judges who have sentenced defendants under the mandatory-minimum provisions of the Anti-Drug Abuse Act of 1986 ("1986 Act"), Pub. L. No. 99-570, 100 Stat. 3207 (1986). Both have written opinions and articles expressing their deep concerns about the unfairness of the onerous mandatory-minimum penalties for non-violent drug offenders and the racial disparities they have engendered. Both are now law professors who continue to research and write on the subject of sentencing and criminal justice policy.

Judge Paul G. Cassell was a judge of the United States District Court for the District of Utah from 2002 until 2007, and served on the Judicial Conference's Committee on Criminal Law during a time when it recommended changes in the cocaine sentencing guidelines. He resigned the bench and joined the faculty of the S.J. Quinney College of Law at the University of Utah. Judge Nancy Gertner was a judge

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae* and counsel, made any monetary contribution towards the preparation and submission of this brief. *See* SUP. CT. R. 37.6. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certifies that counsel of record for both parties received timely notice of *amici curiae*'s intent to file this brief and have consented to its filing by letter on file with the Clerk's office. *See* SUP. CT. R. 37.6(a).

of the United States District Court for the District of Massachusetts from 1994 until 2011. She resigned the bench in September of 2011 to join the faculty of the Harvard Law School.

SUMMARY OF ARGUMENT

Congress enacted the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) ("FSA"), not simply to change the drug quantities needed to trigger the 5-, 10-, and 20-year mandatory-minimum penalties for offenses involving crack cocaine imposed by prior law. Congress enacted the FSA to correct the acknowledged errors of the 1986 Act. The FSA represents express conclusions that sentencing under prior law was unjust, that it was mistaken from the outset, that it did not fulfill any of the purposes of sentencing, and that it was the source of substantial racial disparity in federal sentencing.

Consistent with those conclusions, Congress took steps to implement the FSA as quickly as possible, directing the United States Sentencing Commission to amend the relevant sentencing guidelines within ninety days to conform them to the provisions of the new statute. While Congress did not explicitly indicate application to pre-enactment conduct, the general saving statute, 1 U.S.C. § 109, plainly does not apply where – as here – the will of Congress either "expressly" or by "fair implication" is clear. *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 659

n.10 (1974). As petitioners and the Solicitor General have argued, the text and structure of the FSA, together with its history and purposes, make apparent that Congress intended the FSA's revised mandatory minimums to be effective immediately in sentencing proceedings following its enactment.

As former U.S. District Court Judges, who have sentenced many individuals and have devoted considerable attention to mandatory-minimum penalties, we can attest that no other interpretation is consistent with criminal justice policy, the purposes of sentencing, or indeed, the structure the Guidelines regime. Concluding, as the Seventh Circuit did, that the FSA applies only to those whose crime occurred after the date of its enactment will dramatically compound the acknowledged unfairness of the 1986 Act. It will oblige federal district judges for five years after the FSA's enactment (the statute of limitations for these offenses) to perpetuate an injustice recognized not only by Congress, but by the Executive (through the Department of Justice), the Sentencing Commission, and the bench.

The Seventh Circuit's ruling exacerbates the very unwarranted disparities with which the Sentencing Reform Act was concerned – the sentencing of offenders to different terms of imprisonment, when their conduct was essentially identical – and continues racial disparities all three branches of government have found repugnant. And finally, continuing to apply repudiated mandatory-minimum penalties in the face of what in many cases will be drastically

lower applicable Guidelines ranges will severely undermine judges' attempts to apply § 3553(a), and will damage the legitimacy of the sentencing process.

ARGUMENT

I. ALL THREE BRANCHES OF GOVERNMENT HAVE ACKNOWLEDGED THAT THE PRIOR REGIME IS WRONG AND UNJUST

The preamble to the FSA notes that the Act was intended to "restore fairness to Federal cocaine sentencing." FSA Pmbl., 124 Stat. 2372. The obvious implication is not only that the FSA introduced a new regime, but that the previous sentencing regime was unfair. Indeed, when the FSA was passed, members of Congress expressly noted that the old crack/powder cocaine disparity was wrong, even "contrary to our fundamental principles of equal protection under the law." 156 Cong. Rec. H6196-01, 2010 WL 2942883 (daily ed. July 28, 2010) (statement of Rep. Clyburn).

The FSA followed "almost universal criticism" of the sentencing disparity between penalties for powder cocaine offenses and those for crack. U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 2 (May 2007) ("2007 Report"). In a 1995 report to Congress, the Sentencing Commission noted that the adoption of the 100-to-1 ratio in the treatment under federal law of "two easily convertible forms of the same drug" produced a

variety of "extreme anomalies in sentencing." U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 197 (Feb. 1995) ("1995 Report"). A major trafficker in powder cocaine could receive a shorter prison sentence than the street-level dealer who bought from that trafficker and converted the powder cocaine to crack. *See Kimbrough v. United States*, 552 U.S. 85, 95 (2007). More troubling, the impact of these sentencing disparities fell disproportionately on racial minorities. 1995 Report 192. In 1997, the Commission reiterated "firmly and unanimously" its conclusion that the 100-to-1 ratio was unjustifiable. U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 2 (Apr. 1997) ("1997 Report"). The 100-to-1 disparity resulted in a widespread "perception of unfairness and inconsistency" in federal sentencing. *Id*. at 8.

In 2002, the Commission stated even more clearly that the initial sentencing ratio had been enacted in error. It explained that "[t]he 100-to-1 drug quantity ratio was established based on a number of beliefs" about the dangers of crack cocaine "that more recent research and data no longer support." U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 91 (May 2002) ("2002 Report"). Under the circumstances, the Commission again concluded that the differential is "unjust" and perpetuated racial disparities. *Id*. at 100, 103.

By 2007, the Commission determined that "the problems associated with the 100-to-1 drug quantity ratio" were "so urgent and compelling" that it would address some of them on its own, but recognized that this was an interim solution and that legislative action was necessary. 2007 Report 9. Further, the Commission noted that the "100-to-1 drug quantity ratio significantly undermines the various Congressional objectives set forth in the Sentencing Reform Act." 2007 Report 8.

The Commission urged Congress to include in any ameliorative legislation a grant of "emergency amendment authority" to permit the Commission to immediately incorporate the changes in the federal Sentencing Guidelines, and to minimize the lag between statutory and Guidelines modifications. 2007 Report 9. Plainly responding to the urgency of that recommendation, and finally responding to the Commission's conclusions, Congress adopted the FSA, and in particular § 8 of the Act. Section 8 instructs the Commission to promulgate new guidelines consistent with the FSA "as soon as practicable" and "not later than 90 days after the enactment of the Act." § 8, 124 Stat. 2372.

The Commission's concerns about the 1986 Act have been echoed by federal judges from one end of the country to the other. As Judge Cassell noted in testimony before the House Judiciary Committee, speaking about mandatory-minimum penalties in general, such penalties inflict damage on the "logic and rationality in our nation's federal courts."

Statement on Behalf of the Judicial Conference of the United States Before the H. Judiciary Subcomm. on Crime, Terrorism & Homeland Security, 19 FED. S. REP. 344, 344 (2007) (statement of J. Paul G. Cassell). Mandatory-minimum sentencing schemes can produce sentences in individual cases that are "unjust, cruel, and even irrational." *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004).

More recently, in addressing the scope of the FSA, sentencing judges have been unable to articulate any legitimate reason why Congress would want "to continue to require that courts impose unfair and unreasonable sentences on those offenders whose cases are still pending." *United States v. Acoff*, 634 F.3d 200, 205 (2d Cir. 2011) (Lynch, J., concurring); *see also United States v. Douglas*, 746 F. Supp. 2d 220, 229 (D. Me. 2010) ("What possible reason could there be to want judges to *continue* to impose new sentences that [Congress has declared to be unfair] over the next five years while the statute of limitations runs?"); *United States v. Parks*, No. 8:10CR225, 2010 WL 5463743, at *7 (D. Neb. Dec. 28, 2010) (noting "[t]he government has not identified any valid congressional interest that would be served by continuing to apply the now discredited and repudiated 100-to-1 ratio to those defendants who would now be categorized as minor crack offenders[,]" and deciding that to "continue to sentence defendants under a formula that is uniformly regarded as unfair and unjust" [would] "frustrate the expressed

congressional goals of remedying racially discriminatory impact[.]").[2]

The Executive, too, has acknowledged these fundamental concerns. Most notably, the United States has commendably recognized in this litigation that the FSA properly applies immediately in sentencing proceedings following its enactments.

II. CONTINUING TO SENTENCE UNDER THE PRE-FSA MANDATORY MINIMUMS IS INCONSISTENT WITH THE PURPOSES OF SENTENCING UNDER 18 U.S.C. § 3553(A)

Amici were charged with sentencing individuals under the mandate and purposes of sentencing set forth in 18 U.S.C. § 3553(a). Our former colleagues continue to face that solemn task on a daily basis. The position adopted by the Seventh Circuit – that, for several years to come, the FSA should remain inapplicable to many individuals sentenced after its enactment – is wholly inconsistent with the purposes of sentencing under § 3553(a). Congress has acknowledged as much in adopting the findings of the Sentencing Commission over the past two decades, and in its deliberations on the FSA.

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[2] These are but three examples. During the first year after the enactment of the FSA, dozens of district courts across the country held that the statute's ameliorative provisions apply to all defendants sentenced after the FSA's enactment, regardless of when the offense conduct occurred.

The FSA represents Congress's assessment that the prior penalties are no longer needed to deter offenders. No potential criminal will decide to commit a crime because of the chance that even if he gets caught, one day the legislature might reduce the punishment for that crime. Likewise, with respect to incapacitation, Congressional action in reducing the mandatory penalties suggests that *less* punishment will suffice to protect society. And the FSA underscores Congress's determination that the old penalties are inconsistent with a just sentence that is "sufficient, but not greater than necessary." 18 U.S.C. § 3553(a). It reflects, in effect, a new scientific and social view of crack cocaine – that it is not as much a threat as once feared, that the penalties need not be as severe, and even that the prior penalties were disproportionate to the conduct when compared to the penalties for powder cocaine. In short, there is no basis to support imputing to Congress any intention to "inflict[ ] punishment at a time when it can no longer further any legislative purpose[.]" *Hamm v. City of Rock Hill*, 379 U.S. 306, 313 (1964).

Just as important, and based on our first-hand experience on the bench, continuing an unwarranted crack/powder disparity will have a corrosive impact on the deterrent effect of all federal criminal sentences. Many Americans, particularly in minority communities, have come to regard the federal criminal justice system with suspicion because of the ill-founded crack/powder disparity. These skeptics believe that the ratio is racist and that the resulting

lengthy sentences are unjust. That harmful perception will continue and, indeed, be strengthened if this Court refuses to immediately apply Congress's corrective action.

To be effective, the federal criminal justice system must have the full trust of the public. The system cannot work unless citizens willingly report crimes to police, testify as witnesses before grand juries and at trial, and serve on juries that must unanimously determine guilt. The crack/powder disparity has already done serious damage to public confidence in federal law enforcement, particularly in the high-crime inner-city communities that most desperately need policing efforts. These costs to the system far outweigh whatever marginal incapacitative or other advantage might seemingly stem from applying to crack dealers the full measure of a now-discredited sentencing regime.

Congress recognized these serious problems in enacting the FSA. The Court should hasten to implement Congress's corrective action before any further damage is done.

III. CONTINUING TO SENTENCE UNDER THE PRE-FSA MANDATORY MINIMUMS FUNDAMENTALLY UNDERMINES THE GUIDELINES REGIME

Section 8 of the FSA directs the Sentencing Commission to amend the relevant guidelines within 90 days to conform them to the provisions of the new

statute. The Commission did so. The new sentencing guidelines are applicable at all sentencing hearings that occur after they were promulgated, regardless of when the crimes for which the sentences are being imposed were committed. 18 U.S.C. § 3553(a)(4)(ii). Unless the FSA's revised mandatory-minimum penalties are also applied, these defendants will receive sentences higher than dictated by the guidelines that Congress urged the Commission to adopt and intended to apply to these defendants. The results, as Judge Posner has recognized, are "perverse." *United States v. Holcomb*, 657 F.3d 445, 462 (7th Cir. 2011) (Posner, J., dissenting).

Moreover, the Seventh Circuit's approach introduces the anomaly that major crack traffickers being sentenced for pre-FSA conduct will get the benefit of the ameliorated crack/powder disparity, while minor ones being sentenced for pre-FSA conduct will not. That is because the ameliorative Guidelines amendments mandated by the FSA will determine the sentencing ranges of those trafficking in enough crack to make their Guidelines ranges fall *above* the old mandatory minimums, whereas the old mandatory minimums will be the Guidelines sentence for those minor offenders whose Guidelines ranges fall *below* the old mandatory minimums. *See* U.S.S.G. § 5G1.1.

Or consider the following: an offender, in one courtroom, who distributed 7 grams of crack the day after the FSA's enactment but not sentenced until two years later would get the benefit of the FSA. He would be subject to an ameliorated Guidelines

sentence – and no mandatory minimum. But an offender, in the next courtroom, who distributed the same quantity the day before the enactment would get no benefit, and would be sentenced to the old mandatory minimum. Nothing in the FSA legitimizes this result.

Anytime a penalty is ameliorated, a line must be drawn between those who receive the benefit of a lower penalty and those who do not. There are sound reasons for leaving final judgments undisturbed. But there is no persuasive reason for applying different penalties to individuals not yet sentenced, particularly since doing so perpetuates the injustice Congress was attempting to remedy.

More poignant, as to the defendant subject to that mandatory-minimum penalty that everyone acknowledges is unfair, Judge John Gleeson of the Eastern District of New York described the reaction best:

> The absence of fit between the crude method of punishment [a five-year mandatory minimum] and the particular set of circumstances before me was conspicuous. * * * [W]hen I imposed sentence on the weak and sobbing [defendant], everyone present, including the prosecutor, could feel the injustice.

United States v. Vasquez, No. 09-CR-259 (JG), 2010 U.S. Dist. LEXIS 32293, at *14-15 (E.D.N.Y. Mar. 30, 2010). The signatories to this brief, like their

colleagues still on the bench, well understand that feeling.

CONCLUSION

For the foregoing reasons, and for those set forth in the briefs filed on behalf of petitioners, this Court should reverse the decisions of the U.S. Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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