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 A. 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 THE COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENTS BELOW

DANIEL L. GEYSER
MARIANNA C. CHAPLEAU
RUSSELL H. FALCONER
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Dallas TX 75201
(214) 698-3356

MIGUEL A. ESTRADA
Counsel of Record
SCOTT P. MARTIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, which raised the quantities of crack cocaine required to trigger mandatory-minimum penalties under 21 U.S.C. § 841(b)(1), applies retroactively to defendants whose criminal conduct occurred before the effective date of the Act, but who are sentenced after that date.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

BRIEF OF THE COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENTS BELOW

INTEREST OF *AMICUS CURIAE*

This brief is submitted in response to the Court's order inviting Miguel A. Estrada to brief and argue these cases as *amicus curiae* in support of the judgments below.

STATUTORY PROVISIONS INVOLVED

The general saving statute, 1 U.S.C. § 109, provides in relevant part:

> 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 Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, is reproduced in the appendix to the government's brief (at 5a-12a).

STATEMENT

Petitioners Hill and Dorsey committed crack-cocaine offenses and were convicted, but not sentenced, before the enactment of the Fair Sentencing Act of 2010 ("FSA"), Pub. L. No. 111-220, 124 Stat. 2372, which raised the quantities of crack cocaine required to trigger mandatory-minimum penalties under 21 U.S.C. § 841(b)(1). Both of them were sentenced in accordance with the law at the time of their

offenses, and the pre-FSA mandatory minimums for crack-cocaine offenses dictated their sentences.

The government sought and obtained these mandatory-minimum sentences, and it successfully defended them on appeal to the Seventh Circuit. The government's position was required by the Department of Justice, which had advised prosecutors "[i]mmediately following the enactment" of the FSA that the "new penalties would apply prospectively only to *offense conduct* occurring on or after the [FSA's] effective date." U.S. Br. 2a. Agreeing with the government, the Seventh Circuit reasoned that the general saving statute precludes retroactive application of the FSA to release criminal punishments incurred under prior law, *see* 1 U.S.C. § 109, and that nothing in the FSA provides a contrary indication.

After Hill filed his petition for a writ of certiorari, and shortly before the filing of Dorsey's petition, the Attorney General announced an abrupt change in the government's position. According to the new position, the FSA should apply to sentencing proceedings on or after the FSA's effective date, but not to any pre-existing sentences, including those still pending on direct review. U.S. Br. 3a. The Seventh Circuit declined, however, to reconsider its precedent following this switch. *See United States* v. *Holcomb*, 657 F.3d 445 (7th Cir. 2011).

A. STATUTORY BACKGROUND

At common law, "the offenses committed before" the repeal of a criminal statute were "discharged by such repeal," and could not "be proceeded upon after such repeal, unless a specific clause in the act of repeal be made enabling such proceedings after the repeal." 1 Matthew Hale, *Historia Placitorum Coronae* 291 (1847 ed.) (1736); *see also*, *e.g.*, 1 William Haw-

kins, *Treatise of the Pleas of the Crown* 107 (3d ed. 1739) ("If one commit an Offense which is made Felony by statute, and then the statute be repealed, he cannot be punished as a felon in respect of that statute.").

The precise origins of this abatement doctrine are unclear. *See* Albert Levitt, *Repeal of Penal Statutes and Effect on Pending Prosecutions*, 9 A.B.A. J. 715, 715-16 (1923). But whatever its pedigree, it was quickly and widely adopted in the United States. *See*, *e.g.*, *United States* v. *Passmore*, 27 F. Cas. 458, 459 (C.C.D. Pa. 1804) (No. 16,005) (Washington, J.); *see also Bell* v. *Maryland*, 378 U.S. 226, 231 n.2 (1964) (collecting citations); Levitt, *supra*, at 715 n.5 (same). As this Court explained, "[t]here can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence." *United States* v. *Tynen*, 78 U.S. (11 Wall.) 88, 95 (1871). "By the repeal," therefore, "the legislative will is expressed that no further proceedings be had under the act repealed." *Ibid.*

Although some repealing statutes contained clauses that expressly displaced prior law, many others contained no such repealing language. *See*, *e.g.*, *Norris* v. *Crocker*, 54 U.S. (13 How.) 429, 438 (1851). Courts therefore looked instead to whether "the two [statutes] are repugnant in any of their provisions," in which case "the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first." *Tynen*, 78 U.S. (11 Wall.) at 92.

Importantly, courts found the inconsistency required for repeal not only by evaluating the substantive reach of the old and new statutes, but also by comparing differences in the *penalties* they imposed.

"Common-law abatements" thus "resulted not only from unequivocal statutory repeals, but also from repeals and re-enactments with different penalties, whether the re-enacted legislation increased or decreased the penalties." *Warden* v. *Marrero*, 417 U.S. 653, 660 (1974); *see also*, *e.g.*, *Bradley* v. *United States*, 410 U.S. 605, 608 (1973) ("the rule applied even when the penalty was reduced").

Because the abatement doctrine established only a default rule, it was inapplicable where the legislature provided a saving clause preserving the repealed law for defendants whose conduct had already occurred. *See*, *e.g.*, 1 Hale, *supra*, at 291. Many legislatures therefore found it advantageous to enact *general* saving statutes governing future amendments to the criminal law. *See* Comment, *Today's Law & Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. Pa. L. Rev. 120, 127-30 (1972) (collecting examples).

Congress followed suit in 1871, adopting a federal saving statute, *see* Act of Feb. 25, 1871, ch. 71, § 4, 16 Stat. 432, to "abolish" the common-law presumption and reverse the rule that "the repeal of a criminal statute resulted in the abatement of 'all prosecutions which had not reached final disposition,'" *Marrero*, 417 U.S. at 660 (quoting *Bradley*, 410 U.S. at 607). The saving statute, now codified at 1 U.S.C. § 109, provides that "[t]he 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." As this Court has noted, the statute's broad language was designed to "bar application of ameliorative criminal sentencing laws repealing harsher

ones in force at the time of the commission of an offense." *Marrero*, 417 U.S. at 661.

Against this backdrop, Congress enacted the FSA in 2010. Among other changes, the FSA increases the threshold quantities of crack cocaine necessary to trigger mandatory-minimum sentences and fines under 21 U.S.C. § 841(b)(1), *see* FSA § 2, 124 Stat. 2372, and repeals the previously applicable mandatory-minimum sentence for simple possession of crack cocaine, *id.* § 3, 124 Stat. 2373. At the same time, the FSA increases the amount of fines that may be imposed on the same defendants, *see id.* § 4, 124 Stat. 2372-73, as well as directs the Sentencing Commission to impose other sentencing increases for particular offenders, *id.* §§ 5-7, 124 Stat. 2373-74. The FSA became effective when signed by the President on August 3, 2010.

B. THE PRESENT CONTROVERSIES

1. *Dorsey* (No. 11-5683)

After selling crack cocaine to a government informant on August 6, 2008, Dorsey was arrested and charged with one count of possessing with intent to distribute five or more grams of crack cocaine. Dorsey J.A. 9, 48-49. He pleaded guilty on June 3, 2010. *Id.* at 21. On September 10, 2010, he was sentenced to the applicable pre-FSA mandatory minimum of ten years. *Id.* at 67-68, 80, 85.

On appeal, Dorsey argued that he should instead have been sentenced under the FSA, in which case he would not have faced a mandatory-minimum sentence. In response, the government urged the Seventh Circuit to uphold Dorsey's sentence. Section 109 "*requires* Congress to 'expressly provide' for retroactive application of an ameliorative penalty provi-

sion in order to avoid the default rule that such a provision does not apply retroactively," the government argued, but "'the FSA does not contain so much as a hint that Congress intended it to apply retroactively.'" U.S. *Dorsey* C.A. Br. 14-15 (quoting *United States* v. *Bell*, 624 F.3d 803, 814 (7th Cir. 2010)). The government maintained that "[t]he controlling date for purposes of savings statute analysis is—and should be—the date of the offense conduct," *id.* at 19, particularly since "[t]here is no meaningful distinction between defendants sentenced before and after the effective date of the FSA," *id.* at 18.

The Seventh Circuit affirmed. Dorsey Pet. App. A1-A4. The court rejected Dorsey's contention that the "necessary implication" of the FSA requires that it "be applied retroactively" to defendants sentenced after its effective date. *Id.* at A3. "Given the long-standing debate surrounding, and high-level congressional awareness of, this issue," the court explained, "we are hesitant to read in by implication anything not obvious in the text of the FSA." *Id.* at A4.

The Seventh Circuit also emphasized that, "if Congress wanted the FSA" 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." Dorsey Pet. App. 4a. "Given the absence of any direct statement or necessary implication to the contrary," the court concluded, "the FSA does not apply retroactively," and "the relevant date for a determination of retroactivity is the date of the underlying criminal conduct, not the date of sentencing." *Ibid.*

The Seventh Circuit denied Dorsey's petition for rehearing en banc. Dorsey J.A. 103-15. Judge Wil-

liams, joined by Judge Hamilton, dissented on the ground that, in her view, Congress intended the FSA to extend to all individuals sentenced after its effective date. *Id.* at 107-08, 111.

2. *Hill* (No. 11-5683)

On March 28, 2007, Hill sold 53.3 grams of crack cocaine to a government informant and was subsequently charged with one count of distributing 50 grams or more of crack cocaine. Hill J.A. 6, 69. He was convicted by a jury on April 20, 2009. *Id.* at 83. His sentencing did not occur until December 2, 2010, at which time he was sentenced to the applicable pre-FSA mandatory minimum of ten years. *Id.* at 78, 85.[1]

On appeal, Hill argued that he should have been sentenced under the FSA, which would have resulted in a mandatory-minimum sentence of five years. The government disagreed. It emphasized that nothing in the FSA required retroactivity with sufficient clarity to displace Section 109: "Congress was not unambiguous about retroactivity in the FSA; it was silent." U.S. *Hill* C.A. Br. 13 n.5. Thus, the government contended, "[t]he controlling date for the purposes of savings statute analysis is and should be the date of the offense conduct." *Id.* at 14.

[1] Although Hill was sentenced under 21 U.S.C. § 841(b)(1)(A) for a larger quantity of crack cocaine than Dorsey, who was sentenced under Section 841(b)(1)(B), the applicable mandatory-minimum sentences were the same in light of Dorsey's prior convictions for felony drug offenses. The quantity-based mandatory minimum for Dorsey was five years, but that sentence was doubled under Section 841(b)(1)(B) because of his prior convictions. Had Dorsey been sentenced under the FSA, no minimum sentence would have applied based on quantity, and thus there would have been nothing to double.

The Seventh Circuit affirmed. Hill Pet. App. A1-A2. Invoking its earlier decision in Dorsey's appeal, the Seventh Circuit concluded that the FSA "does not apply retroactively," and that "the relevant date for determining whether the [FSA] applies is the date of the offense conduct, rather than the date of sentencing." *Id.* at A2.

C. SUBSEQUENT DEVELOPMENTS

On July 15, 2011, after the Seventh Circuit's decisions in *Dorsey* and *Hill*, the Attorney General issued a "Memorandum for All Federal Prosecutors," which changed the government's position on the retroactivity issue. U.S. Br. 1a-4a. The memorandum acknowledged that, "[i]mmediately following the enactment" of the FSA, the Department of Justice had "advised federal prosecutors that the new penalties would apply prospectively only to *offense conduct* occurring on or after the enactment date, August 3, 2010." *Id.* at 2a. It nonetheless concluded that a different policy was warranted to "restor[e] fairness in cocaine sentencing." *Id.* at 4a.

The Attorney General conceded that "the Savings Statute, 1 U.S.C. § 109, precludes application of the new mandatory minimums to those sentenced before the enactment" of the FSA. U.S. Br. 3a. "Congress did not intend," he noted, "that its new statutory penalties would apply retroactively to defendants sentenced prior to August 3." *Ibid.* Based on his view that Congress nonetheless intended the FSA to apply "as expeditiously as possible," however, the Attorney General "concluded that the law requires the application of the [FSA]'s new mandatory minimum sentencing provisions to all sentencings that occur on or after August 3, 2010, regardless of when the offense conduct took place." *Ibid.*

The Attorney General's memorandum was submitted to the Seventh Circuit in several appeals that had been filed by the government with the Solicitor General's authorization, and had subsequently been resolved in the government's favor. *Holcomb*, 657 F.3d at 445 (Easterbrook, C.J., concurring in denial of rehearing). A member of the court called for a vote on whether to rehear the appeals en banc, which failed when the judges divided evenly on the question. *See ibid.* (order).

1. Chief Judge Easterbrook, joined by four judges, voted against rehearing. He emphasized that the Attorney General's approach would require "partial retroactivity," in which the FSA "does not apply to cases in which sentence was pronounced on August 2, 2010, or earlier, even if they were pending in the district court or appeal on August 3." 657 F.3d at 445-46. "As far as [he was] aware," however, "the Supreme Court has never held any change in a criminal penalty to be partially retroactive." *Id.* at 446. Rather, "[t]he choice always has been binary: retroactive or prospective." *Ibid.*

Chief Judge Easterbrook emphasized that Section 109 "makes all changes" to criminal punishments "prospective unless the new statute provides otherwise." 657 F.3d at 446. Although the defendants had argued that Section 109 is irrelevant to the FSA, he explained that "a law reducing criminal punishment is a repeal of the old statute and the enactment of a new one for the purpose of [Section] 109, and that a punishment is incurred when the crime is committed." *Ibid.* Thus, Section 109 "makes the [FSA] prospective, because [the latter] lacks an express declaration of retroactivity." *Ibid.*

Although Chief Judge Easterbrook noted that the court "gives respectful consideration to the rationale for the new position" whenever the "Executive Branch confesses error," he also observed that "[t]he Memorandum does not discuss [Section] 109 or the language of the [FSA]," and "does not explain why *partial* retroactivity is appropriate—or why the transition should depend on the date of sentencing rather than some other event." 657 F.3d at 447. "The observation that Congress, the President, and many federal judges think the former rules excessively severe," he noted, "does not distinguish the [FSA] from any other law reducing sentences and does not justify disregarding the anti-retroactivity norm created by [Section] 109." *Ibid.*

Chief Judge Easterbrook acknowledged that, although Section 109 "says that only an 'express' provision in a later statute can support retroactivity," Congress is nonetheless "entitled to change that rule," and "[a] necessary (or fair) implication" could "show that Congress has amended [Section] 109 to that extent." 657 F.3d at 448. The FSA, however, contains no such implication. Section 8 of the FSA, for instance, which grants the Sentencing Commission emergency authority to promulgate amended guidelines, did not "imply anything about when the new minimum and maximum sentences go into force." *Id.* at 450. And Congress's directive in Section 10 of the FSA—instructing the Commission to generate a report on the FSA's effects within five years—also does not suggest retroactivity; indeed, if it had any relevance, the report would "produce meaningful results only if limited to persons whose criminal conduct occurs while the [FSA] is in force." *Ibid.*

2. Judge Williams, joined by four judges, dissented from the denial of rehearing. She questioned why "Congress [would] want sentencing judges to continue to impose sentences that it had already declared to be unfair." *Holcomb*, 657 F.3d at 457 (emphasis omitted). In addition to joining Judge Williams's dissent, Judge Posner dissented separately, arguing that a "literal interpretation" of the FSA would lead to "perverse results." *Id.* at 462.

SUMMARY OF ARGUMENT

The FSA does not apply retroactively to defendants whose criminal conduct occurred before its effective date, whether or not the defendants were (like Petitioners here) sentenced after that date. Section 109 forbids retroactivity, and nothing in the FSA expressly or impliedly repeals that command.

I. Since 1871, Congress has provided, by statute, a default rule governing when changes to the criminal law apply retroactively to benefit defendants who incurred penalties under prior law. The general saving statute provides that, in the absence of an "expres[s] provi[sion]" to the contrary, "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute." 1 U.S.C. § 109. Section 109 governs here: Applying the FSA retroactively would "release or extinguish" the mandatory-minimum "penalt[ies]" that Petitioners "incurred under" the now-"repeal[ed]" prior law. Because the FSA does not *expressly* provide for retroactive application, Section 109 dictates that it be applied prospectively.

A. The FSA "repeal[ed]" the prior law governing sentences for crack-cocaine offenses by increasing the drug-quantity thresholds necessary to trigger mandatory-minimum sentences under 21 U.S.C. § 841(b).

Although Dorsey seeks to characterize the FSA as only "amending" Section 841(b), the pre- and post-FSA versions of the statute cannot both be applied to the same offender; possession of 5 grams of crack cocaine was, but is no longer, punished by a five-year mandatory minimum, and possession of 50 grams is now punished by a five-year minimum instead of the previously applicable ten-year sentence.

Dorsey nonetheless contends that Section 109 is inapplicable to "ameliorative" amendments in which, as here, the relevant penalty provisions are lowered. This Court has already held, however, that Section 109 governs, and precludes retroactive application of the new statute, in exactly these circumstances. *See Warden* v. *Marrero*, 417 U.S. 653, 660 (1974). And even if this Court were to ignore the overwhelming force of *stare decisis* in the statutory context, Section 109 speaks with unmistakable clarity in addressing the repeal of "*any* statute," and precluding the release of "*any* penalty" incurred under prior law—including the mandatory-minimum sentences that Petitioners now seek to avoid.

B. Section 109 provides that the FSA's repeal of the previously applicable mandatory minimums will not be applied retroactively if doing so would avoid "any penalty, forfeiture, or liability incurred under" prior law. 1 U.S.C. § 109. This Court has recognized that the phrase "penalty, forfeiture, or liability" includes all forms of criminal punishment, *see*, *e.g.*, *Marrero*, 417 U.S. at 661, and thus the only remaining issue is whether the mandatory-minimum sentences provided by Section 841(b) were "incurred under" the prior version of the statute.

As lexicographers since Samuel Johnson have recognized, the defendant "incur[s]" a penalty when

he becomes liable to it. And that occurs, in turn, at the time of the criminal conduct—not, as Dorsey would prefer, when the defendant is ultimately sentenced. Although Dorsey insists that prosecution and sentencing are additional "facts" that must occur before any penalty is incurred, the Court has previously applied Section 109 even where the defendant was not sentenced (or even indicted) until after the repeal at issue. Dorsey's approach also ignores the second clause of Section 109, which provides that the repealed statute will "remai[n] in force for the purpose of sustaining any proper action or prosecution for the enforcement of *such penalty*." 1 U.S.C. § 109 (emphasis added). This clause would make little sense if "such penalty" were not incurred until after sentencing.

II. Section 109 is an enacted federal statute that binds the courts, but it does not bind Congress. Congress is free, subject to constitutional constraints, to apply changes in the criminal law retroactively if it desires to do so. But in the absence of any express indication to that effect, the Court can conclude that Congress superseded Section 109 in a later statute *only* if it concludes that the later statute amounts to an implied repeal of Section 109. Petitioners and the government seek to elide the implied-repeal standard, offering isolated strands of text and history to suggest that Congress perhaps *assumed* some retroactive application of the FSA. But these materials do not give rise even to a weak inference of retroactivity, much less anything that would satisfy the demanding standard for finding an implied repeal of Section 109.

A. Petitioners and the government invoke Section 8 of the FSA, which grants the Sentencing

Commission emergency authority to adopt certain amendments to the Sentencing Guidelines. It is far from clear that this provision addresses itself to the minimum-quantity thresholds revised in Section 2 of the FSA. But assuming that it does, Congress had a perfectly good reason to expedite the revision process that requires *no* retroactive application of the FSA: The ordinary process for amending the Guidelines could have left Guidelines based on prior law in place well after passage of the FSA, during which time *post*-FSA offenders would be sentenced under pre-existing Guidelines higher than the new mandatory minimums.

Petitioners and the government fare no better in invoking Section 10 of the FSA, which requires the Commission to report to Congress within five years on the effect of the FSA's changes. Contrary to their assumption, it is hardly likely that the bulk of offenders sentenced during that time will have committed their offenses before the FSA was enacted, and thus the Commission should have more than adequate data even if the FSA applies only prospectively. And even if it were otherwise, Petitioners and the government never explain why Congress would have wanted to study how its change in sentencing practices affects the decisions of those who violated federal law before that change was introduced.

Yet even if Petitioners and the government were correct that their reading of Sections 2 and 10 provides some inference regarding retroactivity, the interpretation that they draw from those provisions is sufficiently absurd that Congress could not have intended it. In their telling, Congress intended the FSA to be applied retroactively to defendants whose crimes occurred before—but whose sentencing oc-

curred after—enactment of the statute, but not to otherwise *identically* situated defendants who happen to have been sentenced earlier. The Court recently noted the absurdity of permitting criminal penalties to "depend on the timing of the federal sentencing proceeding," *McNeill* v. *United States*, 131 S. Ct. 2218, 2223-24 (2011), yet that is *precisely* the approach that Petitioners and the government would attribute to Congress. There is no reason to believe that Congress meant for defendants guilty of the same crime, committed at the same time and perhaps even as part of a single conspiracy, to be sentenced differently based on the happenstance of how quickly the judicial system resolved their cases.

B. Petitioners and the government similarly miss the mark in invoking the history and purpose of the FSA. They emphasize that the FSA was designed to eliminate "unfairness" in the sentencing process. Congress never avowedly changes sentencing practices to make them *less* fair; yet the general rule enacted by Congress in Section 109 precludes retroactive application of those changes in the mine run of cases.

Moreover, Petitioners and the government err by assuming that whatever they believe to further the FSA's objective must be the law; rather, as this Court frequently notes, legislation involves compromises among competing values. That is particularly true in the case of the FSA, which adopts a mix of provisions that in some cases favor, and in others disfavor, crack-cocaine offenders. Petitioners and the government cannot single out only the former for retroactive treatment.

Petitioners and the government nonetheless insist that congressional intent on the retroactivity is-

sue can be discerned from the fact that the bill ultimately enacted by Congress lacks an express anti-retroactivity provision that had been contained in an earlier House bill. This language would have been surplusage in light of Section 109, however, so no inferences about Congress's intent can be drawn from its omission.

C. Finally, Petitioners urge this Court to resolve any ambiguities on the retroactivity issue in their favor by invoking the rule of lenity and constitutional avoidance. Neither doctrine applies here. Petitioners claim that the FSA is potentially a violation of the equal-protection component of the Fifth Amendment. But constitutional avoidance requires *serious* doubts about the constitutionality of the statute, and there is no serious contention that the crack-cocaine sentencing regime involves the sort of *intentional* discrimination necessary to raise equal-protection concerns. And the rule of lenity is applicable only where, after applying the ordinary tools of statutory construction, there remains uncertainty about whether Congress intended to subject an offender to increased punishment. There is, however, no room for ambiguity here.

ARGUMENT

This case involves the interaction between two provisions adopted by Congress. The general saving statute provides that, in the absence of express direction by Congress, changes in the criminal law do not apply retroactively to release penalties incurred before those changes take effect. *See* 1 U.S.C § 109. The FSA is such a change: It eliminates or reduces the minimum sentences previously applicable to certain drug offenses, without any express indication that Congress intended the change to apply retroac-

tively. Under Section 109, therefore, the FSA cannot be applied to drug offenses that occurred before its enactment.

Petitioners and the government do not dispute that the FSA is inapplicable to defendants who were sentenced before its effective date. They nonetheless advance a theory of "partial retroactivity," under which the FSA applies to defendants whose criminal activity occurred before, but who were not sentenced until after, the statute became effective. Under this approach, two defendants whose criminal activity was identical in *every* respect, including the date of the offense, could be sentenced differently depending solely on the speed with which their prosecutions moved through the judicial system.

Although it would be strange and unprecedented to have the FSA's "applicability depend on the timing of the federal sentencing proceeding," *McNeill* v. *United States*, 131 S. Ct. 2218, 2223 (2011), Congress could perhaps have enacted that approach. The question is whether it did so.

Section 109 provides the starting point for this inquiry: Congress has provided clear and binding direction to the courts that, when it intends criminal legislation to release previously incurred penalties, it will say so expressly. As enacted law in its own right, Section 109 must be "treated as if incorporated in and as a part of subsequent enactments." *Great N. Ry. Co.* v. *United States*, 208 U.S. 452, 465 (1908). And because Congress did not provide for retroactivity in the FSA, it should not "lightly . . . be presumed" by the courts. *Marcello* v. *Bonds*, 349 U.S. 302, 310 (1955).

Although Section 109 provides the governing rule for construing later statutes, Congress is free to re-

peal any law, including Section 109 itself. *See Great N. Ry.*, 208 U.S. at 465; *see also*, *e.g.*, *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 135 (1810). But the standard for declaring that Congress superseded Section 109, in the absence of any statement to that effect in the FSA, is intentionally high: It requires a *repeal* of the earlier law by "necessary" or "plain" implication from the later statute. *Great N. Ry.*, 208 U.S. at 465; *Hertz* v. *Woodman*, 218 U.S. 205, 218 (1910); *see also*, *e.g.*, *Lockhart* v. *United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring) ("unambiguous import").

That is because, if Section 109 textually applies, it must be given effect unless another exercise of the lawmaking power requires a different outcome. To conclude that Section 109 has been implicitly superseded, the Court *must* find that the FSA amounts to a partial implied repeal of the statute—an inquiry subject to the "stringent standard" that "there be an 'irreconcilable conflict' between the two federal statutes at issue." *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 381 (1996). Cherry-picked legislative remarks and gauzy inferences that do not amount to a new *law* on the specific point at issue—retroactivity—do not carry the day.

Here, Section 109 applies, and nothing in the FSA repeals its anti-retroactivity command. Because there is "no conflict" between Section 109 and the FSA on the retroactivity question, *Warden* v. *Marrero*, 417 U.S. 653, 659 n.10 (1974), the "general principles of construction requiring, if possible, that effect be given to all the parts of a law" demand applying Section 109 to preclude retroactivity, *Great N. Ry.*, 208 U.S. at 465.

I. UNDER SECTION 109, THE FSA DOES NOT APPLY RETROACTIVELY TO DEFENDANTS WHOSE CRIMES WERE COMMITTED BEFORE ITS EFFECTIVE DATE.

The Seventh Circuit correctly held that the FSA's alteration of the drug-quantity thresholds necessary to trigger mandatory-minimum sentences does not apply retroactively to defendants whose criminal conduct predates the FSA, regardless of when their sentencing occurs. The FSA "repeal[ed]" prior penalty provisions applicable to the relevant drug offenses, and retroactive application of the FSA to defendants whose conduct predated it would "release or extinguish" the "penalt[ies]"—that is, fines and mandatory-minimum terms of imprisonment—"incurred under" prior law. 1 U.S.C. § 109. Because it is common ground that "[t]he FSA does not expressly state that the amended provisions of 21 U.S.C. [§] 841(b) will apply in sentencing proceedings for pre-enactment offenders," U.S. Br. 26, Section 109 prohibits retroactive application of the FSA.[2]

A. THE FSA "REPEAL[ED]" PRIOR PENALTY PROVISIONS.

Section 109 applies when a later-enacted statute "repeal[s]" an earlier penalty provision. According to Dorsey, however, the FSA did not "repeal" prior law but is instead an "ameliorative amendmen[t]." Dorsey Br. 39. This false dichotomy is foreclosed by the statutory text and inconsistent with this Court's longstanding caselaw governing Section 109. It is undoubtedly for this reason that the government has

[2] *See*, *e.g.*, Hill Br. 16 (discussing "[l]egislative silence" about retroactivity); Dorsey Br. 16 (conceding that the FSA does not "expressly" manifest congressional intent on the issue).

rejected Dorsey's position, *see* U.S. Br. 50 (noting that "the FSA is the sort of ameliorative criminal legislation that may trigger" Section 109), and that even Hill cannot bring himself to endorse the argument, *see* Hill Br. 32 (suggesting only that Dorsey "might" be correct).

1. As this Court recognized shortly after Section 109 was enacted, the governing test for whether a later statute "operates . . . as a repeal of the first" is whether "the two are repugnant in any of their provisions." *United States* v. *Tynen*, 78 U.S. (11 Wall.) 88, 92 (1871). "Where provisions in the two acts are in irreconcilable conflict," then "the later act to the extent of the conflict constitutes an implied repeal of the earlier one." *Posadas* v. *Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936).

This test is plainly satisfied here. The FSA replaced the drug-quantity thresholds necessary to trigger fines and mandatory-minimum sentences under 21 U.S.C. §§ 841 and 960, and it abolished the mandatory-minimum sentence under 21 U.S.C. § 844. In these respects, the FSA lowered the applicable imprisonment penalties (while increasing the maximum fines) for precisely the same illegal conduct, in ways that are "clear[ly] repugnan[t]" (*Tynen*, 78 U.S. (11 Wall.) at 92) to the prior penalty provisions: Although defendants who possess 5 or 50 grams of crack cocaine would have faced five- or ten-year mandatory-minimum sentences before the FSA's effective date, those same amounts no longer trigger the previously applicable minimum sentences; defendants who possess 5 grams of crack are no longer subject to a mandatory-minimum sentence, whereas those who possess 50 grams are now subject

to a five-year minimum rather than ten years, as was formerly the case.

2. Dorsey attempts to draw a sharp distinction between "repeals" and "amendments," noting that the FSA describes itself only as "amend[ing]" Section 841(b). Dorsey Br. 43 (quoting FSA § 2(a), 124 Stat. 2372). This ignores, however, that the FSA expressly eliminated the old thresholds by "striking" them from Section 841(b)(1) and replacing them with new thresholds. FSA § 2(a)-(b), 124 Stat. 2372. As a consequence of the FSA's enactment, the version of Section 841(b)(1) that prescribed the relevant penalties for both Petitioners is no longer in effect.

There are indeed amendments that do not repeal prior law, in which case "the later act is to be construed as a continuation of, and not a substitute for, the first act." *Posadas*, 296 U.S. at 503; *see also Tynen*, 78 U.S. (11 Wall.) at 92 ("the rule is to give effect to both if possible"). But whether the later statute is characterized as an "amendment" or otherwise, the test for "repeal" is the same: whether the later statute "irreconcilabl[y] conflict[s]" with the earlier one. *Posadas*, 296 U.S. at 503; *cf. Hamm* v. *City of Rock Hill*, 379 U.S. 306, 314 (1964) (noting that the federal saving statute applies to "amendment and repeal"). Here, there is no question that the pre- and post-FSA versions of 21 U.S.C. § 841(b) cannot *both* be applied to the *same* offender.

Indeed, Dorsey's own sources confirm that a "repeal" includes the enactment of a new provision that "'contains provisions so contrary to or irreconcilable with those of the earlier law that only one of the two statutes can stand in force'" with respect to the same offender. Dorsey Br. 40 n.18 (quoting *Black's Law Dictionary* 67 (2d ed. 1891)). When an amendment

replaces certain statutory terms with other terms, the two provisions are irreconcilable, and only one can remain in force.

It is therefore "immaterial" whether an "existing statute is specifically repealed and a new and different one is passed to replace it, or whether the existing statute is modified by amendment." *Moorehead* v. *Hunter*, 198 F.2d 52, 53 (10th Cir. 1952). "In either event, a new statute comes into being and the old one ceases to exist." *Ibid.*; *see also United States* v. *Jacobs*, 919 F.2d 10, 12 (3d Cir. 1990) (Cowen, J., joined by Alito, J.) ("plain language of the saving statute indicates that it prevents statutory amendments from affecting penalties retroactively").[3] Because the FSA's "amendment" of Section 841(b) operated as a "repeal" of the previously applicable mandatory-minimum provisions, Section 109 applies.

3. As this Court has recognized, "[a]batement by repeal" at common law "included a statute's repeal and reenactment with different penalties." *Bradley* v. *United States*, 410 U.S. 605, 607-08 (1973). Dorsey nonetheless insists that Section 109 should be interpreted as applying only "when a statute amended a prior statute by *increasing* the penalties," so that it would not "preclude the application of *ameliorative* penalty provisions." Dorsey Br. 47, 51 (second em-

---

[3] *See also*, *e.g.*, *United States* v. *Stillwell*, 854 F.2d 1045, 1048 (7th Cir. 1988) (noting that Section 109 "has been repeatedly held to apply to amendments to criminal statutes"); *United States* v. *Breier*, 813 F.2d 212, 215 (9th Cir. 1987) (Section 109 "appl[ies] to statutory amendments"); *White* v. *Warden*, 566 F.2d 57, 59 (9th Cir. 1977) (same); *United States* v. *Mechem*, 509 F.2d 1193, 1194 n.3 (10th Cir. 1975) (per curiam) ("The saving statute is not made inapplicable because an amendment instead of outright repeal changes a statutory punishment.").

phasis added); *see also* NACDL Amicus Br. 3-12. It is not clear how this argument helps Dorsey's position, since the FSA reduces imprisonment, but raises fines, for the same offenders. But even if the Court were to focus solely on the "ameliorative" portion, Dorsey's argument is baseless.

a. Dorsey's purported distinction between "ameliorative" and other amendments is foreclosed by this Court's decision in *Marrero*. The Court emphasized that "[c]ommon-law abatements resulted not only from unequivocal statutory repeals, but also from repeals and re-enactments with different penalties, *whether the re-enacted legislation increased or decreased the penalties*." 417 U.S. at 660 (emphasis added). The Court therefore held that Section 109 "bar[red] the Board of Parole from considering respondent for parole" (*id.* at 659) based on a statutory amendment that would undoubtedly be considered "ameliorative" in Dorsey's view. *See*, *e.g.*, *id.* at 664 (noting that the previously applicable parole prohibition was a "punitive measure").

Dorsey claims that *Marrero*'s "holding was unnecessary," and thus "might be considered dicta," because "[t]he repealing statute in that case" also "included a saving clause." Dorsey Br. 53. But even Dorsey is forced to acknowledge that this Court's discussion of Section 109 was an "alternative holding." *Id.* at 55. After addressing the statute-specific saving clause, the Court "*h*[*e*]*ld further* that the general saving clause" in Section 109 precluded retroactive application of the statutory change. *Marrero*, 417 U.S. at 659 (emphasis added). "It does not make a reason given for a conclusion in a case *obiter dictum*" that "it is only one of two reasons for the same conclusion." *Richmond Screw Anchor Co.* v. *United*

States, 275 U.S. 331, 340 (1928); *see also*, *e.g.*, *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

Because *Marrero*'s interpretation of Section 109 was a holding rather than *dictum*, the suggestion by Dorsey and his *amici* that the Court should "reconsider" (Dorsey Br. 39) or "repudiate" (NACDL *Amicus* Br. 2) *Marrero* is profoundly misplaced. "Considerations of *stare decisis* have special force in the area of statutory interpretation," because "Congress remains free to alter what [the Court] ha[s] done." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989); *see also Neal* v. *United States*, 516 U.S. 284, 295 (1996) ("[o]nce we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*").

If Congress had any reason to believe that this Court misinterpreted Section 109 in *Marrero*, it has had nearly four decades to correct the problem. Yet it has continued to legislate against the backdrop of Section 109, just as it had done for the previous century of the statute's existence, without any change in its language.

Indeed, Congress's decision not to amend Section 109 is particularly significant because that statute is a "framework la[w] that facilitate[s] interpretation—and thus facilitate[s] legislation, too, by giving the legislature a formulary to use." *Holcomb*, 657 F.3d at 448 (Easterbrook, C.J., concurring in denial of rehearing). As this Court has noted, it is of "paramount importance" that "Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts." *Finley* v. *United States*, 490 U.S. 545, 556 (1989). This Court's decision in *Marrero* is precisely such a "clear interpret[ation]" of Section 109, yet

Congress has provided no indication that it would prefer to "legislate against a [different] background." *Ibid.*

b. Even if this Court were free to revisit the issue, it should conclude—as *Marrero* did—that Section 109 applies equally to "ameliorative" statutory amendments. Tellingly, Dorsey opens his argument on this point by discussing the legislative history of Section 109, *see* Dorsey Br. 44-46, but he somehow never gets around to addressing the statutory text. There is a simple reason for this omission: Section 109 does not support any distinction between "ameliorative" and other changes to penalty provisions.

Section 109 addresses the "repeal of *any* statute" that would otherwise release "*any* penalty." 1 U.S.C. § 109 (emphases added). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzalez*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). Congress did not cabin this broad statutory language based on the nature of the repeal at issue, nor did it limit the statute's focus to a particular type of change in penalties. Because retroactive application of the FSA would release previously incurred mandatory-minimum sentences, Section 109 applies.

The history of Section 109 further confirms that it applies even to "ameliorative" amendments. Section 109 was enacted to displace the common-law doctrine of abatement. *See*, *e.g.*, *Marrero*, 417 U.S. at 660. And Dorsey does not seriously dispute that, at common law, there were "instances in which prosecutions were abated following an amendment that lowered a penalty," Dorsey Br. 51; indeed, he concedes "at least six" such abatements, *id.* at 48 n.24

(citing *Ameliorative Criminal Legislation*, *supra*, at 126 nn.41-43); *see also*, *e.g.*, *Commonwealth* v. *Kimball*, 38 Mass. (21 Pick.) 373, 376-77 (1838) (statute changing penalty from fine of $20 to fine between $10 and $20); *Rex* v. *Davis*, 168 Eng. Rep. 238 (1785) (statute changing penalty from death to fine). Shortly after Section 109's enactment, indeed, this Court drew no distinction between increases and decreases to prior penalties: In *Tynen*, the Court held that a statute increasing the applicable penalties in some respects, and decreasing them in others, repealed (and abated prosecutions under) an earlier statute. 78 U.S. (11 Wall.) at 93.

Dorsey nonetheless envisions a contrary rule under which, "rather than abate prosecutions," courts would sometimes apply later-enacted, but "ameliorative," penalty provisions. Dorsey Br. 49. This Court has already recognized, however, that "[c]ommon-law abatements" did not depend on whether the new statute "increased or decreased the penalties." *Marrero*, 417 U.S. at 660; *see also Bradley*, 410 U.S. at 608 (same). Rather, "[b]y the repeal the legislative will is expressed that no further proceedings be had under the act repealed." *Tynen*, 78 U.S. (11 Wall.) at 95. Because this rule applied universally to any repeal, there was full abatement at common law whether the repeal was ameliorative or otherwise. Section 109 was thus "designed to ensure that a convicted criminal does not fortuitously benefit from more lenient laws that may be passed after he or she has been convicted." *United States* v. *Smith*, 354 F.3d 171, 174 (2d Cir. 2003) (Sotomayor, J.); *see also*, *e.g.*, *Holiday* v. *United States*, 683 A.2d 61, 79 (D.C. 1996) (emphasizing that, under Section 109, "individuals should be punished in accordance with the

sanctions in effect at the time the offense was committed").[4]

c. Dorsey attempts to escape the plain text of Section 109 and this Court's decision in *Marrero* by invoking *Hamm*'s statement that Section 109 "was meant to obviate mere technical abatement." 379 U.S. at 314. According to Dorsey, "[a] 'technical abatement' occurred when a new statute amended a prior statute by *increasing* the penalties." Dorsey Br. 47. Dorsey's reliance on *Hamm* is misplaced.

In *Hamm*, the Court held that the Civil Rights Act abated prosecutions under state trespass laws that violated the Act's anti-discrimination provisions. 379 U.S. at 308, 312-16. The Court emphasized that

---

[4] Dorsey also invokes the Tenth Circuit's statement in *Moorehead* that, "where a criminal statute is amended, lessening the punishment, a defendant is entitled to the benefit of the new act, although the offense was committed prior thereto." 198 F.2d at 53. Even *Moorehead* acknowledged that this supposed rule "appl[ied] only where there [was] no general saving statute," *ibid.*, so it can hardly assist Dorsey here. But the Tenth Circuit was mistaken in any event. It is difficult to determine the precise basis for the Tenth Circuit's statement given its belief that "citation of authorities and their discussion and analysis would not be helpful." *Ibid.* The court appears, however, to have confused a distinct body of caselaw holding that, although a statutory change to the applicable penalties for a crime will abate prosecutions under prior law, the legislature may nonetheless choose to apply the new penalties to crimes committed before the amendment, just as it could decide to retain the old penalties through a saving clause. *See State* v. *Daley*, 29 Conn. 272, 1860 WL 1173, at *2 (1860) (discussing alternatives); *see also Ameliorative Criminal Legislation*, *supra*, at 123-24. That an increased penalty could not be imposed retroactively consistent with *ex post facto* principles explains why these cases always involved a reduction in the applicable penalty. *See Daley*, 1860 WL at *2.

Section 109 "was meant to obviate mere technical abatement such as that illustrated by the application of the rule in *Tynen* decided in 1871," in which "a substitution of a new statute with a greater schedule of penalties was held to abate the previous prosecution." *Id.* at 314.[5] "In contrast," the Court explained, "the Civil Rights Act works no such technical abatement." *Ibid.* "[I]t substitutes a right for a crime," and "[s]o drastic a change is well beyond the narrow language of amendment and repeal." *Ibid.*

Dorsey reads the decision in *Hamm* as limiting Section 109 to cases where "a new statute amended a prior statute by *increasing* the penalties." Dorsey Br. 47. But as this Court has subsequently clarified, *Hamm*'s holding is that Section 109 does not apply where (unlike here) Congress radically changes the legal landscape, such as by replacing a criminal prohibition on certain conduct with an entitlement to engage in it. *See Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 434-35 (1972).

Although the statute at issue in *Pipefitters* "may . . . make lawful what was previously unlawful," the

---

[5] The Court's original opinion reportedly stated that *Tynen* was "'decided in 1870,'" John P. MacKenzie, Comment, Hamm *v.* City of Rock Hill *and the Federal Saving Statute*, 54 Geo. L.J. 173, 174 (1965) (quoting preliminary print), which in context implied that Congress enacted Section 109 in response to *Tynen*. But *Tynen* was not decided until April 10, 1871—weeks *after* Section 109 was adopted. *Cf.* 16 Stat. 431. MacKenzie evidently apprised the Court of this error shortly after *Hamm* was issued, and the Court amended its opinion accordingly. *See* MacKenzie, *supra*, at 182 (reprinting letter from Supreme Court Reporter of Decisions). Even as amended, however, the Court's discussion of *Tynen* still incorrectly suggests that Congress was responding to *Tynen*.

Court declined to apply *Hamm* because the statute did not "substitute a right for a crime." 407 U.S. at 434 (alteration omitted). "To the contrary," the Court explained, the statute "retains the basic offense," and thus Section 109 applied. *Id.* at 434-35. Similarly here, the FSA "retains the basic offense"—the prohibitions on drug possession, distribution, and the like remain in force, *see* 21 U.S.C. § 841(a)—but alters only the applicable punishment. In no sense does the FSA create a "right" to engage in drug-related conduct where there once was a criminal proscription.

Yet even if this Court were to read *Hamm* as limiting Section 109 to "technical abatements," there is no basis for Dorsey's argument that only *increases* in the applicable penalties would result in a technical abatement. The Court cited *Tynen* as an example. *See* 379 U.S. at 314 ("such as that illustrated"). But the statute at issue there both increased and decreased the applicable penalties. *See supra* at 26. In any event, *Marrero* later emphasized that even penalty *decreases* could result in a technical abatement: "[I]f the repeal of [a penalty provision] can be viewed as mitigating [the defendant's] punishment under [prior law]," then "his conviction and sentence would not be left intact by the repealer and his prosecution would 'technically' abate under the common-law rule." 417 U.S. at 660 n.11 (citing *Hamm*, 379 U.S. at 314).

The logic of the common-law rule is that, once a new statute replaces an old one, no one can be prosecuted under the old version because it no longer exists; this result has nothing to do with the nature of the amendment—a new provision increasing penalties has "repealed" the prior law in exactly the same

way as a new provision decreasing penalties. In either case, the original statute is "technically" gone. The adjective "technical" thus does not distinguish between increases or decreases in penalties, but between the "narrow language of amendment and repeal" that had given rise to artificial abatements at common law, and the type of "drastic" changes at issue in *Hamm*, in which previously criminal activities became protected activity. 379 U.S. at 314.

d. Finally, Dorsey's reliance on the saving statute's legislative history also misses the mark. As an initial matter, because Section 109 unambiguously applies to ameliorative sentencing amendments, this Court should "not resort to legislative history" at all. *Ratzlaf* v. *United States*, 510 U.S. 135, 147-48 (1994). In any event, there is no pertinent legislative history; Dorsey concedes that neither chamber even "discussed the saving statute during the debate of the 1871 Act." Dorsey Br. 44; *see also* John P. MacKenzie, Comment, Hamm *v.* City of Rock Hill *and the Federal Saving Statute*, 54 Geo. L.J. 173, 177 (1965).[6]

Dorsey's "legislative history" argument instead rests on the fact that, *following enactment of the saving statute*, the commissioners appointed to simplify

---

[6] As Dorsey notes, one legislator noted that the 1871 statute provides "a few general rules for the construction of statutes, and the effect of repealing statutes, all designed to avoid prolixity and tautology in drawing statutes and to prevent doubt and embarrassment in their construction." Cong. Globe, 41st Cong., 3d Sess. 1474 (1871). This is true, as far as it goes, but Dorsey never explains how it could support his interpretation of the statute—particularly since "statements by individual legislators . . . provide evidence of Congress'[s] intent" only "when they are consistent with the statutory language." *Brock* v. *Pierce Cnty.*, 476 U.S. 253, 263 (1986).

and consolidate federal law proposed four provisions governing the effect of repeals, one of which would have reworded the saving statute. Dorsey Br. 45-46. They also noted, however, that the proposal "'embodie[d] the substance'" of the saving statute. MacKenzie, *supra*, at 181 (quoting *Commissioners' Draft of the Revision of the United States Statutes* (1872)). Congress's failure to adopt the proposals is as likely to have stemmed from the commissioners' inclusion of two new provisions, which would have "'add[ed]'" to existing law, as anything else. *Ibid.*

Dorsey assumes that, because (in his view) the proposed revision would more clearly have encompassed "ameliorative" amendments, Congress's failure to enact that proposal confirms that such amendments are outside the scope of Section 109. But the fact that another statute could be written to address an issue with even greater specificity does not mean that the existing statute is insufficiently clear to cover the situation. *See Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47-48 (1950) (drawing "no inference" from "Congress'[s] failure to enact" a proposed "legislative clarification"). There is no basis for reading any particular interpretation of the saving statute into Congress's failure to adopt the proposal, let alone an interpretation so clearly at odds with the text of the statute. *See*, *e.g.*, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994).

B. RETROACTIVE APPLICATION OF THE FSA WOULD "RELEASE OR EXTINGUISH" THE "PENALT[IES]" THAT PETITIONERS "INCURRED UNDER" PRIOR LAW.

Although the FSA "repeal[s]" previously applicable penalty provisions, Section 109 provides that this

repeal "shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under" prior law. 1 U.S.C. § 109. The mandatory-minimum sentences applicable under prior law are "penalt[ies]" within the meaning of Section 109, and defendants whose conduct predated the FSA's effective date "incurred" those penalties "under" the old statute. Section 109 therefore bars retroactive application of the FSA to "release or extinguish" those previously incurred penalties.

1. The phrase "any penalty, forfeiture, or liability" in Section 109 includes criminal punishments. *United States* v. *Reisinger*, 128 U.S. 398, 402-03 (1888). Indeed, because "[t]hese words" were "used by the great masters of crown law and the elementary writers as synonymous with the word 'punishment,'" *id.* at 402, they sweep broadly to "include *all forms* of punishment for crime," *United States* v. *Ulrici*, 28 F. Cas. 328, 329 (C.C.E.D. Mo. 1875) (No. 16,594) (Miller, J.) (emphasis added), *quoted with approval in Marrero*, 417 U.S. at 661.

As this Court emphasized in *Marrero*, the issue whether a particular statutory change implicates a "'penalty, forfeiture, or liability' saved by [Section] 109" turns on whether the repealed provision was an "element of [the defendant's] 'punishment.'" 417 U.S. at 662-64. That is plainly the case here: Mandatory-minimum sentences are even more clearly an "element of [the] 'punishment" than ineligibility for parole, which this Court held in *Marrero* was subject to Section 109. Although parole affects only *where* the defendant serves his sentence, a mandatory minimum affects the duration of the sentence itself: Where a mandatory-minimum sentence is applicable, "the expected punishment will have increased and

the government can require the judge to impose a higher punishment than she might have chosen otherwise." *United States* v. *Krieger*, 628 F.3d 857, 869 (7th Cir. 2010); *see also*, *e.g.*, *Lindsey* v. *Washington*, 301 U.S. 397, 401-02 (1937) (applying the state *ex post facto* clause to mandatory-minimum provision).

2. The mandatory-minimum sentences at issue here were also "incurred under" prior law because the crimes were committed before the effective date of the FSA—regardless of when the sentencing occurred. Although Dorsey claims that a mandatory-minimum sentence has not been "incurred" until, "at a minimum," the defendant has been "indicted, convicted, *and* sentenced," Dorsey Br. 24 & n.11, this interpretation finds no support in the text of Section 109 or this Court's precedents.

The defendant "incur[s]" a penalty when he "become[s] liable or subject" to it. *Webster's New International Dictionary* 1261 (2d ed. 1949); *see also* 1 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) ("to become liable to a punishment or reprehension"). Even courts of appeals that have held on other grounds that the FSA applies retroactively have agreed that the defendant becomes subject to a penalty at "the time of the conduct that makes the defendant liable rather than the date of conviction or imposition of the sentence." *United States* v. *Goncalves*, 642 F.3d 245, 252 (1st Cir. 2011). The saving statute thus "clearly excepts offences *committed before* the passage of the repealing act." *Reisinger*, 128 U.S. at 401 (emphasis added).

Indeed, it is difficult to see how Dorsey can credibly advance a contrary interpretation. The judicial process verifies that the defendant has engaged in criminal wrongdoing and assesses the penalty, but

that is not the process by which the defendant becomes subject to—that is, "incur[s]"—that penalty. And Congress, similarly, imposes the penalty for violating the law, not for doing a poor job in court.

According to Dorsey, however, his interpretation of "incurred" is compelled by this Court's decision in *Hertz* v. *Woodman*, which held that an inheritance tax was incurred at the time of the decedent's death and thus survived the later repeal of the tax statute at issue. 218 U.S. 205, 220 (1910). The Court reasoned that "the right of succession . . . passed by the death of the testator," and "fasten[ed], at the moment th[e] right of succession passed by death, a liability for the tax imposed upon the passing of every such inheritance or right of succession." *Id.* at 219-20.

Dorsey seizes on this Court's statement that the "liability for payment of the tax . . . accrued or arose the moment the right of succession by death passed" to the decedent's beneficiaries, at which point "the occurrence of *no other fact or event* was essential to the imposition of a liability for the statutory tax upon the interest thus acquired." *Hertz*, 218 U.S. at 220 (emphasis added). But the same is true here: Once Petitioners committed each element of an offense subject to the then-applicable mandatory minimum, "no other fact or event" (*ibid.*) was necessary for a mandatory-minimum sentence under then-existing law.

Dorsey appears to assume that *Hertz*'s reference to "fact or event . . . essential to the imposition of a liability" would include, in the criminal context, each step in the prosecutorial process, including "the return of an indictment and a subsequent conviction," Dorsey Br. 24, and "the determination of sentencing factors, such as drug quantity and the existence of a

prior conviction," *id.* at 29. But this reading would completely garble the second clause of the statute. Section 109 not only preserves "any penalty, forfeiture, or liability incurred under [a repealed] statute," it also provides that "such statute" will "remai[n] in force for the purpose of sustaining any proper action or prosecution for the *enforcement of such penalty*." 1 U.S.C. 109 (emphasis added). The second clause allows the government to prosecute a defendant who has *already* incurred a penalty under a later-repealed statute—a provision that would make little sense if "such penalty" were not incurred until the defendant had already been convicted and sentenced.

Consistent with this commonsense reading of the statute, the Court has previously applied Section 109 where the defendant committed the offense at issue while the prior law was in effect but was sentenced only after its repeal. Indeed, in both *Reisinger* and *Great Northern Railway*, the defendants were not even indicted, let alone sentenced, for their crimes until after the repealing statutes had been enacted. *See Reisinger*, 128 U.S. at 400 (repeal in 1884; indictment in 1885 for conduct in 1883); *Great N. Ry.*, 208 U.S. at 459 (repeal in June 1906; indictment in November 1906 for conduct in 1905). Yet in both cases, the Court held that the saving statute prevented abatement of the prosecutions. *See Reisinger*, 128 U.S. at 401-03; *Great N. Ry.*, 208 U.S. at 464-70. Dorsey's reading of *Hertz* cannot be squared with these decisions.[7]

---

[7] Dorsey briefly argues that Section 109 must be narrowly construed as a statute in derogation of the common law. Dorsey Br. 55-56. But this canon of construction is inapplicable where, as here, a statute "'speak[s] directly' to the question addressed by the common law" and manifests a clear purpose to abrogate

[Footnote continued on next page]

II. NOTHING IN THE FSA'S TEXT, HISTORY, OR PURPOSE CLEARLY INDICATES CONGRESS'S INTENT TO DISPLACE SECTION 109.

According to Petitioners and the government, the text, history, and purpose of the FSA demonstrate that Congress intended to override the anti-retroactivity command of Section 109. They stress that the FSA's purpose was to displace a sentencing regime that was widely perceived as unfair, and they rely on two textual features that purportedly suggest that Congress intended the FSA to apply to all sentences imposed after its effective date.

The first of these textual features—Section 8 of the FSA—grants the Sentencing Commission emergency authority to issue "the guidelines, policy statements, or amendments provided for in [the FSA] as soon as practicable," and to make any "conforming amendments . . . necessary to achieve consistency with other guidelines provisions and applicable law." FSA § 8, 124 Stat. 2374. The second—Section 10 of the FSA—directs the Commission to study the "impact of the changes in Federal sentencing law" wrought by the FSA within five years of its enactment. FSA § 10, 124 Stat. 2375. That emergency authority, and the fact that pre-FSA offenders could be prosecuted within the five-year period to be studied, establishes—the argument goes—that Congress

---

[Footnote continued from previous page]
the common-law principle. *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (quoting *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978)). Reversing the common-law rule is precisely why Congress enacted Section 109 in the first place. *See*, *e.g.*, *Ulrici*, 28 F. Cas. at 329 (describing the saving statute as "a general provision changing . . . the rule of the common law").

must have intended that the FSA apply to pre-FSA offenders.

Yet these arguments do not remotely demonstrate that Congress impliedly repealed the anti-retroactivity command of Section 109. Indeed, they do not support much of an inference about retroactivity at all—even apart from the exacting implied-repeal standard that applies here. *See supra* at 18.

As the government recognizes, the FSA was a package of changes to federal sentencing law, not all of them favorable to criminal defendants. While Section 2 of the FSA increased the quantities of crack cocaine necessary to trigger mandatory terms of imprisonment, for example, Section 4 steeply increased the fines applicable *to the same offenders*, whom Congress continues to view as "major drug traffickers." FSA § 4, 124 Stat. 2375. Section 7 directed the Commission to "review and amend" the Guidelines to cabin or further reduce the sentences of certain defendants whose role in the offense was minimal, FSA § 7, 124 Stat. 2372-73, while Sections 5 and 6 mandated "additional penalty increase[s]" for certain aggravating factors, FSA §§ 5-6, 124 Stat. 2373-74.

Neither the government nor Petitioners seriously suggest that Congress meant *all* of these changes to apply immediately to pre-FSA offenders. Indeed, retroactive application of the fine increases would undoubtedly violate the Constitution. *See*, *e.g.*, *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 391 (1798) (Chase, J.). And the same may be true of many applications of the aggravated Guidelines that the FSA prescribes. *See* U.S. Br. 29 n.6 (acknowledging, but disagreeing with, the weight of authority on this point). The government's view implausibly imputes to Congress an intent to apply immediately only those

changes that favor offenders—even to the point of applying only *parts* of the amended versions of Sections 841(b)(1)(A) and (B) to particular defendants.[8] The FSA, however, provides no textual or structural hint that Congress intended offenders to take the sweet without the bitter.

It also does not advance the inquiry to note that the FSA was intended to make the law fairer. All legislation in a democracy is meant to improve things; no legislature sets out to make the law avowedly *less* just. That the current wisdom is better than the old is a basis for making *all* legislation retroactive—a position that cannot be squared with Section 109. Indeed, this logic would support retroactivity even as to final convictions, which no one advocates.

Nor does the legislative history of the FSA help the "retroactivity" view. Apart from decrying the unfairness of existing law, most floor statements on which Petitioners and the government rely merely assert that the FSA would change that immediately, as indeed it would for anyone who violated the law from the moment the President signed the FSA. The

---

[8] For example, while Hill would no longer be subject to the 10-year mandatory-minimum prison sentence under the post-FSA version of 21 U.S.C. § 841(b)(1)(A), he still would be subject to the penalty provisions of 21 U.S.C. § 841(b)(1)(B), even as revised, because he was found guilty of distributing 50 grams or more of cocaine base. If the revised version of Section 841(b)(1)(B) were applied to him, therefore, he would face a maximum fine of $5 million, which is higher not only than the fine previously applicable to defendants prosecuted under Section 841(b)(1)(B) ($2 million), but also than the maximum fine Hill faced under the pre-FSA version of Section 841(b)(1)(A) ($4 million).

only aspect of the drafting history that is remotely pertinent to the specific question of retroactivity—that the FSA omits language expressly prohibiting retroactivity, which was present in an earlier bill—is equally consistent with the conclusion that such language was deemed repetitive of Section 109. *See Great N. Ry.*, 208 U.S. at 465.

Because nothing in the text, history, or purpose of the FSA establishes that Congress intended partial retroactivity, Section 109 precludes it.

A. THE FSA'S TEXT IS CONSISTENT WITH SECTION 109'S PRESUMPTION OF ANTI-RETROACTIVITY.

Petitioners and the government contend that failure to give retroactive effect to the new drug-quantity thresholds would render Sections 8 and 10 of the FSA "empty and pointless" (Hill Br. 20) and "essentially irrelevant" (U.S. Br. 23). This argument echoes interpretive canons that disfavor superfluity and absurd results, but invokes neither expressly because they do not support retroactivity here. Sections 8 and 10 do not address retroactivity at all, and reading them literally to mean only what they do say accomplishes worthy goals that can sensibly be ascribed to Congress.

1. The FSA's most important textual feature, for purposes of this case, is its complete failure to say a single word about retroactivity. "Congress is, after all, not a body of laymen unfamiliar with the commonplaces of our law" but "predominantly a lawyers' body." *Callanan* v. *United States*, 364 U.S. 587, 594 (1961). For that reason, "[i]t is always appropriate to assume that our elected representatives . . . know the law." *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 696-97 (1979). Because Congress must be presumed aware

of the legal context in which it legislates, "if anything is to be assumed from congressional silence" on retroactivity, it is that "Congress was aware" of Section 109 and "legislated with [that provision] in mind." *Albernaz* v. *United States*, 450 U.S. 333, 341-42 (1981). Neither of Petitioners' textual arguments refutes this conclusion.

2. a. The "Emergency Authority" provision, Section 8(1) of the FSA, principally directs the Commission to promulgate "as soon as possible" the "guidelines, policy statements, or amendments provided for in this Act"—that is, by Sections 5-7 of the FSA. FSA § 8(1), 124 Stat. 2374. Section 2, which changes the minimum-quantity thresholds, does not "provide for" any new guidelines.

Section 8(2), in turn, directs the Commission to make "such conforming amendments" to the Guidelines as may be required to achieve "consistency with other guideline provisions and applicable law." FSA § 8(2), 124 Stat. 2374. This text most naturally suggests that the "conforming amendments" are those to be made to *existing* guidelines to achieve consistency with the new guidelines to be issued pursuant to Section 8(1).

Although it is certainly *possible* to read Section 8(2)'s reference to "applicable law" as including other provisions of the FSA itself—rather than, say, only those pre-existing legal rules that otherwise apply to the Sentencing Commission specifically or to administrative action generally, *see infra* at 41 n.9—that interpretation is far from unavoidable. Petitioners and the government thus vastly overstate their case by treating Section 8 as though Congress's principal objective was the immediate implementation of Sec-

tion 2. *See* U.S. Br. 28 (urging that Congress "necessarily" meant this).

b. Even under that reading of Section 8, however, there was ample reason for Congress to require expedition in the formulation of new crack-cocaine guidelines for *post*-FSA offenses. The government makes much of the fact that for federal non-marijuana drug offenses the "median time between indictment and sentencing" is "approximately 11 months." U.S. Br. 30 n.7. But the *median* time means that half of all defendants are sentenced *sooner* than 11 months after their indictments—a period that could have swept in countless post-FSA offenders under pre-FSA Guidelines. Without emergency authority, the revised Guidelines would not have gone into effect for at least 180 days following the FSA's enactment, and possibly not until November 1, 2011—more than a year after the FSA's passage.[9]

---

[9] Pursuant to its duty to "periodically . . . review and revise" the Guidelines, 28 U.S.C. § 994(o), the Commission may submit proposed amendments to Congress "at or after the beginning of a regular session of Congress, but not later than the first day of May," *id.* § 994(p). The Commission must also publish proposed amendments in the Federal Register and provide a notice-and-comment period of at least thirty days. *Id.* § 994(x). The proposed amendments must "take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted [to Congress] and no later than the first day of November of the calendar year in which the amendment . . . is submitted." *Id.* § 994(p). In practice, the Commission has adopted November 1 as the default effective date for its proposed amendments. *See* U.S. Sentencing Comm'n, *Rules of Practice and Procedure* § 4.1 (2007).

When Congress specifically instructs the Commission to conform the Guidelines to a new statute, the Commission typi-

[Footnote continued on next page]

Moreover, the government fails to note that its statistics reflect a *national* pool of defendants; district courts in different regions have different backlogs, different dockets, and process cases at different speeds. *See* Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts*, tbls. D-6, at 254; D-12, at 276 (2011).

With each passing month before new Guidelines were announced, therefore, the risk increased that additional *post*-FSA offenders would be sentenced under pre-existing Guidelines. That obvious risk is all that is needed to make sense of Section 8's emergency authority; it is hardly necessary that the FSA be retroactive in order for Section 8 to have a real

---

[Footnote continued from previous page]
cally promulgates the necessary amendments through the same amendment process. In 2010, for example, Congress passed three statutes that instructed the Commission to promulgate conforming amendments to the Guidelines on a non-emergency basis: the Secure and Responsible Drug Disposal Act of 2010, Pub. L. No. 111-273, § 4, 124 Stat. 2858, 2860 (Oct. 12, 2010); the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1079A(a)(1) & (a)(2), 124 Stat. 1376, 2077-79 (July 21, 2010); and the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10606(a), 124 Stat. 119, 1006-07 (Mar. 23, 2010). The Commission responded to all three of these directives by publishing proposed amendments in the Federal Register on January 19, 2011, *see Sentencing Guidelines for United States Courts*, 76 Fed. Reg. 3193 (proposed Jan. 19, 2011), and then by submitting final amendments to Congress on April 28, 2011, *see Sentencing Guidelines for United States Courts*, 76 Fed. Reg. 24,960 (May 3, 2011). Each of the amendments took effect on November 1, 2011. *Ibid.*; *see also* U.S. Sentencing Guidelines Manual app. C, amend. 749 & 751 (2011).

"job" in the statutory scheme. *See Gutierrez* v. *Ada*, 528 U.S. 250, 258 (2000).[10]

c. There is no greater merit to the government's claim that Congress must have assumed retroactivity because it knew "that the resulting Guidelines amendments would apply immediately in all initial sentencing proceedings, including those involving offenses that predated the FSA." U.S. Br. 28-29 (citing 18 U.S.C. § 3553(a)(4)(A)(ii)). This Court has held that the Guidelines in force at the time of sentencing cannot trump a mandatory-minimum penalty that otherwise is required by 21 U.S.C. § 841(b). *See Neal*, 516 U.S. at 289-90, 295. And the Guidelines themselves contemplate that statutory minimum sentences may exceed "the maximum of the applicable guideline range," and provide that, in such cases, "the statutorily required minimum sentence shall be the guideline sentence." U.S.S.G. § 5G1.1(b).

Thus, even if new Guidelines must "conform" to "the FSA's penalty structure," U.S. Br. 34, n.8, nothing about that requirement "creates a very different

---

[10] Indeed, the fact that the "emergency" Guidelines might not issue for 90 days substantially weakens the retroactivity inference urged by the government. Under the government's view, mandatory minimums would no longer apply on August 4, but the old Guidelines could remain for 90 days—subject only to the *discretion* to depart from those guidelines that individual judges enjoy but need not exercise, *see*, *e.g., Spears* v. *United States*, 555 U.S. 261, 264-65 (2009) (per curiam), and to the possibility that the Commission might exercise its *discretion* to make the new amendments retroactive, *see* 28 U.S.C. 994(u). But Congress's willingness to live with old Guidelines for those sentenced in the most immediate aftermath of the FSA—in the main, as the government says, pre-FSA offenders—suggests that it did not perceive any particular unfairness in applying old law to them.

regime" (*ibid.*) for offenses that *predated* the FSA. When a defendant is sentenced for those offenses in accordance with Section 5G1.1(b), he *is* receiving a Guidelines sentence, and that sentence *does* "conform" to "applicable law."

d. Finally, Congress was well aware that courts may "impose a sentence pursuant to [the] guidelines . . . without regard to any mandatory minimum sentence" under the safety-valve provisions of 18 U.S.C. § 3553(f). Nonviolent offenders with limited criminal records can escape mandatory minimums (pre- or post-FSA) and receive whatever (lower) sentence is available under applicable Guidelines if they come clean about the offense "not later than . . . the sentencing hearing." *Id.* § 3553(f)(5). Congress presumably was aware that this provision offers the traditional tool for ameliorating the severity of mandatory minimums, and that the emergency issuance of the new Guidelines required by the FSA would further ensure that this tool would continue to work as intended.

The government does not appear to dispute this, but it discounts the relevance of this relief because most "crack offenders . . . are disqualified [from safety-valve relief] by their criminal histories." U.S. Br. 39 n.10. It would be strange if this were a "problem" that Congress was endeavoring to solve, even in part, by making the FSA retroactive. Congress does not ordinarily strain for leniency toward the classes of offenders ineligible for safety-valve relief: recidivists, violent criminals, and dealers "engaged in a continuing criminal enterprise." 18 U.S.C. § 3553(f)(2)-(4). Because non-violent first timers can escape mandatory sentences entirely under the safety valve, it is not especially likely that Congress in-

sisted on retroactivity so it could cut further the sentences of inveterate recidivists or violent criminals.

3. Section 10 of the FSA, which requires the Commission to report to Congress within five years on the impact of changes effected by the FSA, is even farther afield on the question of retroactivity.

The government argues that the offenders "*most* likely" to face sentencing "in the early *years* after the Act" are pre-FSA offenders, and thus that the FSA must apply retroactively to them so that the Commission may have something meaningful to "study." U.S. Br. 35 n.9 (emphases added). Hill similarly contends that retroactivity is required "to compile useful data," and that the Commission would confront a "heavy administrative burden" in "tracking which of the many thousands of defendants sentenced after the FSA committed their offenses before its enactment." Hill Br. 25.

It is unlikely, however, that "most" offenders sentenced for "years" after the FSA will have committed their offenses before the statute was enacted. By the government's own telling, many offenders are sentenced within *months* of being charged. U.S. Br. 30 n.7. The fact that the limitations period for drug offenses is five years (*id.* at 35 n.9) establishes only that prosecutions *can* be brought years after the offense, not that drug offenders are overwhelmingly apprehended on the eve of charges becoming time-barred. But only if crack dealers routinely escape apprehension and prosecution for nearly a lustrum—an alarming proposition were it true—would the Commission lack "useful data" on post-FSA offenses to study between 2010 and 2015. Neither the gov-

ernment nor Petitioners proffers a factual basis for believing this to be true.[11]

Moreover, whatever the size of the data set, there is no reason to presume that Congress contemplated a pointless study of how revised sentencing practices may affect the decisions of those who violated federal law before the revised practices were in effect. As Chief Judge Easterbrook noted, "[a] study of the [FSA]'s effects will produce meaningful results only if limited to persons whose criminal conduct occurs while the [FSA] is in force." *Holcomb*, 657 F.3d at 450 (concurring in denial of rehearing). If Section 10 provides an inference either way, accordingly, Petitioners and the government have it "backward[s]." *Ibid.*

Finally, the Commission has proved capable in the past of analyzing different groups of offenders subject to different sentencing schemes. *See*, *e.g.*, U.S. Sentencing Comm'n, *Memorandum: Recidivism Among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment* 2-3 (May 31, 2011). Correctly interpreted to apply only to offenders who violated the law after the FSA, Section 10's directive is

---

[11] Hill notes that the median time between indictment and disposition is longer (17 months) if a defendant elects to stand trial. Hill Br. 21 n.7. Since "most criminal cases do not go to trial and resolution by plea bargaining is the norm," *Blakely* v. *Washington*, 542 U.S. 296, 331 (2004) (Breyer, J., dissenting); *Brady* v. *United States*, 397 U.S. 742, 752 & n.10 (1970), it seems unlikely that Congress legislated with this statistic in mind. Even that figure confirms, though, that the Commission would have plenty to "study" if Section 10 encompasses only those crimes committed and prosecuted from 2010 until 2015.

scarcely beyond the Commission's comprehension or ability.

4. The interpretation urged by Petitioners and the government, even if arguably supported by their readings of Sections 8 and 10, is sufficiently odd that Congress could not have intended it. Indeed, just last Term, the Court unanimously rejected as "absurd" the notion that Congress would make the applicability of federal criminal penalties "depend on the timing of the federal sentencing proceeding." *McNeill* v. *United States*, 131 S. Ct. 2218, 2223 (2011). Neither the government nor Petitioners cite *McNeill*. Yet their reading of the FSA produces the same incongruities that the Court found untenable in that case.

As in *McNeill*, the government and Petitioners urge that *identically* situated offenders—even those "who violated [the drug laws] on the same day and who had identical criminal histories"—"receive dramatically different federal sentences solely because" one "happened" to be sentenced after the FSA. 131 S. Ct. at 2223-24. Indeed, under this view of the FSA, crack dealers could benefit from strategic conduct that delayed sentencing—including outright misconduct, such as fugitivity—even as their co-conspirators, who promptly pleaded guilty and accepted responsibility for their crimes, received much harsher sentences. *See Holcomb*, 657 F.3d at 452 (Easterbrook, C.J., concurring in denial of rehearing); *see also United States* v. *Sidney*, 648 F.3d 904, 906 (8th Cir. 2011) (defendant engaged in machinations "all designed to delay the sentencing until after enactment and implementation of the FSA"), *pet. for cert. filed*, No. 11-8134 (Dec. 28, 2011).

The rank arbitrariness of the rule urged by the government is well illustrated by the cases at bar. According to the government, Petitioners are both entitled to the more lenient crack ratios prescribed by the FSA, even though their offenses were respectively committed in March 2007 (Hill) and August 2008 (Dorsey). But the government insists that the Seventh Circuit correctly denied relief to the defendant in *United States* v. *Bell*, 624 F.3d 803 (7th Cir. 2010), because his case was already pending on appeal by the time the FSA was enacted. *See* U.S. Br. 48. Bell committed his crack-cocaine offense in January 2009—almost *two years* after Hill's offense, and almost *six months* after Dorsey's. *Bell*, 624 F.3d at 805. The differential treatment urged by the government cannot be justified on the basis of deterrence, dessert, or any other conceivably relevant penological aim.

The government claims that "ordinary rules of finality" that Congress "respected" require this result. U.S. Br. 23, 48. But "ordinary rules of finality" look at whether cases are, well, final. Criminal prosecutions are not final if direct review or certiorari remain available. *See Clay* v. *United States*, 537 U.S. 522, 527 (2003) ("Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."). Although Congress was presumably aware of this rule, the government offers no textual analysis demonstrating that Congress nonetheless intended that the FSA apply at sentencing but not on direct appeal—to *some* non-final cases, but not to others. Indeed, the hypotheticals that the government imagines in an attempt to make sense of its position—for instance, that the government may have dropped or

bargained charges away in reliance on then-existing mandatory minimums, U.S. Br. 48—suggest that retroactivity should be *precluded* for cases (like Petitioners') in which guilt was adjudicated before the FSA, even if the sentencing occurred later.[12]

Because neither Section 8 nor Section 10 demonstrates that Congress authorized "inconsistent and unjust outcomes among defendants arising from the vagaries of the scheduling process," *State* v. *Reis*, 165 P.3d 980, 994 (Haw. 2007), Section 109 must be given effect. Accordingly, if penalties are to differ because of an arbitrarily selected date, the severity of the penalty should depend, as it has traditionally, upon the voluntary act of a defendant in choosing the date of his criminal conduct, not on the date of sentencing. *Cf. McNeill*, 131 S. Ct. at 2224 ("the interpretation we adopt permits a defendant to know even before he violates the law whether ACCA would apply").

---

[12] The government also cites the administrative costs and judicial burden of holding new hearings for pre-FSA offenders subject to purportedly "final" sentences. U.S. Br. 48-49. Yet the government nowhere examines the costs on the other side of the ledger: the substantial expense of incarcerating an individual for *years* after a post-FSA sentence would have expired. *See*, *e.g.*, Ctr. on the Admin. of Crim. Law *Amicus* Br. 21-23. It is far from obvious that the expense of additional hearings—or any other procedural mechanism devised to adjust final sentences—is so considerable that the government will expend *fewer* resources keeping pre-FSA offenders in prison for the duration of an "unfair" term. The far more likely explanation is the more plausible one: Congress did not draw a nuanced line at partial retroactivity, as the government urges, but instead deferred to the traditional anti-retroactivity default in Section 109.

B. NEITHER THE FSA'S HISTORY NOR ITS PURPOSE ESTABLISHES THAT CONGRESS INTENDED THE FSA TO APPLY RETROACTIVELY.

Petitioners and the government also contend that the history and purpose of the FSA demonstrate that Congress intended partial retroactivity. They cite statements of individual legislators reflecting the widespread and forceful critique of the 100-to-1 ratio, the "intens[e] concer[n]" engendered by the racial disparities produced by the old system, and the FSA's overall purpose to "restore fairness" to cocaine sentences. U.S. Br. 46-50; Hill Br. 25-31.

None of these statements, concerns, and purposes, however, speaks directly to the question of retroactivity. And none purports to explain or construe any statutory *text* to show how its language, even if ambiguous, was actually meant to address retroactivity. This Court does not give "authoritative weight" to "legislative history that is in no way anchored in the text of the statute." *Shannon* v. *United States*, 512 U.S. 573, 583 (1994). Even considering these legislative materials for all they might be worth, however, they do not establish that Congress intended any retroactive application, much less that it did so with the clarity required to repeal Section 109's contrary command.

1. The "purposes" of the FSA do not require that it be applied to conduct that pre-dated its enactment. Because legislation requires compromise, "no legislation pursues its purposes at all costs." *Rodriguez* v. *United States*, 480 U.S. 522, 525-26 (1987). Indeed, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular purpose is the very essence of legislative choice." *Id.* at 526.

For this reason, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez*, 480 U.S. at 526; *see also*, *e.g.*, *Norfolk S. Ry. Co.* v. *Sorrell*, 549 U.S. 158, 171 (2007). In particular, while "[i]t will frequently be true . . . that retroactive application of a new statute would vindicate its purpose more fully," that "is not sufficient to rebut the presumption against retroactivity." *Landgraf* v. *USA Film Prods.*, 511 U.S. 244, 285-86 (1994) (footnote omitted).

Hill contends that these principles have no relevance here because there is "no evidence" that the FSA resulted from compromise or that "members of Congress bargained over whether an old law fraught with problems should continue to apply at sentencing." Hill Br. 30-33. But *Rodriguez* and *Landgraf* prescribe interpretive rules based on the nature of the legislative process, not adjudicative facts that must be proven empirically for each new Act of Congress. In any event, it is *obvious* from the text and history of the FSA that the statute resulted from legislative compromises.

As the government notes, the Sentencing Commission spent the better part of two decades "firmly and unanimously" urging Congress to repeal the 100-to-1 ratio, and the Commission's attempt to prescribe a 1-to-1 ratio "occasioned Congress'[s] only exercise of its power to disapprove a revision of the Guidelines." U.S. Br. 8, 32. By adopting an 18-to-1 ratio, the FSA necessarily establishes that Members of Congress were not wholly persuaded that differential sentences for crack and powder cocaine are always unjustified. And the fact that Congress was willing to effect even *that* change only as part of a legislative

package that increased the severity of various punishments dispels any notion that the FSA could not have resulted from compromise. By seeking to cherry-pick for retrospective application only those changes that favor defendants, Petitioners and the government would undermine, rather than serve, the package of reforms that Congress enacted.

2. Individual statements by legislators decrying the old law (*see* Hill Br. 28-30; U.S. Br. 44, 46) do not add anything of consequence to Petitioners' argument. Congress undoubtedly wished to change the law, but none of these isolated statements establishes that Congress intended the change to be *retroactive*. And like the invocation of the FSA's purpose to restore "fairness," none of these statements explains or supports the peculiar retroactivity line that Petitioners and the government urge: that Congress somehow viewed re-sentencing hearings as such a monumental burden that it preferred to retain *existing* (and "unfair") sentences for offenders subject to a final judgment, and did not even intend to reduce the *existing* (and "unfair") sentences of offenders whose direct appeals were still pending when the FSA was enacted. *See* U.S. Br. 48-50. It is not unusual that parties abuse legislative history in cases involving statutory interpretation, but rarely are the proffered snippets of the legislative record so logically disconnected from the particular interpretation urged by the litigants.

3. The sole aspect of the legislative record cited by Petitioners and the government that is remotely pertinent to the retroactivity issue is that the Senate bill ultimately enacted by Congress (S. 1789) lacks an express prohibition on retroactivity that had been contained in H.R. 265, a House bill that purportedly

served as the model for the legislation. The government touts this as evidence that "Congress considered and rejected" the earlier prohibition and opted to permit retroactivity. U.S. Br. 44; *see also* Hill Br. 27 (same). Yet even assuming this "deletion" was deliberate, it says nothing definitive about legislative intent.

In failing to include an anti-retroactivity clause, Congress merely omitted language that would do what Section 109 already does. Because Section 109 operates as if its text is "incorporated" directly into each "subsequent enactmen[t]," *Great N. Ry.*, 208 U.S. at 465, there was no reason for Congress to include *another* prohibition on retroactivity in the FSA, *see*, *e.g.*, *Marcello*, 349 U.S. at 309 ("[t]he deletion is nowhere explained, but it is possible that the phrase was considered unnecessary").

Indeed, if Congress advertently deleted the prohibition in order to *permit* retroactivity, one would have expected the FSA to address and permit retroactivity expressly. It defies credulity to contend that Congress somehow focused on the earlier bill's language, intentionally deleted that language in order to authorize retroactivity, and yet somehow did not think to include a single declarative sentence expressing that will in the FSA despite the obvious applicability of Section 109. In fact, since the House bill provided that "[t]here shall be no retroactive application of any portion of this Act," simply deleting the word "no" would have given Congress a running start. Only in comic opera does a task of such sim-

plicity call for the skills of "an old Equity draftsman." W.S. Gilbert & Arthur Sullivan, *Iolanthe* act 2.[13]

C. NEITHER LENITY NOR CONSTITUTIONAL AVOIDANCE HAS ANY APPLICATION HERE.

Petitioners finally urge the Court to apply the FSA retroactively under principles of lenity and constitutional avoidance—in particular, to avoid "serious [c]onstitutional arguments implicating the guarantee of equal protection." Hill Br. 38-39; *see also* Dorsey Br. 56-59. But constitutional avoidance requires the presence of "*serious* constitutional doubts," *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005) (emphasis added), and there can be no serious contention that crack-cocaine sentences involve the type of intentional discrimination by government actors that offends the equal-protection component of due process—even if the sentencing scheme produces racially disparate outcomes. *See*, *e.g.*, *Vill. of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal

---

[13] QUEEN OF THE FAIRIES: And yet (unfolding a scroll) the law is clear—every fairy must die who marries a mortal!

THE LORD CHANCELLOR: Allow me, as an old Equity draftsman, to make a suggestion. The subtleties of the legal mind are equal to the emergency. The thing is really quite simple—the insertion of a single word will do it. Let it stand that every fairy shall die who *doesn't* marry a mortal, and there you are, out of your difficulty at once!

Iolanthe, *supra*, act 2.

Protection Clause."); *Washington* v. *Davis*, 426 U.S. 229, 239 (1976) (same).

The rule of lenity likewise has no application here. Lenity comes into play only when, after applying every canon of statutory interpretation, there is still "grievous ambiguity" about whether Congress intended to subject an offender to increased punishment. *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998); *see also*, *e.g.*, *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980). Thus, the rule of lenity is not an "'overriding consideration of being lenient to wrongdoers.'" *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 410 (1991) (quoting *Callanan*, 364 U.S. at 596). Nor does the rule apply "merely because it is *possible* to articulate a construction" that is more favorable to the defendant's position than to the prosecution's. *Moskal* v. *United States*, 498 U.S. 103, 108 (1990). Nothing about the FSA, alone or in conjunction with Section 109, "is sufficiently ambiguous . . . to permit the rule to be controlling" here. *United States* v. *Rodgers*, 466 U.S. 475, 484 (1984).

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

DANIEL L. GEYSER
MARIANNA C. CHAPLEAU
RUSSELL H. FALCONER
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Dallas TX 75201
(214) 698-3356

MIGUEL A. ESTRADA
Counsel of Record
SCOTT P. MARTIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Amicus Curiae

March 8, 2012