

SCRATCHING THE “8-BALL”: THE FOURTH CIRCUIT’S APPROACH TO THE FIRST STEP ACT MISSES THE MARK

Abstract: On March 9, 2021, in *United States v. Lancaster*, the United States Court of Appeals for the Fourth Circuit held that a district court ruling on a First Step Act motion must consider intervening factual and legal developments when deciding whether to resentence an offender under the Act. In doing so, the Fourth Circuit exacerbated a circuit split regarding the proper scope of the First Step Act. Four circuits, led by the United States Court of Appeals for the Fifth Circuit, have taken the opposite position and do not allow their district courts to consider intervening circumstances at all. The United States Courts of Appeals for the First, Second, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits, on the other hand, allow their district courts to consider intervening circumstances but do not require them to do so. Within the latter group, the First Circuit created a two-step framework for ruling on a First Step Act motion where a district court may not consider intervening circumstances when deciding whether to resentence but may do so when actually resentencing. This Comment argues that the Fourth Circuit incorrectly expanded the First Step Act’s scope of relief in *United States v. Lancaster* because it did not properly balance the Act’s statutory text with the Act’s discretionary grant. Additionally, this Comment argues that the Supreme Court should adopt the First Circuit’s two-step framework because that approach best realizes Congress’s intent within the Act’s textual limitations.

LEN BIAS’S UNFORTUNATE LEGACY

On June 19, 1986, NCAA basketball star Len Bias fatally overdosed on cocaine just two days after the Boston Celtics drafted him into the NBA.¹ Although powder cocaine caused Bias’s death, the resulting media attention contributed to increased national concern over crack cocaine.² Many viewed crack

¹ Keith Harriston & Sally Jenkins, *Maryland Basketball Star Len Bias Is Dead at 22*, WASH. POST (June 20, 1986) <https://www.washingtonpost.com/wp-srv/sports/longterm/memories/bias/launch/bias1.htm> [<https://perma.cc/Z3VX-ZQW4>]. The Celtics drafted Bias second overall and, by all accounts, expected him to be a star. See Sally Jenkins, *Celtics Make Bias Second Overall Pick of Draft*, WASH. POST (June 18, 1986) <https://www.washingtonpost.com/wp-srv/sports/longterm/memories/bias/launch/bias2.htm> [<https://perma.cc/FH9G-S245>] (quoting a Celtics scout who compared Bias to Michael Jordan, who is widely acknowledged as the greatest basketball player of all time).

² See U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 122 (1995), https://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/199502-rtc-cocaine-sentencing-policy/1995-Crack-Report_Full.pdf [<https://perma.cc/KYQ8-AL7M>] (noting seventy-four news reports on crack cocaine in the month following Bias’s death). In the immediate aftermath of Bias’s death, rumors swirled that he fatally overdosed on crack cocaine. *Id.* Crack cocaine is a derivative of powder cocaine and is created by first boiling a

cocaine as an “epidemic,” including the U.S. Senate Permanent Subcommittee on Investigations, which held a hearing to investigate the dangers of crack cocaine in the aftermath of Bias’s death.³ Congress, alarmed by the committee’s findings, quickly passed the Anti-Drug Abuse Act of 1986, which established the first mandatory minimum penalties for possession of crack and powder cocaine, respectively.⁴ Under that law, however, an offender would have to possess one hundred more times the amount of powder cocaine than crack cocaine to trigger the same mandatory minimum penalty.⁵

Although facially neutral, the 1986 mandatory minimums had a disproportionate effect on Black Americans, who comprised 88.3% of crack cocaine users in 1993.⁶ Partially for that reason, the United States Sentencing Commission repeatedly recommended that Congress dispense with the one hundred-to-

mixture of powder cocaine, water, and baking soda, and then breaking apart the resulting solid once it cools. *What Is Crack? Differences Between Crack and Cocaine?*, AM. ADDICTION CTRS., <https://americanaddictioncenters.org/cocaine-treatment/differences-with-crack> [<https://perma.cc/M4TE-VEUB>] (Jan. 7, 2022). The rumors that Bias consumed crack cocaine stemmed from a doctor who speculated about the cause of Bias’s death based on the concentration of cocaine in his bloodstream. U.S. SENT’G COMM’N, *supra*, at 122 n.45. A year later, however, an eyewitness testified that Bias had actually consumed powder cocaine on the night of his death. *Id.* at 123.

³ “Crack” Cocaine: *Hearing Before the Permanent Subcommittee on Investigations of the S. Comm. on Governmental Affs.*, 99th Cong. 4 (1986) (statement of Sen. Samuel Nunn). Much of the testimony at this hearing was alarmist. *See id.* at 2 (statement of Sen. William Roth, Chairman, S. Comm. on Governmental Affs.) (describing cocaine as a “white plague” that rivals the Black Plague of the 1300s in deadliness); *see also id.* at 7 (statement of Sen. Lawton Chiles, Jr.) (fearing that the country would not survive the effects of crack cocaine). These statements reflected a common attitude among public officials at the time that drug abuse was “public enemy number one.” Richard Nixon, President of the U.S., Remarks About an Intensified Program for Drug Abuse Prevention and Control (June 17, 1971), <https://www.presidency.ucsb.edu/documents/remarks-about-intensified-program-for-drug-abuse-prevention-and-control> [<https://perma.cc/GGG9-JHAX>]. For more information about the war on drugs, see German Lopez, *The War on Drugs, Explained*, VOX, <https://www.vox.com/2016/5/8/18089368/war-on-drugs-marijuana-cocaine-heroin-meth> [<https://perma.cc/4UZG-6DUM>] (May 8, 2016).

⁴ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 (codified as amended at 21 U.S.C. § 841(b)(1)). This act, along with other statutes that imposed mandatory minimum penalties, increased the average time served in federal prison for drug offenses from twenty-two to thirty-three months. Roger H. Peters & Marc L. Steinberg, *Substance Abuse Treatment in US Prisons*, in *DRUG USE IN PRISONS* 89, 89–90 (David Shewan & John B. Davies eds., 2013).

⁵ Anti-Drug Abuse Act § 1002. Specifically, under the 1986 Act, an offender would trigger the same five-year mandatory minimum penalty by possessing five grams of crack cocaine as they would for possession of five hundred grams of powder cocaine. *Id.* The same ratio existed for the ten-year mandatory minimum, albeit with proportionally greater amounts. *Id.*

⁶ *See* U.S. SENT’G COMM’N, *supra* note 2, at 161–62 (suggesting that the law punished Black cocaine users more harshly on average than cocaine users of other ethnicities because the law punished crack cocaine users, who skewed Black, more harshly than powder cocaine users). *See generally* DEBORAH J. VAGINS & JESSELYN MCCURDY, *CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW* (2006) for an overview of the demographic impact of federal cocaine sentencing.

one sentencing ratio and replace it with a one-to-one ratio.⁷ Ultimately, after a prolonged push from the public and the Sentencing Commission, Congress passed the Fair Sentencing Act of 2010, which reduced the sentencing differential from one hundred-to-one to eighteen-to-one and represented Congress's first meaningful step toward correcting the inequity in cocaine sentencing.⁸

Part I of this Comment details the state of the relevant law at the time that the United States Court of Appeals for the Fourth Circuit decided *United States v. Lancaster*, as well as the procedural history underpinning its ruling.⁹ Part II discusses the various approaches that circuit courts took when asked to decide the First Step Act's scope of authority.¹⁰ Lastly, Part III argues that the Fourth Circuit's approach to the First Step Act incorrectly balanced the Act's textual requirements with its grant of discretion, and that the Supreme Court, which will determine the Act's scope of review in its 2021–2022 term, should adopt the First Circuit's two-step approach so as to implement faithfully the statutory text and Congress's intent.¹¹

I. FIXING THE LEGACY: MAKING FINALITY LESS FINAL

In 2021, in *United States v. Lancaster*, the United States Court of Appeals for the Fourth Circuit joined an existing circuit split regarding the proper scope of the First Step Act of 2018.¹² The court concluded that a district court ruling

⁷ See U.S. SENT'G COMM'N, REPORT TO CONGRESS: IMPACT OF THE FAIR SENTENCING ACT OF 2010, at 3, 21–22 (2015), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/201507_RtC_Fair-Sentencing-Act.pdf [<https://perma.cc/9TNR-87HR>] (tracing the history of federal cocaine sentencing from the 1980s through the passage of the Fair Sentencing Act of 2010). The Commission also recommended reducing the ratio because of the implementation of the Federal Sentencing Guidelines and the cliff in punishment that resulted near the edges of mandatory minimum ranges (e.g., a person with 4.9 grams of crack cocaine would be sentenced to one year in prison, whereas a person with 5.0 grams would be sentenced to five years). U.S. SENT'G COMM'N, *supra* note 2, at 196–97.

⁸ Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (codified as amended at 21 U.S.C. § 841(b)(1)); see U.S. SENT'G COMM'N, *supra* note 7, at 3, 21–22 (tracing the history of federal cocaine policy). The eighteen-to-one differential stemmed from a political compromise; earlier drafts of the bill would have resulted in a one-to-one ratio. *The Fair Sentencing Act of 2010: It's About Time*, L.A. TIMES (July 31, 2010), <https://www.latimes.com/archives/la-xpm-2010-jul-31-la-ed-sentencing-20100731-story.html> [<https://perma.cc/6GKE-8A5F>].

⁹ See *infra* notes 12–33 and accompanying text.

¹⁰ See *infra* notes 34–60 and accompanying text.

¹¹ See *infra* notes 61–77 and accompanying text.

¹² See *United States v. Lancaster*, 997 F.3d 171, 175 (4th Cir. 2021) (holding that a district court must consider “intervening case law” when deciding whether to reduce a sentence under the First Step Act); see also *id.* at 178 (Wilkinson, J., concurring in the judgment) (noting that the Fourth Circuit’s decision in *Lancaster* pushes the Fourth Circuit “past every circuit court”); *United States v. Concepcion*, 991 F.3d 279, 289–90 (1st Cir.) (concluding that a district court may consider intervening factors when ruling on a First Step Act motion), *cert. granted*, 142 S. Ct. 54 (2021); *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir.) (holding that a district court should only consider the changes made by the Fair Sentencing Act of 2010 when encountering a First Step Act motion), *cert. denied*,

on a First Step Act motion must apply current law when deciding whether to resentence under the Act instead of the law that was in effect at the original sentencing.¹³ Section A of this Part traces the history of federal cocaine sentencing from the Fair Sentencing Act to the First Step Act.¹⁴ Section B discusses the procedural and factual history leading up to the Fourth Circuit's decision in *United States v. Lancaster*.¹⁵

A. Putting the Fair into the Fair Sentencing Act

Even though the Fair Sentencing Act reduced the sentencing disparities between powder and crack cocaine offenses, it only did so prospectively.¹⁶ Within a year, however, the United States Sentencing Commission gave retroactive effect to the Sentencing Guidelines changes it made following the Act.¹⁷ That change allowed pre-Act defendants, upon motion, to request a sentence reduction using the amended guidelines.¹⁸ In ruling on such a motion, however, courts could not apply the amended guidelines in every case.¹⁹ Therefore,

140 S. Ct. 285 (2019). The First Step Act allows courts, upon motion, to review sentences as if the Fair Sentencing Act of 2010 had been in effect at the original sentencing. First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (21 U.S.C. § 841 note (Application of Fair Sentencing Act)); *see also* Fair Sentencing Act § 2 (reducing the mandatory minimum penalties for possession of crack cocaine).

¹³ *Lancaster*, 997 F.3d at 175. The Fourth Circuit held that district courts must reconsider the original sentence by applying “intervening case law.” *Id.* This means that when a district court rules on a First Step Act motion, it must apply the law as it currently stands, even if that law differs from the law in force at the time of the original sentencing. *See id.* (vacating the district court’s First Step Act motion ruling because defendant Christopher Lancaster should not have been considered a career offender under current law).

¹⁴ *See infra* notes 16–26 and accompanying text.

¹⁵ *See infra* notes 27–33 and accompanying text.

¹⁶ Fair Sentencing Act § 2; *Concepcion*, 991 F.3d at 284. The Act did not have retroactive effect, as it only applied to offenses committed after August 3, 2010. *See* First Step Act § 404(a) (listing as a covered offense violations committed before August 3, 2010); *Concepcion*, 991 F.3d at 284 (noting that the Fair Sentencing Act was proscriptive). Consequently, courts sentenced offenders who committed their offenses before the Act’s effective date using different criteria than they did with post-Act offenders. *See id.* (noting that the Act did not have retroactive effect).

¹⁷ U.S. SENT’G GUIDELINES MANUAL app. C, amend. 750, 759 (U.S. SENT’G COMM’N 2018), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/APPENDIX_C_Vol_III.pdf [<https://perma.cc/5PMH-SEK4>]. Specifically, the Sentencing Commission gave retroactive effect to parts A and C of amendment 750, which reduced drug quantity-based sentencing guidelines and eliminated a cross-reference within the guidelines, respectively. *Id.*

¹⁸ *See* 18 U.S.C. § 3582(c)(2) (allowing modification of a final judgment if the defendant’s sentence was “based on a sentencing range” that was subsequently altered by the Sentencing Commission).

¹⁹ *See id.* (stating that a court’s sentencing reduction, which must be in line with the Sentencing Commission’s policy statements, is permissive rather than mandatory). The corresponding policy statement is codified in § 1B1.10 of the U.S. Sentencing Guidelines Manual, which articulates a three-part standard for application. *See generally* OFF. OF THE GEN. COUNS., U.S. SENT’G COMM’N, PRIMER: RETROACTIVE GUIDELINE AMENDMENTS 1–3 (2021), <https://www.ussc.gov/sites/default/files/>

the guidelines reduction did not give full retroactivity to the Fair Sentencing Act.²⁰ Nevertheless, the reductions reflected a concerted effort by several governmental entities to interpret the Fair Sentencing Act expansively in order to better address cocaine sentencing inequity.²¹

That effort culminated in 2018, when Congress made the Fair Sentencing Act sentence reductions fully retroactive through the First Step Act.²² Congress intended the Act to allow judges to make individualized determinations about when to apply the Fair Sentencing Act retroactively.²³ To accomplish this goal, the First Step Act authorizes district courts, upon motion, to recalculate sentences of certain offenses as if the Fair Sentencing Act had been in effect at the time of the original sentencing.²⁴ For a motion to be successful, the offense

pdf/training/primers/2021_Primer_Retroactivity.pdf [https://perma.cc/J37F-BSDV] (explaining how courts apply the policy statement).

²⁰ Compare U.S. SENT'G COMM'N, FINAL CRACK RETROACTIVITY DATA REPORT 4 tbl.1 (2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final_USSC_Crack_Retro_Data_Report_FSA.pdf [https://perma.cc/FV26-NHK3] (finding that the guidelines reductions reduced the sentences of 7,748 prisoners), with U.S. SENT'G COMM'N, FIRST STEP ACT OF 2018 RESENTENCING PROVISIONS RETROACTIVITY DATA REPORT 5 n.1 (2021), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20210519-First-Step-Act-Retro.pdf> [https://perma.cc/7H6J-EGQ3] [hereinafter U.S. SENT'G COMM'N, RESENTENCING REPORT] (noting that the First Step Act resulted in 3,705 additional sentence reductions after enactment).

²¹ See U.S. SENT'G COMM'N, *supra* note 7, at 6–7 (outlining the historical background of cocaine sentencing through 2015). In addition to the Sentencing Commission, both the Supreme Court and the Department of Justice interpreted the Fair Sentencing Act broadly. See *Dorsey v. United States*, 567 U.S. 260, 281 (2012) (holding that the Fair Sentencing Act applies to offenses committed but not sentenced prior to its effective date); Memorandum from Eric H. Holder, Jr., Att'y Gen. of the U.S., to all federal prosecutors (July 15, 2011), https://www.justice.gov/oip/ag_memo_application_statutory_mandatory_sentencing_laws_amended_fair_sentencing_act_2010/download [https://perma.cc/SYU7-56PM] (deciding that the Fair Sentencing Act applies to all sentences handed down after the Act's effective date, even if the original offense occurred before the Act's effective date).

²² First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (21 U.S.C. § 841 note (Application of Fair Sentencing Act)). The Act began as the Save Our Seas Act of 2017, and the Senate substituted its current text by amendment. See generally 164 CONG. REC. S7645 (daily ed. Dec. 17, 2018) (statement of Sen. Richard Durbin) (explaining the legislative history of the Act). The Act had wide bipartisan support and constituted the culmination of nearly a half-decade-long sentencing reform effort by the bill's sponsors. *Id.*

²³ See 164 CONG. REC., *supra* note 22, at S7645 (statement of Sen. Richard Durbin) (describing the “targeted way” in which the Act would reduce mandatory minimum sentences). Only a small portion of the First Step Act concerned Fair Sentencing Act sentence reductions; the remainder of the Act concentrated on prison reform and recidivism reduction. See *id.* (explaining the rest of the First Step Act provisions section by section); John F. Ferraro, Note, *Compelling Compassion: Navigating Federal Compassionate Release After the First Step Act*, 62 B.C. L. REV. 2463 (2021) (detailing the Act's consequences for compassionate relief); Allison L. Cheney, Comment, *Procedural Pitfalls: The Eleventh Circuit Holds the Sentencing Commission's Policy Statement on Sentence Reduction is Binding on Defendant-Filed Motions*, 63 B.C. L. REV. E. SUPP. (Forthcoming Apr. 2022) (exploring whether the First Step Act requires defendants to follow the Sentencing Commission's policy statement when motioning for compassionate relief).

²⁴ First Step Act § 404. An offender, the court, the Director of the Bureau of Prisons, or a government attorney may file a First Step Act motion. *Id.* § 404(b). In ruling on such a motion, the district

must be covered by the First Step Act, the motion must be made in the court that originally imposed the sentence, and the sentence must not have been previously reduced under the First Step Act.²⁵ Nevertheless, even if a defendant is eligible for resentencing, a court does not have to reduce the sentence if it determines that the sentence would have been the same under the Fair Sentencing Act.²⁶

B. Factual Background of United States v. Lancaster

In 2009, Christopher Lancaster was convicted in the United States District Court for the Eastern District of North Carolina on one count of conspiracy to distribute or possess powder and crack cocaine with intent to distribute.²⁷ His conviction automatically triggered a mandatory minimum of at least ten years' incarceration.²⁸ In determining Lancaster's sentence, the court calculated the sentencing guidelines primarily accounting for his status as a career offender, rather than the quantity of drugs he allegedly possessed, and sentenced him to 180 months' incarceration.²⁹

court is not limited by the Sentencing Commission's procedural hurdles. *See id.* (making no mention of the Sentencing Commission's policy statement, in contrast to 18 U.S.C. § 3582(c)(2)).

²⁵ *Id.* § 404(b), (c). The First Step Act governs offenses amended under sections 2 and 3 of the Fair Sentencing Act. *Id.* § 404(a). Section 2 of the Fair Sentencing Act modifies penalties for violations of 21 U.S.C. § 841(b)(1)(A)(iii) and § 841(b)(1)(B)(iii), which criminalizes possession of crack or powder cocaine). Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372. Section 3 of the Fair Sentencing Act eliminates the mandatory minimum penalty for simple possession of a controlled substance. *Id.* § 3.

²⁶ First Step Act § 404(b) (permitting, but not requiring, a court to resentence); *see United States v. Lancaster*, 997 F.3d 171, 175 (4th Cir. 2021) (noting that a court's decision is discretionary).

²⁷ *Lancaster*, 997 F.3d at 172, 173. Lancaster was convicted of violating 21 U.S.C. § 846, which is the federal attempt and conspiracy statute for drug offenses. *Id.* at 172. Notably, this statute does not require an overt act, and is therefore broader than the general conspiracy statute. *United States v. Norman*, 935 F.3d 232, 237 (4th Cir. 2019). The federal statute that criminalizes possession of both crack and powder cocaine is 21 U.S.C. § 841, which is a covered offense under the Fair Sentencing Act. Fair Sentencing Act § 2.

²⁸ 21 U.S.C. § 841(1)(A)(iii). When Lancaster was sentenced, federal law required fifty grams of crack cocaine to trigger a ten-year mandatory minimum. *See* Fair Sentencing Act § 2 (striking the requirement that an offender possess 50 grams from 21 U.S.C. § 841(b)(1)(A)(iii)). Since 2010, however, federal law has required 280 grams of crack cocaine to trigger that same penalty. 21 U.S.C. § 841(b)(1)(A)(iii). This distinction might not matter, however, as Lancaster allegedly possessed more than six kilograms of powder cocaine and more than eleven kilograms of crack cocaine, well above the threshold for any mandatory minimum. *Lancaster*, 997 F.3d at 173.

²⁹ *Lancaster*, 997 F.3d at 173. Prior to sentencing, Lancaster objected to the quantity of cocaine attributed to him, and the district court sustained his objection but left the issue unresolved. *Id.* Additionally, Lancaster was considered a career offender under the applicable law in 2009. *See* U.S. SENT'G GUIDELINES MANUAL, *supra* note 17, at § 4B1.1, https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/CHAPTER_4.pdf [<https://perma.cc/2UQQ-RDM9>] (defining career offender as a defendant who is at least 18 years old and who has more than one felony conviction for violent crimes and/or drug offenses). Therefore, in sentencing Lancaster, the district court calculated the Sentencing Guidelines solely based on Lancaster's career offender status. *See Lancaster*, 997 F.3d at 173 (explaining that the district court refrained from using drug quantity when calculating Lancaster's

Eleven years later, in 2020, Lancaster filed a motion under the First Step Act to recalculate his sentence as if the Fair Sentencing Act were in effect in 2009.³⁰ Because Lancaster could not be considered a career offender after the Fourth Circuit’s 2019 decision in *United States v. Norman*, he argued that his sentence would have been different under the Fair Sentencing Act, and that he was therefore entitled to relief under the First Step Act.³¹ The district court disagreed, noting without discussion that his sentence would have been the same had the Fair Sentencing Act been in effect in 2009.³² Lancaster appealed the district court’s decision, arguing that the court erred by not reevaluating his sentencing guidelines in light of “intervening case law.”³³

II. CIRCUIT DISAGREEMENT OVER THE SCOPE OF THE FIRST STEP ACT

Without the First Step Act, Lancaster’s story would have ended when he was sentenced, as federal courts usually cannot alter criminal sentences.³⁴ The general rule, however, does not apply if a federal statute expressly permits modification.³⁵ Therefore, in passing the First Step Act, which allows courts to

sentencing guidelines). The Sentencing Guidelines recommended a sentence of 262 to 367 months of incarceration, but the district court only sentenced Lancaster to 180 months of imprisonment. *Id.*

³⁰ *Lancaster*, 997 F.3d at 173.

³¹ *Id.*; see also *Norman*, 935 F.3d at 237, 239 (deciding that conspiracy under 21 U.S.C. § 846 is broader than generic conspiracy, and that § 846 conspiracy does not amount to conspiracy under the Sentencing Guidelines for that reason). Because Lancaster was convicted of a § 846 violation, the *Norman* decision meant that his conviction no longer qualified as a “controlled substance offense” and that he therefore was no longer a career offender under the sentencing guidelines. *Lancaster*, 997 F.3d at 176.

³² *Lancaster*, 997 F.3d at 174. As a result, the district court denied Lancaster’s motion in an order dated April 21, 2020. *Id.*

³³ *Id.* The Fourth Circuit found Lancaster’s line of reasoning persuasive and adopted it as binding precedent for each district court that rules on a First Step Act motion. See *id.* at 175 (holding that the district courts must consider “intervening case law”). Because the district court did not consider intervening case law, the Fourth Circuit remanded Lancaster’s case to the district court. *Id.* at 176.

³⁴ See 18 U.S.C. § 3582(c) (forbidding courts from disturbing criminal sentences except in specific limited instances). This limitation furthers the criminal justice system’s interest in finality, which is desirable because it acts as a deterrent to would-be offenders and conserves judicial resources. See *Teague v. Lane*, 489 U.S. 288, 309–10 (1989) (suggesting that much of criminal law’s deterrent effect stems from finality); *Lancaster*, 997 F.3d at 179 (Wilkinson, J., concurring in the judgment) (noting that the Fourth Circuit’s decision in *Lancaster* will require district courts to relitigate years-old factual disputes); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451–53 (1963) (pointing out that relitigating criminal proceedings would strain the entirety of the legal system’s resources). But see Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the “Interests of Finality,”* 2013 UTAH L. REV. 561, 563–64 (arguing that restricting post-trial review can waste state resources instead of conserving them).

³⁵ See 18 U.S.C. § 3582(c)(1)(B) (allowing courts to modify criminal sentences when there is a statute on point). To ensure that Congress has weighed the “benefits of retroactivity” against the state’s interest in finality, Congress must explicitly state its intention to allow sentence modification. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 268 (1994).

resentence as if the Fair Sentencing Act had been in effect at the time of original sentencing, Congress explicitly allowed such a modification and opened the door for offenders like Lancaster to challenge their sentences.³⁶ Nevertheless, the United States Courts of Appeal disagree about how to interpret the First Step Act, with some circuits viewing it as a narrow corrective tool and others using it as a more general vehicle for correcting errors in the original sentencing.³⁷

In 2019, in *United States v. Hegwood*, the United States Court of Appeals for the Fifth Circuit became the first federal circuit court to articulate the First Step Act's scope of relief.³⁸ In reaching its decision, the court first rejected the notion that the First Step Act allowed district courts to engage in plenary resentencing.³⁹ Instead, the court reasoned that the text of the First Step Act only granted a district court "limited authority" to amend a criminal sentence.⁴⁰ The

³⁶ See *United States v. Wirsing*, 943 F.3d 175, 184 (4th Cir. 2019) (holding that the First Step Act qualifies as an 18 U.S.C. § 3582(c)(1)(B) exception). Courts rarely find § 3582(c)(1)(B) exceptions, however, as only a small fraction of federal statutes qualify. See *id.* at 184 (listing only three federal statutes that qualify as § 3582(c)(1)(B) exceptions).

³⁷ See Sarah E. Ryan, *Judicial Authority Under the First Step Act: What Congress Conferred Through Section 404*, 52 LOY. U. CHI. L.J. 67, 103–04 (2020) (characterizing the scope of relief under the First Step Act as unresolved); *Lancaster*, 997 F.3d at 178 (Wilkinson, J., concurring in the judgment) (noting that there is a wide split among the circuits regarding the First Step Act's proper scope).

³⁸ 934 F.3d 414, 418 (5th Cir.) (holding that district courts reviewing a First Step Act motion may only consider legal changes made by the Fair Sentencing Act), *cert. denied*, 140 S. Ct. 285 (2019). *Hegwood* involved a defendant whose sentencing guidelines were originally calculated based on his status as a career offender, like the defendant in *Lancaster*. *Id.* at 416; see *Lancaster*, 997 F.3d at 176 (explaining that the district court originally sentenced Christopher Lancaster based on his career-offender status). Under intervening Fifth Circuit case law, however, Michael Hegwood could no longer be considered a career offender. *Hegwood*, 934 F.3d at 416; see also *United States v. Tanksley*, 848 F.3d 347, 352 (5th Cir.) (deciding that possession with intent to distribute a controlled substance did not amount to a controlled substance offense), *opinion supplemented by* 854 F.3d 284 (5th Cir. 2017). As the Fifth Circuit did not allow the district court to consider that case law, however, the district court did not err by maintaining Hegwood's career offender status. *Hegwood*, 934 F.3d at 419.

³⁹ See *Hegwood*, 934 F.3d at 415 (deciding that the First Step Act prevents courts from completely resentencing under the First Step Act); *Plenary*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining plenary as "[f]ull; entire; complete").

⁴⁰ *Hegwood*, 934 F.3d at 418. The court reached its conclusion using a canon of statutory interpretation, *expressio unius est exclusio alterius*, which means that the expression of one thing is the exclusion of another. See *Hegwood*, 934 F.3d at 418 (confining the scope of the First Step Act to provisions that were explicitly enumerated); see also *United States v. Chambers*, 956 F.3d 667, 672 (4th Cir. 2020) (disagreeing with the Fifth Circuit's application of that canon); *Expressio unius est exclusio alterius*, MERRIAM WEBSTER'S DICTIONARY, <https://www.merriam-webster.com/legal/expressio%20unius%20est%20exclusio%20alterius> [<https://perma.cc/YT6A-249R>] (last visited Feb. 3, 2022) (defining the phrase as excluding everything except for those that are expressly mentioned). Because the statute did not explicitly allow courts to consider intervening case law, the Fifth Circuit concluded that considering intervening case law was not appropriate under the First Step Act. See *Hegwood*, 934 F.3d at 418–19 (holding that district courts may only consider changes made by the Fair Sentencing Act); First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (21 U.S.C. § 841 note (Application of Fair Sentencing Act)) (listing sections 2 and 3 of the Fair Sentencing Act as covered offenses).

court therefore directed district courts to recalculate sentences using the law that was in force at the time of the original sentencing, except for any changes made by the Fair Sentencing Act.⁴¹ The United States Courts of Appeals for the Ninth and Eleventh Circuits reached similar conclusions when they encountered the issue, largely based on strict adherence to the First Step Act's text.⁴² Together, these decisions took the view that Congress only intended the First Step Act to be a narrow corrective tool, and that the statutory text perfectly reflects Congress's intent.⁴³

By contrast, district courts in the First, Second, Sixth, Seventh, Eighth, Tenth, and D.C. Circuits may consider intervening factual and legal developments when resentencing under the First Step Act but are not required to do so.⁴⁴ In 2021, in *United States v. Maxwell*, the United States Court of Appeals for the Sixth Circuit adopted this view and suggested that strict adherence to the statutory text creates a paradox in that courts do not really have discretion to reduce sentences if they can only consider changes made by the Fair Sentencing Act.⁴⁵

The courts that have recognized this paradox have applied one of two approaches.⁴⁶ In one group of circuits, led by the Sixth Circuit, district courts are

⁴¹ See *Hegwood*, 934 F.3d at 418–19 (holding that district courts may not consider intervening case law when considering a First Step Act motion). In *United States v. Stewart*, the Fifth Circuit decided that the Fair Sentencing Act's mandated Sentencing Guidelines amendments fall under this umbrella. 964 F.3d 433, 438 (5th Cir. 2020).

⁴² *United States v. Kelley*, 962 F.3d 470, 475 (9th Cir. 2020) (disallowing district courts from considering intervening case law when deciding whether to resentence under the First Step Act), *cert. denied*, 141 S. Ct. 2878 (2021); *United States v. Denson*, 963 F.3d 1080, 1089 (11th Cir. 2020) (similarly limiting the First Step Act). In each case, the courts' reasoning tracked the Fifth Circuit's analysis in *Hegwood*. See *Kelley*, 962 F.3d at 475 (relying on *Hegwood* as authority for its analysis); *Denson*, 963 F.3d at 1089 (same).

⁴³ See *Hegwood*, 934 F.3d at 418 (noting that Congress intended courts to have restricted authority under the First Step act and nothing more).

⁴⁴ See *United States v. Concepcion*, 991 F.3d 279, 289–90 (1st Cir.) (holding that a district court may consider intervening factors when recalculating sentences under the First Step Act), *cert. granted*, 142 S. Ct. 54 (2021); *United States v. White*, 984 F.3d 76, 90 (D.C. Cir. 2020) (same); *United States v. Maxwell*, 991 F.3d 685, 691 (6th Cir.) (same), *petition for cert. pending*, No. 20-1653 (filed May 27, 2021); *United States v. Moore*, 975 F.3d 84, 92 n.36 (2d Cir. 2020) (same); *United States v. Brown*, 974 F.3d 1137, 1145 (10th Cir. 2020) (same); *United States v. Moore*, 963 F.3d 725, 727 (8th Cir. 2020) (same), *cert. denied*, 141 S. Ct. 1118 (2021); *United States v. Shaw*, 957 F.3d 734, 742 (7th Cir. 2020) (same).

⁴⁵ See 991 F.3d at 691 (pondering how a district court could use discretion without being able to consider intervening case law). Practically, if a district court were only able to consider changes made by the Fair Sentencing Act when reviewing sentences under the First Step Act, it would have limited discretion in resentencing, almost to the point of discretion becoming a nullity. See *id.* (noting that discretion requires courts to look at the sentencing guidelines factors when ruling on a First Step Act motion).

⁴⁶ Compare *Concepcion*, 991 F.3d at 289 (allowing district courts to consider intervening case law after they decide to reduce a sentence under the First Step Act), with *Maxwell*, 991 F.3d at 692 (permitting district courts to consider intervening case law when deciding whether to recalculate sentencing guidelines and in the actual recalculation of sentencing guidelines).

empowered, without restriction, to consider intervening factual and legal developments when ruling on a First Step Act motion.⁴⁷ Under the other approach, which the United States Court of Appeals for the First Circuit articulated in *United States v. Concepcion*, a district court must bifurcate a First Step Act motion into two analyses, separating the decision to resentence under the Act from the actual resentencing.⁴⁸ In deciding whether to resentence, the district court can only consider changes made by the Fair Sentencing Act.⁴⁹ To ensure that courts still have discretion, however, they may consider intervening developments when determining how much to resentence.⁵⁰ Nevertheless, both approaches apply the First Step Act as a corrective tool and largely leave its strength to the district court's discretion.⁵¹

The United States Court of Appeals for the Fourth Circuit's decision in *United States v. Lancaster*, however, went a step beyond the other circuit courts by *requiring* its district courts to consider intervening case law when reviewing sentences under the First Step Act.⁵² The court based its analysis on its 2020 decision in *United States v. Chambers*, which noted that the First Step Act's language does not prevent courts from applying intervening case law.⁵³

⁴⁷ See, e.g., *Maxwell*, 991 F.3d at 693 (granting district courts the discretion to determine how they rule on a First Step Act motion). From the perspective of the Sixth Circuit, giving this level of discretion to the trial court advances Congress's aim of reducing disparities between sentences. *Id.* at 692–93. For instance, if a district court decides, for whatever reason, that reducing a sentence would be unfair to similarly-sentenced offenders, it may decline to reduce the sentence, thereby fulfilling Congress's goal of sentencing equity. *Id.*

⁴⁸ See, e.g., 991 F.3d at 289 (noting that the statutory text limits the situations where a court can resentence but that the text is silent once a decision to resentence has been made).

⁴⁹ *Id.* Under the First Circuit's analysis, the statutory text limits the instances in which the First Step Act applies. *Id.* Consequently, the First Circuit determined that if a defendant did not commit a covered offense as required by the text, the Act offers no relief. *Id.*

⁵⁰ *Id.* at 289–90 The First Circuit observed that there is no language within the Act that precludes a court from using intervening case law once it has decided to recalculate the guidelines. See *id.* (quoting *United States v. Foreman*, 958 F.3d 506, 513 (6th Cir. 2020)) (stating that the First Step Act does not constrain a court's discretion once it decides that the Fair Sentencing Act would have changed the original sentence). The court observed that the lack of such language suggests that courts have discretion when actually resentencing. *Id.*

⁵¹ See *Maxwell*, 991 F.3d at 691 (noting that the First Step Act allows courts to consider intervening factors when determining whether and/or how to resentence an offender, thereby giving courts more opportunity to resentence under the Act). In these circuits' view, such consideration does not amount to a plenary resentencing. See *id.* (explaining how considering intervening circumstances does not equate to a plenary resentencing).

⁵² *United States v. Lancaster*, 997 F.3d 171, 175 (4th Cir. 2021); see *id.* at 179 (Wilkinson, J., concurring in the judgment) (pointing out that the *Lancaster* decision pushes the Fourth Circuit further than the other circuits); see also *United States v. Easter*, 975 F.3d 318, 326 (3d Cir. 2020) (holding that district courts must apply the section Sentencing Guidelines factors when resentencing).

⁵³ *Lancaster*, 997 F.3d at 175; see *United States v. Chambers*, 956 F.3d 667, 668 (4th Cir. 2020) (holding that district courts should consider intervening case law when recalculating sentencing guidelines). Citing *Chambers* as precedential authority, the *Lancaster* court remanded Lancaster's case back to the district court because it did not consider intervening case law or reconsider the sentencing guideline factors. *Lancaster*, 997 F.3d at 176.

Chambers involved a defendant whose sentencing guidelines were calculated based on his status as a career offender, a designation which was retroactively nullified by later case law.⁵⁴ The Fourth Circuit, after reviewing the case, required the district court to consider that case law on remand.⁵⁵ The *Lancaster* court interpreted that holding broadly and understood *Chambers* as requiring district courts to consider intervening case law in all cases.⁵⁶ Even still, the *Lancaster* court expressly disclaimed that it was requiring a plenary resentencing.⁵⁷ As Judge Wilkinson's concurring opinion noted, however, the Fourth Circuit's holding guarantees that the First Step Act has much more corrective power in the Fourth Circuit than it does elsewhere.⁵⁸

⁵⁴ 956 F.3d at 669. In 2003, Brooks Chambers was convicted of conspiracy to possess with intent to distribute more than fifty grams of cocaine and was eventually sentenced to just shy of twenty-two years in prison. *Id.* at 668–69. His sentencing guidelines were calculated based on his status as a career offender, which the court erroneously placed on him in *United States v. Harp*, 406 F.3d 242, 246 (4th Cir. 2005), *superseded by statute*, N.C. GEN. STAT. ANN. § 15A-1340.17(d) (West 2007), *as stated in* *United States v. White*, 458 F. App'x 281 (4th Cir. 2011). *Id.* at 669. In that case, the Fourth Circuit held that a court should use the maximum possible penalty for a hypothetical defendant in a crime to determine career offender status. *Harp*, 406 F.3d at 246. The Fourth Circuit later rejected that holding in *United States v. Simmons*, 649 F.3d 237, 241 (4th Cir. 2011) (en banc), and applied its decision retroactively. *Miller v. United States*, 735 F.3d 141, 146 (4th Cir. 2013). Therefore, *Simmons* nullified *Chambers*' career offender designation. *Simmons*, 649 F.3d at 241; *Chambers*, 956 F.3d at 669.

⁵⁵ *Chambers*, 956 F.3d at 675. *Chambers* could be read as only requiring district courts to consider intervening case law that has retroactive effect. *See Lancaster*, 997 F.3d at 177 (Wilkinson, J., concurring in the judgment) (noting that *Chambers* and *Lancaster* are distinguishable). The Fourth Circuit chose not to do so. *Id.* On remand, the district court decreased Lancaster's sentence from 180 months to 176 months. Order Regarding Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(1)(B) at 1, *Lancaster*, No. 4:09-cr-00019-BO (E.D.N.C. Aug. 25, 2021).

⁵⁶ *See Lancaster*, 997 F.3d at 175 (holding that district courts must briefly analyze intervening case law when deciding First Step Act motions). In Justice Wilkinson's view, this interpretation misunderstood *Chambers*, which dealt only with a retroactive guidelines error. *Id.* at 177 (Wilkinson, J., concurring in the judgment); *see Chambers*, 956 F.3d at 668 (concluding that retroactive guidelines errors must be corrected in a First Step Act motion).

⁵⁷ *Lancaster*, 997 F.3d at 176. Instead, the court noted that the First Step Act's scope of review is limited to resolving gaps left in the original sentencing. *Id.* Nevertheless, requiring district courts to recalculate sentencing guidelines using intervening case law could create gaps in the original sentencing after the fact. *Id.* at 179 (Wilkinson, J., concurring in the judgment). For instance, because the district court relied on Christopher Lancaster's career offender designation in his original sentencing, the district court had no basis to recalculate his sentence under the First Step Act. *Id.* at 176 (majority opinion). That change in the law created a gap in his sentencing that needed correction, even though it was originally not an issue. *Id.* Therefore, to recalculate sentencing guidelines accurately under the First Step Act, district courts must occasionally relitigate issues from the original sentencing. *Id.* at 179 (Wilkinson, J., concurring in the judgment). In Lancaster's case, the district court had to relitigate how much crack and powder cocaine Lancaster possessed at the time of his arrest, more than a decade after the fact. *Id.*

⁵⁸ *Id.* at 179 (Wilkinson, J., concurring in the judgment) (noting that the Fourth Circuit's First Step Act jurisprudence approximates plenary resentencing). Some circuits allow their district courts to have a similar amount of corrective power, but do not require them to exercise it. *See United States v. Maxwell*, 991 F.3d 685, 691 (6th Cir.) (holding that courts do not have to consider intervening case

Accordingly, there is wide disagreement among the circuits regarding the interpretation of the First Step Act, with different circuits reaching nearly opposite conclusions.⁵⁹ To correct the disagreement, the United States Supreme Court recently granted certiorari to a representative case and will determine the First Step Act's scope of authority during its 2021–2022 term.⁶⁰

III. FIXING THE LEGACY: SOLVING THE PARADOX

Each circuit that has addressed the scope of the First Step Act based its decision on its view of Congress's original intent.⁶¹ The United States Courts of Appeal for the Fifth, Ninth, and Eleventh Circuits adopted a narrow view of that intent based on a strict reading of the statutory text.⁶² On the other hand, the United States Court of Appeals for the Fourth Circuit (first in *United States v. Chambers*, and then in *United States v. Lancaster*) broadly interpreted the

law when ruling on a First Step Act motion), *petition for cert. pending*, No. 20-1653 (filed May 27, 2021).

⁵⁹ See *Ryan*, *supra* note 37, at 103–04 (explaining that the circuit courts are undecided on whether the First Step Act permits “plenary-approximate sentencing”). Compare *United States v. Hegwood*, 934 F.3d 414, 418 (5th Cir.) (forbidding courts from considering intervening factual and legal changes under the First Step Act), *cert. denied*, 140 S. Ct. 285 (2019), with *Lancaster*, 997 F.3d at 176 (requiring courts to consider intervening case law under the First Step Act). Beyond the legal debate, the circuit split has an arbitrary impact on the prison system, as offenders in the Fourth Circuit who committed their offenses before the Fair Sentencing Act receive a windfall from a more expansive reading of the First Step Act, whereas other offenders do not. See *Lancaster*, 997 F.3d at 180 (Wilkinson, J., concurring in the judgment) (citing *United States v. Kelley*, 962 F.3d 470, 478 (9th Cir. 2020)), *cert. denied*, 141 S. Ct. 2878 (2021)) (describing the arbitrariness of the majority's holding). For instance, the Fourth Circuit, which has jurisdiction over five states, has granted 1,160 First Step Act motions, whereas the Ninth Circuit, covering a much larger population in nine states, has granted only 168. U.S. SENT'G COMM'N, RESENTENCING REPORT, *supra* note 20, at 6 tbl.3.

⁶⁰ *United States v. Concepcion*, 991 F.3d 279 (1st Cir.), *cert. granted*, 142 S. Ct. 54 (2021). In taking up the case, the Supreme Court will determine whether district courts are allowed to consider intervening circumstances when ruling on a First Step Act motion. *Petition for a Writ of Certiorari*, at I, *Concepcion v. United States*, 142 S. Ct. 54 (2021) (No. 20-1650), 2021 WL 2181524, at *i.

⁶¹ See, e.g., *Concepcion*, 991 F.3d at 288 (quoting *Chambers*, 956 F.3d at 676 (Rushing, J., dissenting)) (concluding that Congress did not intend for the Fair Sentencing Act to allow courts to engage in a plenary resentencing); *Hegwood*, 934 F.3d at 418 (noting that Congress did not wish for courts to have significant corrective power under the First Step Act); *Chambers*, 956 F.3d at 673 (requiring district courts to consider intervening case law to not distort Congress's intent).

⁶² See, e.g., *Hegwood*, 934 F.3d at 418 (explaining that courts only have “limited authority” to resentence under the Act); see also *supra* notes 38–43 and accompanying text (describing the textual analysis of the First Step Act). A large part of the analysis in *Hegwood* concerns the meaning of the word “impose” and whether that word allowed courts to engage in plenary sentencing under section 404(b) of the First Step Act. *Hegwood*, 934 F.3d at 417–19. The court ultimately determined that Congress used the word because it intended for the original sentence to be conceptually replaced by the new sentence. *Id.* at 418. The more important analysis, in the court's view, was that the phrase “as if” limited the scope of authority under the First Step Act. See *id.* (applying a maxim of statutory construction and imputing that view to Congress).

statutory text to prevent an absurdity.⁶³ Neither analysis properly balanced the statutory text with Congress's intent; rather, the view espoused by the United States Court of Appeals for the First Circuit in *United States v. Concepcion* is the only approach that is mindful of both the statutory text and the discretion that Congress afforded to courts.⁶⁴

Resolving how a court should handle a First Step Act motion is primarily an exercise in statutory interpretation, which must begin by looking to the text.⁶⁵ By its terms, the First Step Act allows courts to impose a new sentence as if the Fair Sentencing Act's sentence reductions were in place at the time of the original sentencing.⁶⁶ A plain reading of the language clearly limits a district court's resentencing decision to whether the Fair Sentencing Act would have changed the original sentence.⁶⁷ Once a district court has decided to resentence under the First Step Act, however, the statutory text offers no guidance.⁶⁸ Therefore, the statutory text is unclear on this point, and courts may

⁶³ *Chambers*, 956 F.3d at 673; see *supra* notes 52–56 (describing the Fourth Circuit's interpretation of the First Step Act). The court thought that requiring the district court to ignore a retroactive guidelines error would result in an "absurdity." *Chambers*, 956 F.3d at 673. The Fourth Circuit noted that Congress intended to remedy gaps in the Fair Sentencing Act and argued that a court must consider intervening case law so as to not "pervert" that goal. *Id.* The *Lancaster* court used *Chambers* as persuasive authority for its holding. See *Lancaster*, 997 F.3d at 176 (deciding that the district court did not consider intervening case law as required by *Chambers*).

⁶⁴ See *Concepcion*, 991 F.3d at 289–90 (creating a two-step framework for reviewing First Step Act motions where a court could only consider changes made by the Fair Sentencing Act when deciding whether to resentence but could consider intervening case law when actually resentencing); see also First Step Act of 2018, Pub. L. No. 115-391, § 404(b), (c), 132 Stat. 5194, 5222 (21 U.S.C. § 841 note (Application of Fair Sentencing Act)) (allowing courts to resentence as if the Fair Sentencing Act had been in place but not requiring them to do so). In crafting its approach, the First Circuit found points from both the Fifth and Fourth Circuit's analyses persuasive, among others. See *Concepcion*, 991 F.3d at 289–90 (relying on *Hegwood* for authority for its textual analysis and on *Chambers* for its discretionary analysis).

⁶⁵ See *Hegwood*, 934 F.3d at 418 (citing *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 113 (2014)) (noting that statutory interpretation always begins with looking to the text); *Concepcion*, 991 F.3d at 286 (pointing out that statutory analysis must look to the controlling statute's text). Generally, the statutory text controls unless its meaning is unclear. *King v. Burwell*, 576 U.S. 473, 486 (2015).

⁶⁶ First Step Act § 404(b).

⁶⁷ See, e.g., *Hegwood*, 934 F.3d at 418 (noting that the "ground rules" of the First Step Act are limited to resentencing under sections 2 and 3 of the Fair Sentencing Act); *Concepcion*, 991 F.3d at 289 (pointing out that the First Step Act is concerned only with sections 2 and 3 of the Fair Sentencing Act). But see *United States v. Maxwell*, 991 F.3d 685, 692 (6th Cir.) (explaining how the phrase "as if" does not completely instruct courts on how to resentence under the act), *petition for cert. pending*, No. 20-1653 (filed May 27, 2021). Because the text is clear, the rules of statutory interpretation dictate that the statutory text on this point should control. See *Burwell*, 576 U.S. at 486 (observing that clear text must be read according to its plain meaning).

⁶⁸ See First Step Act § 404 (permitting but not requiring courts to reduce sentences under the Act). In fact, the statutory text implicitly allows courts to use their discretion in resentencing. *Concepcion*, 991 F.3d at 289–90 (quoting *United States v. Foreman*, 958 F.3d 506, 513 (6th Cir. 2020)) (stating that the First Step Act does not constrain a court's discretion once it decides that the Fair Sentencing Act would have changed the original sentence).

look to Congress's intent to resolve the text's meaning.⁶⁹ Looking to intent, then, the First Step Act's congressional testimony suggests that Congress intended the Act to empower courts to reduce sentences on an individualized basis.⁷⁰ Therefore, to realize Congress's intent best, courts should construe the First Step Act to give courts the broadest discretionary powers possible within the Act's textual confines.⁷¹

By effectively removing discretion from the equation, the Fifth Circuit's approach circumscribed Congress's legislative intent.⁷² On the other hand, the Fourth Circuit placed too much emphasis on the discretionary prong and gives the First Step Act significantly more corrective power than the statutory text contemplates.⁷³ Thus, neither approach strikes the right balance between text and intent, nor does either approach implement a faithful adaptation of what Congress intended.⁷⁴ By contrast, the First Circuit's approach in *Concepcion* followed the effect of the statutory text by confining a district court in deciding

⁶⁹ See *Burwell*, 576 U.S. at 486 (noting that courts may look to legislative history to resolve the meaning of unclear statutory text).

⁷⁰ 164 CONG. REC., *supra* note 22, at S7645 (statement of Sen. Richard Durbin). Senator Durbin was one of the Act's sponsors and gave some of the only testimony on the Act. See *id.* at S7639–S7648 (transcribing Senate debate on the First Step Act). Congress introduced the entire First Step Act as an amendment to the Save Our Seas Act of 2017, and consequently the First Step Act has no committee report. See S. 756, 115th Cong. (as reported in Senate, July 24, 2017) (comprising an act entitled “Save Our Seas Act of 2017”).

⁷¹ See *Maxwell*, 991 F.3d at 692–93 (implying that strict adherence to the Act's text does not realize Congress's intent). But see *Burwell*, 576 U.S. at 515–16 (Scalia, J., dissenting) (pointing out that courts may not disregard clear language to realize congressional intent).

⁷² Compare *Hegwood*, 934 F.3d at 418 (concluding that district courts may only consider changes made by the Fair Sentencing Act in resentencing under the First Step Act), with *Maxwell*, 991 F.3d at 692 (pondering how a district court could use discretion without being able to consider intervening case law). To the Sixth Circuit, a district court cannot realize Congress's intent of correcting disparities in cocaine sentencing on an individualized basis without the power to look beyond the Fair Sentencing Act. *Maxwell*, 934 F.3d at 692–93.

⁷³ See *United States v. Lancaster*, 997 F.3d 171, 179 (4th Cir. 2021) (Wilkinson, J., concurring in the judgment) (noting that requiring courts to consider intervening case law turns discretion to a mandate). Indeed, because the Fourth Circuit may screen a district court's First Step Act ruling for reasonableness, the *Lancaster* holding effectively disallows a district court from choosing not to resentence on equity grounds. See *United States v. Collington*, 995 F.3d 347, 360 (4th Cir. 2021) (imparting substantive and procedural reasonableness review for First Step Act motions); *Maxwell*, 934 F.3d at 693 (involving a case where the district court used its discretion and declined to resentence because it would create an inequity between crack and powder cocaine sentencing).

⁷⁴ See First Step Act of 2018, Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (21 U.S.C. § 841 note (Application of Fair Sentencing Act)) (only allowing resentencing if the Fair Sentencing Act would have changed the original sentence). By swinging too far in favor of strict adherence to the text, the Fifth Circuit ignores a principal sponsor's characterization of the legislation. See 164 CONG. REC., *supra* note 22, at S7645 (statement of Sen. Richard Durbin) (explaining that section 404 of the First Step Act was designed to correct disparities in cocaine sentencing through individualized determinations). On the other hand, the Fourth Circuit ignores that section 404(b)'s text limits its scope of review. First Step Act § 404, see *Hegwood*, 934 F.3d at 415 (rejecting that the First Step Act allows a plenary resentencing).

whether to resentence but affords the necessary discretion to that court in *actually* resentencing.⁷⁵ In doing so, the First Circuit gave complete discretion to district courts as long as an offense meets the Act’s textual requirements, and empowered its district courts to realize Congress’s goal in the manner that Congress intended.⁷⁶ Thus, when the Supreme Court determines the Act’s scope in its 2021–22 term, it should adopt the First Circuit’s two-step approach, as it is the only approach that both adheres to the statutory text and realizes Congress’s intent.⁷⁷

CONCLUSION

In 2021, in *United States v. Lancaster*, the United States Court of Appeals for the Fourth Circuit held that a district court ruling on a First Step Act motion must consider intervening case law when deciding whether to resentence under the Act. This decision, along with that of the United States Court of Appeals for the Fifth Circuit in *United States v. Hegwood*, is misguided because it misunderstands the effect of the statutory text. Specifically, the Fourth Circuit’s decision effectively transformed a congressional grant of discretion into a mandate, whereas the Fifth Circuit’s decision treats that discretion as a nullity. On the other hand, the two-step framework espoused by the United States Court of Appeals for the First Circuit in *United States v. Concepcion* is preferable for two reasons. First, by precluding district courts from considering intervening case law when deciding whether to resentence under the First Step

⁷⁵ See First Step Act § 404 (textually limiting the Act’s scope); *United States v. Concepcion*, 991 F.3d 279, 289–90 (1st Cir.) (giving courts discretion within the Act’s textual limits), *cert. granted*, 142 S. Ct. 54 (2021). By creating a two-step framework, the First Circuit satisfied the legal requirements imposed by 18 U.S.C. § 3582(c) (disallowing courts from disturbing criminal sentences absent explicit congressional authorization) and still give district courts the deference that the statute contemplated. *Concepcion*, 991 F.3d at 289–90. Indeed, the First Circuit’s approach in *Concepcion* allows district courts to make case-by-case determinations within the statutory framework. See *id.* at 292 (affirming the trial court based on its “reasoned,” “reasonable,” and individualized assessment of Carlos Concepcion’s motion).

⁷⁶ Cf. *Maxwell*, 934 F.3d at 692–93 (noting that courts are able to correct inequities in cocaine sentencing by using their discretion to determine whether a sentence reduction would actually reduce inequity).

⁷⁷ See First Step Act § 404(b) (imposing a textual limit through the “as if” phrase); see also *Hegwood*, 934 F.3d at 418 (taking the “as if” phrase of the First Step Act as a limiting phrase that only includes explicitly enumerated items). But see 164 CONG. REC., *supra* note 22, at S7645 (statement of Sen. Richard Durbin) (explaining that the Act sought to empower judges to make individualized determinations); *Maxwell*, 934 F.3d at 692 (noting that discretion requires courts to look beyond the “as if” phrase). Other circuits swung too far in favor of either text or intent, at the expense of the other. See *Hegwood*, 934 F.3d at 418 (severely limiting the scope of the First Step Act through strict adherence to its text); *Lancaster*, 997 F.3d at 176 (considerably broadening the First Step Act by glossing over the textual limitations of the “as if” phrase). As the First Circuit showed, however, the Act’s text and Congress’s intent do not necessarily have to compete with each other. See *Concepcion*, 991 F.3d at 289–90 (balancing Congress’s intent with the Act’s textual limitations).

Act, this approach faithfully implements the statutory text. Second, this approach affords district courts a sufficient level of discretion so that they may realize Congress's goal of correcting sentencing inequities. Therefore, when the Supreme Court decides on the First Step Act's scope of review, it should adopt the two-step approach elucidated in *Concepcion* to give full effect to Congress's intent.

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