IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 12-5226/12-5582

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CORNELIUS DEMORRIS BLEWETT

and JARREOUS JAMONE BLEWITT,

Defendants-Appellants.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF DEFENDANTS-APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 12-5226/5582 Case Name: U.S. v. Blewett

Name of counsel: Ria Tabacco Mar

Pursuant to 6th Cir. R. 26.1, NAACP Legal Defense and Educational Fund, Inc.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on August 8, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Ria Tabacco Mar

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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Statement of Interest of *Amicus Curiae*[1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is the nation's first civil rights law firm. LDF was founded as an arm of the NAACP in 1940 by Charles Hamilton Houston and Thurgood Marshall to redress injustice caused by racial discrimination and to assist African Americans in securing their constitutional and statutory rights. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights.

LDF has a longstanding concern with racial discrimination in the administration of criminal justice, including the devastating effects of America's "War on Drugs" and its discriminatory treatment of African Americans in the context of federal crack-cocaine sentencing. Thus, LDF repeatedly called on Congress to eliminate the 100:1 disparity in sentences for crack and powder cocaine offenses. *See* Letters from Theodore M. Shaw and John Payton, Director Counsels, NAACP Legal Defense & Educational Fund, Inc., to Congress (Feb. 11 and 28, 2008; Apr. 9, 2009) (on file with author). Furthermore, LDF served as

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[1] All parties have consented to the filing of the NAACP Legal Defense and Educational Fund's brief as *amicus curiae* in support of Appellants. Pursuant to Fed. R. App. P. 29(c)(5), counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

amicus curiae in *Kimbrough v. United States*, 552 U.S. 85 (2007) and argued that the extensive evidence of racial disparities associated with federal crack-cocaine sentencing is an appropriate consideration when fashioning an individualized sentence.

LDF also served as counsel of record or *amicus curiae* in federal and state court litigation challenging the arbitrary role of race in capital sentencing, *see McCleskey v. Kemp*, 481 U.S. 279 (1987), *Furman v. Georgia*, 408 U.S. 238 (1972); the influence of race on prosecutorial discretion, *see United States v. Armstrong*, 517 U.S. 456 (1996), *United States v. Bass*, 266 F.3d 532 (6th Cir. 2001); the correlation between felon disenfranchisement, racial bias, and racial disproportionality in the criminal justice system, *see Farrakhan v. Gregoire*, 590 F.3d 989 (9th Cir. 2010); and the discriminatory use of peremptory challenges, *see Miller-El v. Dretke*, 545 U.S. 231 (2005), *Johnson v. California*, 545 U.S. 162 (2005), *Batson v. Kentucky*, 476 U.S. 79 (1986).

Given its expertise in matters concerning racial discrimination in the criminal justice system, LDF believes its perspective would be helpful to the Court in resolving the issues presented in this case.

ARGUMENT

The sentencing disparity between crack-cocaine and powder cocaine (the "100:1 ratio" or "100:1 classification")—and its particularized impact in the African-American community—have become notorious symbols of racial discrimination in the modern criminal justice system. Since the enactment of the 100:1 ratio, African Americans have suffered a panoply of direct and indirect harms, including pronounced disparities in rates of conviction and incarceration for drug offenses, disparities in lengths of sentences, and disparities in collateral consequences, as compared to whites. The unjust and arbitrary nature of the 100:1 ratio has provoked widespread criticism and gravely undermined the legitimacy of the criminal justice system. *See* Part II, *infra.*

In 2010, Congress enacted the Fair Sentencing Act ("FSA") which eliminated the 100:1 ratio, and replaced it with a much smaller disparity for crack and powder cocaine offenses. In enacting the law, Congress recognized that the 100:1 ratio lacked any penological justification; there was no evidence that crack cocaine was one hundred times more harmful than powder cocaine; and that the overwhelming majority of persons subject to excessive sentences under the 100:1 ratio were African American. *Id.*

The cases of Cornelius Blewett and Jarreous Blewitt ("the Blewetts") are an illustration. Both are serving ten-year mandatory minimums for offenses involving

less than 30 grams of crack—offenses that would not have been subject to mandatory minimums had they involved powder cocaine. The FSA helps to remedy this unequal treatment: under the statute, the Blewetts are not subject to any mandatory minimum sentence. The Government, however, insists that the FSA should be interpreted so that the pre-FSA 100:1 classification keeps the Blewetts in prison. That interpretation raises grave constitutional problems, and this Court should reject it. The failure to apply the FSA to the Blewetts and similar cases will undermine the integrity of the criminal justice system in much the same way as the 100:1 ratio did prior to the enactment of the FSA.

I. The 100:1 Federal Sentencing Ratio Between Crack and Powder Cocaine Is Unjust and Discriminatory.

African Americans have suffered a vast array of well-documented and undisputed harms as a result of the application and the perpetuation of the 100:1 ratio. These harms include:

- African Americans have been incarcerated for federal crack-related offenses in substantially higher numbers and proportions than whites, even though whites use crack cocaine in greater numbers. Although more than 50% of reported crack users are white, whites represent less than 10% of federal convictions for crack offenses.[2] Meanwhile

[2] Substance Abuse and Mental Health Services Administration, Results from the 2003 National Survey on Drug Use & Health, Table 1.47B, *available at* http://www.oas.samhsa.gov/Nhsda/2k3tabs/Sect1peTabs1to66.htm#tab1.47B; United States Sentencing Comm'n ("USSC"), 2010 Sourcebook of Federal Sentencing Statistics tbl.34.

African Americans comprise approximately 32% of reported crack cocaine users, but 82% of federal convictions for crack offenses.[3]

- African Americans have been subject to longer federal prison sentences because of the 100:1 ratio. In 1986, prior to the institution of the 100:1 ratio, the average federal drug sentence for African Americans was 11% higher than it was for whites. Four years later, after the introduction of the 100:1 ratio, the average federal drug sentence for African Americans was 49% higher than for whites.[4] As of 2003, African Americans served nearly as much time in prison for a drug offense in the federal system (58.7 months) as whites did for a violent offense (61.7 months).[5]

- The exponentially longer prison terms stemming from the 100:1 ratio subject the broader African-American community to a host of negative consequences in excess of the initial sentence, including exclusion from labor markets, voting disenfranchisement, civic disengagement and damage to familial and social networks.[6] Moreover, reintegration and reentry upon release are more difficult after prolonged incarceration because family and community relationships are often attenuated and support networks are typically deteriorated.[7]

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[3] *Id.*

[4] *See* Barbara Stone Meierhoefer, Federal Judicial Center, *The General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentence Imposed* 20 (1992), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/geneffmm.pdf/$file/geneffmm.pdf).

[5] *Compendium of Federal Statistics, 2003* (Oct. 2005), Table 7.16, p.112

[6] *See generally* Dorothy E. Roberts, *The Social and Moral Costs of Mass Incarceration in African American Communities*, 56 Stan. L. Rev. 1271, 1281-85, 1291-97 (2004); *see also* Steve Rickman, *The Impact of the Prison System on the African Community*, 34 How. L.J. 524, 526 (1991); Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. Gender Race & Just. 253, 259 (2002).

[7] *See* James P. Lynch & William J. Sabol, *Prisoner Reentry in Perspective*, 3 Crime Pol'y Rep. 1, 17-19 (2001).

Given the fact that African Americans have been consistently overrepresented among those who have been prosecuted and sentenced under the 100:1 ratio, African Americans will certainly bear the brunt of any decision finding that the FSA is not retroactive. Before the FSA's enactment, African Americans comprised 78.5% of crack cocaine defendants and 78.8% of crack-cocaine offenders who received mandatory minimum penalties. United States Sentencing Comm'n ("USSC"), *2010 Annual Report*, 35-36 (2010).

II. Congress Enacted the FSA to Remedy the Arbitrary and Racially Discriminatory 100:1 Ratio.

In light of the overwhelming evidence that: (1) the 100:1 ratio was arbitrary and lacked any support in chemistry or penology; and (2) the classification imposed excessive sentences on African Americans, the USSC issued four reports[8] to Congress where it repeatedly explained that the 100:1 ratio was "too high and unjustified," that it "reflected unjustified race based differences," and that it should be significantly modified. *Dorsey v. United States* 132 S. Ct. 2321, 2329 (2012).[9]

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[8] *See*, USSC, Special Report to Congress: Cocaine and Federal Sentencing Policy 197–98 (Feb. 1995); USSC, Special Report to Congress: Cocaine and Federal Sentencing Policy 8 (Apr. 1997); USSC, Report to Congress: Cocaine and Federal Sentencing Policy 91, 103 (May 2002); USSC, Special Report to Congress: Cocaine and Federal Sentencing Policy 8 (May 2007) ("2007 Report").

[9] *See also* 2007 Report at 8 (noting that the crack cocaine penalties disproportionately affect minorities and finding that the "quantity-based penalties

A wide range of voices echoed the USSC, including judges, civil rights advocates, and congressional leadership.[10] Even the Department of Justice ("DOJ") recognized that "the current cocaine sentencing disparity is difficult to justify based on the facts and science" and that the racial "impact of these laws has fueled the belief across the country that federal cocaine laws are unjust."[11] DOJ proposed

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overstate the relative harmfulness of crack cocaine compared to powder cocaine" and "overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality."); USSC, *Fifteen Years of Guidelines Sentencing* 132 (Nov. 2003) (concluding that eliminating the 100:1 sentencing disparity would do more to reduce the sentencing gap between African Americans and whites "than any other single policy change" and would "dramatically improve the fairness of the federal sentencing system").

[10] *See* 2007 Report at B-1 (testimony of United States District Court Judge Reginald Walton); *id.* at B-17 to B-24 (testimony of community representatives and interested parties). In 2010, groups such as the National African American Drug Policy Coalition, the National Association of Blacks in Criminal Justice, The National Coalition of Black Civic Participation, the National Urban League, and the NAACP submitted letters to Congress highlighting the racial implications of the Sentencing Guidelines and the 100:1 ratio and calling for legislation to correct the sentencing disparity. Letter from "organizations committed to the fairness of the justice system," to Nancy Pelosi, Speaker, House of Representatives (July 15, 2010), *available at* http://opensocietypolicycenter.org/wpcontent/uploads/PelosiCoalitionLetter-Crack-7.28.10.pdf. *Amicus* was also among those who called on Congress to remedy the discriminatory treatment of African Americans in crack-cocaine sentencing. Letters from Theodore M. Shaw and John Payton, Director Counsels, NAACP Legal Defense & Educational Fund, Inc., to Congress (Feb. 11 and 26, 2008; Apr. 28, 2009) (on file with author).

[11] *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. (Apr. 29, 2009).

formulating a policy that would "completely eliminate the sentencing disparity between crack and powder cocaine."[12]

In 2010, Congress finally heeded these recommendations and enacted the FSA. *Dorsey*, 132 S. Ct. at 2329. The FSA's legislative history makes clear that the unfair sentencing of African Americans was a motivating factor behind the Act.[13]

Thus, for example, Senator Dick Durbin, the author of the FSA, stated "[H]eavy [crack-cocaine] sentencing enacted years ago took its toll primarily in the African-American community. It resulted in the incarceration of thousands of people . . . and a belief in the African-American community that it was

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[12] *Id.* at 10; *see also* Assistant Attorney General Lanny A. Breuer, Speech at the Benjamin N. Cardozo School of Law (Mar. 13, 2012) ("Early in this administration, the Justice Department began advocating to completely eliminate the disparity in crack and cocaine sentencing, and reduce the ratio to 1:1. Indeed, days after I joined the Justice Department, in 2009, I was proud to testify before Congress on behalf of the administration in favor of eliminating the disparity.").

[13] 156 CONG. REC. S1680-02, (daily ed. Mar. 17, 2010) (statement of Sen. Durbin), 156 Cong. Rec. WL 956335. *See also Fair Sentencing Act of 2010 Before the Judiciary Committee on Crime, Terrorism and Homeland Security* (2009) (statement of Asa Hutchinson, Former Administrator, U.S. Drug Enforcement Administration, noting that sentencing reform on this issue "would better reduce the gap in sentencing between blacks and whites than any other single policy change, and it would dramatically improve the fairness of the Federal sentencing system").

fundamentally unfair."[14] Steny Hoyer, Majority Leader of the House of Representatives explained that the:

> 100-to-1 disparity has had a racial dimension as well, helping to fill our prisons with African Americans disproportionately put behind bars for longer. The 100-to-1 disparity is counterproductive and unjust. That's not just my opinion, but the opinion of a bipartisan U.S. Sentencing Commission, the Judicial Conference of the United States, the National District Attorneys Association, the National Association of Police Organizations, the Federal Law Enforcement Officers Association, the International Union of Police Associations, and dozens of former Federal judges and prosecutors.[15]

The concerns crossed political lines. For example, the FSA was co-sponsored by longtime conservative leader Senator Jeff Sessions.[16] Additionally, Republican Representative Daniel Lungren, who helped author the original 100:1 ratio, supported the FSA and stated that the 100:1 ratio "has led to racial

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[14] 156 CONG. REC. S1680-02 (2010) (statement of Sen. Durbin). Indeed, the USSC noted that the "perceived improper unwarranted disparity based on race fosters disrespect for and lack of confidence in the criminal justice system." United States Sentencing Comm'n, Report to Congress: Cocaine and Federal Sentencing Policy 103 (May 2002) ("2002 Report"). *See also*, Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L. REV. 1143, 1165 (2006) ("[w]hen citizens perceive the state to be furthering injustice . . . they are less likely to obey the law, assist law enforcement, or enforce the law themselves"); Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399 (2005) ("the perceived legitimacy of one law or legal outcome can influence one's willingness to comply with unrelated laws"); Tom R. Tyler, *Why People Obey the Law* 3-4 (1990) (cooperation with the law depends on the perception that the law is "just").

[15] 156 CONG. REC. H6196-01 (2010) (statement of Rep. Hoyer).

[16] Fair Sentencing Act of 2010, S. 1789, 111th Cong. (introduced Oct. 15, 2009).

sentencing disparities which simply cannot be ignored in any reasoned discussion of this issue."[17] Lungren also acknowledged the arbitrariness of the sentencing disparity: "We initially came out of committee with a 20-to-1 ratio. By the time we finished on the floor, it was 100-to-1. We didn't really have an evidentiary basis for it, but that's what we did, thinking we were doing the right thing at the time."[18]

The Congressional intent behind the FSA was clear: to remedy the arbitrary and discriminatory 100:1 ratio.[19]

III. The Panel Correctly Applied the Canon of Constitutional Avoidance in Interpreting the FSA.

Given the considerable record evidence that the 100:1 ratio was arbitrary and treats citizens unequally based on race—and Congress's knowledge of that record evidence—a failure to apply the FSA retroactively raises two significant constitutional questions. *First*, an interpretation of the FSA that denies retroactivity risks imputing a discriminatory purpose to Congress, which was aware that the ratio lacked a penological justification, and discriminated against

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[17] 156 CONG. REC. H6196-01 (2010) (statement of Rep. Lungren).

[18] *Id.*

[19] The FSA replaced the 100:1 classification with an 18:1 sentencing ratio. *Amicus* maintains that crack and powder cocaine offenses should be treated equally, but adopting that view is not necessary for the resolution of this case. Congress explicitly and unequivocally recognized that the 100:1 ratio lacks any justification.

African Americans, when the FSA was passed. *Second*, there is no legitimate state interest in imprisoning people under a sentencing classification that has been recognized as arbitrary and discriminatory. Retroactive application of the FSA, however, avoids these substantial constitutional concerns. *See United States v. Blewett*, 719 F.3d 482, 487 (6th Cir. 2013), *vacated*, pending rehearing, U.S. v. Blewett No. 12-5226 (6th Cir. July 11, 2013). ("'[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'") (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.,* 213 U.S. 366, 40 (1909)) (additional citation omitted).

A. The Government's Interpretation of the FSA Raises Serious Questions of an Illicit Racial Purpose.

The Government insists Congress did not intend for the FSA to apply to persons already sentenced under the 100:1 classification. *See* Gov't Pet., DOC. 006111578150 at 11. But, as the Panel discussed, the Government's interpretation risks imputing an unconstitutional purpose to Congress's action. *See Blewett*, 719 F.3d at 487-88.

An examination of the equal protection principles at issue is instructive. The equal protection component of the Fifth and Fourteenth Amendments "'requires that all persons subjected to legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities

imposed.'" *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 602 (2008) (quoting *Hayes v. Missouri*, 120 U.S. 68, 71-72 (1887) (alteration omitted)).[20] The judiciary must be particularly vigilant in enforcing this principle, which *amicus* refers to as the impartiality principle, where it has been the most often dishonored: the law's unequal treatment of African Americans. *See, e.g., Rose v. Mitchell*, 443 U.S. 545, 554 (1979) ("Discrimination on account of race was the primary evil at which the Amendments adopted after the War Between the States, including the Fourteenth Amendment, were aimed."); *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880) (recognizing that the "common purpose" of the Reconstruction Amendments, including the Equal Protection Clause, was to "secur[e] to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that [whites] enjoy").[21] Nowhere is impartiality more important than in the criminal justice system, because "[d]iscrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice." *Rose*, 443 U.S. at 555.

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[20] "[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth." *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) (plurality opinion); *see also Bowman v. United States*, 564 F.3d 765, 772 (6th Cir. 2008) (citing *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954)).

[21] Impartiality should not be conflated with false symmetries. Race-conscious classifications designed, for example, to achieve racial diversity in education or remedy prior racial discrimination are consistent with the impartiality principle. *See generally Grutter v. Bollinger*, 539 U.S. 306 (2003); *Paradise*, 480 U.S. at 166 (plurality opinion).

A law violates the impartiality principle when it is motivated by a racially discriminatory purpose. *See, e.g., Hunter v. Underwood*, 471 U.S. 222, 233 (1985). Individuals subject to unduly harsh mandatory minimum sentences for crack offenses under the 100:1 ratio were overwhelmingly African-American. When the consequences of a legislative classification track race as closely as they do here, no additional evidence is necessary to support a finding of racial purpose. *See Vill. of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.") (citing, *inter alia*, *Yick Wo v. Hopkins*, 118 U. S. 356 (1886), and *Gomillion v. Lightfoot*, 364 U. S. 339 (1960)).

That principle applies with special force here because, by 2010, Congress recognized that the vast majority of those who received an excessive sentence due to the 100:1 classification were African-American. *See* Parts I & II, *supra*. As Judge Calabresi stated in 1995: "If Congress . . . was made aware of both the dramatically disparate impact among minority groups of enhanced crack penalties and the limited evidence supporting such enhanced penalties," but were to allow the 100:1 classification to persist, "subsequent equal protection challenges based on claims of discriminatory purpose might well lie." *United States v. Then*, 56 F.3d 464, 468 (2d Cir. 1995) (concurring opinion).

For these reasons, the Government's interpretation of the FSA raises the prospect of assigning a discriminatory purpose to Congress. The Blewetts, by contrast, have offered a persuasive interpretation of the statute that raises none of these concerns and should therefore be adopted. *See* Blewetts' En Banc Br. Doc. 006111771993 at 3-14.

B. Interpreting the FSA to Deny Resentencing Would Implicate Equal Protection Regardless of Congress's Purpose.

The Government's interpretation of the FSA would raise serious equal protection concerns even if this Court concluded it would not impute a discriminatory purpose to Congress, because the impartiality principle does more than ensure that laws are not motivated by race. To withstand equal protection scrutiny, any "classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" *Bowman*, 564 F.3d at 776 (quoting *Johnson v. Robison*, 415 U.S. 361, 374-75 (1974)) (additional citations omitted).

This standard, known as rational-basis review, is applied with more or less rigor depending on the context. It is applied deferentially in challenges to most social and economic legislation, where "'the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.'" *Northville Downs v. Granholm*, 622 F.3d 579, 586 (6th Cir. 2010) (quoting *City of*

Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985)). By contrast, courts have applied this review more rigorously to certain unusual classifications that raise doubts about the integrity of the democratic process. This more rigorous approach has been called "'rational basis with a bite.'" *Am. Express Travel Related Servs. Co., v. Kentucky*, 641 F.3d 685, 692 (6th Cir. 2011). More generally, it can be seen as a type of heightened review that calls for "'careful consideration'" of whether the legislature has fulfilled its duty to act impartially. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (citation omitted); *see Cleburne*, 473 U.S. at 452 (Stevens, J., joined by Burger, C.J., concurring) (arguing that the tiered approach to equal protection scrutiny represents a single standard whose application varies with context, and explaining that the term "'rational'" "includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially").

The Supreme Court has applied such heightened review to invalidate statutory classifications that discriminate against identifiable groups, even when classifications targeting the group are not categorically subject to heightened scrutiny. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 635 (1996) (discrimination against gays and lesbians); *Cleburne*, 473 U.S. at 450 (discrimination against people with intellectual disabilities); *see also Burstyn v. City of Miami Beach*, 663 F.Supp. 528, 536–37 (S.D. Fla. 1987) (discrimination against the elderly).

Heightened review is also warranted where a classification is designed to entrench the privileged treatment of a favored group. *See Zobel v. Williams*, 457 U.S. 55, 63-64 (1974) (invalidating Alaska's dividend distribution scheme that provided more money to residents who had lived in the state longer); *Craigmiles v. Giles,* 312 F.3d 220, 224 (6th Cir. 2002) (invalidating an economic regulation aimed at "protecting a discrete interest group from economic competition"). In both of these circumstances, the democratic process has broken down, and the legislature has no legitimate justification for treating similarly-situated people differently.

These same principles apply here. As Judge Calabresi recognized in 1995, even if evidence concerning the 100:1 classification were insufficient to establish racially illicit purpose, that evidence "might nonetheless serve to support a claim of irrationality," given the more rigorous review that has been applied when "courts have reason to be concerned about possible discrimination." *Then*, 56 F.3d at 468 (citations omitted).[22] By 2010, Congress knew that the 100:1 ratio lacked any

[22] Judge Calabresi was not alone in noting serious constitutional concerns about the 100:1 classification well before 2010. *See, e.g., United States v. Smith*, 73 F.3d 1414, 1418-22 (6th Cir. 1996) (Jones, J., concurring) (concluding—in light of, *inter alia*, the fact that crack prosecutions overwhelmingly target African Americans and the evidence that crack and powder cocaine are pharmacologically identical—that the failure to reconsider precedents upholding the 100:1 ratio "risk[s] substantial harm to the integrity of our constitutional jurisprudence," and that "[c]ontinued use of the law to perpetuate a result at variance with rationality and common sense is indefensible"); *United States v. Dumas*, 64 F.3d 1427, 1432 (9th Cir. 1995) (Bochever, J., concurring) ("If it were an open question in this circuit, one might find that the imposition of the 100 to 1 ratio with its invidious

evidence-based justification, even at the time it was enacted, and that the overwhelming majority of defendants who received excessively harsh sentences as a result were African American. If, as the Government contends, Congress nonetheless decided to maintain the arbitrary and discriminatory 100:1 classification for anyone already imprisoned, that would be a decision of an "'unusual character,'" warranting "'careful consideration to determine whether [it is] obnoxious'" to the constitutional requirement of equal protection. *Windsor*, 133 S. Ct. at 2692 (quoting *Romer*, 517 U.S. at 633) (additional quotation marks and citation omitted).

Careful scrutiny is especially warranted here given the long history of facially race-neutral laws targeting African Americans. *See, e.g.*, *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 102 (1965) (Fortas, J., concurring) (explaining that "Shuttlesworth's arrest [for loitering] was an incident in the tense racial conflict in Birmingham"); Douglas A. Blackmon, *Slavery By Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* 53 (2008)

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racial effects is so arbitrary and capricious as to lack a rational basis."); *United States v. Willis*, 967 F.2d 1220, 1226-27 (8th Cir. 1992) (Heaney, J., joined by Lay, J., concurring) (noting that "drug researchers have concluded that the short-term and long-term effects of crack and powder cocaine are identical," and referring to racial consequences); *see also United States v. Reddrick*, 90 F.3d 1276, 1284 (7th Cir. 1996) (Cudahy, J., concurring) ("The rationality of the 100:1 crack/powder ratio and its implications for equal protection will no doubt be the subject of continuing examination both within the judiciary and without.") (citing Judge Jones's opinion in *Smith* and Judge Calabresi's opinion in *Then*).

(detailing the historical use of facially neutral measures like vagrancy laws to subjugate African Americans).

The 100:1 classification cannot survive such careful scrutiny, because it is not supported by a legitimate, impartial state interest. *See, e.g.*, *Romer*, 517 U.S. at 632-33 (recognizing that a classification must be supported by "an independent and legitimate legislative end"); *see also Cleburne*, 473 U.S. at 446-47 (majority); *id.* at 452 (Stevens, J., concurring); *Zobel*, 457 U.S. at 63-64. This is not a case where the state proffered an independent, neutral justification for a classification (providing a benefit to veterans), which had adverse consequences on women. *See Personnel Adm. of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Here, the Government's proffered justification of finality, *see* En Banc Pet. at 10-11, is a euphemism for ossifying an arbitrary and discriminatory classification.

To be clear, *amicus* recognizes that finality can be a legitimate state interest. *See generally Penry v. Lynaugh*, 492 U.S. 302, 313-14 (1989) (citation omitted).[23] But not always, and not here. "'As Justice Harlan wrote: 'There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose.'" *Id.* at 330.

The Blewetts are imprisoned because of a 100:1 sentencing ratio, which, as Congress itself recognized, dramatically overstates the harm caused by crack as

[23] As the Blewetts note, 18 U.S.C. § 3582(c)(2) provides an exception to the general rule of finality. *See* Blewetts' En Banc Br. at 5-6, 19.

compared to powder cocaine, and thereby fails "to treat[] like offenders alike," or "treat[] different offenders (*e.g.*, major drug traffickers and low-level dealers) differently." *Dorsey*, 132 S. Ct. 2328. Not only is that classification arbitrary, it "reflect[s] unjustified race-based differences." *Id.* There is no legitimate state interest in keeping the Blewetts in prison because of a classification that Congress has recognized to be arbitrary and discriminatory. To do so would require their sentences to "'rest at a point'" they "'ought properly never to repose.'" *Penry*, 492 U.S. at 330.[24]

C. The Government's Interpretation of the FSA Raises Eighth Amendment Concerns.

In addition to the arguments set forth here, LDF supports the argument made by *amicus curiae* National Association of Criminal Defense Lawyers. The Government's interpretation of the FSA raises substantial problems under the Eighth Amendment as well.

The Eighth Amendment is implicated when the law imposes a sentence in an arbitrary manner with what are known to be pronounced effects on a particular race. *See Furman*, 408 U.S. at 244-45 (Douglas, J., concurring) ("[I]t is 'cruel and unusual' to apply the death penalty—or any other penalty—selectively to

[24] The foregoing does not undermine Congress's authority to decide, in general, that changes to criminal statutes shall not benefit persons already sentenced. This case is unique for two reasons, which Congress itself recognized: (1) the 100:1 ratio lacks—and indeed never had—a legitimate penological justification; and (2) the ratio reflects unjustified differences based on race.

minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board."). Race cannot—and must not—play any role in the imposition of criminal sanctions. *Rose*, 443 U.S. at 555. Denying retroactive effect to the FSA, and continuing the well-documented racial discrimination associated with the 100:1 ratio, violates this basic precept.

CONCLUSION

"The concept of equal justice under law requires the State to govern impartially. The sovereign may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective." *Lehr v. Robertson*, 463 U.S. 248, 265 (1983) (citations omitted). The Government's interpretation of the FSA conflicts with these principles, and the Panel properly rejected it in an appropriate exercise of constitutional avoidance.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the forgoing brief complies with the type-volume limitation provided in Fed. R. App. P. 29(c) and 32(a)(7)(B). The foregoing brief uses Times New Roman (14-point) proportional type, and contains 4,962 words according to the Microsoft word count function.

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's system.

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