

No. 19-2204

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

UNITED STATES OF AMERICA,

Appellee,

v.

EMILIANO EMMANUEL FLORES-GONZALES,

Appellant.

On Appeal from the Appeal from the United States District Court
for the District of Puerto Rico, Hon. Francisco A. Besosa, U.S. District Judge

**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
IN SUPPORT OF APPELLANT**

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Pursuant to Federal Rule of Appellate Procedure 29 and this Court's Order dated August 22, 2022 granting *en banc* review, the NAACP Legal Defense and Educational Fund, Inc. (LDF) hereby respectfully moves this Court for leave to file the attached *amicus* brief in support of Appellant Emiliano Flores-González.

ARGUMENT

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is the nation's first and foremost civil rights law organization. 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 long been concerned about the persistent and pernicious influence of race on the administration of the criminal legal system, including in the discriminatory treatment of Black people at sentencing. For example, LDF advocated for Congress to eliminate the 100:1 sentencing disparity for crack and cocaine offenses. *See* Ltrs. From Theodore Shaw and John Payton, Directors Counsel, NAACP Legal Defense & Educational Fund, Inc., to Congress (Feb. 11, 2008; Apr. 9, 2009) (on file). LDF further served as *amicus curiae* in *Kimbrough v. United States*, 552 U.S. 86 (2007), arguing that courts should be permitted to vary downwards from the United States Sentencing Guidelines by considering racial disparities in federal crack-cocaine sentencing.

Since then, LDF has continued to serve as counsel of record and *amicus curiae* urging courts to acknowledge and combat the impacts of racial bias on sentencing regimes. *See, e.g., Buck v. Davis*, 137 S. Ct. 759 (2017) (vacating capital sentence due to improper injection of racial discrimination into sentencing proceedings); *United States v. Blewett*, 746 F.3d 647 (6th Cir. 2013) (addressing whether Fair Sentencing Act applied retroactively in light of racially discriminatory impacts of crack-cocaine sentencing disparity).

Based on the historical and geographical breadth of its expertise in identifying and combating racial inequality in the administration of criminal justice, including at sentencing, LDF's perspective will assist the Court. Moreover, all parties have consented to the filing of this *amicus* brief.

For the foregoing reasons, Amicus respectfully requests that the Court grant this motion for leave to file a brief as *amicus curiae* in support of Appellant.

Respectfully Submitted,

/s/ Adam Murphy

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October 28, 2022

*Counsel for Amicus Curiae NAACP
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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Adam Murphy _____
Adam Murphy

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d), I hereby certify that:

This motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because this motion contains 364 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f). As permitted by Federal Rule of Appellate Procedure 32(g), I have relied upon the word count feature of Microsoft® Word for Microsoft 365 MSO (Version 2209 Build 16.0.15629.20208).

This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this motion has been prepared in Times New Roman 14-point font using Microsoft® Word for Microsoft 365 MSO (Version 2209 Build 16.0.15629.20208).

/s/ Adam Murphy

Adam Murphy

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**MOTION FOR LEAVE
TO FILE NOTICES OF APPEARANCE**

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Counsel for Amicus Curiae

Pursuant to First Circuit Rule 12.0(a), and in accordance with this Court's instructions, counsel for proposed *amicus curiae*, the NAACP Legal Defense and Educational Fund, Inc., respectfully requests leave to file notices of appearance in the above-captioned case. In support of this motion, counsel for proposed *amicus* states the following:

1. This is a criminal appeal in which this Court has granted rehearing *en banc*, with argument scheduled for November 18, 2022.
2. The parties filed concurrent supplemental briefs on October 21, 2022.
3. Pursuant to this Court's August 22, 2022, Order, *amici* were invited to file *amicus* briefs no later than 7 days after the principal supplemental briefs were filed.
4. Counsel's notices of appearance are attached to this motion.

For the foregoing reasons, counsel for proposed *amicus curiae* the NAACP Legal Defense and Educational Fund, Inc., respectfully requests that the Court grant this motion for leave to file notices of appearance.

Respectfully Submitted,

/s/ Adam Murphy

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*Counsel for Amicus Curiae NAACP
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/s/ Adam Murphy

Adam Murphy

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27(d), I hereby certify that:

This motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because this motion contains 153 words, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f). As permitted by Federal Rule of Appellate Procedure 32(g), I have relied upon the word count feature of Microsoft® Word for Microsoft 365 MSO (Version 2209 Build 16.0.15629.20208).

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/s/ Adam Murphy

Adam Murphy

United States Court of Appeals For the First Circuit

NOTICE OF APPEARANCE

No. 19-2204

Short Title: U.S. v. Flores-Gonzalez

The Clerk will enter my appearance as counsel on behalf of *(please list names of all parties represented, using additional sheet(s) if necessary)*:

NAACP Legal Defense and Educational Fund, Inc. as the

appellant(s) appellee(s) amicus curiae
 petitioner(s) respondent(s) intervenor(s)

/s/ Janai S. Nelson 10/28/2022
Signature Date

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Court of Appeals Bar Number: 1168384

Has this case or any related case previously been on appeal?

No Yes Court of Appeals No. _____

Attorneys for both appellant and appellee must file a notice of appearance within 14 days of case opening. New or additional counsel may enter an appearance outside the 14 day period; however, a notice of appearance may not be filed after the appellee/respondent brief has been filed without leave of court. 1st Cir. R. 12.0(a).

Counsel must complete and file this notice of appearance in order to file pleadings in this court. Counsel not yet admitted to practice before this court must promptly submit a bar application. 1st Cir. R. 46.0(a)(2).

United States Court of Appeals For the First Circuit

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NAACP Legal Defense and Educational Fund, Inc. as the

appellant(s) appellee(s) amicus curiae

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/s/ Christopher E. Kemmitt

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NAACP Legal Defense and Educational Fund, Inc. as the

[] appellant(s)

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[] amicus curiae

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/s/ Ashok Chandran

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[] No

[] Yes Court of Appeals No. _____

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United States Court of Appeals For the First Circuit

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NAACP Legal Defense and Educational Fund, Inc. _____ as the

[] appellant(s)

[] appellee(s)

[] amicus curiae

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/s/ Catherine Logue

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Court of Appeals Bar Number: 1205108

Has this case or any related case previously been on appeal?

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[] Yes Court of Appeals No. _____

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**BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE
AND EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLANT IN
FAVOR OF REVERSAL**

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RULE 29(a)(4)(E) STATEMENT

Pursuant to First Circuit Rule 29(a)(4)(E), undersigned counsel states that no party's counsel authored the brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the amicus curiae contributed money that was intended to fund preparing or submitting the brief.

/s/ Adam Murphy

Adam Murphy

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INTEREST OF AMICUS CURIAE

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is the nation's first and foremost civil rights law organization. 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 long been concerned about the persistent and pernicious influence of race on the administration of the criminal legal system, including in the discriminatory treatment of Black people at sentencing. For example, LDF advocated for Congress to eliminate the 100:1 sentencing disparity for crack and cocaine offenses. *See* Ltrs. From Theodore Shaw and John Payton, Directors Counsel, NAACP Legal Defense & Educational Fund, Inc., to Congress (Feb. 11, 2008; Apr. 9, 2009) (on file). LDF further served as *amicus curiae* in *Kimbrough v. United States*, 552 U.S. 85 (2007), arguing that courts should be permitted to vary downwards from the United States Sentencing Guidelines by considering racial disparities in federal crack-cocaine sentencing.

Since then, LDF has continued to serve as counsel of record and *amicus curiae* urging courts to acknowledge and combat the impact of racial bias on sentencing regimes. *See, e.g., Buck v. Davis*, 137 S. Ct. 759 (2017) (vacating capital sentence due to improper injection of racial discrimination into sentencing proceedings);

United States v. Blewett, 746 F.3d 647 (6th Cir. 2013) (addressing whether Fair Sentencing Act applied retroactively in light of racially discriminatory impacts of crack-cocaine sentencing disparity). Because a decision to permit upward variances at sentencing based on neighborhood crime characteristics creates the risk of racially biased sentences, LDF’s perspective will assist the Court.

SUMMARY OF ARGUMENT

After Emiliano Flores-González entered a guilty plea to unlawful possession of a firearm, 18 U.S.C. § 922(o), the district court calculated his federal sentencing guidelines range as 24 to 30 months’ imprisonment. Although both the defense and the Government requested sentences within this range, the district court sentenced Mr. Flores-González—a nineteen-year-old with no criminal history—to 48 months.

The dramatic upward variance from the Sentencing Guidelines was based not on the severity of the crime or on Mr. Flores-González’s individual culpability. “The [c]ourt [did] *not* purport to establish that Mr. Flores’[s] crime itself was more harmful than others similar to his.” App.¹ at 30 (emphasis added). Rather, the court increased Mr. Flores-González’s sentence because his conduct fell “within a category of offenses, gun crimes, that the [c]ourt, considering the particular situation

¹ Citations to “App.” refer to the Appendix to the Brief for the Appellant filed on August 4, 2020, and located on the public docket as Doc. No. 117623952.

in Puerto Rico [involving violent crime], views as more serious here than if they had occurred in a less violent society.” *Id.*

In making this determination, the district court did not make any specific findings about the rate of violent crime in Puerto Rico—or find any specific nexus between that rate and the individual standing before the court. Rather, the judge imposed an upward variance based on his own perceptions of crimes “occurring at all hours, in any place on the island, even on congested public highways, in shopping centers, public basketball courts, and at cultural events.” *Id.* at 29. And before imposing sentence, the judge presented graphic footage of a shooting that he acknowledged was “completely unrelated to the facts of this case.” *Id.* at 32, 38.

On appeal, a panel of this Court correctly determined that Mr. Flores-González had been punished more harshly “based solely on a community characteristic of the crime’s locale” or the court’s perception of Mr. Flores-González’s community as a violent one. *See United States v. Flores-González*, 34 F.4th 103, 120 (1st Cir. 2022) (internal quotations omitted), *reh’g en banc granted, opinion withdrawn*, No. 19-2204, 2022 WL 3583654 (1st Cir. Aug. 22, 2022). Put differently, Mr. Flores-González was punished more harshly not for what he had done but for where he was from: Puerto Rico.

If approved by this Court, the district court’s reasoning would apply with equal force to other crimes and other neighborhoods throughout the First Circuit.

This point was made explicit by Judge Kayatta’s concurrence to the panel opinion, which outlined scenarios in which a higher sentence may be appropriate in Boston as compared to, for example, “a rural town in Western Massachusetts.” *See Flores-González*, 34 F.4th at 120–21.²

Authorizing upwards variances of this kind would create an impermissible risk that Black people and other people of color will receive harsher sentences than white people for identical conduct. Historically, and to this day, “racially explicit policies of federal, state, and local governments” have segregated and impoverished communities of color.³ Across the country, these communities remain hyper segregated and continue to suffer from social isolation, systemic disinvestment, and racial stereotyping, all of which affect perceived, constructed, and actual rates of crime. As a result, endorsing upward variances from the federal sentencing guidelines based on community crime characteristics risks condoning more severe punishment based on race, an outcome that “flatly contravenes” the foundational constitutional principle that all people must be afforded equal protection under the

² The Government also makes this point explicitly as it advocates to this Court for the overly punitive sentence it did not request below. *See* Gov’t Suppl. En Banc Br., Doc. No. 117935247, at 39–40 (Oct. 21, 2022) (arguing that it is proper to impose disparate sentences for “two defendants with similar records engag[ing] in otherwise similar conduct in different communities” because “the statutory framework for federal sentencing permits a district court to impose an upward variance based *solely* on a characteristic of the community in which a crime occurs” (emphasis added)).

³ Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* vii (2017).

law. *See Buck v. Davis*, 137 S. Ct. 759, 778 (2017). Such authorization would be “a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are.” *Id.*

ARGUMENT

I. Conscious Policy Choices Made Over the Course of Decades of American History Have Concentrated Black Communities in Segregated Neighborhoods That Suffer from Chronic Underinvestment.

Residential segregation is the “structural linchpin of racial stratification”⁴ in the United States and “[r]acially-concentrated areas of poverty exist in virtually every metropolitan area.”⁵ Over the past 50 years, at least 52 metropolitan areas “satisfied the criteria for black hypersegregation,”⁶ which means that Black people

⁴ Douglas S. Massey, *Residential Segregation is the Structural Linchpin of Racial Stratification*, 15(1) *City Cmty.* 4 (2016), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6141205/>.

⁵ U.S. Dep’t of Hous. & Urban Dev., *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42271, 42348 (2015). *See also* Tracey H. Loh, et al., *Separate and unequal: Persistent residential segregation is sustaining racial and economic injustice in the U.S.*, The Brookings Inst. (Dec. 16, 2020), <https://www.brookings.edu/essay/trend-1-separate-and-unequal-neighborhoods-are-sustaining-racial-and-economic-injustice-in-the-us/>; Ivan Nativdad, *How American Racism is Rooted in Residential Segregation*, Berkeley Rsch. (June 21, 2021), <https://vcresearch.berkeley.edu/news/how-american-racism-rooted-residential-segregation>. (“[When assessing] what the average neighborhood looks like for a particular racial group, you actually see that we are as segregated today as we were in 1940.”)

⁶ Douglas S. Massey and Jonathan Tannen, *A Research Note on Trends in Black Hypersegregation*, 52(3) *Demography* 1025 (2015), <https://read.dukeupress.edu/demography/article/52/3/1025/169528/A-Research-Note-on-Trends-in-Black>.

were “highly segregated” across every measure used by social scientists to quantify exclusion.⁷ Based on a comprehensive analysis of 2010 census data, only 0.8% of all Black metropolitan residents live in an area characterized by low segregation.⁸ And a study published last year by the University of California at Berkeley concluded that “[o]ut of every metropolitan region in the United States with more than 200,000 residents, 81 percent (169 out of 209) were more segregated as of 2019 than they were in 1990.”⁹

Residential segregation is not the product of happenstance, but rather “of unhidden public policy that explicitly segregated every metropolitan area in the United States.”¹⁰ Beginning in the 1930s, the federal Home Owners Loan Corporation (HOLC) and the Federal Housing Administration (FHA) used maps to rank the investment potential of residential areas for banks, insurance companies,

⁷ *Id.*

⁸ *Id.*

⁹ Stephen Menendian, et al., *Twenty-First Century Racial Residential Segregation in the United States*, The Roots of Structural Racism Project at Berkeley (June 30, 2021), https://belonging.berkeley.edu/roots-structural-racism#footnote1_r5woby6; see also Alana Semuels, *The United States Is Increasingly Diverse, So Why Is Segregation Getting Worse?* Time Mag. (June 21, 2021), <https://time.com/6074243/segregation-america-increasing/>.

¹⁰ Rothstein, *supra* n. 3, at viii; accord Janai S. Nelson, *Residential Zoning Regulations and the Perpetuation of Apartheid*, 43 UCLA L. Rev. 1689 (1996).

and loan associations.¹¹ The HOLC’s rankings were based almost entirely on the racial demographics of individual neighborhoods:¹²

Green (“Best”): Green areas represented in-demand, up-and-coming neighborhoods where “professional men” lived. These neighborhoods were explicitly homogenous, lacking “a single foreigner or Negro.”¹³

Blue (“Still Desirable”): Blue neighborhoods had “reached their peak” but were considered stable due to their low risk of “infiltration” by non-White groups.¹⁴

Yellow (“Definitely Declining”): Yellow areas typically bordered Black neighborhoods. They were considered risky due to the “threat of infiltration of foreign-born, negro, or lower grade populations.”¹⁵

Red (“Hazardous”): Red areas were neighborhoods where “infiltration” had already occurred. These neighborhoods, almost all of them populated by Black residents, were described by the HOLC as having an “undesirable population.”¹⁶

Properties in “red” communities (also referred to as “redlined” neighborhoods) were deemed unsafe investments and were usually not eligible for

¹¹ Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass*, Cambridge: Harv. Univ. Press (1993); Rothstein, *supra* n. 3 at 63–67.

¹² *Mapping Inequality: Redlining in New Deal America*, Univ. of Richmond, <https://dsl.richmond.edu/panorama/redlining/#loc=5/39.1/-94.58&text=intro> (last visited Oct. 28, 2022); Darryl Fears, *Redlining means 45 million Americans are breathing dirtier air; 50 years after it ended*, Wash. Post (Mar. 9, 2022), <https://www.washingtonpost.com/climate-environment/2022/03/09/redlining-pollution-environmental-justice/>.

¹³ *Id.*; Beatrix Lockwood, *The History of Redlining*, Thought Co., <https://www.thoughtco.com/redlining-definition-4157858> (updated June 20, 2022).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

federally issued or federally backed mortgages.¹⁷ But a combination of racially restrictive covenants and discriminatory steering practices prevented Black families from leaving redlined neighborhoods.¹⁸ As a result, while white families could flee those areas and then rely on federally-backed affordable mortgages to build wealth, many Black families throughout the United States were barred from home ownership.¹⁹ Those able to buy homes without federal underwriting faced exorbitant interest rates and unstable property values—oftentimes losing wealth through the process of buying a home.²⁰ Redlined neighborhoods grew even more segregated and impoverished, falling into decline over the ensuing generations.²¹ Federal highway construction programs funded by the Federal-Aid Highway Act further reified those conditions by “purposely target[ing] Black communities to make way

¹⁷ Bruce Mitchell and Juan Franco, *HOLC “Redlining” Maps: The persistent structure of segregation and economic inequality*, Nat’l Cmty. Reinvestment Coal., https://ncrc.org/wp-content/uploads/dlm_uploads/2018/02/NCRC-Research-HOLC-10.pdf (last visited Oct. 28, 2022).

¹⁸ Rothstein, *supra* n. 3 at 78–91.

¹⁹ *Id.* at 69–70 (describing Black family forced to “make a substantial down payment . . . and get an uninsured mortgage with higher interest rates” due to redlining).

²⁰ *Id.*; *A history of residential segregation in the United States*, 34(4) IRP Focus 2 (2019), <https://www.irp.wisc.edu/wp/wp-content/uploads/2019/03/Focus-34-4a.pdf>

²¹ Margery Austin Turner and Solomon Greene, *Causes and Consequences of Separate and Unequal Neighborhoods*, Urb. Inst. (2021), <https://www.urban.org/racial-equity-analytics-lab/structural-racism-explainer-collection/causes-and-consequences-separate-and-unequal-neighborhoods>; Jason Richardson, et al. *Redlining and Neighborhood Health*, Nat’l Cmty. Reinvestment Coal. (2021), available online at <https://ncrc.org/holc-health/>.

for massive highway projects.”²² In many cases, white residents lobbied to have highways serve as a “permanent racial barrier between white and Black neighborhoods, entrenching racial segregation and walling off economic opportunity.”²³

Today, many of the neighborhoods that were labeled “Red” or “Yellow” continue to have staggering rates of poverty and remain hyper-segregated and disproportionately Black.²⁴ Half of all Black people have lived in the poorest quartile of urban neighborhoods for at least two consecutive generations—compared with just seven percent of white people.²⁵ As Princeton Professor Patrick Sharkey has concluded, “the reason children end up in neighborhood environments similar to those of their parents is not that the parents have passed on a set of skills, resources, or abilities to their children Instead, parents pass on the place itself”²⁶

²² Deborah Archer, “*White Men’s Roads Through Black Men’s Homes*”: *Advancing Racial Equity Through Highway Reconstruction*, 73 *Vanderbilt L. Rev.* 1259, 1265 (2020).

²³ *Id.* at 1266.

²⁴ The median income for Black families is about 60 percent of that for whites, but the median net worth of Black households is only 10 percent of that for white households. The “significant disparity” between a 60 percent income ratio and a 10 percent wealth ratio is almost entirely attributable to segregated housing policy that was never remedied. *A history of residential segregation in the United States*, *supra* n. 20.

²⁵ Massey and Tannen, *supra* n. 6

²⁶ *Id.*

The presence and consequence of residential segregation are especially evident in metropolitan areas throughout the First Circuit. As of 2017, “six of the eight medium-sized and large New England metro areas had rates of residential segregation that were higher than the national average for similarly sized metro areas.”²⁷ Boston—this Circuit’s most populous city—has been hyper-segregated since at least 1970.²⁸ Today, of the 147 municipalities that form the Greater Boston area, “61 are at least 90 percent white, and some are much whiter.”²⁹ By contrast, Boston’s Black population is concentrated in Dorchester, Roxbury, and Mattapan, which together are home to approximately two-thirds of Black Bostonians.³⁰ As of 2020, the city’s Black-white index of dissimilarity is 68.8, meaning that 68.8 percent of white Bostonians would need to relocate to a different neighborhood for white

²⁷ Nicholas Chiumenti, *Recent Trends in Residential Segregation in New England*, Fed. Rsrv. Bank of Bos. (Apr. 8, 2020), <https://www.bostonfed.org/publications/new-england-public-policy-center-regional-briefs/2020/recent-trends-in-residential-segregation-in-new-england.aspx>.

²⁸ Massey and Tannen, *supra* n. 6

²⁹ Catherine Elton, *How Has Boston Gotten Away With Being Segregated For So Long?* Bos. Mag. (Dec. 8, 2020), <https://www.bostonmagazine.com/news/2020/12/08/boston-segregation/>.

³⁰ *Id.*; see also Camille Ofulue, *Redlining in Boston: How the Architects of the Past Have Shaped Boston’s Future*, The Bos. Pol. Rev. (Nov. 4, 2021), <https://www.bostonpoliticalreview.org/post/redlining-in-boston-how-the-architects-of-the-past-have-shaped-boston-s-future>.

and Black people to be distributed evenly.³¹ With dissimilarity indices of 65.5, Providence and Warwick are “highly segregated” in very much the same way.³²

Consistent with other parts of the country, residential segregation in this Circuit can be traced to decades of conscious policy choices. In Boston, redlining practices were “especially egregious.”³³ To cite just a few examples: the HOLC classified Roxbury as red because of the “infiltration of Negroes.”³⁴ A neighborhood in Cambridge was labeled yellow because “a few Negro families moved in . . . and threatened to spread.”³⁵ Another neighborhood right outside of Boston was denied a green designation because of the presence of “one Negro family.”³⁶ At the same time, the FHA funded 25 public housing projects in Boston, “most all of which were segregated by race.”³⁷ In Providence, the paths of I-195 and I-95 physically divided the city and further isolated already segregated communities of color.³⁸ Thus,

³¹ CensusScope, *Providence-Fall River-Warwick, MA-RI*, available online at https://censusscope.org/us/m6483/chart_dissimilarity.html (last visited Oct. 28, 2022). This was an increase from the 60 percent index of dissimilarity recorded in 2010.

³² *Id.*

³³ Ofulue, *supra* n. 30.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Elton, *supra* n. 29.

³⁸ Jacob Binder, *Divided By Pavement, Divided By Race: I-195's Impact on Providence*, *Brown Pol. Rev.* (Mar. 19, 2016), <https://brownpoliticalreview.org/2016/03/divided-pavement-divided-race-195s-impact-providence/>.

“through city development, Providence used transportation infrastructure to reinforce segregation, and these divisions still remain, preserved by the two strips of highway.”³⁹

Residential segregation leads to dramatically disparate life outcomes that “collectively undermine well-being across a variety of dimensions.”⁴⁰ Because redlining impoverished Black communities, Black neighborhoods today disproportionately face “high levels of social isolation from mainstream society [and] high concentrations of poverty and disadvantage.”⁴¹ Likewise, because neighborhood wealth often determines school funding, Black students are seven times more likely than white students to attend high-poverty schools, which have been consistently linked to lower academic achievement and, prospectively, limited employment opportunities and joblessness.⁴²

³⁹ *Id.*

⁴⁰ Massey, *supra* n. 4.

⁴¹ Michael Hotchkiss, *Hypersegregated Cities Face Tough Road to Change*, Princeton Univ. (May 18, 2015), [https://www.princeton.edu/news/2015/05/18/hypersegregated-cities-face-tough-road-](https://www.princeton.edu/news/2015/05/18/hypersegregated-cities-face-tough-road-change#:~:text=%E2%80%9CHypersegregation%20produces%20high%20levels%20of,Douglas%20Massey%2C%20the%20Henry%20G.)

[change#:~:text=%E2%80%9CHypersegregation%20produces%20high%20levels%20of,Douglas%20Massey%2C%20the%20Henry%20G.](https://www.princeton.edu/news/2015/05/18/hypersegregated-cities-face-tough-road-change#:~:text=%E2%80%9CHypersegregation%20produces%20high%20levels%20of,Douglas%20Massey%2C%20the%20Henry%20G.)

⁴² Janie Boschma and Ronald Brownstein, *The Concentration of Poverty in Americans Schools*, The Atlantic, (Feb. 29, 2016), <https://www.theatlantic.com/education/archive/2016/02/concentration-poverty-american-schools/471414/> (“In almost all major American cities, most African Americans and Hispanic students attend public schools where a majority of their classmates qualify as poor or low-income.”).

Those conditions are compounded by a lack of investment and infrastructure that “forc[e] residents to navigate degraded built environments and targeted advertising campaigns that encourage consumption of health damaging foods, alcohol and other products.”⁴³ Deficits in primary and emergency health care further jeopardize health outcomes, leading to “shorter life, particularly for Black residents.”⁴⁴ Residents in Roxbury, for example, have a life expectancy that is under 60 years of age—approximately *thirty* years less than the nearby, predominantly white Back Bay.⁴⁵ Racially isolated areas also have higher concentrations of racial trauma and adverse childhood experiences, while conversely having less access to mental health care.⁴⁶

⁴³ Mariana Arcaya and Alina Schnake-Mahl, *Health in the Segregated City*, NYU School of Law Furman Center (Oct. 2017),

<https://furmancenter.org/research/iri/essay/health-in-the-segregated-city%20>

⁴⁴ *Id.*

⁴⁵ Kristy Lee and Douglas Moser, *Your Neighborhood Could Be Harming Your Health*, NBC Bos. (Feb. 18, 2019), <https://www.nbcboston.com/news/local/your-neighborhood-could-be-harming-your-health/1469/>.

⁴⁶ *See, e.g.*, Tristen Hall, et al., *Intersections of Adverse Childhood Experiences, Race and Ethnicity and Asthma Outcomes: Findings from the Behavioral Risk Factor Surveillance System*, 17(21) *Int’l J. Env’t Rsch. And Pub. Health* 8236 (2020), available online at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7664623/>; Prevention Institute, *Minimizing the Impact of Adverse Childhood Experiences Through a Focus on Adverse Community Experiences* (Oct. 2017), <https://www.preventioninstitute.org/unity/publications/minimizing-impact-adverse-childhood-experiences-through-focus-adverse-community>.

Research has consistently shown that “social and economic destabilization have been associated with increased crime.”⁴⁷ People who live in these communities frequently do not have access to the most basic necessities (including safe drinking water), are shut out of the formal labor market, and are burdened by significantly higher rates of trauma and hopelessness.⁴⁸ Each of those factors, standing alone, is criminogenic; combined, they lead to significantly higher rates of crime.

Poverty and income inequality correlate strongly with crime rates—especially violent crime rates—in a community.⁴⁹ For example, in Boston’s Black

⁴⁷ Kesha Moore, et al., *The Truth Behind Crime Statistics* at 27, Thurgood Marshall Inst. (2022), available online at <https://www.naacpldf.org/wp-content/uploads/2022-08-03-TMI-Truth-in-Crime-Statistics-Report-FINAL-2.pdf>; accord Phelan Wyrick and Kadee Atkinson, *Examining the Relationship Between Childhood Trauma and Involvement in the Justice System* (Apr. 29, 2021), Nat’l Inst. of Just., <https://nij.ojp.gov/topics/articles/examining-relationship-between-childhood-trauma-and-involvement-justice-system>.

⁴⁸ See e.g., *True Justice: Bryan Stevenson’s Fight for Equality*, 1:06:20–1:08:30 (HBO/KUNHARDT Films 2019) (“When I go into poor communities and sit down with young boys . . . they’ll say . . . I know I’m going to be in prison by the time I’m 21. Because they are living in communities where 80 percent of the young men of color end up in jail or in prison . . . By the time they are five [years old] they actually have a trauma disorder. Threat and menace become a defining reality in the lives of these children. And when you are constantly dealing with that year after year after year, at the age of 8, if someone comes to you and says I got a drug why don’t you try this? And for the first time in your life, you have three hours where you don’t feel threatened and menaced. What do you want? You want more of that drug. And if someone at 10 or 11 says . . . why don’t you join our gang, we’re going to help you fight all of these forces that are threatening and menacing you. And you say, yeah. Instead of seeing that choice as the choice of a bad kid, we ought to see that [as the manifestation] of a larger problem.”)

⁴⁹ Moore, et al., *supra* n. 47 at 29–30.

neighborhoods, a recent study found that people’s inability to find safe and stable housing or meaningful employment aggravates community social problems, translating to higher crime rates.⁵⁰ The solution is not incarceration. Rather, a recent study using data from the Department of Justice and the Federal Bureau of Investigations found that “every \$10,000 increase in [social and public health] spending per person living in poverty was associated with . . . approximately a 16% decrease in the average homicide rate.”⁵¹ Sadly, as discussed above, neighborhoods with higher concentrations of Black populations are least likely to receive that type of investment.

II. “Community Characteristics” Like Crime Rates—Both Perceived and Actual—Act as Proxies for Race.

Racial bias contributes to perceptions of crime that far exceed actual crime rates in Black and Latinx neighborhoods. These perceptions lead to increased policing and inflated crime rates, which in turn lead to perverse confirmation biases—creating a cycle of racial discrimination and “high-crime” designations.

⁵⁰ Eileen M. Kirk, *Obstructing the American Dream: Homeownership Denied and Neighborhood Crime*, Hous. Pol’y Debate (2020), <https://www.tandfonline.com/doi/full/10.1080/10511482.2020.1793794?scroll=top&needAccess=true>; accord Moore, *supra* n. 47 at 15–17 (noting the “close association between evictions and homicides” and collecting data showing “a strong, direct relationship between evictions and recent homicide patterns”).

⁵¹ Heather L. Sipsma, et al., *Spending on social and public health services and its association with homicide in the USA: an ecological study*, BMJ Open (2017), <https://pubmed.ncbi.nlm.nih.gov/29025831/>.

Presumptions of dangerousness and criminality assigned to Black communities and other communities of color shape perceptions of “high-crime areas,” leading to changes in policing patterns. Disparate policing in turn leads to actual disparities in arrest, prosecution, and conviction rates, which then serve as further justification for labeling an area “high-crime.”

In other words, because racial bias shapes law enforcement activity, even actual crime rates are not reliable proxies for criminal conduct. An enhanced sentence based on community crime characteristics cannot be free from racial bias.

A. Biases Linking Black and Latinx Communities with Criminality Shape Perceptions of Neighborhoods.

Americans consistently overestimate the proportion of violent crimes committed by Black and Latinx people by more than 30 percent.⁵² That overestimation is the result of stereotyping. When asked in a survey about the extent to which various racial groups “tend to be violence-prone,” a majority of white respondents ranked Latinx and Black people as significantly more prone to violence.⁵³

Those biases in turn shape how people view neighborhood crime rates and danger. Even residents of neighborhoods with high Black and Latinx populations are

⁵² Ted Chiricos, et al., *Racial Typification of Crime and Support for Punitive Measures*, 42(2) *Criminology* 358, 370 (May 2004).

⁵³ Steven E. Barkan & Steven F. Cohn, *Why Whites Favor Spending More Money to Fight Crime: The Role of Racial Prejudice*, 52(2) *Soc. Probs.* 300 (July 2014).

more likely to overestimate their neighborhood’s crime rates than residents of predominantly white neighborhoods.⁵⁴ Studies have confirmed that “neighborhoods with a higher percentage of young [B]lack men do have higher perceived rates of crime, even when controlling for actual measures of the crime rate.”⁵⁵ In many regions in the country, a neighborhood’s racial composition is more determinative of whether it will be perceived as “high-crime” than any other factor—including the *actual crime rate* of that neighborhood.⁵⁶

⁵⁴ See e.g., Nazgol Ghandnoosh, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*, The Sent’g Project, (Sept. 2014), <https://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies/#III.%20Racial%20Perceptions%20of%20Crime>.

⁵⁵ See Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 Cal. L. Rev. 345 (2019).

⁵⁶ Wonhyuk Cho & Alfred T. Ho, *Does neighborhood crime matter? A multi-year survey study on perceptions of race, victimization, and public safety*, 55 Int’l J. of L., Crime and Just. 13, 20 (2018), available online at <https://www.sciencedirect.com/science/article/pii/S1756061618301587>. (“[T]he odds ratios show that the racial factor is more substantive than the neighborhood violent crime standardized score.”). For these reasons, courts have—in the context of Fourth Amendment inquiries—begun to view assertions of “high-crime areas” with suspicion. See, e.g., *United States v. Caruthers*, 458 F.3d 459, 467 (6th Cir. 2006) (“[L]abeling an area ‘high-crime’ raises special concerns of racial, ethnic, and socioeconomic profiling.”); *United States v. Montero-Carmago*, 208 F.3d 1122, 1138 (9th Cir. 2000) (“The citing of an area as ‘high-crime’ requires careful examination by the court, because such a description . . . can easily serve as a proxy for race or ethnicity.”); *United States v. Black*, 707 F.3d 531, 542 (4th Cir. 2013) (“In our present society, the demographics of those who reside in high crime neighborhoods often consist of racial minorities and individuals disadvantaged by their social and economic circumstances.”).

B. Perceptions of Neighborhood Crime Lead Police to Concentrate Arrests and Prosecutions in Black and Latinx Neighborhoods, Even Where Conduct Occurs at Comparable Rates.

Law enforcement officers “share the latent biases that pervade our society.”⁵⁷

Thus, “African Americans and Hispanic Americans make up almost all of the population in most of the neighborhoods the police regard as high crime areas.”⁵⁸

Since the perceived “high crime” in an area shapes policing patterns, “[m]inority neighborhoods experience higher levels of field interrogation and surveillance activity, controlling for crime and other social factors.”⁵⁹ As a result, by “sanctioning investigative stops on little more than the area in which the stop takes place, the phrase ‘high crime area’ has the effect of criminalizing race.”⁶⁰

While that phenomenon exists across the country, this Court need look no further than its own metropolitan areas to see its application. As the Massachusetts Supreme Judicial Court recently recognized, “[B]lack men in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations.”⁶¹ Black men are further

⁵⁷ *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540, 580 (S.D.N.Y. 2013).

⁵⁸ David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Ind. L.J. 659, 677–78 (1994).

⁵⁹ Jeffrey Fagan et al., *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 Fordham Urb. L.J. 539, 540, 544–45 (2016).

⁶⁰ Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 Miss. L.J. 423, 493 (2004).

⁶¹ *Commonwealth v. Warren*, 475 Mass. 530, 539 (Mass. 2016).

“disproportionately targeted for repeat police encounters.”⁶² Thus, the Supreme Judicial Court cautioned that its legal rules “cannot be divorced from the findings . . . documenting a pattern of racial profiling of [B]lack males in the city of Boston.”⁶³

Profiling occurs at both the individual and neighborhood level. The Boston Police Department (BPD) disproportionately targets the substantially Black neighborhoods of Roxbury, Mattapan, Dorchester, and parts of Jamaica Plain for patrols and enforcement activities, causing Black residents in these areas to be unjustly overrepresented in the criminal legal system.⁶⁴ Studies of the Boston Police Department have uniformly come to the same conclusion: “[a]fter controlling for local crime rates, [BPD engages in] higher rates of FIO activity [Field Interrogation, Observation, Frisk, and/or Search practices] for census tracts based on their Black or Hispanic racial composition[.]”⁶⁵ Put another way, “given two otherwise identical

⁶² *Id.* at 539–40.

⁶³ *Id.* at 539.

⁶⁴ The Boston Indicators Project, MassINC & the Mass. Criminal Justice Reform Coalition, *The Geography of Incarceration: The Cost and Consequences of High Incarceration Rates in Vulnerable City Neighborhoods* 3 (Oct. 2016), <https://massinc.org/wp-content/uploads/2016/11/The-Geography-of-Incarceration.pdf>.

⁶⁵ Jeffrey Fagan et al., *An Analysis of Race and Ethnicity Patterns in Boston Police Department Field Interrogation, Observation, Frisk, and/or Search Reports* 8 (June 15, 2015), available online at <https://www.ca1.uscourts.gov/sites/ca1/files/citations/full-boston-police-analysis-on-race-and-ethnicity.pdf>.

Boston neighborhoods . . . [BPD] initiated more street encounters in the neighborhood with more Black residents . . . [T]he mere presence of Black residents increased the numbers of police-civilian encounters.”⁶⁶

The extent of this disparity is difficult to overstate. Scholars have observed that police presence in Black neighborhoods is so severe that it is challenging to draw meaningful neighborhood-level conclusions about actual crime rates, as “Black communities experience such extreme levels of police contact that there are not enough White neighborhoods to draw relevant comparisons.”⁶⁷ A national study by the American Civil Liberties Union, for example, recently found that Black people are 3.7 times more likely to be arrested for marijuana-related offenses than white people despite the fact that marijuana usage rates are similar between the two

⁶⁶ ACLU of Mass., *Black, Brown, and Targeted: A Report on Boston Police Department Street Encounters from 2007–2010*, at 7–9 (2014), <https://www.aclum.org/sites/default/files/wp-content/uploads/2015/06/reports-black-brown-and-targeted.pdf>. As recently as 2020, data released by the BPD confirmed that Black communities continue to be overpoliced. Isaiah Thompson, *Black People Made Up 70 Percent of Boston Police Stops, Department Data Show*, WGBH (June 12, 2020), <https://www.wgbh.org/news/local-news/2020/06/12/black-people-made-up-70-percent-of-boston-police-stops-department-data-show>.

⁶⁷ Jaquelyn Hahn et al., *Racial Disparities in Neighborhood Arrest Rates During the COVID-19 Pandemic 2* (July 2021), available online at <https://open.bu.edu/handle/2144/42755>.

groups—a disparity which makes one group’s “community characteristics” appear much different than the others.⁶⁸

Drug policing in Black neighborhoods has brought more than half of all young Black men in many large American cities under the control of the criminal legal system.⁶⁹ A staggering one out of three “Black boys born [in America] can expect to go to prison in his lifetime”⁷⁰ and Black adults are 5.9 times as likely to be incarcerated than white adults.⁷¹ The role of race in shaping these crime statistics is placed in stark relief by false conviction data: 69 percent of all people exonerated for drug crimes are Black,⁷² demonstrating “the depth of the belief that race is a proxy for criminality in the criminal legal system.”⁷³

⁶⁸ ACLU, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* (Apr. 2020), available online at https://www.aclu.org/sites/default/files/field_document/marijuanareport_03232021.pdf.

⁶⁹ Michelle Alexander, *The New Jim Crow* 9, 16 (2010).

⁷⁰ *Id.*

⁷¹ The Sentencing Project, *Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racial Discrimination, Xenophobia, and Related Intolerance Regarding Racial Disparities in the United States Criminal Justice System* (March 2018), available online at <https://www.sentencingproject.org/app/uploads/2022/08/UN-Report-on-Racial-Disparities.pdf>.

⁷² Samuel R. Gross, *Race and Wrongful Convictions in the United States: 2022*, Nat’l Registry of Exonerations at 1, Table 1 (Sept. 2022), <https://www.law.umich.edu/special/exoneration/Documents/Race%20Report%20P%20review.pdf>

⁷³ *New Report Highlights Persistent Racial Disparities Among Wrongful Convictions*, Innocence Project (Sept. 27, 2022), <https://innocenceproject.org/nre->

In addition, reported crime rates are not reliable measures of actual criminal conduct because major categories of crimes concentrated in white communities are often treated as public health problems. The contrast between the treatment of marijuana-related offenses and the recent and far more dangerous opioid epidemic—concentrated primarily in white communities⁷⁴— is a prime example.⁷⁵ That choice reflected the selective extension of medical care “in ways that preserve a protected space for White opioid users, while leaving intact a punitive, carceral system as the appropriate response for Black and Brown drug use.”⁷⁶

The sum of these biased choices is clear: Black Americans “are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted, and once convicted, they are more likely to experience lengthy prison sentences.”⁷⁷ Those well-documented facts underscore the arbitrary, and racially discriminatory, consequences of allowing courts to determine sentences based on

national-registry-exonerations-report-2022-racism-criminal-system/#:~:text=The%20National%20Registry%20of%20Exonerations%20report%20highlighted%20particularly%20shocking%20disparities,illegal%20drugs%20at%20similar%20rates (quoting Christina Swarns, Executive Director).

⁷⁴ Monica J. Alexander, et al., *Trends in Black and White Opioid Mortality in the United States, 1979–2015*, 29(5) *Epidemiology* 707 (2018).

⁷⁵ *Id.*

⁷⁶ Julie Netherland and Helena Hanson, *White Opioids: Pharmaceutical Race and the War on Drugs That Wasn't*, 12(2) *Biosocieties* 217 (2017), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5501419/>.

⁷⁷ The Sentencing Project, *supra* n. 71.

community crime rates rather than individual culpability. Taking that rule to its logical conclusion would allow courts to impose higher sentences for drug crimes when committed in predominately Black neighborhoods—neighborhoods with higher rates of arrest for drug offenses due to disparate law enforcement targeting and perceptions of crime—even where *actual drug use* is lower than in predominately white areas.

III. Imposing Harsher Penalties on the Basis of Racial Proxies Is Unconstitutional and Runs Afoul of the Federal Sentencing Scheme

Since community crime characteristics all too often serve as a proxy for race, to allow an upward variance from the sentencing guidelines based on these characteristics is to allow a more severe punishment on the basis of race. As the Supreme Court affirmed in *Buck*, imposing harsher penalties on the basis of race is “odious in all aspects” and represents a “disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are.” 137 S. Ct. at 778 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)).

The *Buck* principle extends to the context of federal sentencing. As the Supreme Court has put it “of course, sentencing courts’ discretion under [18 U.S.C.] 3661 is subject to constitutional constraints.” *Pepper v. United States*, 562 U.S. 476, 489 n.8 (2011). In particular, the constitutional guarantees of due process and equal protection apply at sentencing, making it axiomatic that “[a] defendant’s race or nationality may play *no adverse role* in the administration of justice, including at

sentencing.’”⁷⁸ *Id.* (emphasis added) (quoting *United States v. Leung*, 40 F.3d 577, 586 (2d Cir. 1994) (internal citations omitted)); accord *United States v. Borrero-Isaza*, 887 F.2d 1349, 1355 (9th Cir. 1989) (finding violation of due process where individual was “penalized because of his national origin”). Indeed, since “justice must satisfy the appearance of justice,” *Offutt v. United States*, 348 U.S. 11, 14 (1954), “courts must be especially careful of even the appearance that a sentence was influenced by such bias.” *United States v. Cardona*, 76 F. App’x 377, 378 (2d Cir. 2003).

The district court’s upward variance here is inconsistent with this fundamental precept. The sentencing guidelines recommended that Mr. Flores-González—a teenager with no criminal record convicted of a victimless offense—receive a sentence of 24 to 30 months’ imprisonment. Yet, the district court imposed a sentence of 48 months, a term 18 months longer than the top of the advisory range.

In so doing, the sentencing court cited not to Mr. Flores-González’s own history or actions but to perceptions of crime in Puerto Rico generally. The judge made clear that “[t]he court does not purport to establish that . . . Mr. Flores’[s] crime

⁷⁸ *Accord* 28 U.S.C. § 994(d) (“The [Sentencing] Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.”); U.S. Sent’g Guidelines Manual § 5H1.10 (“[National origin is] not relevant in the determination of a sentence.”).

itself was more harmful than others similar to his, but that his crime falls within a category of offenses, gun crimes, that the [c]ourt, considering the particular situation in Puerto Rico, views as more serious here than if they had occurred in a less violent society.” App. at 30. And though Mr. Flores-González had not been accused of firing a gun, the court opined at length about “violent crime and murders . . . occurring at all hours of the day, in any place on the island,” *id.* at 29, even playing a graphic video depicting a mass shooting that not even the Government had sought to admit. *Id.* at 32, 38. When defense counsel objected that the footage was “completely unrelated to the facts of this case” and “[did] not reflect Mr. Flores’[s] conduct,” the court replied without hesitation: “It’s not supposed to.” *Id.* at 38. The message was clear: The “driving force behind the upward variance,” *United States v. Rivera-Berrios*, 968 F.3d 130, 135 (1st Cir. 2020), was the perception that the place where the crime occurred was “violent.”

Mr. Flores-González was sentenced not for his crime, but for where he came from: Puerto Rico. In this way, the district court’s ruling opens the door to adverse consequences on the basis of neighborhood and other racial proxies throughout the First Circuit—inviting courts to punish people more harshly for “who they are” and not “what they do.” As the Supreme Court has made clear, “[r]elying on race to impose a criminal sanction ‘poisons public confidence’ in the judicial process,” injuring “not just the defendant, but the law as an institution, the community at large,

and the democratic ideal reflected in the processes of our courts.” *Buck*, 137 S. Ct. at 778 (internal citations omitted).

IV. *Kimbrough v. United States* and *Spears v. United States* Authorized Downward Variances to Reduce Racial Disparities in Sentencing—The Opposite of the Relief the Government Seeks Here.

On appeal, the Government attempts to defend this stark upward variance—a sentence 18 months longer than that which it sought—by re-branding group-based sentencing as a “policy disagreement” with the sentencing guidelines for gun possession.⁷⁹ The Department of Justice bases its argument on *Kimbrough v. United States*, 552 U.S. 85 (2007) and *Spears v. United States*, 555 U.S. 261 (2009)—two landmark decisions that allowed *downward* variances to *reduce* racial inequality in sentencing. A closer look at *Kimbrough* reveals that such reliance is inapposite.

At the time when Derrick Kimbrough was sentenced, the Sentencing Guidelines had adopted a 100-to-1 ratio between crack and powder cocaine—meaning that each gram of the form most prevalent in Black communities (crack), was treated as 100 grams of the form most prevalent in white communities (powder).⁸⁰ Yet years earlier, the United States Sentencing Commission had

⁷⁹ See Gov’t Suppl. En Banc Br., Doc. No. 117935427, at 29–34 (Oct. 21, 2022).

⁸⁰ See U.S. Sent’g Comm’n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 106–107, App. A, pp. 3–6 (May 2002), available online at ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf (hereinafter *Report to*

concluded—based on a wealth of empirical evidence—that this distinction posed a uniquely negative impact on Black people, who were disproportionately sentenced to higher prison terms, serving decades more behind bars as a result.⁸¹ In fact, citing a Bureau of Justice Statistics study, the Sentencing Commission concluded that “[t]he 100-to-1 crack cocaine to powder cocaine quantity ratio is a primary cause of the growing disparity between sentences for Black and white federal defendants.”⁸² And, at the time, surveys showed that Black people were charged in 80 to 90 percent of federal prosecutions of crack-cocaine.⁸³ In the case of Mr. Kimbrough, a Black

Congress); see also, *Kimbrough*, 552 U.S. at 85 (2007) (“[A] drug trafficker dealing in crack cocaine is subject to the same sentence as one dealing in 100 times more powder cocaine.”).

⁸¹ See, e.g., U.S. Sent’g Comm’n, *Report to Congress* at 103, ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf (finding “even the perception of racial disparity problematic because it fosters disrespect for and lack of confidence in the criminal justice system”).

⁸² U.S. Sent’g Comm’n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, at 34, 152–53 (1995), <https://www.ojp.gov/pdffiles1/Digitization/145328NCJRS.pdf>.

⁸³ *United States v. Smith*, 359 F. Supp. 2d 771, 780 (E.D. Wis. 2005) (citing Diana Murphy, *Statement to Senate Judiciary Committee, May 22, 2002*, reprinted in 14 FED. SEN. RETPR. 236, 237 (Nov./Dec.2001-Jan./Feb.2002); see also, U.S. Sent’g Comm’n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, at 34, 152–3 (1995).

man, this disparate treatment would have resulted in more than a decade longer behind bars solely based on the form of the drug.⁸⁴

Mindful of this empirical research, in *Kimbrough*, the sentencing court took a step toward remedying a racial injustice by sentencing Mr. Kimbrough to 180 months, a longer sentence than he likely would have received for possession of powder cocaine, but nearly 100 months shorter than the top of the advisory range. As the district court noted, the variance was appropriate in view of the “disproportionate and unjust effect that crack cocaine guidelines have in sentencing.” *Kimbrough*, 552 U.S. at 93 (internal quotes and citation omitted); accord *Spears*, 555 U.S. 261. Similarly, in *United States v. Perry*, a decision cited favorably in *Spears*, the District of Rhode Island brought the concern of racialized harms to the forefront, explaining that “the current penalty structure disparately impacts minorities” and that “this leads to, at the very least, a perception that the crack/powder disparity is racially-motivated.” 389 F. Supp. 2d 278, 302 (D.R.I. 2005).⁸⁵ *Perry* affirmed that sentencing courts have an obligation to ensure the

⁸⁴ Mr. Kimbrough’s calculated sentencing range was 228 to 270 months, or 19 to 22.5 years. Had Mr. Kimbrough been convicted of crimes involving powder cocaine, his range would have been 97 to 106 months, or roughly 8 to 9 years. *See Kimbrough*, 552 U.S. at 93 (2007).

⁸⁵ *See also Smith*, 359 F. Supp. 2d at 780 (E.D. Wis. 2005) (“Perhaps most troubling . . . is [] the unjustifiably harsh crack penalties disproportionate impact on [B]lack defendants.”); *United States v. Leroy*, 373 F. Supp. 2d 887, 892 (E.D. Wis. 2005) (“[T]he unjustifiably harsh crack penalties disproportionately impact on black

fundamental fairness of sentences imposed by the court, noting that racial disparities “actually promote less respect for the law because the penalties suggest untoward discrimination” *Id.* at 304.

Given the history, the use of racial proxies to justify harsher punishment for minority groups cannot be supported by *Kimbrough*—as such disparate sentencing contravenes the very concerns of racial justice simmering beneath the sentence. In *Kimbrough*, the sentencing court varied from the guidelines to sentence Mr. Kimbrough for his crime, recognizing that race not culpability drove the sentencing disparity in crack/cocaine cases. Here, the Government attempts the opposite, subverting *Kimbrough* to justify a sentence based not on personal culpability but on a racial proxy. This Court must not allow it.

CONCLUSION

If sentencing courts enhance punishment based on community crime characteristics or perceptions of community crime characteristics, communities of color are likely to receive perpetually longer sentences and be subject to a never-ending cycle of discrimination. Longer sentences make it more difficult for people to obtain jobs, access housing, and maintain familial and community connections,

defendants and have increased racial disparity in federal sentencing, contrary to one of the Sentencing Reform Act’s primary goals.”).

which are strong social determinants of recidivism.⁸⁶ Rather than act as a deterrent that makes communities safer, longer sentences are themselves criminogenic and “counterproductive for public safety.”⁸⁷

Thus, enhancing punishment based on community crime characteristics will drive a cycle of concentrated crime and increasingly longer sentences over time for majority Black communities and other communities of color.⁸⁸ In turn, such a sentencing scheme risks perpetuating the racial harm of unequal policing in America, further entrenching the precise harms that contribute to labeling a neighborhood as “high crime.” A decision that traps communities of color in a cycle of incarceration cannot be reconciled with the most basic notions of equal protection and fundamental fairness and will further exacerbate a long legacy of place-based discrimination that has never been remedied.

⁸⁶ See, e.g., Prison Policy Initiative, *Recidivism and Reentry: What makes people more or less likely to succeed upon release?* (2022), https://www.prisonpolicy.org/research/recidivism_and_reentry/; Ryan Shanahan and Sandra V. Agudelo, *The Family and Recidivism*, Vera Inst. of Just. (Oct. 2012), available online at <https://www.prisonpolicy.org/scans/vera/the-family-and-recidivism.pdf>.

⁸⁷ Marc Mauer, *Long Term Sentences: Time to Reconsider the Scale of Punishment*, The Sent’g Project (Nov. 5, 2018), available online at <https://www.sentencingproject.org/app/uploads/2022/08/UMKC-Law-Review-Scale-of-Punishment.pdf>.

⁸⁸ See, e.g., Elizabeth Hinton, et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, Vera Inst. of Just. (2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>.

For the foregoing reasons, this Court should vacate the sentence imposed by the district court and remand for resentencing.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Adam Murphy _____

Adam Murphy

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I hereby certify that this brief complies with the type-volume limitation of October 28, 2022 Order of the Court.

In compliance with Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6), the brief has been prepared in proportionally spaced Times New Roman font with 14-point type using Microsoft® Word for Microsoft 365 MSO (Version 2209 Build 16.0.15629.20200).

In compliance with Federal Rule of Appellate Procedure 32(a)(7)(B), the brief contains 7,102 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and First Circuit Rule 29. As permitted by Federal Rule of Appellate Procedure 32(g), I have relied upon the word count feature of Microsoft® Word for Microsoft 365 MSO (Version 2209 Build 16.0.15629.20208) in preparing this certificate.

/s/ Adam Murphy

Adam Murphy