ORAL ARGUMENT NOT YET SCHEDULED

No. 14-5109

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Brian Davis,
Plaintiff – Appellant

v.

United States Sentencing Commission,
Defendant-Appellee

On Appeal from the United States District Court
for the District of Columbia (Judge James E. Boasberg)

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT BRIAN DAVIS

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December 18, 2014

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

LIST OF PARTIES AND AMICUS CURIAE

Appellant is Brian Davis. Appellee is the United States Sentencing Commission. The Intervenor for Appellant was Charles Edward Macintyre, who has not appealed. The *Amicus Curiae* in support of Appellant is the National Association of Criminal Defense Lawyers ("NACDL").

RULINGS UNDER REVIEW

The District Court ruling being appealed is District Judge James E. Boasberg's April 11, 2014 order granting the Sentencing Commission's motion to dismiss (Civil Action No. 11-1433 (JEB), D.E. 37).

RELATED CASES

This case was previously before this Court in Appeal No. 11-5264. *See Davis v. United States Sentencing Comm'n*, 716 F.3d 660 (D.C. Cir. 2013). NACDL is not aware of any currently pending related cases.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel for NACDL states that NACDL is a non-partisan professional bar association that seeks to advance the mission of the nation's criminal defense lawyers to ensure equal protection and the fair administration of justice for persons accused of crime or other misconduct. NACDL is a non-profit corporation, NACDL has no parent corporations, and no publicly held company has a 10 percent or greater ownership interest in NACDL.

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STATEMENT OF INTEREST

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") as *amicus curiae* in support of the Appellant, Brian Davis.[1] NACDL, a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. NACDL has frequently appeared as *amicus curiae* before this Court, before the Supreme Court, and before the highest courts of numerous states.

NACDL has a longstanding concern with the 100:1 federal sentencing ratio for powder to crack cocaine, which is at issue in this case. In particular, NACDL is concerned about the disproportionate impact the ratio has had on the African-

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[1] NACDL certifies pursuant to Fed. R. App. P. 29(a) and Circuit Rule 29(b) that all parties have consented to the filing of this *amicus* brief. In giving its consent, the Sentencing Commission requested that the briefing schedule be adjusted to permit the Sentencing Commission to file its response brief 30 days from the date on which the *amicus* brief was filed. NACDL does not oppose that request, and respectfully requests that this Court adjust the remaining deadlines accordingly.

American community, and on the lack of any rational justification for the 100:1 ratio. In 1995, NACDL called on Congress to eliminate the 100:1 ratio. *See, e.g.*, *Cocaine and Federal Sentencing Policy: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 104th Cong. 114-43 (1995) (hereinafter "1995 House Hearing") (statement of William B. Moffitt, Treasurer, NACDL); Gerald E. Goldstein, *Written, Public Comments for the Record Regarding the United States Sentencing Commission's February 1995 Report to Congress, and Future Congressional Recommendations, on the Current 100-1 Federal Sentencing Disparity between "Crack" and Powder Cocaine Offenses* (Apr. 10, 1995). Congress did not listen, leaving the 100:1 ratio intact despite its knowledge of the ratio's discriminatory impact and without suggesting any rational basis for preserving the ratio. NACDL submits that Congress's 1995 reaffirmation of that ratio violated Equal Protection, and that continuing to enforce sentences imposed under the 100:1 ratio will erode public confidence in the judicial system and may undermine the effective administration of justice.

NACDL submits this brief because of the importance of this Court's decision to Equal Protection and to the fair administration of justice. This Court has not addressed in a published opinion whether Congress's 1995 decision to reaffirm the 100:1 ratio violated Equal Protection. This case provides an ideal opportunity for this Court to reach this important question.

Given its expertise in matters concerning the fair administration of justice, and its repeated participation in the debate over the 100:1 ratio, NACDL believes its perspective would be helpful to the Court in resolving the issues presented in this case.[2]

SUMMARY OF ARGUMENT

In 1993, Appellant Brian Davis was sentenced to life in prison [3] for crack cocaine offenses, at a time when the federal law imposed a 100:1 sentencing ratio for crack to powder cocaine. In 1995, after Mr. Davis had begun serving his sentence, the United States Sentencing Commission determined that this 100:1 ratio had a severely disproportionate impact on African Americans like Mr. Davis, and that no justification for the ratio existed. The Sentencing Commission proposed to eliminate the disparity altogether. Had Congress done nothing, the Sentencing Commission's proposal would have become law, and the 100:1 ratio would have been eliminated. Instead, Congress took affirmative steps to preserve

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[2] NACDL hereby certifies pursuant to Fed. R. App. P. 29(c)(5) that no counsel for a party authored this brief in whole or in part; that no party or counsel for a party contributed money that was intended to fund preparation or submission of this brief; and that no person other than NACDL, its members, and its counsel, contributed money that was intended to fund preparation or submission of this brief.

[3] His sentence has since been reduced to 360 months.

the 100:1 ratio, rejecting the Sentencing Commission's proposal and doing nothing to mitigate or eliminate the ratio's obviously discriminatory impact.

Based on these extraordinary historical facts, Mr. Davis now seeks the extraordinary remedy of mandamus, and his Petition raises the fundamental question of whether Congress's action in 1995 violated Equal Protection. *Amicus* submits that it did. As detailed below, when Congress acted to save the 100:1 ratio in 1995, it had before it overwhelming evidence that this ratio discriminated against African Americans and that there existed no rational justification for preserving it. It is hard to imagine a more textbook Equal Protection violation.

ARGUMENT

As part of the Anti-Drug Abuse Act of 1986, Congress amended certain penalties in the Controlled Substances Act for offenses involving crack and powder cocaine. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. Specifically, Congress enacted mandatory minimum sentences that established a 100:1 federal sentencing ratio for powder to crack cocaine. *See id.* § 1002, 100 Stat. at 3207-2 through -4.

The 100:1 ratio quickly became a symbol of unfairness and inequality in the criminal justice system. In the years following its enactment, research consistently showed that the 100:1 ratio had a disproportionate impact on African Americans, and that the bases on which Congress had relied when establishing the 100:1 ratio in 1986 were, at best, exaggerated. At worst, they were illusory.

The mounting evidence of the ratio's irrationality and discriminatory impact spurred Congress to action in 1994. In the Violent Crime Control and Law Enforcement Act of 1994, Congress directed the Sentencing Commission—an independent government agency established to serve as an expert in federal sentencing law and policy—to research the ratio's impact and to make recommendations regarding the retention or modification of the ratio. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280006, 108 Stat. 1796, 2097.

During the ensuing year, the Sentencing Commission rigorously examined the impact of the 100:1 ratio and assessed the justifications for it. In a February 1995 report, the Sentencing Commission "firmly conclude[d] that it cannot recommend a ratio differential as great as the current 100-to-1 quantity ratio," and in fact "strongly recommend[ed] against a 100-to-1 quantity ratio." United States Sent'g Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, 196-98 (Feb. 1995) (hereinafter "Cocaine and Federal Sentencing Policy"). In particular, the Sentencing Commission noted that federal sentencing data led to the "inescapable conclusion" that African Americans were disproportionately affected by the 100:1 ratio, and expressed "great concern" over the disparity. *Id.* at xii. Furthermore, the Sentencing Commission concluded that sufficient justifications did not exist to support a ratio as drastic as 100:1. "Research and public policy may support somewhat higher penalties for crack versus powder cocaine, but a 100-to-1 quantity ratio cannot be recommended." *Id.* at xiv.

Consistent with its report, on May 1, 1995, the Sentencing Commission submitted proposed amendments to the Sentencing Guidelines that would replace the 100:1 ratio with a 1:1 ratio. *See* Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25074, 25075-77 (May 10, 1995). In doing so, the Sentencing Commission reiterated its "deep[] concern" over the 100:1 ratio's

disproportionate impact on African Americans, and explained that "sufficient policy bases for the [100:1 ratio] do not exist." *Id.* at 25076.

Following the Sentencing Commission's February 1995 report and May 1995 proposed amendments, the House Subcommittee on Crime and the Senate Committee on the Judiciary held separate hearings to gather additional input on the 100:1 ratio and the proposed equalization. *See Cocaine and Federal Sentencing Policy: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 104th Cong. (1995) (hereinafter "1995 House Hearing"); *U.S. Sentencing Commission and Cocaine Sentencing Policy: Hearing Before the Sen. Comm. on the Judiciary*, 104th Cong. (1995) (hereinafter "1995 Senate Hearing"). Throughout those hearings, witnesses repeatedly highlighted the disproportionate impact of the 100:1 ratio on African Americans, and repeatedly underscored the lack of justification for the ratio. In fact, of the 16 witnesses who testified at the hearings, all but one urged Congress to eliminate the 100:1 ratio.

Despite the overwhelming evidence before it, Congress rejected the Sentencing Commission's proposed equalization, thereby reaffirming the 100:1 ratio. *See* Act of Oct. 30, 1995, Pub. L. No. 104-38, 109 Stat. 334. As explained below, Congress's reaffirmation of the 100:1 ratio was unconstitutional because it violated Equal Protection. Continuing to enforce sentences, like Mr. Davis's, that

are based on the 100:1 ratio negatively impacts public perceptions on the criminal justice system, and may undermine the effective administration of justice.

I. CONGRESS'S REAFFIRMATION OF THE 100:1 RATIO VIOLATED EQUAL PROTECTION

The Equal Protection guarantees of the Fifth Amendment "require[] 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) (quotation and alteration omitted); *see Weinberger v. Wiesenfeld*, 420 U.S. 636, 637 n.2 (1975) (explaining that the approach to Equal Protection claims under the Fifth and Fourteenth Amendments is the same). Courts apply strict scrutiny to laws that on their face discriminate on the basis of race. But when, as here, a law is facially neutral, courts apply strict scrutiny only if the law was passed or applied with discriminatory intent or purpose. *See Miller v. Johnson*, 515 U.S. 900, 913 (1995); *Washington v. Davis*, 426 U.S. 229, 239-42 (1976); *Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). Otherwise, courts apply rational basis review. *See Rogers v. Lodge*, 458 U.S. 613, 617 (1982).

As explained below, Congress's reaffirmation of the 100:1 ratio fails under either strict scrutiny or rational basis. This Court should therefore reverse the District Court decision and remand this case.

A. Congress's Reaffirmation of the 100:1 Ratio Fails Under Strict Scrutiny

To demonstrate that Congress passed a facially neutral law with discriminatory intent or purpose, and thus that courts should subject the law to strict scrutiny, one must show that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). "[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact . . . that the law bears more heavily on one race than another." *Davis*, 426 U.S. at 242; *accord Wo*, 118 U.S. at 373-74. Sometimes, a law is so discriminatory in practice that the only plausible explanation is discriminatory purpose. *See, e.g.*, *Wo*, 118 U.S. at 373-74; *see also 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. The evidentiary inquiry is then relatively easy." (internal citations omitted)).

Here, the evidence before Congress in 1995 demonstrated that the 100:1 ratio disproportionately affected African Americans. In fact, the discriminatory impact was so extreme, and the evidence of it so overwhelming, that it is difficult to devise a plausible conclusion other than that Congress reaffirmed the 100:1 ratio

with a discriminatory purpose. Thus, Congress's rejection of the proposed equalization and reaffirmation of the 100:1 ratio should be subjected to strict scrutiny, which it cannot pass.

1. The 100:1 Ratio Disproportionately Impacted African Americans

a. African Americans Consistently Comprised 90 Percent of All Federally Convicted Crack Cocaine Defendants

Following enactment of the Anti-Drug Abuse Act of 1986, statistical studies consistently showed that the 100:1 ratio disproportionately impacted African Americans. Analyzing post-Guidelines data from 1989 and 1990, the Department of Justice concluded that 82 percent of all defendants convicted of federal crack cocaine offenses were African American. Douglas C. McDonald and Kenneth E. Carlson, Bureau of Justice Statistics, Dep't of Justice, *Sentencing in the Federal Courts: Does Race Matter?*, 90-93 (Dec. 1993) (hereinafter "Sentencing in Federal Courts"). During the early-to-mid 1990s, the percentage of federal crack cocaine convictions involving African Americans steadily rose. *E.g.*, 1995 Senate Hearing at 38, 42 (statement of Wayne A. Budd, Commissioner, U.S. Sentencing Commission) (stating that over 90 percent of federal crack cocaine convicts in 1994 were African American); 1995 House Hearing at 76 (statement of Lyle Strom, U.S. District Judge, District of Nebraska) (discussing a study conducted by the District of Nebraska finding that 90 percent of federal crack cocaine

prosecutions from 1990 through part of 1993 involved African Americans); *id.* at 123, 130-31 (statement of William B. Moffitt, Treasurer, NACDL) (showing that African Americans comprised approximately 90 percent of all federal crack cocaine convicts for each year from 1992 to 1995, and identifying at least one study showing that the percentage exceeded 92 percent in 1992); Cocaine & Fed. Sent'g Pol'y at 152 (concluding that in 1993, 88.3 percent of convicted crack cocaine offenders were African American). By 1995, more than 90 percent of federal defendants convicted of crack cocaine offenses were African American. 1995 House Hearing at 130 (statement of William B. Moffitt, Treasurer, NACDL).

In contrast, the percentage of white defendants convicted of crack cocaine offenses markedly decreased over the same time period. At least one study showed that in 1988 and 1989, whites comprised more than 20 percent of federally convicted crack cocaine defendants. *Id.* at 132 (statement of William B. Moffitt, Treasurer, NACDL). Thereafter, that percentage dropped precipitously, plummeting to 3 or 4 percent between 1992 and 1994. 1995 Senate Hearing at 42 (statement of Wayne A. Budd, Commissioner, U.S. Sentencing Commission); 1995 House Hearing at 130-31 (statement of William B. Moffitt, Treasurer, NACDL); *id.* at 163 (statement of Nkechi Taifa, Legislative Counsel, ACLU).

Alone, the stark disparity between crack cocaine convictions involving—and thus application of the 100:1 ratio to—African Americans and whites is troubling.

But it raises even graver concerns in context. According to a 1991 survey by the Department of Health and Human Services, 62 percent of all crack users were white, and only 25 percent were African American. *See* Nat'l Inst. on Drug Abuse, *National Household Survey on Drug Abuse: Population Estimates 1991*, 37-39 (1991). The Sentencing Commission likewise reported that a majority of crack cocaine users were white. Cocaine & Fed. Sent'g Pol'y at 34 (indicating that 52 percent of crack cocaine users were white and 38 percent were African American). Furthermore, in 1995, African Americans comprised only 15 percent of the population. *See* 1995 House Hearing at 7 (statement of Rep. Charles B. Rangel). Yet, African Americans represented more than 90 percent of all convicted federal crack cocaine offenders, whereas whites comprised barely more than 3 percent.

When it considered the Sentencing Commission's recommendations in 1995, most, if not all, of these statistics were before Congress. Thus, Congress was well aware that the 100:1 ratio had an extreme disproportionate effect on African Americans.

b. Some Research Suggested Racial Targeting in the Application of the 100:1 Ratio

In fact, during the 1995 hearings, Congress was apprised of research bluntly suggesting that African Americans and other racial minorities were targeted for crack cocaine prosecution in federal court. A 1993 study revealed that in Los Angeles County, African Americans were more likely than members of other races

to be charged with federal crack cocaine offenses, to which the 100:1 ratio would apply, than with state offenses, to which more lenient ratios often applied. Richard Berk and Alec Campbell, *Preliminary Data on Race and Crack Charging Practices in Los Angeles*, 1993 WL 388006, at *36-38 (1993); *see* 1995 House Hearing at 85 (statement of Douglas C. McDonald, Senior Scientist and Manager, ABT Associates Inc.) (discussing Berk's study); *cf.* 1995 Senate Hearing at 28-29 (statement of Michael Goldsmith, Commissioner, U.S. Sentencing Commission) (alluding to this study); *id.* at 45 (remarks by Richard P. Conaboy, U.S. District Judge, Middle District of Pennsylvania, and Commissioner, U.S. Sentencing Commission) (same). Specifically, the data showed that in Los Angeles County, 49 percent of African Americans arrested by state agencies for crack cocaine offenses were charged federally, but not a single white arrestee was so charged. Berk & Campbell, 1993 WL 388006, at *36-38. A 1995 investigation by the Los Angeles Times likewise found that in Los Angeles County, not one white defendant was prosecuted federally for crack cocaine offenses between 1988 and 1994. Similarly, since the 100:1 ratio was enacted in 1986, no white defendants in Los Angeles County and six surrounding counties were convicted in federal court for crack cocaine offenses. Dan Weikel, *War on Crack Targets Minorities Over Whites*, L.A. Times, May 21, 1995, at 1; *see* 1995 House Hearing at 152 (statement of Wade Henderson, Director, NAACP) (referencing the investigation).

A 1992 Sentencing Commission study indicated that potential racial targeting was not localized in Los Angeles County and its environs. In more than half of the federal jurisdictions handling crack cocaine cases, only racial minorities were prosecuted for crack cocaine offenses. *See* 1995 House Hearing at 68 (remarks by Rep. Robert C. Scott). No whites were federally prosecuted in 17 states and in many major cities. *Id.*

c. The Disproportionate Impact of the 100:1 Ratio Directly Caused Stark Sentencing Disparities between African-American and White Defendants

Predictably, the disproportionate impact of the 100:1 ratio on African-American defendants directly resulted in marked sentencing disparities when compared to whites. Before Congress enacted the 100:1 ratio in 1986, the average length of incarceration for African-American and white defendants, for all crimes, was roughly equal. By 1990, a mere four years later, prison sentences for African Americans were over 40 percent longer. Sent'g in Fed. Courts at 93; *accord* 1995 House Hearing at 83-85 (statement of Douglas C. McDonald, Senior Scientist and Manager, ABT Associates Inc.); Cocaine & Fed. Sent'g Pol'y at 153-54. The disproportionate impact of the 100:1 ratio accounted for 60 percent of this sentencing disparity, and for "nearly all of the black/white difference in sentences for cocaine trafficking . . . ." Sent'g in Fed. Courts at 94; *accord* 1995 House Hearing at 85 (statement of Douglas C. McDonald, Senior Scientist and Manager,

ABT Associates Inc.); Cocaine & Fed. Sent'g Pol'y at 153-54. Perhaps most strikingly, a Department of Justice study concluded that equalizing the powder-to-crack ratio would not only eliminate the difference in prison lengths for African Americans and whites, but would slightly reverse it. Sent'g in Fed. Courts at 2; *accord* Cocaine & Fed. Sent'g Pol'y at 153-54.

In short, by 1995, Congress had overwhelming evidence that the 100:1 ratio disproportionately impacted African Americans and was the principal cause for the widening gap in the length of incarceration for African-American and white offenders. The evidence was so clear that it is hard to imagine a plausible explanation other than discriminatory purpose for Congress's decision to reject the proposed equalization and reaffirm the 100:1 ratio. *See, e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339, 341-42 (1960); *Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886); *see also Miller v. Johnson*, 515 U.S. 900, 905-10, 917-20 (1995). Accordingly, Congress's decision must pass strict scrutiny. *See Miller*, 515 U.S. at 913.

2. Congress's Reaffirmation of the 100:1 Ratio Fails Strict Scrutiny

Congress's decision to reaffirm the 100:1 ratio cannot withstand strict scrutiny. To pass strict scrutiny, a law must be narrowly tailored to achieve a compelling government interest. *E.g.*, *Miller*, 515 U.S. at 920. The 100:1 ratio fails to meet either prong. As explained below, no justification—let alone a

compelling interest—existed to support a sentencing disparity as severe as 100:1. Moreover, case-specific enhancements under the Sentencing Guidelines provided a more narrowly tailored method of addressing whatever perceived harms actually existed. *See infra* Part I.B. Congress's decision to reaffirm the 100:1 ratio therefore fails strict scrutiny. At minimum, these facts suffice at the pleading stage to support the claim that Congress's reaffirmation of the 100:1 ratio violated the Fifth Amendment's Equal Protection Clause. *See* Fed. R. Civ. P. 8; *Monmouth Med. Ctr. v. Thompson*, 257 F.3d 807, 815 (D.C. Cir. 2001).

B. Congress's Reaffirmation of the 100:1 Ratio Fails Under Rational Basis Review

Even if Congress lacked discriminatory purpose and intent when it reaffirmed the 100:1 ratio, Congress's decision would still violate Equal Protection. Any classification in the law, even if not based on race, "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." *Johnson v. Robinson*, 415 U.S. 361, 374-75 (1974) (quotation and citation omitted). When a law uniquely impacts a historically disadvantaged minority group, the Supreme Court has applied a more stringent form of rational basis review. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2692-96 (2013); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-38 (1973).

Here, Congress's reaffirmation of the 100:1 ratio disproportionately impacted a historically disadvantaged group—African Americans—and must be subjected to a more rigorous form of rational basis review. Under that more rigorous review, Congress's decision fails. Instead, the reaffirmation of the 100:1 ratio was arbitrary, unreasonable, and unjustifiable, and therefore fails the rational basis test.

1. Available Evidence Discredited All Purported Justifications for the 100:1 Ratio

When Congress enacted the 100:1 ratio in 1986, it identified five primary bases it believed justified the disparity between crack and powder cocaine: (1) crack cocaine is associated with increased crime; (2) crack cocaine is more addictive; (3) crack cocaine victimizes juveniles to a greater extent; (4) crack cocaine is easier to manufacture, transport, afford, ingest, and dispose, and therefore has the potential to become more widespread; and (5) crack cocaine generates greater public health concerns because of its impact on pregnant women and on the spread of HIV, as well as the increased risk it poses for psychosis and death. *See* Cocaine & Fed. Sent'g Pol'y at 180-91. Congress parroted many of these concerns when it reaffirmed the 100:1 ratio in 1995. *See, e.g.*, H.R. Rep. No. 104-272, at 3-4 (1995); 1995 Senate Hearing at 1-3 (statement of Sen. Orrin G. Hatch); *id.* at 7 (statement of Sen. Dianne Feinstein).

Whether these concerns could justify the 100:1 ratio in 1986 is, at best, debatable.[4] By 1995, the conclusion was undeniable: Available evidence overwhelmingly demonstrated that these concerns could not support the 100:1 ratio or anything close to it. Nor could the only new justification Congress could devise—purported concerns over sentencing disparities—support the 100:1 ratio.

a. The 100:1 Ratio Lacked a Rational Relationship to Concerns over Alleged Increased Crime

By 1995, Congress was aware that one of its primary justifications for enacting the 100:1 ratio—combatting the increased crime allegedly attributable to crack cocaine—could not support the ratio. First, determining how much systemic crime is associated with the use and distribution of crack, as opposed to powder, cocaine is "difficult, if not impossible." Cocaine & Fed. Sent'g Pol'y at 95; *but see Tr. of U.S. Sent'g Comm'n Hearing on Crack Cocaine* at 79-82 (Nov. 9,1993) (hereinafter "1993 Sentencing Commission Hearing") (remarks by Paul J. Goldstein, Professor of Epidemiology, University of Illinois at Chicago)

[4] According to Representative Daniel Lungren, a drafter of the Anti-Drug Abuse Act of 1986, "[w]e 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 any evidentiary basis for it." 156 Cong. Rec. H6202 (daily ed. July 28, 2010) (statement of Rep. Daniel E. Lungren). Senator Edward Kennedy agreed: The 100:1 ratio "wasn't based upon any hearings. That wasn't based upon [any] information. That wasn't based upon law enforcement people testifying. . . . The majority leader said 20-to-1 at that time. . . . The one thing . . . that is pretty uniform is that the 100-to-1 makes absolutely no sense." 1995 Senate Hearing at 55 (remarks by Sen. Edward M. Kennedy).

(explaining that crack is no more associated with violence than powder cocaine). Thus, whatever correlation existed between cocaine and systemic crime could be equally attributable to powder as to crack, and cannot rationally support a 100:1 ratio.

Second, while studies disagreed about the level of correlation between crack cocaine and systemic crime, there was no dispute that the related criminal conduct could just as easily be attributable to socio-economic variables, the characteristics of the environment in which crack cocaine was used and distributed, and other systemic factors. *E.g.*, 1995 House Hearing at 96, 100 (statement of Jeffrey Fagan, Professor of Criminal Justice, Rutgers University); Cocaine & Fed. Sent'g Pol'y at 94-98, 105-06; 1993 Sent'g Comm'n Hr'g at 57-59 (statement of Steven Belenko, Deputy Director, New York Criminal Justice Agency); *cf.* Bureau of Justice Statistics, Dep't of Justice, *A National Report: Drugs, Crime, and the Justice System* 2 (Dec. 1992) (explaining that socio-economic and other factors contribute to the crime associated with drugs). Nor could studies provide any significant conclusions regarding an association between crack cocaine and non-systemic crime. *E.g.*, Cocaine & Fed. Sent'g Pol'y at 185; 1993 Sent'g Comm'n Hr'g at 54 (statement of Steven Belenko, Deputy Director, New York Criminal Justice Agency).

In any event, even assuming *arguendo* that studies could link crack cocaine to more crime than powder cocaine, the data provided no sound basis for a numerical distinction between crack and powder cocaine, let alone a distinction as severe as 100:1. *See* Cocaine & Fed. Sent'g Pol'y at 185-86; 1993 Sent'g Comm'n Hr'g at 177, 179 (statement of Robert S. Hoffman, Senior Attending Physician, Bellevue Hospital Center) (concluding that any increased violence associated with crack cocaine cannot justify a 100:1 ratio). The only reliable conclusion that the data supported was that crack offenders tended to have worse criminal histories. Cocaine & Fed. Sent'g Pol'y at 186-87. But those worse criminal histories were already captured under the Sentencing Guidelines. *See* U.S.S.G. ch. 4 (1994). The 100:1 ratio was not necessary to account for them. *See infra* Part I.B.2. In fact, one study suggested that the 100:1 ratio may actually worsen them: Among drug offenders, longer incarceration was associated with greater risk of recidivism. *See* 1995 House Hearing at 101-02 (statement of Jeffrey Fagan, Professor of Criminal Justice, Rutgers University).

In short, the 100:1 ratio was not rationally related to congressional concerns over alleged increased crime attributable to crack cocaine.

b. The 100:1 Ratio Lacked a Rational Relationship to Concerns over Alleged Greater Addictiveness

Nor was the 100:1 ratio rationally related to the allegedly greater addictiveness of crack cocaine. Crack and powder cocaine are pharmacologically

identical and produce the same psychotropic effects. *See* Cocaine & Fed. Sent'g Pol'y at 14, 182. Smoking crack cocaine and injecting powder cocaine are equally addictive. *Id.* at 18-19, 22-23, 182. Some scholars even concluded that there is "no evidence that crack is any more addictive than powder cocaine" in any form. 1993 Sent'g Comm'n Hr'g at 68 (statement of Paul J. Goldstein, Professor of Epidemiology, University of Illinois at Chicago); *accord* 1995 House Hearing at 100 (statement of Jeffrey Fagan, Professor of Criminal Justice, Rutgers University). Even assuming *arguendo* that crack cocaine posed a greater risk of dependence than powder cocaine, that greater risk was insufficient to justify the 100:1 ratio. *See* Cocaine & Fed. Sent'g Pol'y at 197.

c. The 100:1 Ratio Lacked a Rational Relationship to Concerns over Allegedly Greater Victimization of Juveniles

Research studies also discredited Congress's assertion that crack cocaine victimized juveniles to a greater extent than powder cocaine. Among cocaine users, powder cocaine was at the time overwhelmingly more popular than crack, regardless of the age group studied. *See id.* at 187. Among distributors, the percentage of juveniles was similar between crack and powder cocaine. *See id.* at 84. To the extent that juveniles were involved more frequently, in greater

numbers, or in greater roles in the distribution of crack cocaine,[5] the Sentencing Guidelines accounted for it. *See* U.S.S.G. § 2D1.2 (1994); Cocaine & Fed. Sent'g Pol'y at 187; *infra* Part I.B.2. Thus, concerns over crack cocaine's victimization of juveniles could not support a ratio as high as 100:1.

d. The 100:1 Ratio Lacked a Rational Relationship to Concerns over Allegedly Greater Availability of Crack Cocaine

Congress's concern over purportedly greater availability of crack cocaine also failed to justify the 100:1 ratio. "[C]rack cocaine rarely, if ever, [was] imported into the United States." Cocaine & Fed. Sent'g Pol'y at 66. Large-scale trafficking instead involved powder. *Id.* at 188. Once in the United States, cocaine was not necessarily easier to transport, distribute, and destroy in crack rather than in powder form. Both crack and powder could be divided into small, easily transportable and discardable quantities that could be sold at affordable prices for individual use. *See id.* at 69, 189. Indeed, retail-level dealers of crack and powder cocaine employed the same method of "drip" trafficking, whereby dealers carried small amounts for immediate distribution and left the larger quantities in reserve at stash houses. Given that almost all cocaine was imported into the United States as powder, and that crack and powder cocaine could be transported, distributed, and

[5] Studies suggested that more juveniles distributed crack cocaine than powder cocaine, and that juveniles were more frequently used in visible positions in crack cocaine distribution networks. *See* Cocaine & Fed. Sent'g Pol'y at 84.

discarded with similar ease, congressional fears of the greater availability of crack cocaine could not justify a ratio as high as 100:1.

e. The 100:1 Ratio Lacked a Rational Relationship to Concerns over Alleged Increased Public Health Risks

Finally, medical and scientific research did not support Congress's concerns over increased public health risks associated with crack cocaine. Rates of HIV infection, for instance, were found to be nearly equal among crack cocaine smokers and powder cocaine injectors. *See* Cocaine & Fed. Sent'g Pol'y at 42-44, 191. Other studies were unable to link crack cocaine use with increased numbers of "crack babies," increased instances of teenage pregnancy, maternal neglect, or child abuse, or worse effects on children whose mothers used crack cocaine while pregnant. *Id.* at 45-47, 189-90; 1993 Sent'g Comm'n Hr'g at 152, 184 (statement of Ira J. Chasnoff, President, National Association for Perinatal Addiction Research and Education). Nor did studies connect crack cocaine use to greater instances of psychosis and death. Cocaine & Fed. Sent'g Pol'y at 37-41, 183-84. In fact, data suggested that injecting powder cocaine more often led to death than smoking crack cocaine. *Id.* at 40.

In short, the evidence available in 1995 conclusively demonstrated that Congress's 1986 concerns about the increased harm and danger associated with crack cocaine—many of which Congress cited to support the 100:1 ratio in 1995—were exaggerated. None of those concerns could support a 100:1 sentencing

disparity between crack and powder cocaine. *See* Amendments to the Sentencing Guidelines for the United States Courts, 60 Fed. Reg. 25074, 25076 (May 10, 1995).

f. The 100:1 Ratio Lacked a Rational Relationship to Purported Concerns Over Sentencing Disparities

Ironically, the only new justification that Congress could muster in 1995 to support the 100:1 ratio was a concern over sentencing disparities. Congress worried that if the 100:1 ratio were eliminated under the Guidelines but not simultaneously eliminated under the Controlled Substances Act, the result would be marked sentencing disparities based on small differences in drug weights. *See, e.g.*, H.R. Rep. No. 104-272, at 4 (1995). This concern, however, could not justify maintaining the 100:1 ratio. The 100:1 ratio had no basis in fact or science, regardless of whether the ratio was applied under the Guidelines or under the statute. Refusing to equalize the ratio under the Guidelines just because the same unjustifiable ratio had not yet been reduced under the statute is arbitrary and nonsensical. Furthermore, there is nothing anomalous about applying different ratios for purposes of the Sentencing Guidelines and for purposes of mandatory minimums. In any event, if Congress was concerned about sentencing disparities, it could have eliminated the unjustifiable 100:1 ratio under the Controlled Substances Act.

2. The Sentencing Guidelines Accounted for Many of the Perceived Greater Harms of Crack Cocaine

To the extent that crack cocaine was more harmful and more dangerous than powder cocaine, that greater harm was largely accounted for by the Sentencing Guidelines. The Sentencing Guidelines in effect at the time, combined with the amendments proposed in 1995, provided case-specific enhancements that could largely account for increased violence, greater victimization of youth and women, distribution in protected areas, increased criminality and recidivism, and other societal ills that Congress attributed to crack cocaine. *See* U.S.S.G. §§ 2D1.1(a)(1)-(2) (death and bodily injury), 2D1.1(b)(1) (possession of a firearm), 2D1.1(d) (murder), 2D1.2 (use of or distribution to juveniles and women, and distribution occurring near protected areas), 3A1.1 (vulnerable victims), ch. 4 (calculating criminal history category) (1994); Amendments to the Sentencing Guidelines, 60 Fed. Reg. at 25075-76 (proposed enhancements for possessing, brandishing, and discharging a firearm); *accord* 1995 Senate Hearing at 16, 19-22, 24-25 (statement of Richard P. Conaboy, U.S. District Judge, Middle District of Pennsylvania, and Chairman, U.S. Sentencing Commission) (identifying myriad offense characteristics that would be captured by the Sentencing Guidelines). According to the Sentencing Commission, these and other enhancements could have resulted in sentences for crack cocaine that were 270 percent more severe than sentences for other forms of cocaine. *See* 1995 House Hearing at 115, 119

(statement of William B. Moffitt, Treasurer, NACDL); *accord* 1995 Senate Hearing at 31-32, 34-35 (statement of Michael Goldsmith, Commissioner, U.S. Sentencing Commission) (demonstrating that a 10:1 or 5:1 ratio would produce sentences 150-300 percent greater for crack than for powder cocaine). The Sentencing Commission therefore notified Congress that "the guideline provisions, as amended, will better take into account the increased harms associated with some crack cocaine offenses and, thus, the different offense levels based solely on the form of cocaine are not required." Amendments to the Sentencing Guidelines, 60 Fed. Reg. at 25077.[6]

That the Guidelines provided for specific enhancements more accurately accounting for many of the concerns Congress cited "necessarily casts considerable doubt" that the 100:1 ratio was rationally intended to target those same concerns. *Dep't of Agric. v. Moreno*, 413 U.S. 528, 536-37 (1973).

3. Witnesses Testifying Before Congress Were Nearly Unanimous In Rejecting the 100:1 Ratio as Unfounded

Considering the mountain of evidence dispelling Congress's concerns about crack cocaine, and in light of the case-specific enhancements in the Sentencing

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[6] Some members of the Sentencing Commission disagreed that the Guidelines adequately captured all harms associated with crack cocaine. But not even they believed that a ratio as great as 100:1 was necessary to account for those harms. *See, e.g.*, 1995 Senate Hearing at 26-29 (statement of Michael Goldsmith, Commissioner, U.S. Sentencing Commission).

Guidelines, the Sentencing Commission—the very expert in federal sentencing law and policy that Congress had specifically charged with studying the continued viability of the 100:1 ratio—unanimously concluded that the 100:1 ratio was unjustifiable. 1995 House Hearing at 9 (statement of Richard P. Conaboy, U.S. District Judge, Middle District of Pennsylvania, and Chairman, U.S. Sentencing Commission); 1995 Senate Hearing at 17 (statement of Richard P. Conaboy, U.S. District Judge, Middle District of Pennsylvania, and Chairman, U.S. Sentencing Commission); *see* Amendments to the Sentencing Guidelines, 60 Fed. Reg. at 25076 ("[T]he Commission concluded that sufficient policy bases for the current penalty differential do not exist."). Testifying before the House Subcommittee on Crime, one Commissioner elaborated that the Sentencing Commission "looked hard for a justification for the 100-to-1 quantity ratio and found . . . that there was no empirical or policy justification for it." 1995 House Hearing at 35 (statement of Wayne A. Budd, Commissioner, U.S. Sentencing Commission).

Other witnesses—including a representative of the Department of Justice—concurred. *E.g.*, *id.* at 61-66 (statement of Jo Ann Harris, Assistant Attorney General, Department of Justice) ("urg[ing]" Congress to review the 100:1 ratio). Indeed, of the 16 witnesses who testified during the 1995 House and Senate hearings, all but one agreed that the ratio was unjustifiable. *See* 1995 Senate

Hearing at 3-4, 13, 26, 29, 38-40, 59, 63; 1995 House Hearing at 9, 19, 35, 61-63, 65-66, 77, 93-94, 100, 103, 105, 107-08, 110-11.[7]

In short, by 1995, no justifications existed to support the 100:1 ratio. Congress's decision to reaffirm the ratio anyway lacked a rational basis, and cannot stand. At the very least, these facts are sufficient at the pleading stage to support the claim that Congress's reaffirmation of the 100:1 ratio violated the Fifth Amendment's Equal Protection Clause. *See* Fed. R. Civ. P. 8; *Monmouth Med. Ctr. v. Thompson*, 257 F.3d 807, 815 (D.C. Cir. 2001). Accordingly, this Court should reverse the District Court's decision and remand this case.

II. CONTINUING TO ENFORCE THE 100:1 RATIO UNDERMINES THE EFFECTIVE ADMINISTRATION OF JUSTICE

When Congress enacted the 100:1 ratio in 1986, it did not know the discriminatory impact that the ratio would have. Nor was it aware that the

[7] The lone dissenter was a law enforcement official who offered five justifications to the 100:1 ratio: (1) "pharmacological differences between the substances," (2) "[v]iolence and street crimes . . . directly associated with crack cocaine," (3) "[c]rack's significantly greater addictive character," (4) crack's greater victimization of youth, and (5) the need for enhanced sentencing penalties to ensure cooperation in government investigations. 1995 House Hearing at 104 (statement of Tim Nelson, Special Agent, North Carolina State Bureau of Investigation). As explained above, available research directly contradicted the first four purported justifications. As for the fifth, the officer provided no basis for believing that a sentencing disparity between crack and powder cocaine—as opposed to simply harsh penalties for crack cocaine—was necessary to secure cooperation, let alone one as high as 100:1. *See id.* at 104-05. In any event, it does not appear that Congress relied on that inadequate justification when reaffirming the 100:1 ratio. *See, e.g.*, H.R. Rep. No. 104-272, at 3-4 (1995).

justifications it had offered for the ratio were hollow. Congress enacted the 100:1 ratio "thinking we were doing the right thing at the right time." 156 Cong. Rec. H6202 (daily ed. July 28, 2010) (statement of Rep. Daniel E. Lungren). Judicial enforcement of the 100:1 ratio at that time—however misguided the ratio turned out to be—was therefore understandable. But by 1995, the situation had dramatically changed: Available evidence overwhelmingly showed that the 100:1 ratio disproportionately affected African Americans and lacked any basis in fact and science.

Congressional reaffirmation of the 100:1 ratio in 1995 was thus a far cry from the ratio's uninformed but well-intentioned 1986 enactment. Congress's willful disregard of the evidence available in 1995 instead raises grave constitutional concerns. Yet, some courts, like the District Court below, have ignored those concerns and have continued enforcing sentences imposed under the 100:1 ratio. Those decisions promise to erode public perceptions of the criminal justice system and may undermine the effective administration of justice.

Continued application of the 100:1 ratio after 1995 "fueled the belief across the country that Federal cocaine laws are unjust." *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. 5 (2009) (statement of Lanny A. Breuer, Assistant Attorney General, Department of

Justice); *accord* 156 Cong. Rec. S1681 (daily ed. Mar. 17, 2010) (statement of Sen. Richard Durbin) (observing that the 100:1 ratio has engendered "a belief in the African-American community that [crack cocaine laws were] fundamentally unfair"). Those negative perceptions of federal cocaine laws have contributed to broader disillusionment with the criminal justice system. According to the Sentencing Commission, the "perceived improper unwarranted disparity based on race fosters disrespect for and lack of confidence in the criminal justice system." United States Sent'g Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 103 (May 2002).

Continued enforcement of the 100:1 ratio promises to perpetuate these negative perceptions and the consequent disillusionment with the criminal justice system. These ill effects may, in turn, undermine the effective administration of justice. Witnesses testifying in 1995 before the Senate Committee on the Judiciary cautioned that continued application of the 100:1 ratio could breed further criminality and could disrupt proper functioning of the criminal justice system. *See* 1995 Senate Hearing at 17 (statement of Richard P. Conaboy, U.S. District Judge, Middle District of Pennsylvania, and Commissioner, U.S. Sentencing Commission); *id.* at 29 (statement of Michael Goldsmith, Commissioner, U.S. Sentencing Commission). Indeed, "[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." Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L. Rev. 1143, 1165 (2006); *accord, e.g.*, Josh Bowers and Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 Wake Forest L. Rev. 211, 212, 256-63 (2012) ("[A] criminal justice system perceived to be procedurally unfair or substantively unjust may provoke resistance and subversion . . . .").

By granting the Sentencing Commission's motion to dismiss and continuing to enforce the 100:1 ratio as applied to Davis, the District Court's decision risks further erosion of public confidence in the fairness of the criminal justice system and risks undercutting the effective administration of justice.

III. CONCLUSION

For these reasons, NACDL urges this Court to reverse the District Court's decision and remand this case.

December 18, 2014

Respectfully submitted,

/s/ Timothy P. O'Toole

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I hereby certify that on December 18, 2014, I electronically filed the foregoing **BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT BRIAN DAVIS** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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