No.

In the Supreme Court of the United States

TONY R. HEWITT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

RUSSELL WILSON II
Law Office of Russell Wilson II
1910 Pacific Avenue
No. 12050
Dallas, Texas 75201
(469) 573-0211

MICHAEL B. KIMBERLY
Counsel of Record
CHARLES SEIDELL
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
mkimberly@mwe.com

Counsel for Petitioner

QUESTION PRESENTED

The First Step Act (FSA) significantly reduced the mandatory minimum sentences for several federal drug and firearm offenses. First Step Act of 2018, Pub. L. No. 115-391, §§ 401, 403, 132 Stat. 5194, 5220-5222. Sections 401 and 403 apply to offenses committed after the FSA's enactment on December 21, 2018, and to "any offense that was committed before the date of enactment * * * if a sentence for the offense has not been imposed as of such date of enactment." FSA §§ 401(c), 403(b).

There is an acknowledged split between the Third, Seventh, and Ninth Circuits, on the one hand; and the Fifth and Sixth Circuits, on the other hand, on the question whether sections 401(c) and 403(b) apply when a pre-enactment sentence is vacated and the court must impose a new post-enactment sentence.

The question presented accordingly is as follows:

Whether the First Step Act's sentencing reduction provisions apply to a defendant originally sentenced before the FSA's enactment when that original sentence is judicially vacated and the defendant is resentenced to a new term of imprisonment after the FSA's enactment.

RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

- *United States* v. *Hewitt*, No. 3:08-cr-167-B-BH (May 7, 2010) (judgment and sentencing)
- *United States* v. *Hewitt*, No. 3:08-cr-167-B-BH (Dec. 6, 2012) (resentencing)
- *Hewitt* v. *United States*, No. 3:16-cv-603-B-BH (July 25, 2018) (denying section 2255 motion)
- *United States* v. *Hewitt*, No. 3:08-cr-167-B-BH (Aug. 19, 2021) (granting section 2255 motion)
- *United States* v. *Hewitt*, No. 3:08-cr-167-B-BH (Nov. 8, 2022) (judgment on resentencing)

United States Court of Appeals (5th Cir.):

- *United States* v. *Duffey*, 456 F. App'x 434 (No. 10-10103) (Jan. 3, 2012) (affirming in part, reversing in part, and remanding for resentencing)
- *United States* v. *Ross*, 582 F. App'x 528 (No. 12-11021) (Oct. 8, 2014) (affirming sentences)
- *In re Hewitt*, No. 20-10501 (Jan. 28, 2021) (granting leave to file successive section 2255 request)
- *United States* v. *Duffey*, 92 F.4th 304 (No. 22-10265) (Feb. 2, 2024) (affirming resentencing)

United States Supreme Court:

- *Hewitt* v. *United States*, No. 11-10019 (May 29, 2012) (denying petition for certiorari)

TABLE OF CONTENTS

Table of Authorities iv
Introduction 1
Opinions Below 1
Jurisdiction 1
Statutory Provisions Involved 1
Statement 1
A. Legal background 1
B. Factual and procedural background 4
Reasons for Granting the Petition 5
A. The decision below deepens an acknowledged circuit split 6
B. The FSA's sentencing reduction provisions apply when a pre-enactment sentence is vacated 10
C. This is a perfect vehicle to resolve a question of substantial importance 16
Conclusion 19
Appendix A – court of appeals decision 1a
Appendix B – statutory excerpt 17a

TABLE OF AUTHORITIES

Cases

Astoria Federal Savings & Loan Association v. *Solimino*, 501 U.S. 104 (1991) 12

Bond v. *United States*, 572 U.S. 884 (2014) 12

Davis v. *Michigan Department of Treasury*, 489 U.S. 803 (1989) 13

Davis v. *United States*, 417 U.S. 333 (1974) 18

Deal v. *United States*, 508 U.S. 129 (1993) 2

Dorsey v. *United States*, 567 U.S. 260 (2012) 15

FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 13

North Carolina v. *Pearce*, 395 U.S. 711 (1969) 11, 12

Pepper v. *United States*, 562 U.S. 476 (2011) 11-13

Russello v. *United States*, 464 U.S. 16 (1983) 13

Smith v. *Berryhill*, 139 S. Ct. 1765 (2019) 13

United States v. *Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004) 2

United States v. *Ayres*, 76 U.S. 608 (1869) 11

Cases—continued

United States v. *Bethea*,
841 F. App'x 544 (4th Cir. 2021).....3, 9

United States v. *Carpenter*,
2023 WL 3200321 (6th Cir. 2023).....7

United States v. *Carpenter*,
80 F.4th 790 (6th Cir. 2023).....7

United States v. *Davis*,
139 S. Ct. 2319 (2019).....3, 4, 18

United States v. *Duffey*,
456 F. App'x 434 (5th Cir. 2012) 4

United States v. *Figueroa*,
530 F. Supp. 3d 437 (S.D.N.Y. 2021).....9

United States v. *Henry*,
983 F.3d 214 (6th Cir. 2020).....2, 3

United States v. *Holloway*,
68 F. Supp. 3d 310 (E.D.N.Y. 2014) 2

United States v. *Jackson*,
995 F.3d 522 (6th Cir. 2021).....7, 9

United States v. *Merrell*,
37 F.4th 571 (9th Cir. 2022).....7, 10

United States v. *Mitchell*,
38 F.4th 382 (3d Cir. 2022)..... 4, 8-11

United States v. *Nix*,
2023 WL 4457894 (W.D.N.Y. 2023) 9

United States v. *Ross*,
582 F. App'x 528 (5th Cir. 2014).....4

Cases—continued

United States v. *Stinson*,
97 F.3d 466 (11th Cir. 1996) 15

United States v. *Taylor*,
596 U.S. 845 (2022) 18

United States v. *Uriarte*,
975 F.3d 596 (7th Cir. 2020) 8, 9

United States v. *Walker*,
830 F. App'x 12 (2d Cir. 2020) 9, 16

Statutes

18 U.S.C.
§ 924(c)(1) 2
§ 924(c)(1)(A) 1
§ 924(c)(1)(D)(ii) 2
§ 3582(c) 12
§ 3742(g) 12

28 U.S.C. § 1254(1) 1

First Step Act of 2018, Pub. L. No. 115-391,
132 Stat. 5194 1
§ 401(c) 5
§ 403(a) 3
§ 403(b) 3, 5

Legislative Materials

164 Cong. Rec. S7645 (daily ed. Dec. 17,
2018) 13

164 Cong. Rec. S7774 (daily ed. Dec. 18,
2018) 14

Legislative Materials—continued

Hearing Before the Over-Criminalization Task Force of 2014 of the H. Comm. on the Judiciary, 113th Cong. (2014) (Hon. Irene M. Keeley, Judicial Conference of the United States) 2

Other Authorities

Ask the Editor: Past Perfect and Present Perfect Tenses, Britannica Dictionary (accessed Mar. 7, 2024).....10

The Chicago Manual of Style ¶ 5.132 (17th Ed. 2017)..... 10, 11

Human Rights Watch, *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty* (2013) 2

Karen M. Ross, *Essential Legal English in Context: Understanding the Vocabulary of US Law and Government* (2019) 11

U.S. Sentencing Commission, *Mandatory Minimum Penalties for Firearm Offenses in the Federal Criminal Justice System* (Mar. 2018).....2

U.S. Sentencing Commission, *Primer: Drug Offenses* (2023).....17

U.S. Sentencing Comm'n, *QuickFacts: Federal Offenders in Prison* (2023).....17

Vacate, *Black's Law Dictionary* (11th ed. 2019) 11

INTRODUCTION

All the ingredients for a grant of certiorari are present here. As the Fifth Circuit recognized in its opinion in this case, there is a hardened conflict among the federal courts of appeals on the question presented. Moreover—and as the government *agreed* at every stage of the proceedings below—the Fifth Circuit's resolution of the question is wrong. The issue is undeniably important and will continue to affect countless criminal defendants moving forward. Although the Court recently denied review of the question presented here in *Carpenter* v. *United States* (No. 23-531), it did so on the promise that the Sixth Circuit might resolve the conflict on its own. Now that the Fifth Circuit has joined the Sixth, that is no longer a possibility. The Court should grant the petition and reverse.

OPINIONS BELOW

The Fifth Circuit's opinion (App., *infra*, 1a-16a) is published at 92 F.4th 304.

JURISDICTION

The Fifth Circuit entered judgment on February 2, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, are reproduced in the appendix at pages 1a-16a.

STATEMENT

A. Legal background

1. Section 924(c) of Title 18 of the U.S. Code criminalizes the use, carrying, or possession of a firearm in connection with a "crime of violence or drug trafficking crime." 18 U.S.C. § 924(c)(1)(A). A first conviction under section 924(c) carries a mandatory sentence of at least

five years, and sentences for additional 924(c) convictions carry a minimum sentence of 25 years. *Id.* § 924(c)(1). Section 924(c) convictions must run consecutively rather than "concurrently with any other term of imprisonment." 18 U.S.C. § 924(c)(1)(D)(ii).

The practice of imposing concurrent sentences under section 924(c) is known as "stacking." See U.S. Sentencing Commission, *Mandatory Minimum Penalties for Firearm Offenses in the Federal Criminal Justice System* 8 (Mar. 2018), perma.cc/JQG6-A22E. Stacking often yields extremely long sentences, particularly because section 924(c)'s 25-year mandatory minimum applies even to second and subsequent 924(c) convictions obtained in the same criminal proceeding as a defendant's initial 924(c) conviction. See *Deal* v. *United States*, 508 U.S. 129, 134-135 (1993). The result was *de facto* life sentences for first-time section 924(c) offenders—a practice widely criticized. See, *e.g.*, Human Rights Watch, *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty* (2013); *Hearing Before the Over-Criminalization Task Force of 2014 of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Hon. Irene M. Keeley, Judicial Conference of the United States); *United States* v. *Angelos*, 345 F. Supp. 2d 1227, 1233 (D. Utah 2004); *United States* v. *Holloway*, 68 F. Supp. 3d 310, 316-317 (E.D.N.Y. 2014).

2. In response to the extraordinarily harsh sentences that section 924(c) imposed on first-time offenders, Congress enacted section 403 of the First Step Act (FSA). The FSA was the "product of a remarkable bipartisan effort," *United States* v. *Henry*, 983 F.3d 214, 218 (6th Cir. 2020), and made "once-in-a-generation reforms to America's prison and sentencing system," *Senate Passes Land-*

mark Criminal Justice Reform, U.S. Senate Comm. on the Judiciary (Dec. 18, 2018).

Section 403 of the FSA was designed "to remedy past overzealous use of mandatory-minimum sentences." *Henry*, 983 F.3d at 218. The provision amends section 924(c) to clarify that the 25-year mandatory minimum sentence applies only for violations that "occur[] after a prior" section 924(c) conviction "has become final." FSA § 403(a). In the absence of stacked 25-year sentences, first-time offenders receive only section 924(c)'s consecutive five-year minimum sentences—a difference of two decades per count.

Section 403 "changed the law so that, *going forward*, only a section 924(c) violation committed after a prior section 924(c) conviction has become final will trigger the 25-year minimum." *United States* v. *Davis*, 139 S. Ct. 2319, 2324 n.1 (2019) (cleaned up, emphasis added). But Congress also specified that section 403's reduced sentences apply to "any offense that was committed before the date of enactment of [the FSA], if a sentence for the offense has not been imposed as of such date of enactment." FSA § 403(b).

Congress used identical language in section 401, which reduces mandatory minimum sentences and sentencing rules for various federal drug offenses. Like section 403(b), section 401(c) states that the provision's reforms "shall apply to any offense that was committed before the date of enactment of [the FSA], if a sentence for the offense has not been imposed as of such date of enactment." Because sections 401(c) and 403(b) use the same language, the lower courts "have construed them to have the same meaning." *United States* v. *Bethea*, 841 F.

App'x 544, 548 n.5 (4th Cir. 2021); accord *United States* v. *Mitchell*, 38 F.4th 382, 389 (3d Cir. 2022).

B. Factual and procedural background

1. In 2009, petitioner Tony Hewitt was convicted on various charges relating to a series of bank robberies in 2008. The district court originally sentenced him to 355 years of imprisonment, the bulk of which corresponded to various 924(c) counts. *United States* v. *Duffey*, 456 F. App'x 434, 438-439 (5th Cir. 2012). The Fifth Circuit reversed the convictions in part and vacated Hewitt's sentence due to an error at sentencing. *Id.* at 444. On remand, the district court imposed a new sentence of 305 years, which the Fifth Circuit later affirmed. *United States* v. *Ross*, 582 F. App'x 528 (5th Cir. 2014).

In 2019, this Court held that section 924's "residual clause" was unconstitutionally vague, which eliminated conspiracy-based charges as predicates necessary to support convictions under section 924(c). *United States* v. *Davis*, 139 S. Ct. 2319 (2019). Given that several of his convictions were predicated on conspiracy to commit bank robbery, and in light of *Davis*, Hewitt requested authorization to file a successive section 2255 motion. App., *infra*, 3a. The Fifth Circuit granted leave, and the district court granted relief. *Ibid.*

2. Back before the district court for resentencing, Hewitt objected to his presentence report, arguing that section 403, which had been enacted in the interim between his sentencings, should apply. App., *infra*, 3a-4a. Hewitt had been convicted of five 924(c) violations. Under the law in place at the time of his original sentencing, his minimum sentence for these counts would have been 105 years; under the FSA it is only 25.

With respect to Hewitt's co-defendants, who raised the same objections, the government took the position that section 403 was inapplicable on resentencing because the original, since-vacated sentence was imposed before the FSA became effective. But by the time of Hewitt's resentencing, the government had reversed its course and requested application of section 403 at Hewitt's resentencing.

The district court nevertheless rejected Hewitt's and the government's position. It concluded that section 403 did not apply and sentenced Hewitt to a 105-year term of imprisonment for his section 924(c) convictions. App., *infra*, 5a.

The Fifth Circuit affirmed Hewitt's sentence. App., *infra*, 1a-16a. Before the Fifth Circuit, Hewitt and the government both argued that section 403 should apply at resentencing following the judicial vacatur of a pre-FSA sentence. App., *infra*, 7a. Recognizing that the question had "vexed[] and split[]" the courts of appeals, the court of appeals nonetheless concluded that the statutory language unambiguously applies regardless of the fact that prior sentence has been vacated. App., *infra*, 6a.

REASONS FOR GRANTING THE PETITION

Further review is manifestly warranted. The FSA's historic reforms "apply to any offense that was committed before the date of enactment of [the] Act, if a sentence for the offense has not been imposed as of such date of enactment." FSA §§ 401(c), 403(b). As the Fifth Circuit recognized below, the federal courts of appeals are split over whether that language covers defendants whose pre-FSA sentences have been judicially vacated and who are then resentenced post-FSA.

As the government agreed below, the Fifth Circuit's resolution of the question is deeply flawed—the text, context, and purpose of the FSA establish that these provisions apply at post-enactment resentencings. The difference attributable to that error in this and many other cases is decades of imprisonment per defendant.

The Court recently denied review of this question in *Carpenter* v. *United States* (No. 23-531). Although the petition in that case was supported by two *amicus* briefs explaining the surpassing importance of the question presented, the government resisted certiorari on the ground that it could resolve the split by acquiescing in rehearing before the Sixth Circuit. But with the Fifth Circuit now joining the Sixth, that is no longer a viable path for resolving the disagreement among the courts of appeals. Only this Court can restore uniformity on the question presented. Because this case offers a fully developed vehicle that cleanly tees up the question for review, the petition should be granted.

A. The decision below deepens an acknowledged circuit split

1. In proceedings below, Hewitt and the government both argued that "the First Step Act's reach encompass[es] prior offenses for which a pre-Act sentence is later vacated." App., *infra*, 5a-6a.

The Fifth Circuit expressly rejected that argument. In its view, "Congress unambiguously drew the line for the First Step Act's application based on the date a sentence was imposed." App., *infra*, 8a. And while the Fifth Circuit observed that Congress's language "could perhaps have been clearer," it did not in the end "discern ambiguity in § 403(b)'s language." App., *infra*, 9a, 10a. The court thus held that because Hewitt's original sentence

had "been imposed upon [him] prior to the First Step Act's December 21, 2018, enactment date—even though the sentence was "later vacated in 2020—section 403(a) of the First Step Act does not apply." App., *infra*, 11a.

For support, the Fifth Circuit looked to the Sixth Circuit's decisions in *United States* v. *Jackson*, 995 F.3d 522 (6th Cir. 2021), and *United States* v. *Carpenter*, 80 F.4th 790 (6th Cir. 2023) (Kethledge, J., concurring in the denial of rehearing en banc). In *Jackson*, the Sixth Circuit held that the applicability of section 403's reformed sentences turns exclusively on a defendant's "status on the day the First Step Act became law," regardless of whether a sentence then in place was subsequently vacated. 995 F.3d at 523.[1] And in *Carpenter*, the panel reiterated that "the Act's amendments did not apply to the defendant's resentencing when his first sentence was not vacated until after the Act became law." *United States* v. *Carpenter*, 2023 WL 3200321 at *2 (6th Cir. 2023). The Sixth Circuit denied rehearing *en banc* over the dissent of six judges. *Carpenter*, 80 F.4th 790.

2. As the Fifth Circuit forthrightly acknowledged, App., *infra*, 6a, the holdings of the Fifth and Sixth Circuits conflict squarely with those of the Third and Ninth Circuits.

The Third and Ninth Circuits have held that once a defendant's sentence is vacated, it is "null and void" such that "a sentence has not been imposed" for purposes of the FSA's provisions. *United States* v. *Merrell*, 37 F.4th 571, 575-576 (9th Cir. 2022) (interpreting section 403).

---

[1] A petition for rehearing en banc in a second *Jackson* appeal is pending before the Sixth Circuit. The government filed a response on February 26, 2024, acquiescing in *en banc* rehearing. *See* Response, *United States* v. *Jackson*, No. 22-3958 (6th Cir. Feb. 26, 2024).

As the Third Circuit has said, a judicial "vacatur of [an] original sentence washe[s] away that * * * sentence, rendering it a nullity" *ab initio*, as though the defendant "had no sentence as of the date of his resentencing." *United States* v. *Mitchell*, 38 F.4th 382, 388-389 (3d Cir. 2022). Thus, neither section 403(b) nor Section 401(c) "prevent[s a defendant] from receiving the Act's benefits." *Ibid.*

3. In reality, the split is deeper than the 2-2 division described above. In *United States* v. *Uriarte*, 975 F.3d 596 (7th Cir. 2020) (en banc), for example, the *en banc* Seventh Circuit held that section 403(b) applies to a defendant whose sentence had been vacated prior to the FSA's enactment and who remained unsentenced as of the enactment date. *Id.* at 601. The Fifth Circuit below understood the Seventh Circuit to have reserved judgment on the question presented here based on *Uriarte*'s focus on "Congress's intent not to reopen *finished* proceedings because of the change in the law effected by the First Step Act." App., *infra*, 6a n.2 (quoting *Uriarte*, 975 F.3d at 605).

The Third Circuit, by contrast, "agree[d] with the" Seventh Circuit's holding in *Uriarte* "and join[ed] [it] in construing [section] 403(b) broadly." *Mitchell*, 38 F.4th at 387. This is a defensible interpretation of the Seventh Circuit's position—the opinion explained that "Congress naturally wanted [section 403(b)] to reach all cases where there was not already a sentence in place." *Uriarte*, 975 F.3d at 605. The court reasoned that there are "no countervailing considerations suggesting that Congress wanted to deprive anyone without a set sentence of the benefit of these new, preferred sentencing standards."

Ibid. It is a fair reading of *Uriarte*, then, that the Seventh Circuit is aligned with the Third and Ninth. [2]

4. The conflict is entrenched and in need of this Court's resolution. The Fifth Circuit cited and disagreed with contrary cases from the Third, Fourth, Seventh, and Ninth Circuits. App., *infra*, 6a. Like the Third Circuit, it observed that the language of sections 403(b) and 401(c) has "vexed, and split," the federal courts of appeals. *Ibid.* (quoting *Mitchell*, 38 F.4th at 386). As the split has grown, courts on both sides have openly weighed the views of their sister courts, expressly noting and departing from their reasoning.

What is more, the circuits have produced thorough and fully reasoned opinions examining the issue from every possible angle, including in numerous dissents and concurrences. In the Sixth Circuit alone, the opinion in *Jackson* drew a panel dissent, a four-judge concurrence in the denial of rehearing, and two dissents from the denial of rehearing, one signed by six judges and another by three. This is emblematic of the broad-based disagreement among courts and judges across the country. See

---

[2] The Fourth Circuit has reached the same conclusion in an unpublished section 401(c) case. See *United States* v. *Bethea*, 841 F. App'x 544, 549 (4th Cir. 2021) ("Bethea's sentence is best understood as 'imposed' for purposes of the FSA on the date of its reimposition, because the district court's vacatur rendered his 2015 sentence a legal nullity."). The Second Circuit also has remanded, by unpublished decision, at least one case in which "the government agreed" that a defendant whose pre-FSA sentence was vacated post-enactment "would benefit from the Act's reforms" on resentencing. *United States* v. *Walker*, 830 F. App'x 12, 17 n.2 (2d Cir. 2020). District courts within the Second Circuit have followed *Walker*'s footnote. See, *e.g.*, *United States* v. *Figueroa*, 530 F. Supp. 3d 437, 444 (S.D.N.Y. 2021); *United States* v. *Nix*, 2023 WL 4457894, at *2 (W.D.N.Y. July 11, 2023).

also *Bethea*, 841 F. App'x at 556 (Quattlebaum, J., dissenting); *Merrell*, 37 F.4th at 578 (Boggs, J., dissenting); *Mitchell*, 38 F.4th at 392 (Bibas, J., concurring in the judgment). All to say, the issues have been fully ventilated, and the split will continue to persist unless and until this Court weighs in.

B. The FSA's sentencing reduction provisions apply when a pre-enactment sentence is vacated

As the government has repeatedly recognized, the Fifth Circuit's interpretation of the FSA is incorrect. The text, context, and purpose of the FSA all establish that defendants facing resentencing after their pre-FSA sentences were vacated fall within the FSA's scope.

1. Several features of the statutory text confirm this interpretation. To begin, Congress phrased the FSA's applicability provision using the present-perfect tense—the reforms apply to any offense for which a sentence "*has* not been imposed." See *The Chicago Manual of Style* ¶ 5.132 (17th Ed. 2017) (explaining that the present-perfect tense signifies an "act, state, or condition" that "is now completed or continues up to the present"). Even when the present-perfect tense refers to completed past acts, it does so with the implication that the act has not since been discredited or invalidated. See *Ask the Editor: Past Perfect and Present Perfect Tenses*, Britannica Dictionary (accessed Mar. 7, 2024), perma.cc/VRP3-6UBL.

It would be incoherent and ungrammatical to say that a since-vacated sentence "*has* been imposed as of 2021" because by the time of the speaking, the sentence is recognized as void. Any ordinary English speaker would thus say instead that a since-vacated sentence "*had* been imposed as of 2021," so as to convey that the sentence's existence was in the past and no longer continuing.

This grammatical distinction is reflected in the Fifth Circuit's opinion, although maybe only inadvertently. When describing the relevant text, Judge Wilson changed the Act's language, describing it as specifying that "a sentence * * * ha[d] not been imposed." App., *infra*, 8a (alterations in original). That the Fifth Circuit was forced to modify the statutory language is all the Court needs to know to reject the Fifth Circuit's opinion.

As a matter of simple logic and grammar, a vacated sentence does not "continue up to the present," *The Chicago Manual of Style* ¶ 5.132 (17th Ed. 2017), and thus it "has not been imposed" for purposes of the FSA. For centuries, courts (including this one) have "uniformly understood" that "a vacated order never happened." *Mitchell*, 38 F.4th at 392 (Bibas, J., concurring); *United States* v. *Ayres*, 76 U.S. 608, 610 (1869) (holding that a vacated judgment is "null and void, and the parties are left in the same situation as if no trial had ever taken place"). This Court has thus recently reiterated that vacatur "wipe[s] the slate clean." *Pepper* v. *United States*, 562 U.S. 476, 507 (2011).

This understanding of vacatur is confirmed by modern legal dictionaries. See Vacate, *Black's Law Dictionary* (11th ed. 2019) ("To nullify or cancel; make void; invalidate); Karen M. Ross, *Essential Legal English in Context: Understanding the Vocabulary of US Law and Government* 156 (2019) ("An award, judgment, or sentence that is vacated is set aside or nullified, in effect removing it from existence."). And a variety of legal doctrines depend on this principle. Defendants may be retried, for example, after vacatur of their original convictions without running afoul of the Double Jeopardy Clause. See *North Carolina* v. *Pearce*, 395 U.S. 711, 720-721 (1969). "[T]his 'well-

established part of our constitutional jurisprudence'" depends on the "fiction" that a conviction, once vacated, is "wholly nullified and the slate wiped clean." *Ibid.*

The courts' historic treatment of vacatur is relevant for an additional reason as well: "[C]ommon-law adjudicatory principles" such as the effect of vacatur "apply except 'when a statutory purpose to the contrary is evident.'" *Astoria Federal Savings & Loan Association* v. *Solimino*, 501 U.S. 104, 108 (1991). Congress legislates against the backdrop of these unexpressed presumptions and does not lightly or silently displace them. *Bond* v. *United States*, 572 U.S. 884, 857 (2014). That vacatur wipes the slate clean is just such a principle, and there is no evidence here that Congress intended the FSA to contravene this basic common-law rule.

That is why the Fifth Circuit's reliance on 18 U.S.C. § 3742(g) for a contrary conclusion backfires. That provision specifies that a district court on resentencing after an appeal shall "apply the guidelines * * * that were in effect on the date of the previous sentencing of the defendant prior to appeal." All this proves is that Congress knew how to use a vacated sentence as a reference point as an exception to the general rule. In the absence of such an express direction, however, the general rule governs—and nothing in the language of the FSA implies that Congress sought to withhold its reforms for defendants being resentenced.

A better analogy is 18 U.S.C. § 3582(c), which addresses the finality of imposed sentences. It provides that a court "may not modify a term of imprisonment once it has been imposed." But this Court has held that section 3582(c)'s language does *not* preclude deviation from a previous sentence that has been vacated—in that circum-

stance, sentencing authority remains plenary. *Pepper*, 562 U.S. at 507. The same interpretation should apply to the words "has * * * been imposed" in the FSA.

Moreover, Congress keyed sections 401 and 403 to the imposition of "a" sentence. Congress's use of the indefinite article stands in contrast to its use of the word "any" earlier in the same sentence in the phrase "any offense * * * committed before the date of enactment of this Act." *Ibid.* It is well established that "Congress' use of the word 'any' suggests an intent to use that term 'expansively.'" *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1774 (2019) (cleaned up). And where Congress uses different language throughout a statute, this Court has instructed that those differences should be understood and respected. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983). The contrasting use of "a" and "any" thus suggests Congress intended the set of relevant sentences for determining the FSA's applicability should be construed more narrowly than the set of offenses.

The text of the FSA thus makes clear that its reforms apply to resentencings of pre-Act offenders, regardless of when the original sentences were vacated.

2. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis* v. *Michigan Department of Treasury*, 489 U.S. 803, 809 (1989)). The FSA's context and purpose underscore that Congress's chosen words extend the FSA's sentencing reform to all defendants on resentencing.

The First Step Act was the result of an "extraordinary political coalition." 164 Cong. Rec. S7645 (daily ed. Dec.

17, 2018) (Sen. Durbin). Though broad in scope, its "most important reforms" were its "changes to mandatory minimums." *Id.* at S7748 (daily ed. Dec. 18, 2018) (Sen. Klobuchar). Moved by repeated examples of the draconian effects of "stacking" section 924(c) convictions, it was a principal goal of Congress to ensure that "enhancements for repeat offenses apply only to true repeat offenders." *Id.* at S7774 (daily ed. Dec. 18, 2018) (Sen. Cardin).

In determining the sweep of its reforms, Congress sensibly struck a balance between the widespread benefits of the FSA and the finality of criminal sentences. Sections 403(b) and 401(c) were drafted to effectuate this balance—while the FSA does not displace existing sentences or allow for reopening based on its reforms, it allows application of the new, shorter mandatory minimum sentences when a defendant *has* no existing sentence to upset, whether on original sentencing or resentencing.

There can be little doubt of Congress's intent for these provisions of the FSA. In an *amicus* brief filed in the Ninth Circuit, Senators Durbin, Grassley, and Booker (described as "the lead sponsors" of the Act) expressed their interest in "ensuring that the First Step Act's terms are interpreted and applied in a manner consistent with their intent." *Amicus* Br. for U.S. Sens. Durbin, Grassley, and Booker 1, *United States* v. *Mapuatuli*, No. 19-10233 (9th Cir. May 12, 2020). There, the senators explained that "the language Congress chose effectuates its intent to allow pre-Act offenders whose sentences are vacated to benefit from the Act's ameliorative provisions at resentencing." *Id.* at 2-3.

Specifically, the brief clarified that "Congress intended for Section 401," whose language is identical to section 403, "to apply to pre-Act offenders who are not

subject to a sentence for their offenses, including those individuals whose original sentences are vacated as unlawful for other reasons." *Id.* at 11. The senators explained that "[i]n selecting text to meet this objective," they "relied on the settled principle that 'when a criminal sentence is vacated, it becomes void in its entirety.'" *Ibid.* (quoting *United States* v. *Stinson*, 97 F.3d 466, 469 (11th Cir. 1996)). "The First Step Act was enacted on the background of, and is therefore consistent with, these settled legal principles, and consequently treats defendants whose prior sentences were vacated no differently from individuals being sentenced for the first time." *Id.* at 14.

What's more, the Fifth Circuit's interpretation below results in precisely the "kind of unfairness that modern sentencing statutes typically seek to combat." *Dorsey* v. *United States*, 567 U.S. 260, 277 (2012); see also Senators' Br. 17. Congress aims to avoid "radically different sentences" for defendants "who each engaged in the same criminal conduct * * * and were sentenced at the same time." *Dorsey*, 567 U.S. at 276-277. There is simply nothing in the language or history of the FSA to suggest that Congress intended to introduce such disparities here.

The Fifth Circuit offered no explanation to harmonize its interpretation of section 403(b) with Congress's purpose and the general statutory scheme of the FSA. That is because there is none. This is another compelling reason to reject the Fifth and Sixth Circuit's unintuitive, punitive reading of this landmark sentencing reform.

C. This is a perfect vehicle to resolve a question of substantial importance

This case provides an attractive vehicle for clarifying the applicability of the First Step Act to the countless defendants in Hewitt's position. The issue was preserved, pressed, and passed upon at all stages of the proceedings below. And it is outcome-determinative here, resulting in a sentence for a first-time offender that is 80 years longer than Congress intended.

1. The question presented was raised and addressed at each stage below. Prior to his resentencing hearing, Hewitt filed objections to his presentence report "arguing, *inter alia*, that [section] 403 of the [FSA] applied to [his] resentencing." App., *infra*, 3a-4a. The district court overruled these objections and resentenced Hewitt without the benefit of the FSA's reforms. *Id.* at 4a. Hewitt subsequently pressed this issue as the main event on appeal, and the Fifth Circuit rejected his claim on the merits. *Id.* at 5a-16a. The issue here is thus cleanly presented and properly preserved.

2. Hewitt's case highlights the significant stakes at issue when lower courts resolve the question presented. Under the Fifth Circuit's approach below, four of Hewitt's five section 924(c) convictions remain subject to the pre-FSA 25-year mandatory minimum, consecutive sentences. The result is a 105-year sentence for the five section 924(c) counts—a *de facto* life sentence of the type Congress sought to eliminate for first-time offenders with the FSA. See *United States* v. *Walker*, 830 F. App'x 12, 16 (2d Cir. 2020) (noting complaints that a 105-year sentence under the pre-FSA section 924(c) was "unrealistic, unbelievable, and incredible").

In the Third, Seventh, and Ninth Circuits, however, Hewitt's sentence on the section 924(c) counts would have been only 25 years—a full 80 fewer years of incarceration. There is simply no justification that can allow sentences to vary so widely for conduct committed at the same time, based on nothing more than which side of the Ohio River the defendant is tried.

3. The issue arises with great frequency. Two *amicus* briefs were filed in this Court in *Carpenter* (No. 23-531). In one of them, the ACLU, Cato Institute, and Due Process Institute explained that "correctly applying the First Step Act is extraordinarily important in light of the magnitude of sentencing reductions for certain federal firearm convictions." ACLU *Amicus* Br., *Carpenter* v. *United States*, No. 23-531, at 7 (Dec. 18, 2023) (capitalization omitted). Whether or not the FSA applies is often the "difference between being sentenced to die in prison, and serving a long but survivable sentence." *Id.* at 11.

The brief for the National Association of Criminal Defense Lawyers (NACDL) highlighted that resolution of the section 403(b) question also will settle the section 401(c) question. NACDL Br., *United States* v. *Carpenter*, No. 23-531, at 6 (Dec. 18, 2023); accord ACLU Br. 12. Defendants convicted of drug crimes and crimes involving weapons—the two categories covered by sections 401 and 403—together make up approximately two thirds of inmates in federal prison. NACDL Br. 6. Almost 13% of all individuals in federal custody due to federal convictions are serving sentences imposed for violations of section 924(c). U.S. Sentencing Comm'n, *QuickFacts: Federal Offenders in Prison* 1 (2023). And section 401's reforms target "the most commonly prosecuted drug offenses" in

the country. U.S. Sentencing Commission, *Primer: Drug Offenses* 1 (2023).

Because of the extraordinarily punitive sentences that characterized pre-FSA mandatory minimums, "the harshness of the old regime follows defendants who were originally sentenced before the Act's passage." NACDL Br. 11. Numerous such defendants have their pre-FSA sentences vacated each year for any number of reasons, from misapplication of sentencing guidelines to due process violations. And section 2255 frequently permits defendants to challenge their sentences when this Court construes the statutes under which they were convicted. See *Davis* v. *United States*, 417 U.S. 333 (1974).

This Court has issued at least two substantial opinions construing section 924(c) in the last few years alone. See *United States* v. *Taylor*, 596 U.S. 845 (2022) (holding that attempted Hobbs Act robbery is not a crime of violence for purposes of section 924(c)); *Davis*, 139 S. Ct. 2319 (2019) (holding that section 924(c)'s "residual clause" is void for vagueness). The shifting landscape surrounding section 924(c) and the drug crimes affected by section 401 thus results in a consistent flow of resentencings for pre-FSA convictions even years after the FSA's enactment.

Countless criminal defendants across the Nation will continue to receive significant and arbitrary differences in sentencings because of the split at issue here. Such dramatic and unfair variability in the administration of federal criminal justice is intolerable. The Court should grant review to restore uniformity on the question presented.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

RUSSELL WILSON II
Law Office of
Russell Wilson II
1910 Pacific Avenue
No. 12050
Dallas, Texas 75201
(469) 573-0211

MICHAEL B. KIMBERLY
Counsel of Record
CHARLES SEIDELL
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
mkimberly@mwe.com

Counsel for Petitioner

March 8, 2024