Nos. 23-1002, 23-1150

In the Supreme Court of the United States

TONY R. HEWITT, *Petitioner*, v. UNITED STATES OF AMERICA, *Respondent.*	COREY D. DUFFEY *and* JARVIS D. ROSS, *Petitioners*, v. UNITED STATES OF AMERICA, *Respondent.*

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER TONY R. HEWITT

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

Petitioner Tony R. Hewit was appellant below. Corey Deyon Duffey and Jarvis Dupree Ross, petitioners in the consolidated case, also were appellants below. The United States of America, respondent on review in both cases, was the appellee below.

RELATED PROCEEDINGS

U.S. Supreme Court:

- *Duffey* v. *United States*, No. 23-1150 (July 2, 2024) (petition for writ of certiorari granted)
- *Hewitt* v. *United States*, No. 11-10019 (May 29, 2012) (denying petition for certiorari)

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

- *United States* v. *Duffey*, 456 F. App'x 434 (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 section 2255 request)
- *United States* v. *Duffey*, 92 F.4th 304 (No. 22-10265) (Feb. 2, 2024) (affirming resentencing)

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-cv-167-B-BH (Dec. 6, 2012) (resentencing)
- *United States* v. *Hewitt*, No. 3:08-cv-167-B-BH (Aug. 19, 2021) (granting section 2255 motion)
- *United States* v. *Hewitt*, No. 3:08-cv-167-B-BH (Nov. 8, 2022) (judgment on resentencing)

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

JURISDICTION

The Fifth Circuit entered judgment on February 2, 2024. Petitioner filed a petition for a writ of certiorari on March 8, 2024, which the Court granted on July 2, 2024. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant provisions of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, are reproduced in the petition appendix at pages 17a-21a.

INTRODUCTION

Section 924(c) of title 18 of the U.S. Code authorizes drastic mandatory minimum sentences for those who commit certain federal crimes while carrying, brandishing, or discharging a firearm. For first offenses, it calls for a mandatory minimum sentence between five and ten years' imprisonment. For second or subsequent offenses, that number jumps to 25 years. The statute requires that the sentence for each section 924(c) count run consecutively with any other sentence.

In *Deal* v. *United States*, 508 U.S. 129 (1993), the Court held that section 924(c), as originally enacted, required imposition of the 25-year mandatory minimum if a defendant was convicted of multiple section 924(c) counts in a single criminal proceeding. Thus, even a first-time offender, if charged with multiple section 924(c) counts, could face multiple 25-year sentences, running consecutively. This effect, which often resulted in *de facto* life sentences for first-time offenders, came to be known as "stacking."

Stacking was widely regarded as unjust and irrational. As one district court noted, a first-time, nonviolent offender who carried a firearm during a string of simple

drug sales would face more prison time than a murderer. Congress finally answered the calls for corrective action with the First Step Act of 2018 (FSA). A principal aim of the law was to end stacking. To that end, section 403(a) of the FSA amended section 924(c) to abrogate *Deal*, so that the statute now permits enhanced sentences only "[i]n the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final." 18 U.S.C. § 924(c). As a result, now only true recidivists may be sentenced to section 924(c)'s enhanced 25-year mandatory minimum.

But under 1 U.S.C. § 109, the default rule for such sentencing reforms is that they apply only to crimes committed after enactment. Appreciating the grave injustice that would result if stacking were allowed to continue in post-enactment sentencings for pre-enactment conduct, Congress overrode the default rule, making section 403(a)'s sentencing reform retroactive. It thus adopted section 403(b), which specifies that section 403(a) "shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment."

All agree that this language makes section 403(a) relief available to a defendant who committed an offense pre-enactment but is sentenced post-enactment. All also agree that it does *not* make relief available to anyone who committed an offense pre-enactment and whose sentence and judgment of conviction were final on the date of enactment and remain so today. The only question here is whether it makes section 403(a) relief available to a defendant who was sentenced pre-enactment, but whose initial sentence was thereafter vacated, rendering the initial sentence void *ab initio* and necessitating post-enactment plenary *re*sentencing.

The plain text of section 403(b) supplies the answer: It does. As a starting point, "a sentence for the offense"

does not—cannot—include a sentence that has been vacated. A vacated sentence is a nullity, one treated by operation of law as never having been imposed. The point of vacatur is to ensure that the object has no legal effect and works no ongoing prejudice. Congress is presumed to understand and incorporate background legal principles like this and thus could not have intended "a sentence" to include a *vacated* sentence.

This is confirmed by the statutory context, including the verb tense and preposition that Congress used. The present-perfect tense, used together with the preposition "as of," indicates that Congress sought to deny section 403(a)'s reforms only to those defendants whose judgments of conviction were final on the date of enactment *and* remain so today. As the government now agrees, no ordinary English speaker would say that a sentence "has been imposed as of December 21, 2018" if the sentence was vacated and no longer has any force or effect.

Reading section 403(b) as drawing a line between pending and past cases reflects Congress's evident desire to respect the finality of judgments. But finality is not an issue when a judgment is vacated for reasons independent of the FSA; such a case is "pending" like any other. That is confirmed by post-vacatur practice, which calls for an entirely new, *de novo* proceeding at which Congress could not have intended stacking to remain available.

None of the contrary rationales supplied by the court below or by the Sixth and Eleventh Circuits is persuasive. Those courts' rationales would revise the statute's language and blinder the Court to the statute's context, structure, and manifest purpose, reading section 403(b) to defeat Congress's design rather than to conform to it. This Court's cases require no such result. If there were any doubt about that, the rule of lenity would require resolving it in petitioner's favor and thus reversing the decision below.

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).

Conviction for a first section 924(c) violation carries a mandatory minimum sentence of five years for offenders who carry or possess a firearm during a crime of violence or a drug trafficking crime. 18 U.S.C. § 924(c)(1)(A)(i). As originally enacted and through December 21, 2018, a conviction for a "second or subsequent" 924(c) violation carried a mandatory minimum sentence of 25 years. *Id.* § 924(c)(1)(C). Moreover, when a defendant is convicted of violating section 924(c), the statute's mandatory minimum sentence must run consecutively rather than concurrently "with any other term of imprisonment." *Id.* § 924(c)(1)(D)(ii).

In *Deal* v. *United States*, 508 U.S. 129 (1993), the Court interpreted section 924(c)'s "second or subsequent" language to apply to multiple 924(c) convictions obtained in a single criminal proceeding. See 508 U.S. at 134 (rejecting the contention that that section "924(c)(1) must be read to impose the enhanced sentence only for an offense committed after a previous sentence has become final"). In other words, according to the Court, a defendant could commit an initial *and* "subsequent" offense as part of a single criminal transaction prosecuted in a single case. The Court thus rejected the notion that section 924(c) was intended to punish only recidivists and held that a defendant with no prior criminal history could receive enhanced, consecutive sentences for each section 924(c) count charged. *Ibid.*

Given its lengthy minimum consecutive penalties, section 924(c) threatened exceptionally "long prison sen-

tences for anyone who uses a firearm in connection with certain other federal crimes." *United States* v. *Davis*, 588 U.S. 445, 448 (2019). The practice of "charging multiple violations of section 924(c) within the same indictment" became known as "stacking." See U.S. Sentencing Commission, *Mandatory Minimum Penalties for Firearm Offenses in the Federal Criminal Justice System* 271 (Oct. 2011) (hereinafter *USSC Report*). Because each count beyond the first was subject to the enhanced 25-year minimum penalty, stacking often resulted in *de facto* life sentences for first-time section 924(c) offenders—often several hundred years' imprisonment imposed all at once. As one court noted, a first-time offender frequently would receive a lighter sentence "if he had committed murder" rather than a series of nonviolent drug sales while carrying a firearm. *United States* v. *Holloway*, 68 F. Supp. 3d 310, 313 (E.D.N.Y. 2014).

Stacking was widely criticized as unjust. District judges—those on the front lines of the federal criminal justice system—objected to having to impose what they viewed as drastic and disproportionate sentences for first-time (and often nonviolent) offenders. See, *e.g.*, *United States* v. *Angelos*, 345 F. Supp. 2d 1227, 1230-33 (D. Utah 2004) (having to sentence the defendant, a "twenty-four-year-old first offender who is a successful music executive with two young children," to "prison for the rest of his life is unjust, cruel, and even irrational").

Circuit judges likewise expressed great discomfort having to affirm "irrational, inhumane, and absurd" sentences that were "a predictable by-product of the cruel and unjust mandatory minimum sentencing scheme adopted by Congress." *United States* v. *Hungerford*, 465 F.3d 1113, 1118 (9th Cir. 2006) (Reinhardt, J., concurring); see also, *e.g.*, *United States* v. *Hunter*, 770 F.3d 740, 746-747 (8th Cir. 2014) (Bright, J., concurring) (decrying the sentence imposed as "out of this world" and

"join[ing] in the litany of criticisms directed towards" the "overly harsh" practice of sentence stacking).

Judges and commentators observed that, beyond the undue harshness of mandatory minimum sentences, the law also produced wildly divergent sentencing outcomes based on mere geography—prosecutors in some jurisdictions used stacking as a matter of course, while others more often avoided it. See *In re Hernandez*, 857 F.3d 1162, 1169 (11th Cir. 2017) (Martin, J., concurring) (explaining that the defendant "might never have received this sentence if he had been sentenced in another part of the country"). And prosecutors frequently used the threat of stacked sentences to induce defendants to accept plea deals, thus forfeiting their Sixth Amendment right to a jury trial, adding constitutional insult to statutory injury. See Human Rights Watch, *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty* (2013).

Among those calling for reform was the Sentencing Commission itself. *USSC Report* 359-362. In a report to Congress, the Commission explained that "[t]he 'stacking' of mandatory minimum penalties for multiple violations of section 924(c) results in excessively severe and unjust sentences in some cases." *Id.* at 359. In many of those cases, "the offense did not involve any physical harm or threat of physical harm to a person." *Ibid.* The Commission noted that the Judicial Conference had, on multiple occasions, urged Congress "to amend the 'draconian' penalties established at section 924(c)." *Id.* at 360-361 (quoting *Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834, and H.R. 1466 Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary*, 111th Cong. 35 (2009)); see also *Hearing Before the Over-Criminalization Task Force of 2014 of the House Committee on the Judiciary*, 113th

Cong. 23 (2014) (testimony of Hon. Irene M. Keeley, Judicial Conference of the United States).

2. Although it took several attempts over nearly a decade, Congress finally heeded the Sentencing Commission's call to action in 2018. Late that year, it enacted and President Trump signed the First Step Act, which was the "product of a remarkable bipartisan effort." *United States* v. *Henry*, 983 F.3d 214, 218 (6th Cir. 2020). The culmination of work by an "extraordinary political coalition" (164 Cong. Rec. S7645 (daily ed. Dec. 17, 2018) (statement of Sen. Durbin)), the FSA made "once-in-a-generation reforms to America's prison and sentencing system" (*Senate Passes Landmark Criminal Justice Reform*, U.S. Senate Committee on the Judiciary (Dec. 18, 2018)).

Section 403 of the FSA addresses sentence stacking. Its well-recognized purpose is "to remedy past overzealous use of mandatory-minimum sentences" under section 924(c). *Henry*, 983 F.3d at 218. To that end, section 403(a) amends section 924(c) to clarify that the 25-year mandatory minimum sentence applies only for violations "occur[ing] after a prior" section 924(c) conviction "has become final," effectively overruling *Deal*. See *Oversight Hearing on the Federal Bureau of Prisons and Implementation of the First Step Act: Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary*, 116th Cong. 2 (2019) (statement of Rep. Karen Bass) (describing section 403 as "eliminat[ing] the ability to stack firearm enhancements within the same indictment, which has historically resulted in excessive sentences").

Without stacked 25-year sentences, first-time offenders convicted of multiple violations of section 924(c) at once will receive consecutive five-year minimum sentences, rather than one five-year sentence and one or more 25-year sentences.

3. By default, a change in sentencing law is prospective only. That is so by statute—1 U.S.C. § 109 specifies that a "new criminal statute [that amends or repeals] an older criminal statute shall not change the penalties 'incurred' under that older statute 'unless the repealing Act shall so expressly provide.'" *Dorsey* v. *United States*, 567 U.S. 260, 272 (2012) (quoting 1 U.S.C. § 109). For this purpose, "penalties are 'incurred' under the older statute when an offender * * * commits the underlying conduct that makes the offender liable." *Ibid.*

But by late 2018, Congress knew well how widespread and problematic sentence stacking had become. Lawmakers thus added section 403(b) to the FSA. It specifies that section 403(a)'s amendment of section 924(c) shall apply not only to future offenders, but also to past offenders whose criminal cases remain pending:

> APPLICABILITY TO PENDING CASES.—This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

Congress thus extended section 403(a) relief to all criminal defendants whose sentence "has not been imposed as of" December 21, 2018.[1]

In contrast, Congress did not make section 403(a) a basis for reducing the sentence of a defendant whose case was and remains subject to a final criminal judgment. Instead, it provided limited alternative relief through

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[1] Section 401, which reduces mandatory minimum sentences for various federal drug offenses, uses identical language. Because sections 403(b) and 401(c) 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).

section 404 to "defendants previously sentenced" in a final judgment, which this Court addressed three Terms ago in *Concepcion* v. *United States*, 597 U.S. 481 (2022). Under certain circumstances, section 404 authorizes sentence-reduction motions, which are a more limited form of sentencing relief than plenary resentencing following a vacatur. See *Dillon* v. *United States*, 560 U.S. 817, 830 (2010).

B. Factual and procedural background

1. Petitioner Tony Hewitt and his co-defendants were convicted on various charges relating to a series of bank robberies in 2008. The district court originally sentenced Hewitt to 355 years of imprisonment, the bulk of which corresponded to a number of stacked section 924(c) counts. *United States* v. *Duffey*, 456 F. App'x 434, 438-439 (5th Cir. 2012); Judgment, No. 3:08-cv-167, Dkt. 374 (N.D. Tex. May 7, 2010). The Fifth Circuit reversed the convictions in part and vacated Hewitt's sentence due to an error not relevant here. *Duffey*, 456 F. App'x at 444. On remand, the district court resentenced Hewitt to 305 years—275 years of which corresponded to mandatory 25-year consecutive sentences for second or subsequent 924(c) convictions. The Fifth Circuit affirmed. *United States* v. *Ross*, 582 F. App'x 528, 530 (5th Cir. 2014); Amended Judgment, No. 3:08-cv-167, Dkt. 524 (N.D. Tex. Dec. 6, 2012).

In 2019—after the FSA's enactment—this Court held that section 924(c)'s "residual clause" is unconstitutionally vague. *Davis*, 588 U.S. at 448. Following *Davis*, conspiracy-based charges no longer support convictions under section 924(c). Given that several of Hewitt's convictions were predicated on conspiracy to commit bank robbery, Hewitt moved the Fifth Circuit for authorization to file a successive section 2255 habeas petition. Pet. App. 3a. The Fifth Circuit granted leave.

Ibid. The district court, in turn, vacated the conspiracy-based section 924(c) convictions, vacated the sentence on the remaining convictions, and ordered plenary resentencing. *Ibid.*

2. The case returned to the district court for *de novo* resentencing, but the new presentence report prepared in Hewitt's case did not account for section 403(a)'s intervening amendment of section 924(c). Pet. App. 3a-4a. Hewitt thus objected to the report, arguing that section 403(a) should apply. *Ibid.* The difference, he observed, was substantial: Under the law in place at the time of his original sentencing, his minimum sentence for the remaining section 924(c) counts would be 105 years, still effectively a life sentence. Under section 403(a) of the FSA, the combined mandatory minimum is 25 years.

Hewitt's co-defendants raised the same objections. As to them, the government took the position that section 403 was inapplicable on resentencing because the initial sentence for each had been imposed before the FSA's date of enactment. But by the time of Hewitt's resentencing, the government had reversed its course and requested application of section 403(a) at Hewitt's resentencing. See Sentencing Tr., No. 3:08-cv-167, Dkt. 785 at 19:8-16 (N.D. Tex. Jan. 17, 2023).

The district court rejected Hewitt's and the government's position. *Id.* at 22:18-23:5. The court reasoned that even when a sentence has been vacated, "it's not vacated for purposes of the statute." *Id.* at 22:25-23:1. It thus held that section 403(a) does not apply and sentenced Hewitt to a 165-year term of imprisonment, 105 of which corresponded to stacked section 924(c) sentences. Pet. App. 5a; *see* Judgment on Resentencing, No. 3:08-cv-167, Dkt. 780 (N.D. Tex. Nov. 8, 2022).

3. The Fifth Circuit affirmed. See Pet. App. 1a-16a. Before the court of appeals, Hewitt and the government again both argued that section 403(a) should apply at resentencing following the judicial vacatur of a pre-FSA sentence. Pet. App. 7a. The Fifth Circuit nonetheless concluded that section 403(b) bars relief for Hewitt and his codefendants. Pet. App. 6a.

While the Fifth Circuit acknowledged that the phrase "has not been imposed" is an example of "present-perfect tense," the court focused predominantly on the word "imposed." Pet. App. 7a. It reasoned that whether a sentence has been imposed "appears to hinge on a district court's action or inaction" as a singular point in time, and "not on a defendant's status." Pet. App. 8a. It thus held that section 403(b)'s focus is on the one-time historical fact of a sentence's imposition. *Ibid.* Because Hewitt had been sentenced before the FSA's enactment as a matter of historical fact, it held relief under section 403(a) was unavailable. *Ibid.*

The court reasoned that "[i]f Congress meant for the First Step Act's retroactivity bar to apply only to valid sentences, it could easily have said so." Pet. App. 8a. And it rejected Hewitt's arguments to the contrary, explaining that "[t]he mere observation that the statutory language could be made clearer does not make it unclear in the first place." *Id.* at 9a (quoting *United States* v. *Jackson*, 995 F.3d 522, 526 (6th Cir. 2021)).

The Fifth Circuit held further that "vacatur has no effect" on the outcome of the case. Pet. App. 9a. That conclusion was justified, the court explained, because "otherwise, one who, as here, has been in prison for over a decade serving later-vacated sentences would nonetheless qualify" for a more lenient sentence at resentencing under the FSA. Pet. App. 9a-10a. The court referred to 18 U.S.C. § 3742(g), which requires use of the guidelines "that were in effect on the date of the previous sentencing

of the defendant prior to the appeal" for resentencing, which it characterized as giving continuing effect to initial sentences that have been vacated. *Id.* at 10a. On those grounds, the court affirmed.

SUMMARY OF ARGUMENT

Pursuant to section 403(b) of the FSA, section 403(a) applies to a defendant who committed an offense and was convicted and sentenced pre-enactment, but whose initial conviction and sentence have been vacated, necessitating a post-enactment *de novo* resentencing.

A.1. The question here is whether Congress meant "a sentence for the offense" to include a sentence that was pronounced before that date but later vacated. It could not have done so. Congress drafts and enacts statutes against background legal principles, the content of which is presumptively incorporated into the meaning of the words it uses. As relevant here, the law treats a sentence that has been vacated as a nullity *ab initio*, as if it never existed. Cases from before the Founding and consistently through today confirm that when an order or judgment is vacated, the *status quo ante* is restored, and it is as though the order or judgment had never been made.

Congress is presumed to have known that settled legal principle and, absent a contrary indication, to have incorporated it in the FSA. A sentence that has been vacated therefore cannot be "a sentence for the offense," because a sentence that has been vacated does not exist. It therefore cannot be ground to deny substantive relief at resentencing.

2. Some lower courts have reasoned that to focus on the invalidation *ab initio* of a vacated judgment is to add words to section 403(b), effectively inserting the word "valid" in front of the word "sentence." That reading has matters backward. Again, the Court must presume that Congress incorporates settled legal principles into the

statutes it enacts. It therefore does not add words to the statute to presume the word "sentence" means a sentence that has not been vacated. On the contrary, to read "a sentence" in section 403(b) to *include* a vacated sentence would be to read it as "an initial sentence" or "an original sentence." Such modifiers would be necessary to displace the background rule that the law treats a sentence that has been vacated as though it never existed. But Congress did not include those words.

3. Other courts have held that section 403(b) refers only to the historical fact of a past pronouncement and that a vacatur does not change the past. That is wrong twice over. First, vacatur does change the past by operation of law—cases from time immemorial stand for the proposition that when an order is vacated, it as though the proceeding that produced the order never happened. That is why the Double Jeopardy Clause does not bar retrial after a conviction is vacated on appeal.

Second, section 403(b) refers to the ongoing enforcement of a sentence, not the fact of a past pronouncement. Congress's use of the present-perfect tense and the preposition "as of" confirm so. Use of the present-perfect tense implies concern with a time-span beginning in the past *and extending up to now*. And the preposition "as of" is used to indicate a time or date from which something continues. Together, they indicate that Congress was concerned only with sentences that were pronounced pre-enactment and remain in force and effect today.

Common English usage confirms the point. No one would say that Hewitt's initial, since-vacated sentence "has been imposed as of December 21, 2018," because it has no continuing force or effect. If one wanted to refer to the fact of a vacated sentence having been pronounced, one would use the simple past tense and a preposition indicating a singular point in time: Hewitt's initial, since-vacated sentence *was* imposed *before* December 21, 2018.

Indeed, Congress used just that formulation in section 404, concerning sentencing modifications. That it did so there but not in section 403(b) must be taken as intentional.

4. Statutory interpretation turns on ordinary, contemporary, and common use of the English language. Thus, while rules of grammar and dictionary definitions are centrally important, the outcome cannot be determined by a single phrase scrutinized in the abstract. The Court must look to the relevant language in its full context, with an eye to the statute's overall objective.

Only our interpretation is consistent with the FSA's broader context, design, and purpose. Section 403(b) reflects a clear purpose: to make section 403(a)'s ameliorative sentencing reform available retroactively in pending cases while preserving the finality of valid criminal judgments. That line is sensible. Allowing application in pending cases ensures that no court ever again engages in sentencing stacking, while at the same time respecting the importance of the principle of finality to criminal justice and sound judicial administration.

Plenary resentencings following full vacaturs are "pending" cases like any other; there is no sentence for the defendant to serve, and a new one must be imposed by exercise of *de novo* judicial discretion. In that context, application of section 403(a) would do nothing to disturb the finality of an already-vacated judgment. Applying section 403(a) to such cases is thus consistent with Congress's objective to foreclose stacking in pending cases while preserving the finality of past cases.

The opposite is true of the decision below. It draws an arbitrary line between plenary sentencings and plenary resentencings, without any account for why Congress would have intended such an irrational distinction. And in doing so, it ensures that prosecutors still may seek, and

courts still will be required to impose, stacked sentences in plenary sentencing proceedings into the future. That cannot be what Congress intended.

B. The rule of lenity arises only if the Court concludes that the statutory text is ambiguous, which the provision here is not. But if the Court disagrees, it must resolve the ambiguity in favor of Hewitt and the lesser sentence required under section 403(a).

The Court has repeatedly confirmed that the rule of lenity applies not only to statutes that define criminal liability, but also those that set the penalties for violations. Under our interpretation of section 403(a), Hewitt would face a mandatory minimum of 25 years. Under the Fifth, Sixth, and Eleventh Circuit's mistaken construction, he would face a mandatory minimum of longer than one century at his resentencing on the section 924(c) counts alone. If there is any reasonable doubt about the construction of section 403(a), it must be resolved in his favor.

ARGUMENT

"The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Star Athletica, LLC* v. *Varsity Brands, Inc.*, 580 U.S. 405, 414 (2017) (quoting *Estate of Coward* v. *Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992)). When the statute's text is "unambiguous," that "first step of the interpretive inquiry" is also the "last." *Rotkiske* v. *Klemm*, 589 U.S. 8, 13 (2019).

To interpret Congress's words, the Court must focus on "ordinary, contemporary, [and] common" use of the English language. *Star Athletica*, 580 U.S. at 414. That means among other things the Court must give the text a reading that is consistent with and incorporates settled background legal principles, with which the public would expect any words to comport. *E.g.*, *Cannon* v. *University*

of Chicago, 441 U.S. 677, 696-697 (1979) (explaining that "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law").

And while background principles, rules of grammar, and dictionary definitions are centrally important to the task of statutory interpretation, the Court must "'consider not only the bare meaning' of the critical word or phrase 'but also its placement and purpose in the statutory scheme.'" *Holloway* v. *United States*, 526 U.S. 1, 6 (1999) (quoting *Bailey* v. *United States*, 516 U.S. 137, 145 (1995)). The only permissible meaning of a word or phrase is the one that fits with the statutory context and purpose, rather than conflicts with them. See, *e.g.*, *Dubin* v. *United States*, 599 U.S. 110, 118-120 (2023).

First, Congress did not intend the phrase "a sentence for the offense" to include a vacated sentence. According to settled background principles, the law treats a vacated sentence as never having been pronounced. For a statute to override that principle requires a clear statement. There is no such statement here.

Second, the contrary rationales offered among the lower courts are unpersuasive. The rules of grammar, relevant dictionary definitions, and statutory context all confirm that Congress intended section 403(b) to authorize section 403(a) relief in *all* pending cases, including cases that are pending *de novo* resentencing following a vacatur. No other conclusion is consistent with Congress's purpose or settled practice. And even if there were doubt on that front (there should be none), it would be resolved by the rule of lenity.

No matter whether the Court finds the words clear or ambiguous, a resentencing with the benefit of section 403(a) is necessary.

A. Section 403(a) applies to post-enactment *de novo* resentencings

All relevant considerations—the text, context, and purpose of the FSA, the statute's design, and the background principles against which it was enacted—confirm that section 403(a) applies to plenary resentencings that take place after the Act's enactment.

1. A sentence that has been vacated is not "a sentence for the offense"

The central issue is whether Congress meant "a sentence for the offense" imposed "as of" December 21, 2018, to include a sentence that was pronounced before that date but later vacated. It did not.

a. One rule for reading "statutory text is recognizing that Congress legislates against the backdrop of certain unexpressed presumptions." *Bond* v. *United States*, 572 U.S. 844, 857 (2014). Among those presumptions is that "Congress is aware of existing law" and, absent express indication otherwise, intends for the statutes it enacts to comport with settled background legal principles and precedents. See, *e.g.*, *Mississippi ex rel. Hood* v. *AU Optronics Corp.*, 571 U.S. 161, 169 (2014); accord *Cannon*, 441 U.S. at 696-697.

Put another way, the background principles against which Congress acts operate as default rules to which it presumptively intends for its enactments to conform. Because the accepted legal backdrop will generally accord with "widely held intuitions about how statutes ordinarily operate," a presumption that Congress means to incorporate background legal principles "will generally coincide with legislative and public expectations." *Landgraf* v. *USI Film Productions*, 511 U.S. 244, 272 (1994). Cf. *US Airways, Inc.* v. *McCutchen*, 569 U.S. 88, 102 (2013) (in a case concerning ERISA plan documents, relying on the "default rules [that] govern in the absence

of a clear expression of [a] contrary intent"); *Staub* v. *Proctor Hospital*, 562 U.S. 411, 418 (2011) (in a federal tort case, observing that the Court must "consult general principles of law" that "form the background against which federal tort laws are enacted").

b. Here, the settled legal background against which section 403(b) was adopted demonstrates beyond debate that Congress did not mean for "a sentence" to include a vacated sentence. Absent contrary intent, a vacated order is and always has been treated as though it was never entered in the first place—it is a nullity, as though it never existed. See *United States* v. *Mitchell*, 38 F.4th 382, 392 (3d Cir. 2022) (Bibas, J., concurring) (historical principles "reveal that vacatur makes a sentence void from the start"). Nothing in section 403(b)'s text overrides that default understanding.

Take first historical sources. At common law before the Founding, vacatur on appeal made it "as if no [judgment] had been" entered, meaning in effect that there was no "record of it." *Ognell's Case* (1592) 78 Eng. Rep. 526, 526; 34 Cro. Eliz. 270, 271 (Q.B.); *accord Eyre* v. *Woodfine* (1592) 78 Eng. Rep. 533, 533; 34 Cro. Eliz. 278, 278-279 (Q.B.). Countless other historical sources confirm that when an order is vacated, it is "in all respects as though the [order] had never been made." *Norman* v. *Norman*, 207 P. 970, 972 (Okla. 1922). Since time out of mind, courts have understood that vacatur "puts the parties in the state, in which they were, immediately before the judgment was rendered," fully restoring the *status quo ante*. *Lockwood* v. *Jones*, 7 Conn. 431, 436 (1829). This Court summarized this principle more than 150 years ago: "vacating the former judgment * * * render[s] it null and void, and the parties are left in the same situation as if no trial had ever taken place in the cause." *United States* v. *Ayres*, 76 U.S. (9 Wall.) 608, 610 (1869).

A vacated order is not merely "suspended" on a forward-looking basis, while "retain[ing] its vitality" retrospectively. *Stewart* v. *Oneal*, 237 F. 897, 906 (6th Cir. 1916). Rather, "where an irregular order has been vacated *it is held to be the same as though it never existed*, and for that reason" courts may not afford any "protection to the acts which may have been performed under it." *Farnsworth* v. *Western Union Telephone Co.*, 6 N.Y.S. 735, 747 (Gen. Term 1889) (emphasis added). When orders are vacated, it is "as though they had never been made or had" in the first place. *United States* v. *Mayse*, 5 F.2d 885, 886 (9th Cir. 1925).[2]

This ancient principle has been carried forward to modern times without meaningful alteration. Like their forebears, cases since the midcentury onward confirm that after a conviction is vacated, the defendant "stand[s]

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[2] Other historical examples expressing this principle are too many to list. For a limited sample, see *Williams* v. *Floyd*, 27 N.C. 649, 656 (1845) (a void or "stricken" order is "the same as if the [order] had never been made"); *Lawson* v. *Bissell*, 7 Ohio St. 129, 132 (1857) (when a verdict and judgment are "vacated" it is "as if there had been no trial"); *In re Lacey*, 14 F. Cas. 906, 908 (C.C.D. Conn. 1874) (vacating an order allows the parties to act "in the same way and manner, and to the like effect" as they could have had the order "never been made"); *Strickland* v. *Flagstaff Silver Mining Co.*, 1 Utah 199, 204 (1875) (for purposes of post-judgment motions, a judgment that is vacated "was as though it had never existed"); *Aultman* v. *Seiberling*, 31 Ohio St. 201, 204 (1877) (when a decision is vacated, the law and the facts are treated "the same as if no decision had been made"); *Bondholders & Purchasers of the Iron Railroad* v. *Toledo*, 62 F. 166, 168 (7th Cir. 1894) (after a court order vacating and annulling a decree disallowing a claim, the claim was "re-established in all respects as fully as if [the vacated decree] had never been made"); *Green* v. *McCarter*, 42 S.E. 157, 158 (S.C. 1902) (when a judge "revoke[s] his * * * order, the case [stands] just as if no order had been made"); *In re Rochester Sanitarium & Baths Co.*, 222 F. 22, 26 (2d Cir. 1915) (recognizing "[t]he general rule" that when a court vacates an order, "it is the same as if such order had never existed").

in the position of any man who was accused of a crime but has not yet shown to have committed it." *Fiswick* v. *United States*, 329 U.S. 211, 223 (1946). "The general rule," according to these cases, "is that when an order or judgment is vacated the previously existing status is restored and the situation is the same as though the order or judgment had never been made." *Wrang* v. *Spencer*, 235 A.2d 861, 863 (Conn. App. Ct. 1967). Nearly verbatim restatements of this universal principle appear in *Mitchell* v. *Joseph*, 117 F.2d 253, 255 (7th Cir. 1941); *Miller* v. *Schlereth*, 36 N.W.2d 497, 506 (Neb. 1949); *Tims* v. *Holland Furnace Co.*, 90 N.E.2d 376, 380 (Ohio 1950); and *Buchanan* v. *Cabiness*, 245 S.W.2d 868, 873 (Mo. 1951) (en banc).

The notion that a vacated order is treated as though it had never been entered in the first place reflects the same principle behind the Court's own *Munsingwear* doctrine: An order vacating a judgment "eliminates [the] judgment" so that "none is prejudiced" by it, "clear[ing] the path for future relitigation of the issues between the parties." *United States* v. *Munsingwear*, 340 U.S. 36, 40 (1950). "The point of vacatur is to prevent" its object "from spawning any legal consequences, so that no party is harmed by" it. *Camreta* v. *Greene*, 563 U.S. 692, 713 (2011) (citing *Munsingwear*).

And the law not only treats the vacated judgment as a nullity in its own right, but also regards the proceedings producing it effectively as never having happened. Thus, for example, the vacatur of a criminal judgment of conviction on appeal effectively erases from history the fact of the jury's empanelment in the original trial, and thus in most circumstances "there is no double jeopardy upon a new trial." *Burks* v. *United States*, 437 U.S. 1, 12 (1978) (quoting *Bryan* v. *United States*, 338 U.S. 552, 560 (1950)). That rule "rests ultimately upon the premise that the original conviction has, at the defendant's behest,

been wholly nullified and the slate wiped clean." *North Carolina* v. *Pearce*, 395 U.S. 711, 721 (1969) (citing *United States* v. *Ball*, 163 U.S. 662 (1896)).

The same rationale applies with respect to sentencing. As the Court made clear in *Pepper* v. *United States*, 562 U.S. 476 (2011), when a court of appeals "set[s] aside [a defendant's] entire sentence and remand[s] for a *de novo* resentencing," all legal effect from the original sentencing proceeding is nullified, "effectively wip[ing] the slate clean." *Id.* at 507. Rulings made at the original sentencing therefore have no continuing vitality under the law-of-the-case doctrine. *Ibid.*

c. The legal backdrop against which Congress enacted the FSA is thus clear: When a criminal sentence is vacated, the *status quo ante* is restored as if the sentence had never been pronounced. A sentence that has been vacated is a nullity; it is nothing; it never existed. See *Fiswick*, 329 U.S. at 223.

That resolves this case. Congress specified that section 403(a)'s sentencing reform shall apply "if *a sentence* for the offense has not been imposed as of" December 21, 2018. FSA § 403(b) (emphasis added). Because a sentence that has been vacated is treated by operation of law as though it never was imposed—so that it "spawn[s no] legal consequences" and "no party is harmed by" it (*Camreta*, 563 U.S. at 713 (quoting *Munsingwear*, 340 U.S. at 40-41))—Congress could not have intended for "a sentence" to include a vacated sentence. As a matter of law, an offender whose sentence has been vacated is one for whom "a sentence for the offense has not been imposed" *ever*, including as of December 21, 2018.

2. Contrary opinions among the lower courts are not persuasive

a. In holding otherwise, the Fifth Circuit focused on the indefinite article, "*a*" appearing before the word "sentence." See Pet. App. 8a-9a. The same argument was spelled out by then-Judge Barrett in her dissent in *United States* v. *Uriarte*, 975 F.3d 596 (7th Cir. 2020) (en banc): "[T]he indefinite article 'a' is broad enough," she argued, "to refer to any sentence that has been imposed for the offense, even one that was subsequently vacated." *Id.* at 608. In her and the Fifth Circuit's view, a pre-enactment sentence, even if later vacated, remains "*a* sentence" imposed "as of" December 21, 2018. *Ibid.*; Pet. App. 8a-9a; see also *United States* v. *Hernandez*, 107 F.4th 965, 969 (11th Cir. 2024).

Respectfully, that position disregards the nature of a vacatur and the default rule that it establishes. When Congress says "a sentence" without more, it cannot mean a sentence that is treated by operation of law as never having been imposed. Otherwise, what would it mean for something to be treated as never having been imposed?

That conclusion does not add words to the statute, as the Fifth Circuit implied. In the lower court's view, "[i]f Congress meant for the First Step Act's retroactivity bar to apply only to valid sentences, it could easily have said so" by specifying "a *valid* sentence." Pet. App. 8a-9a. But that misses the point, which is that an adjective like "valid" would have been redundant given the background legal principles against which Congress adopted the FSA. Again, Congress is presumed to be aware of and incorporate those principles in the statues it enacts. And here, the long-settled rule is that when an unlawful "order has been vacated it is held to be the same as though it never existed" and the law will "afford no protection to

the acts which may have been performed under it." *Farnsworth*, 6 N.Y.S. at 747.

Accordingly, it is the Fifth Circuit's reading, not petitioner's, that would add words to the statute. To read "a sentence" as including a vacated sentence would be to read the statute as saying "an *initial* sentence" or "an *original* sentence." Use of such adjectives would have readily displaced the default rule that a vacated sentence is treated as a matter of law as never having existed. But Congress did not use those modifiers, and thus the assumption "that our elected representatives, like other citizens, know the law" when they draft and enact statutes (*Cannon*, 441 U.S. at 696-697) carries the day for Hewitt.

b. Some lower courts have instead simply denied the premise of the argument, asserting that an order fully vacating a sentence "does not require the district court to proceed as if the initial sentencing never happened." Pet. App. 9a (quoting *Uriarte*, 975 F.3d at 608 (Barrett, J., dissenting)). For support, they have pointed to 18 U.S.C. § 3742(g)(1), which specifies that "a district court imposing a sentence on remand" following a vacatur on appeal "must apply the Sentencing Guidelines 'that were *in effect on the date of the previous sentencing* of the defendant prior to the appeal.'" *Uriarte*, 975 F.3d at 608 (Barrett, J., dissenting) (quoting section 3742(g)(1)). That, we are told, is evidence that the effects of a vacated sentence are not wholly eliminated, and a court need not "proceed as if the earlier sentencing never happened." *United States* v. *Carpenter*, 80 F.4th 790, 792 (6th Cir. 2023) (Kethledge, J., concurring in the denial of rehearing en banc).

That misunderstands what section 3742(g)(1) does. As a starting point, the very relevance of the provision is doubtful. It provides only that when a court of appeals remands a case for resentencing (plenary or otherwise),

the district court must utilize the sentencing guidelines "that were in effect on the date of the previous sentencing." 18 U.S.C. § 3742(g)(1). That shows only that Congress did not want changes to the guidelines to apply retroactively at resentencing. The statute's reference to the state of the law on "the date of" a prior proceeding does not suggest in any way that a vacated sentence itself continues to have legal force or effect.

Moreover, to the extent section 3742(g) has any relevance, it is only to confirm that Congress knows how to use express language to override the default rule when it wishes to. Our point is not that a vacated sentence can *never* have ongoing consequences—it is only that, given that Congress is assumed to understand that a vacated sentence is treated as if it were never entered, Congress would have to use express language to accomplish that objective. That is at most what section 3742(g) confirms: When Congress wants a vacated sentence to continue to have some effect, it says so using a clear statement. Such language is missing from section 403(b).

3. Section 403(b) refers to the ongoing enforcement of a sentence, not the fact of a past pronouncement

a. Other lower court opinions have rejected the relevance of vacatur by characterizing the imposition of a sentence as a historical fact that, if it occurred, cannot be erased from the documented past by a later vacatur of the sentence. According to this rationale, when Congress said that section 403(a) shall apply to a pre-enactment offense "if a sentence for the offense has not been imposed as of" December 21, 2018 (FSA § 403(b)), it actually meant "if a sentence was not pronounced before" that date.

The Eleventh Circuit took this view in *Hernandez*. There, it reasoned that section 403(b) "is best read to refer to a completed act" because it conjugates the verb

"imposed," which "refers to the historical fact of *pronouncement*" taking place at "a specific point in time." *Hernandez*, 107 F.4th at 969-970; accord Pet. App. 7a-8a. Viewing the imposition of a sentence this way renders effect of vacatur irrelevant, according to these sources, because "vacatur does not erase * * * from history" the recorded fact that a sentence was pronounced on a date preceding enactment. *United States* v. *Jackson*, 995 F.3d 522, 525 (6th Cir. 2021).

b. The problem with that approach is two-fold.

First, that is indeed precisely what an order of vacatur does—by operation of law, it erases from history both the vacated order or judgment and the proceeding that produced it. Thus, when a verdict and judgment are "vacate[d]," it is "as if no trial had ever taken place in the cause." *Ayres*, 76 U.S. (9 Wall.) at 610; accord *Lawson*, 7 Ohio St. at 132 (following a vacatur, the case must proceed "as if there had been no trial").

Again, that is the premise underlying the rule that "there is no double jeopardy upon a new trial" following a vacatur on appeal of the final judgment. *Burks*, 437 U.S. at 12. "There are few if any rules of criminal procedure clearer than the rule that 'jeopardy attaches when the jury is empaneled and sworn.'" *Martinez* v. *Illinois*, 572 U.S. 833, 839 (2014) (quoting *Crist* v. *Bretz*, 437 U.S. 28, 35 (1978)). But when a conviction is later vacated, the law treats the jury's empanelment at the first trial effectively as if it had never happened. *Burks*, 437 U.S. at 12.

Applied here, that means that no legal disability may follow from Hewitt's sentence ever having existed, including any disability following from the historical fact of the pronouncement having taken place.

Second, the historical-fact approach to section 403(b) is inconsistent with the verb tense and preposition that Congress used there. If Congress had meant the applic-

ability of section 403(a) to turn on whether a district judge had pronounced a sentence on a date preceding December 21, 2018, as a simple matter of historical fact, it would not have used the present-perfect tense or the preposition "as of." Instead, it would have used the simple past tense, together with a preposition such as *before* or *prior to*—it would have said section 403(a) shall apply to a pre-enactment offense "if a sentence for the offense *was* imposed *before* such date of enactment." That word choice would have been consistent with the House Legislative Drafting Manual, which directs drafters of legislation to use the past tense to refer to "facts that must precede" the statute's "operation." *House Legislative Counsel's Manual on Drafting Style*, HLC No. 104-1, § 351(f)(2), at 60 (1995).

But that is not the formulation that Congress chose. Instead, it used the present-perfect tense, together with the preposition "as of." Each alone—and undeniably both together—connote an ongoing condition rather than the occurrence of a singular past event.

The relevant grammar rules make this clear. The present-perfect tense uses the words "has been" (or in this case "has not been"). Whereas the past tense "is a simple tense, just past," the present perfect "is a compound tense combining past and present." Rodney Huddleston & Geoffrey K. Pullum, *The Cambridge Grammar of the English Language* 142 (2002) (hereinafter *Cambridge Grammar*). That is to say, the present perfect "involves reference to both past and present time" and "is concerned with a time-span beginning in the past *and extending up to now*." *Id.* at 143 (emphasis added). Thus, in contrast with the past tense, which focuses on a singular past occurrence, "the primary focus" of the present-perfect "is on the present." *Ibid.* It accordingly "is not used in contexts where the 'now' component of [the time span] is explicitly or implicitly excluded," such

as when one is speaking about a discrete past event that has concluded. *Ibid.*

That alone forecloses *Hernandez*'s past-historical-fact rationale. If one says that a sentence "has been imposed as of" some past date, it indicates that the sentence was in effect on that date and is still being enforced today, "extending up to now." *Cambridge Grammar* 143. It indicates, in other words, that the sentence remains final and in force at the time of speaking, and that it has not been vacated by a court. [3]

That conclusion follows not only from the use of the present-perfect tense, but also from the preposition "as of," which indicates a time or date "from" which something begins or continues. See *Collins English Dictionary* 113 (14th ed. 2023) (hereinafter *Collins*). One would say, for example, that a contract is effective "as of" the date it comes into force. In doing so, one would indicate the commencement of a continuous period of enforcement—the effective date *and onward*. And if one were to combine "as of" with the present-perfect tense (stating that a contract "*has been* effective *as of* December 21, 2018"), the plain meaning would be that the contract was enforceable on that date and remains so now. In contrast, it would be incoherent to say that a contract "*has been* effective *as of* December 21, 2018," if, at the time of speaking, the contract was terminated by the parties or voided by a court.[3]

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[3] It bears noting "the widely accepted modern legislative drafting convention that a law should not be read to speak as of the date of enactment," but "'as of any date on which it is read.'" *Carr* v. *United States*, 560 U.S. 438, 463 (2010) (Alito, J., dissenting) (quoting Senate Office of the Legislative Counsel, Legislative Drafting Manual § 103(a), at 4 (1997)). This convention recognizes that most laws "have a continuing effect in that they apply over time," and they thus "speak at the time of reading, not merely at the time of their adoption." *Id.* at 464.

The same goes for section 403(b). Congress specified that section 403(a) shall apply to a pre-enactment offense "if a sentence for the offense has not been imposed as of" December 21, 2018. The inverse is that section 403(a) shall *not* apply to a pre-enactment offense "if a sentence for the offense *has* been imposed as of" that date. But it would be ungrammatical to say that Hewitt is a defendant on whom "a sentence has been imposed as of" December 21, 2018, because that formulation mistakenly implies that at the time of speaking, there is a present, ongoing enforcement of his sentence.

One might say that Hewitt's initial sentence *was* imposed *before* that date. But, again, those are not the words Congress used. And "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992).

c. Use of the word "imposed" does not change matters. To be sure, "imposed," viewed in isolation, can be taken to mean "to establish as something to be obeyed or complied with." *Collins* 984; see also *Webster's Third New International Dictionary* 1136 (2002) (hereinafter *Webster's*) (defining impose as, among other things, "bestow"). On that meaning, a judge who *imposes* a sentence establishes it or bestows it on the defendant as a matter of fact at a singular point in time.

But the word can also mean to "enforce" (*Collins* 984) or to "apply," as in a "penalty" (*Webster's* 1136). Understood in that way, the word means an ongoing condition of enforcement: A sentence is *imposed* on (it is applied to or enforced against) an offender during the entire duration of his or her incarceration. This meaning suggests not a singular past occurrence that took place at a particular point in time, but rather an ongoing condition: A "sentence remains 'imposed'" until it is "vacate[d]."

United States v. *Henry*, 983 F.3d 214, 223 (6th Cir. 2020).

The academic possibility of these two meanings does not render section 403(b) ambiguous. The proper interpretation of "words that can have more than one meaning" are generally resolved "by their surroundings." *Arizona* v. *Inter Tribal Council of Arizona*, 570 U.S. 1, 10 (2013) (quoting *Whitman* v. *American Trucking Associations*, 531 U.S. 457, 466 (2001)). That is, the "susceptibility" of a singular word to multiple meanings does not necessarily render the word ambiguous, because "all but one of the meanings is ordinarily eliminated by context." *Deal* v. *United States*, 508 U.S. 129, 131-132 (1993).

Just so here. By using the present-perfect tense (rather than the past tense) and the preposition "as of" (rather than "before" or "prior to") Congress signaled its focus on a "time-span beginning in the past and extending up to now." *Cambridge Grammar* 143. Any contention that the word "imposed" in section 403(b) "refers to the historical fact of *pronouncement*" at "a specific point in time" (*Hernandez*, 107 F.4th at 970) rather than a condition of ongoing enforcement would require reforming the tense and replacing the preposition that Congress used. The law permits no such revisions.

d. Moreover, section 404 of the FSA demonstrates that Congress was aware of and intended the difference. There, Congress provided for motions to reduce valid, final sentences in limited circumstances. See generally *Concepcion* v. *United States*, 597 U.S. 481 (2022). In doing so, Congress limited relief in two notable ways. First, it specified in section 404(c) that "[n]o court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced" under certain circumstances. FSA § 404(c), Pet. App. 21a. If the lower court were correct that Congress intended in section 403(b) to refer to a

singular past event (the pronouncement of a sentence before enactment), it presumably would have used the same formulation—section 403(a) shall apply to pre-enactment offenses "if no sentence for the offense was previously imposed." It did not do so.

Second, also in section 404(c), Congress foreclosed relief if a motion "to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits." Again, if the lower court's reading were correct, Congress could have used that alternative formulation in section 403(b)—section 403(a) shall apply to pre-enactment offenses "if no sentence for the offense was imposed before said date of enactment." Again, it did not do so.

Both examples demonstrate that Congress knows how to use the simple past tense to denote discrete events taking place at fixed times in the past when it wishes to. It did so in section 404(c), but it did not do so in section 403(b). And the Court "generally presum[es] that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *Intel Corp. Investment Policy Committee* v. *Sulyma*, 589 U.S. 178, 186 (2020) (quoting *BFP* v. *Resolution Trust Corporation*, 511 U.S. 531, 537 (1994)).

All of this leads to a straightforward conclusion: When Congress said that section 403(a) shall apply to a pre-enactment offense "if a sentence for the offense has not been imposed as of" December 21, 2018 (FSA § 403(b), Pet. App. 20a), it meant a sentence that was being enforced "as of" that date and is still being enforced at the relevant time of reading. And needless to say, that does not describe a sentence vacated before the reading.

4. Purpose and practice confirm that section 403(a) applies to plenary resentencings

a. Purpose and practice confirm the Fifth Circuit's error in this case. Statutory interpretation turns on the way that ordinary English speakers use language. The Court thus has a long history of reading statutory words and phrases "not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose,'" "not to mention common sense." *Abramski* v. *United States*, 573 U.S. 169, 179 (2014) (quoting *Maracich* v. *Spears*, 570 U.S. 48, 76 (2013)). While rules of grammar, dictionary definitions, and background legal principles are of course matters of central importance, the Court "must not be guided by a single sentence or member of a sentence" studied in the academic abstract; it must instead "look to the provisions of the whole law, and to its object and policy." *Kelly* v. *Robinson*, 479 U.S. 36, 43 (1986) (quoting *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 221 (1986)).

Although broader in total effect, the FSA's "most important reforms" were the "changes to mandatory minimums" at issue here. 164 Cong. Rec. S7748 (daily ed. Dec. 18, 2018) (statement of Sen. Klobuchar). Moved by heartless examples of excessive imprisonment, Congress set out to "eliminate[] the so-called stacking provision in the U.S. Code" and to "ensure that sentencing enhancements for repeat offenses apply only to true repeat offenders." *Id.* at S7774 (statement of Sen. Cardin); accord 164 Cong. Rec. H10362 (daily ed. Dec. 20, 2018) (statement of Rep. Nadler). Courts on both sides of the issue have thus concluded that the FSA's purpose "is obvious: to reduce the harsh length of sentences for * * * certain firearms offenses." *Mitchell*, 38 F.4th at 387. It was, in other words, "to ensure that the lengthy mandatory-minimum sentences for stacked

§ 924(c) convictions ended, whether at initial sentencings or resentencings." *Henry*, 983 F.3d at 224.

To that end, Congress made section 403(a) applicable not only to post-enactment crimes, but also pre-enactment ones. In doing so, it had two options: *First*, it could make section 403(a) retroactively applicable to *all* defendants serving stacked sentences, including those subject to valid final judgments. *Second*, it could make section 403(a) retroactively applicable to crimes committed pre-enactment, but only in pending, non-final cases.

The choice required a balance of competing values of the highest order. On the one hand, Congress was deeply concerned that defendants were serving unduly harsh and overlong sentences. Few government interventions have the same impact and gravity as deprivation of liberty by imprisonment. On the other hand, there is a "strong interest in preserving the finality of judgments." *Harris* v. *Rivera*, 454 U.S. 339, 348 n.21 (1981) (quoting *Henderson* v. *Kibbe*, 431 U.S. 145, 154 n.13 (1977)). Legislators understand that "[f]inality is essential to both the retributive and the deterrent functions of criminal law." *Calderon* v. *Thompson*, 523 U.S. 538, 555 (1998). And finality serves the public's interest in efficient judicial administration, increases confidence in the justice system, and fosters the public interest in repose.

Evidently with these latter principles in mind, Congress selected the second option: It made section 403(a) relief available to defendants whose criminal conduct predated enactment of the statute, but whose cases were "pending" (that is, those whose sentence "has not been

imposed as of" the FSA's enactment). See FSA § 403(b) (titled "Applicability to Pending Cases").[4]

In taking this approach, "Congress stanched, to the degree that it could," the problem of sentence stacking, but "without overturning valid and settled sentences." *Uriarte*, 975 F.3d at 601. "In choosing not to write § 403(b) to allow reductions to valid sentences that already had been imposed, Congress expressed a policy preference in favor of settled expectations and ease of administration." *Id.* at 605; see also *United States* v. *Merrell*, 37 F.4th 571, 576 (9th Cir. 2022) ("[W]e find it clear that § 403(b) was intended to ensure that the adoption of the First Step Act by itself would not affect any sentence previously imposed."); *Henry*, 983 F.3d at 225 ("Congress chose not to disrupt the finality of past sentences * * * for defendants serving stacked sentences.").

What is more, Congress "naturally wanted to reach all cases where there was not already a sentence in place." *Uriarte*, 975 F.3d at 605. It intended to give defendants the benefit of section 403(a) at all *future* plenary sentencing proceedings, without disturbing the sentences validly imposed in *past* proceedings.

b. Applying section 403(a) to defendants like Hewitt is consistent with Congress's policy choice. The lower court's contrary decision is not.

Once a court vacates a criminal sentence and orders a *de novo* resentencing, there can no longer be any interest

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[4] "This Court has long considered that the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of" a statutory provision. *Dubin*, 599 U.S. at 120-121 (cleaned up). A section title cannot "override" the words that follow, but Congress's words "must be construed in light of the terms surrounding them, and the title Congress chose is among those terms." *Id.* at 121 (cleaned up).

in finality. See *Pepper*, 562 U.S. at 507. Because the district court must resentence the defendant "as if no initial sentencing ever occurred" (*United States* v. *Burke*, 863 F.3d 1355, 1359 (11th Cir. 2017)), finality is already out the window by the time the district court undertakes a *de novo* resentencing following a vacatur. The initial sentence is gone, and a brand new sentence must be determined and pronounced.

Practice bears this out. A plenary resentencing is a *de novo* proceeding, and the district court must exercise its discretion anew in setting an appropriate sentence. "[A]t any subsequent resentencing after a sentence has been set aside," the court must determine a sentence "based on appropriate consideration of all of the factors listed in § 3553(a)," without regard for prior rulings from the initial sentencing. *Pepper*, 562 U.S. at 490. Among other things, the probation officer must prepare a new presentence report (see Pet. App. 3a-4a; Dkt. 785, at 15), the parties must submit new objections and responses (Dkts. 694, 699), and the court must hold a new hearing and consider and resolve the disagreements. See *Concepcion*, 597 U.S. at 484.

There is no conceivable reason that Congress would have wanted district courts to continue imposing "irrational, inhumane, and absurd" sentences pursuant to a "cruel and unjust" sentencing rule (*Hungerford*, 465 F.3d at 1118 (Reinhardt, J., concurring)) that it had just repealed retroactively for all pending cases. On the contrary, lawmakers "wanted the unfair practice" of stacking "stopped upon enactment" (*Uriarte*, 975 F.3d at 603) because they "recognized that such lengthy sentences * * * were draconian and sought to end the practice" (*Henry*, 983 F.3d at 225).

No court and no party in any case presenting this issue has identified any reason why Congress would have intended for courts to continue to impose since-repu-

diated stacking rules in plenary resentencings. Simply put, there is none. Given "that Congress had determined that the earlier sentencing structure resulted in sentences that were too long and unfair," its goal was to "ensur[e] that those sentences would not be imposed on defendants yet to be sentenced," *for whatever reason*. *Uriarte*, 975 F.3d at 603. The Court is not required to turn a blind eye to that purpose, adopting an interpretation that does violence to it rather than respecting it.

B. Any ambiguity must be resolved in favor of applying section 403(a) to Hewitt

If, after all, there were any doubt about section 403(b)'s proper interpretation, the rule of lenity would require the Court to resolve it in Hewitt's favor. A penal statute cannot be construed to impose a 105-year mandatory minimum sentence when another plausible reading would produce a 25-year mandatory minimum. No matter the Court's view of the interpretations adopted by the Fifth, Sixth, and Eleventh Circuits, Hewitt's interpretation is at the very least a plausible one. The rule of lenity thus requires the Court to adopt it.

1. The rule of lenity is an interpretive canon "not much less old than [statutory] construction itself." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.). It demands that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling* v. *United States*, 561 U.S. 358, 410 (2010) (quoting *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000)). It "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980). Simply stated, "[i]n the construction of a penal statute, it is well settled * * * that all reasonable doubts concerning

its meaning ought to operate in favor of [the defendant]." *Harrison* v. *Vose*, 50 U.S. (9 How.) 372, 378 (1850).

The rule is grounded in the Constitution. It ensures "that the power of punishment is vested in the legislative, not in the judicial department," for it is "the legislature, not the Court, which is to define a crime, and ordain its punishment." *Wiltberger*, 18 U.S. (5 Wheat.) at 95; see also *Wooden* v. *United States*, 595 U.S. 360, 388-392 (2022) (Gorsuch, J., concurring) (describing the due-process and separation-of-powers underpinnings).

The rule of lenity applies when the ordinary tools of construction ("text, structure, and history") "fail to establish that" the harsher reading is "unambiguously correct." *United States* v. *Granderson*, 511 U.S. 39, 54 (1994). Lenity applies "when, after consulting traditional canons of statutory construction, [the Court is] left with an ambiguous statute." *Shular* v. *United States*, 589 U.S. 154, 165 (2020) (quoting *United States* v. *Shabani*, 513 U.S. 10, 17 (1994)); see also *Wooden*, 595 U.S. at 392-393 (Gorsuch, J., concurring).

2. As we demonstrated in the preceding parts of this brief, section 403(b) states plainly that Hewitt's plenary resentencing shall be subject to section 403(a). That is the only reading consistent with the background rules against which Congress enacted the FSA, as well as the relevant rules of grammar, the definitions of the terms used, the structure and scheme of the statute, and Congress's manifest purpose.

If for any reason the Court concludes that the lower court's alternative interpretation is a possible one, the rule of lenity would dictate that the ambiguity be resolved in Hewitt's favor. Indeed, this is a textbook case for application of lenity. Defendants like Hewitt who are resentenced will receive drastically lower sentences under our interpretation than they would under the Fifth,

Sixth, and Eleventh Circuits' construction. "[L]enity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Bifulco*, 447 U.S. at 387 (quoting *Ladner* v. *United States*, 358 U.S. 169, 178 (1958)). To adopt the Fifth, Sixth, and Eleventh Circuit's reading would mean making just such a guess.

If, after applying all the textual rules of construction, the Court sees no one clear answer, then lenity requires reversal. *Granderson* proves the point. There, as here, the Court addressed a question of statutory interpretation concerning sentencing. 511 U.S. at 41. The practical difference between the principal options was a mandatory 20-month sentence (if the government was correct) or a mandatory two-month sentence (if the defendant was correct). *Id.* at 41-42. After evaluating the "text, structure, and history" and finding no clear answer, the Court "appl[ied] the rule of lenity and resolve[d] the ambiguity in [the defendant's] favor." *Id.* at 54.

The same process is required here. There is no question that Hewitt must be resentenced. Under our interpretation of section 403(a), he would face a mandatory minimum of 25 years. Under the Fifth, Sixth, and Eleventh Circuits' construction, he would face a mandatory minimum of longer than 100 years at his resentencing. Were there any "reasonable doubt" about the construction of section 403(a), that doubt "should be resolved in favor of" Hewitt. *Wooden*, 595 U.S. at 397 (Gorsuch, J., concurring).

CONCLUSION

The Court should reverse and remand with instructions to resentence Hewitt under section 403(a).

Respectfully submitted.

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