Nos. 23-1150, 23-1002

IN THE

Supreme Court of the United States

COREY DEYON DUFFEY AND JARVIS DUPREE ROSS,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent,

TONY R. HEWITT,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR PETITIONERS COREY DEYON DUFFEY AND JARVIS DUPREE ROSS

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

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

RELATED PROCEEDINGS

U.S. Court of Appeals for the Fifth Circuit:

- *United States* v. *Duffey*, No. 22-10265 (Feb. 2, 2024) (reported at 92 F.4th 304) (affirming sentences)
- *In re Duffey*, No. 20-10644 (Jan. 7, 2021) (granting leave to file successive 28 U.S.C. § 2255 motion)
- *In re Ross*, No. 20-10845 (Dec. 14, 2020) (granting leave to file successive 28 U.S.C. § 2255 motion)
- *In re Ross*, No. 19-10365 (May 13, 2019) (dismissing motion for authorization to file successive 28 U.S.C. § 2255 motion)
- *Duffey* v. *United States*, No. 18-10138 (Mar. 7, 2018) (dismissing 28 U.S.C. § 2255 appeal for want of prosecution)
- *Ross* v. *United States*, No. 17-10954 (Jan. 11, 2018) (dismissing 28 U.S.C. § 2255 appeal for want of prosecution)
- *United States* v. *Ross*, No. 12-11021 (Oct. 8, 2014) (reported at 582 F. App'x 528) (affirming Ross's sentence)
- *United States* v. *Ross*, No. 12-11021 (Nov. 7, 2013) (dismissing Duffey's appeal)
- *United States* v. *Duffey*, No. 10-1013 (Jan. 3, 2012) (reported at 456 F. App'x 434) (affirming in part, reversing in part, and remanding for resentencing)

U.S. District Court for the Northern District of Texas:

- *United States* v. *Ross*, No. 3:08-cr-00167-B (Mar. 29, 2022) (judgment on resentencing)

- *United States* v. *Duffey*, No. 3:08-cr-00167-B (Mar. 14, 2022) (judgment on resentencing)
- *Ross* v. *United States*, No. 3:20-cv-02245-B-BH (Nov. 2, 2021) (granting second 28 U.S.C. § 2255 motion)
- *Duffey* v. *United States*, No. 3:20-cv-01686-B-BH-cr-00167-B (June 14, 2021) (granting second 28 U.S.C. § 2255 motion)
- *United States* v. *Ross*, No. 3:08-cr-00167-B (July 14, 2020) (denying motion to reduce sentence under the First Step Act of 2018)
- *Ross* v. *United States*, No. 3:19-cv-00586 (Mar. 29, 2019) (transferring second 28 U.S.C. § 2255 motion to Fifth Circuit)
- *Duffey* v. *United States*, No. 3:15-cv-00500-B-BH (Jan. 17, 2018) (denying 28 U.S.C. § 2255 motion)
- *Ross* v. *United States*, No. 3:15-cv-03233-B-BH (Aug. 3, 2017) (denying 28 U.S.C. § 2255 motion)
- *United States* v. *Duffey*, No. 3:08-cr-00167-B (Nov. 15, 2012) (amended judgment)
- *United States* v. *Ross*, No. 3:08-cr-00167-B (Sept. 28, 2012) (amended judgment)
- *United States* v. *Ross*, No. 3:08-cr-00167-B (Feb. 22, 2010) (judgment)
- *United States* v. *Duffey*, No. 3:08-cr-00167-B (Feb. 3, 2010) (judgment)

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BRIEF FOR PETITIONERS COREY DEYON DUFFEY AND JARVIS DUPREE ROSS

INTRODUCTION

The First Step Act of 2018 is the most sweeping and significant criminal-justice reform of this century. It eliminates some of the harshest penalties in the criminal code, reduces mandatory minimums, and broadens key safety valves. Congress passed the Act with overwhelming bipartisan support, and it was signed into law by President Trump.

One of the Act's most important provisions is Section 403, which prohibits the "stacking" of 18 U.S.C. § 924(c)'s enhanced sentences for first-time

offenders. For years, defendants convicted of multiple Section 924(c) counts in a single proceeding faced a 25-year mandatory-minimum sentence on each count beyond the first. This practice of "sentence stacking" routinely led to extremely long sentences. This case presents a vivid example: Petitioners were originally sentenced to over 300 years' imprisonment on their Section 924(c) convictions alone.

Section 403 of the First Step Act ended this practice. Now, a defendant convicted of multiple Section 924(c) convictions in one proceeding faces a five-year—rather than a 25-year—mandatory minimum on each of those offenses. The difference between several five-year sentences and several 25-year sentences is as stark as it sounds: It can be the difference between dying in prison and having a second chance.

Congress expressly made Section 403 retroactive to defendants who committed their offense "before" the First Step Act was enacted, "if a sentence for the offense has not been imposed as of such date of enactment." The question presented by this case is whether Congress intended this retroactivity provision to reach a defendant who was originally sentenced before the First Step Act was enacted, but who, after his sentence was vacated, faces plenary resentencing after the enactment date.

Every traditional tool of statutory interpretation indicates that the answer is yes.

First, Congress tied the application of Section 403 to whether a "sentence" has been imposed by a particular date. Congress did not define "sentence." But Congress is presumed to legislate against background legal principles. One of those background

principles—reflected in this Court's decisions, federal statutes, and longstanding criminal and civil doctrines—is that "sentence" means a *valid* sentence. A vacated sentence, in the eyes of the law, was *never* a sentence at all. Such a sentence was null and void from the start, not simply from the moment a court entered a vacatur order. Vacatur, put simply, "wipe[s] the slate clean." *Pepper* v. *United States*, 562 U.S. 476, 507 (2011); *see also Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 114-115 (1983) (regardless of "the historical fact of the conviction," vacatur "nullifie[s]" the conviction such that it has no legal force).

This ordinary meaning of "sentence" reflects the ancient rule that vacated orders are void ab initio, not just going forward. Blackstone articulated this principle, which was dusty even by his time; the rule dates back to at least the 1400s, when English courts still worked in French. Read against this background principle, Section 403's meaning is plain: A defendant whose sentence was vacated after the First Step Act's enactment did not have a "sentence" as of that date. Thus, like any other defendant sentenced after the First Step Act went into effect, Section 403 applies at his post-Act sentencing proceeding.

Second, the rest of Section 403(b)'s text confirms that Congress intended that "sentence" carry its ordinary meaning of a valid sentence. Congress has used similar constructions in other parts of the criminal code, and those other examples illustrate that when Congress conditions a rule on whether a "sentence" has been "*imposed*," Congress intends for that rule to reach resentencing. Moreover, Congress referred to "*a* sentence"—not *any* sentence. Congress did so despite using the more expansive "any"

elsewhere in the First Step Act, including in Section 403 itself. This makes clear that "a sentence" is not any sentence—such as one that was void from the start but entered as a historical matter. Confirming as much, Congress used the present-perfect tense (*has* been imposed), which is used to discuss events with continued relevance to the present. And in the sentencing context, that can mean only a *valid* sentence. Every part of the text thus points in the same direction: A defendant whose pre-Act sentence was vacated has no "sentence" within the meaning of Section 403(b).

Third, to the extent the text leaves any doubt, the statutory context settles the question. Prior versions of Section 403 distinguished between past and pending cases in such a way as to make clear that the enacted version of the statute extends Section 403's reforms to resentencing proceedings. The First Step Act's legislative history indicates that Congress intended to cease the unjust practice of stacking Section 924(c)'s enhanced mandatory sentences for first-time offenders in all sentencing proceedings moving forward—including resentencing proceedings. Finally, because the ordinary meaning of "sentence" favors liberty, the rule of lenity supports applying Section 403 at post-vacatur resentencing proceedings.

When Congress intended to eliminate a particularly unjust provision of the criminal code and make that change retroactive, it spoke clearly: Congress crafted a statute that would reach defendants who were originally sentenced before the First Step Act was enacted, but who, after their sentences were vacated, face resentencing after the enactment date. This Court should give effect to that

statute's plain text, honor Congress's decision to rely on the longstanding meaning of "sentence," and reverse.

OPINION BELOW

The Fifth Circuit's opinion is available at 92 F.4th 304. *See* Pet. App. 1a-18a.[1]

JURISDICTION

The Fifth Circuit entered judgment on February 2, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 403 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5221-22, provides:

> (a) IN GENERAL.—Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final".
>
> (b) 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.

[1] All references to "Pet. App." refer to the Petition Appendix filed in *Duffey* v. *United States*, No. 23-1150 (Apr. 19, 2024).

STATEMENT

A. Legal Background

1. Federal law prohibits using, carrying, or possessing a firearm in connection with a "crime of violence or drug trafficking crime." 18 U.S.C. § 924(c)(1)(A). A defendant's first conviction under Section 924(c) carries a mandatory-minimum sentence of at least five years, and each subsequent conviction triggers a 25-year mandatory minimum. *Id.* § 924(c)(1)(A)(i), (C). Sentences for multiple convictions run consecutively, both as to each other and to sentences for other convictions. *Id.* § 924(c)(1)(D). The practice of sentencing defendants to multiple consecutive Section 924(c) sentences is colloquially referred to as "sentence stacking."

As originally enacted, Section 924(c) provided that the 25-year mandatory minimum for multiple convictions applied "[i]n the case of [the defendant's] second or subsequent conviction." 18 U.S.C. § 924(c)(1) (1988). This Court interpreted that provision to mean that a defendant convicted of multiple Section "924(c) violations in a single prosecution face[s] a 25-year minimum for the second violation," and for the third, and so on. *United States* v. *Davis*, 588 U.S. 445, 450 n.1 (2019) (citing *Deal* v. *United States*, 508 U.S. 129, 132 (1993)).

This interpretation bore three interrelated ills. First, the stacking of Section 924(c)'s enhanced penalty for first-time offenders led to "excessively severe and unjust sentences in some cases." U.S. Sentencing Comm'n, Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 359 (Oct. 2011) ("2011

Commission Report").[2] To take just two examples, a first-time offender who possessed a firearm while selling small amounts of marijuana to an undercover officer received a mandatory sentence of 55 years, *see United States* v. *Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004); and a first-time offender who provided security at a series of controlled drug purchases—all of which were charged as separate conspiracies—received a mandatory sentence of 130 years, *see United States* v. *Rivera-Ruperto*, 852 F.3d 1, 4-5, 16-17 (1st Cir. 2017).

Second, such stacking gave prosecutors an unduly powerful cudgel in plea negotiations. Rather than bring multiple Section 924(c) charges only against the most culpable defendants, the Government routinely used the threat of stacked charges to convince a defendant to forego his right to a jury trial and plead guilty. *E.g.*, Andrew Manuel Crespo, The Hidden Law of Plea Bargaining, 118 Colum. L. Rev. 1303, 1313-14, 1339-40 (2018). *Angelos* is again illustrative: The Government offered that it would recommend a sentence of 15 years in exchange for a plea deal, but warned that it would "add[] several § 924(c) counts that could lead to" an effective "life sentence" if the defendant insisted on exercising his jury-trial right. 345 F. Supp. 2d at 1231-32.

Finally, the stacking of Section 924(c)'s enhanced penalty for first-time offenders exacerbated racial disparities in criminal sentences. The Sentencing Commission has repeatedly reported that Black offenders constitute a disproportionate majority of offenders convicted of multiple Section 924(c) counts. *See* U.S. Sentencing Comm'n, Mandatory Minimum

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[2] *Relevant chapter available at* https://perma.cc/ZMU4-V22K.

Penalties For Firearms Offenses in the Federal Criminal Justice System 6 (2018);[3] 2011 Commission Report, *supra*, at 363; U.S. Sentencing Comm'n, Fifteen Years of Guidelines Sentencing 90-91, 131 (2004).[4]

2. After years of increasing calls for reform, Congress passed the First Step Act of 2018. That Act has been called "the most significant criminal justice reform bill in a generation." Amicus Br. of Sen. Richard J. Durbin et al., at 9, *Terry* v. *United States*, No. 20-5904 (Feb. 19, 2021) (citation omitted); *see Pulsifer* v. *United States*, 601 U.S. 124, 155 (2024) (Gorsuch, J., dissenting) (quoting this brief). Across six titles, the Act implements "correctional reform via the establishment of a risk and needs assessment" for federal prisoners; alleviates some of the harshest penalties in the criminal code; reauthorizes the Second Chance Act of 2007, which, among other things, aims to help federal prisoners reenter society; and contains a host of other criminal-justice reforms, including allowing federal prisoners to bring motions for compassionate release on their own behalf, modifying the way good-time credits are calculated, and prohibiting the use of restraints on pregnant prisoners. *See* Nathan James, Cong. Rsch. Serv., R45558, The First Step Act of 2018: An Overview, at 1 (2019).[5]

Sentencing reform is the heart of the Act. In Title IV, the Act reduced mandatory minimums for certain drug offenses, *see* First Step Act § 401; broadened 18 U.S.C. § 3553(f)'s safety valve, which exempts certain

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[3] *Available at* https://perma.cc/R4PV-5LGY.

[4] *Available at* https://perma.cc/R7YK-3YE3.

[5] *Available at* https://perma.cc/SK3S-FCUU.

defendants from otherwise-applicable mandatory minimums, *id.* § 402; and made fully retroactive Congress's earlier reforms to crack-cocaine sentences in the Fair Sentencing Act of 2010, *id.* § 404; *see also* U.S. Sentencing Comm'n, The First Step Act of 2018: One Year of Implementation, at 2 (2020).[6]

3. One of Title IV's sentencing reforms is Section 403, which prohibited the stacking of Section 924(c)'s enhanced penalty for first-time offenders. In Section 403(a), Congress "clarif[ied]" Section 924(c) to provide that its 25-year sentences apply only "after a prior [Section 924(c)] conviction * * * has become final." Thus, a first-time offender convicted of multiple Section 924(c) violations at once now faces a mandatory-minimum sentence of five years for each conviction—as opposed to a 25-year mandatory minimum for each conviction after the first. Had the First Step Act applied, the defendant in *Angelos* would have faced the same sentence for his Section 924(c) convictions the Government offered him at the plea-bargaining table: 15 years, as opposed to the 55 years he received.

Congress also departed from default retroactivity principles in Section 403. Under one default rule, a statute that reduces an offense's penalties applies only to offenses that are committed after the new statute's enactment. 1 U.S.C. § 109; *see also Dorsey* v. *United States*, 567 U.S. 260, 272-273 (2012). In Section 403(b), Congress expressly displaced this default rule, consistent with "the ordinary practice" in federal sentencing "to apply new penalties to defendants not yet sentenced," "regardless of when the offender's conduct occurs." *Dorsey*, 567 U.S. at 273,

[6] *Available at* https://perma.cc/L2HP-9BQV.

280. Section 403(b) provides that Section 403(a)'s reforms "apply to any offense that was committed before the date of enactment of [the First Step Act], if a sentence for the offense has not been imposed as of such date of enactment."

B. Factual Background

1. In 2009, a jury convicted Duffey, Ross, and other defendants of various counts related to a series of bank robberies. *See United States* v. *Duffey*, 456 F. App'x 434, 436-438 (5th Cir. 2012). Among other offenses, Duffey and Ross were convicted of multiple counts of conspiracy to commit bank robbery, attempted bank robbery, and bank robbery. *See id.* at 438 & nn. 1-3. Duffey was also convicted of 14 corresponding Section 924(c) violations; Ross was convicted of 13. *See id.* at 438 n.4.

The district court sentenced Duffey to a total of 354 years in prison, 330 years of which were the result of stacked Section 924(c) sentences. *See* Duffey Judgment, D. Ct. Dkt. 314 (Feb. 3, 2010).[7] The court sentenced Ross to a total of 330 years in prison, 305 years of which were similarly mandated by Section 924(c). *See* Ross Judgment, D. Ct. Dkt. 322 (Feb. 22, 2010).

On direct appeal, the Fifth Circuit reversed and vacated the attempted-bank-robbery convictions for insufficient evidence. *See Duffey*, 456 F. App'x at 443-444. The court also reversed and vacated Duffey's and Ross's two corresponding Section 924(c) convictions and sentences. *See id.* at 444.

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[7] Unless otherwise indicated, "D. Ct. Dkt." refers to No. 3:08-cr-00167-B (N.D. Tex.).

On remand, the district court resentenced Duffey to roughly 304 years' imprisonment, 280 years of which were required by Section 924(c). *See* Duffey Am. Judgment, D. Ct. Dkt. 506 (Nov. 15, 2012). The court resentenced Ross to over 285 years in prison, 255 of which reflected stacked Section 924(c) sentences. *See* Ross Am. Judgment, D. Ct. Dkt. 491 (Sept. 28, 2012).

The Fifth Circuit affirmed. *See* Pet. App. 2a; *United States* v. *Ross*, 582 F. App'x 528 (5th Cir. 2014) (per curiam).

2. In 2020, Duffey and Ross sought leave to file successive 28 U.S.C. § 2255 motions in light of this Court's decision in *Davis*. *See* Motion, *In re Duffey*, No. 20-10644, Dkt. 3 (5th Cir. June 24, 2020); Motion, *In re Ross*, No. 20-10845, Dkt. 5 (5th Cir. Aug. 21, 2020).[8] This Court had held in *Davis* "that conspiracy-predicated § 924(c) convictions do not qualify as 'crimes of violence.'" Pet. App. 3a (quoting *Davis*, 588 U.S. at 469-470). Duffey and Ross accordingly sought authorization to challenge their Section 924(c) convictions predicated on conspiracy to commit bank robbery. *See* Pet. App. 3a-4a. The Fifth Circuit granted these motions. Order, *Duffey*, No. 20-10644, Dkt. 36-3 (Jan. 7, 2021); Order, *Ross*, No. 20-10845, Dkt. 32-2 (Dec. 14, 2020).

In the district court, the Government conceded that Duffey's seven and Ross's six conspiracy-predicated Section 924(c) convictions were unlawful after *Davis* and should be vacated. The district court vacated those convictions and sentences, vacated the sentences on the remaining counts, and ordered

[8] Duffey and Ross had previously "filed unsuccessful motions to vacate, set aside, or correct their sentences under 28 U.S.C. § 2255." Pet. App. 3a.

resentencing on all remaining counts. *See* Duffey Order at 2, D. Ct. Dkt. 672 (June 14, 2021); Ross Order at 2, D. Ct. Dkt. 700 (Nov. 2, 2021).

3. Following the *Davis*-related vacaturs, Duffey and Ross faced plenary resentencing on their five surviving Section 924(c) convictions, as well as on their other convictions.

Before their resentencing hearings, Duffey and Ross objected to their presentence reports on the ground that Section 403 of the First Step Act "applied to their resentencing" such that each of their Section 924(c) convictions triggered a five-year sentence. *See* Pet. App. 4a. The Government opposed these objections, arguing that Section "403 did not apply because [Duffey and Ross] were serving valid sentences at the time that the First Step Act was enacted on December 21, 2018." *Id.* The Government argued that the court should sentence Duffey and Ross to a five-year sentence on only the first of their Section 924(c) convictions, and apply the enhanced 25-year sentence to each of the remaining Section 924(c) convictions.

The district court sided with the Government. *See* Pet. App. 30a-31a, 62a. Duffey and Ross were each resentenced to 105 years' imprisonment on their five Section 924(c) counts. *See* Pet. App. 40a; Pet. App. 73a. This was on top of an additional 25 years for Duffey's remaining counts, and 29 years for Ross's remaining counts. *See* Pet. App. 40a; Pet. App. 73a.

4. Duffey and Ross appealed. The Government, reversing course, agreed on appeal with Duffey and Ross's position that Section 403 applies at resentencing proceedings after the First Step Act's enactment. *See* Gov. Br. at 8, No. 22-10265, Dkt. 85

(5th Cir. June 20, 2023). Despite the parties' agreement that Duffey's and Ross's sentences should be vacated, the Fifth Circuit affirmed. *See* Pet. App. 18a.

The Fifth Circuit held that Section 403(b) "draw[s] the line for § 403(a)'s application at the date on which a sentence—whether later-vacated or with ongoing validity—was imposed." Pet. App. 11a. The court concluded that, "because sentences for Appellants' offenses had been imposed upon them prior to the First Step[] Act's December 21, 2018 enactment date—even though those sentences were later vacated in 2020—§ 403(a) of the First Step Act does not apply." Pet. App. 12a. The court therefore affirmed Duffey's and Ross's century-long sentences. Pet. App. 18a.

The Fifth Circuit provided three reasons for that holding. First, the court reasoned that a sentence is "'imposed' when the district court pronounces it," and so that word "puts the focus on the historical fact of a sentence's imposition." Pet. App. 8a (quotation marks and citations omitted). The court continued that "'a sentence' mean[s] *any* sentence—including subsequently vacated ones." Pet. App. 9a. Second, the court rejected the argument that "the impact of sentence vacatur" has anything to do with Section 403(b)'s meaning. Pet. App. 10a. For support, the court analogized to 18 U.S.C. § 3742(g), which directs courts when sentencing after a remand on direct appeal to apply the Sentencing Guidelines that were in effect on the date of the previous sentencing. Pet. App. 11a. And third, because the Fifth Circuit concluded that Section 403(b) is unambiguous, it "reject[ed] Duffey and Ross's arguments that the rule

of lenity requires [the court] to read § 403(b) in the light most favorable to them." Pet. App. 12a n.4.

5. This Court granted certiorari and consolidated this case with *Hewitt* v. *United States*, No. 23-1002.

SUMMARY OF ARGUMENT

I. The ordinary meaning of the term "sentence" is a valid sentence, not a vacated one. This Court has relied on that ordinary meaning of "sentence" for close to a century, as have numerous federal statutes and rules of criminal procedure. That ordinary meaning reflects the general rule that vacated orders are void ab initio, as if they have never been imposed. That understanding of vacatur underpins many criminal and civil rules and has been around for over 500 years. Congress is presumed to legislate against those firmly established legal principles. Section 403(b)'s reference to "a sentence" thus refers to a valid sentence and excludes a vacated sentence.

II. The rest of Section 403(b) confirms that Congress intended the ordinary meaning of a "sentence" to exclude vacated sentences. The word "imposed" means the same thing in Section 403(b) as it does in other parts of the criminal code—it refers to any sentencing or *resentencing*. Congress was also careful to say that Section 403(b) applies to "a" sentence, not to "any" sentence, indicating that Section 403(b) should not be read expansively to overturn the usual meaning of "sentence." And Congress used the present-perfect tense instead of the past-perfect tense, confirming that Congress was focused on the sentence's continuing validity. Finally, Congress's reference to the enactment date simply clarifies that the First Step Act's reforms apply to all post-enactment sentencings, whether initial or de

novo resentencing. Had Congress intended to apply Section 403 only to *original* sentences, it would have said so.

III. This interpretation accords with the statutory context. Congress expressly distinguished between "past cases" and "pending cases" in prior versions of the First Step Act, confirming that Congress intended Section 403's reforms to apply to "pending cases" at resentencing. Congress also titled Section 403 a "clarification" of prior law, clarifying that it *always* intended Section 924(c) to prohibit the stacking of enhanced mandatory minimums for first-time offenders. That intent is consistent with reading Section 403 to apply to all post-Act sentencing proceedings, including resentencings. And if there were any doubt as to the meaning of Section 403(b), the rule of lenity requires the interpretation consistent with the ordinary meaning of "sentence" to exclude vacated sentences.

IV. Courts that have reached the opposite conclusion—reading "sentence" to include a vacated sentence—primarily rely on two "presumptions." But both "presumptions" are based on statutes that do not apply. The general savings statute does not apply because Congress expressly made Section 403(a)'s reforms applicable to "pending cases." First Step Act § 403(b). And a remnant of 18 U.S.C. § 3742(g), largely eviscerated post-*Booker*, says nothing about the statutory penalties applicable at resentencing and does not apply. In any event, the court below's historical interpretation proves too much: According to the Fifth Circuit, Section 403 would not apply to a defendant who successfully appealed his conviction

and was (re)sentenced after an entirely new trial. That cannot be right.

ARGUMENT

I. THE ORDINARY MEANING OF "SENTENCE" EXCLUDES A VACATED SENTENCE.

The starting point for resolving any question of statutory interpretation is the statute's text. *E.g.*, *Limtiaco* v. *Camacho*, 549 U.S. 483, 488 (2007). In Section 403(b), Congress tethered the application of Section 403(a) to whether a "sentence" has been imposed as of the First Step Act's date of enactment. Congress did not define the term "sentence" in the statute. But Congress is presumed to legislate against background legal principles, including background sentencing principles. *See Concepcion* v. *United States*, 597 U.S. 481, 486 (2022); *Dorsey*, 567 U.S. at 275. One of those principles is the rule that a sentence that has been vacated is no sentence at all. *See, e.g.*, *Pepper*, 562 U.S. at 507 (explaining that vacatur of a sentence "wipe[s] the slate clean"); *Dickerson*, 460 U.S. at 114-115 (vacatur "nullifie[s]" a conviction such that it has no legal force). Read against this background principle, the meaning of Section 403(b) is clear: A defendant whose sentence was vacated after the First Step Act's enactment had no "sentence" as of that date.

A. The Term "Sentence" Excludes A Vacated Sentence.

1. A "sentence" is "[t]he *judgment* that a court formally pronounces after finding a criminal defendant guilty." *Sentence*, Black's Law Dictionary (12th ed. 2024) (emphasis added). A "judgment," in turn, is "[a] court or other tribunal's *final*

determination of the rights and obligations of the parties in a case." *Judgment*, Black's Law Dictionary (emphasis added). And "final," when used to describe "a judgment at law," denotes an order "*not requiring any further judicial action* by the court that rendered judgment to determine the matter litigated." *Final*, Black's Law Dictionary (emphasis added). When the district court imposes a "sentence," the judgment is a final appealable order.

If a sentence has been vacated, then that now-vacated order cannot be fairly described as a "sentence" because finality is an essential ingredient of a sentence. As this Court has put it: "In a criminal case final judgment means sentence; and a void order purporting * * * to * * * sentence is neither a final nor a valid judgment." *Miller* v. *Aderhold*, 288 U.S. 206, 210-211 (1933). Thus, even where a trial court has already issued an order purporting to dispose of the case, if that order, "though expressly made permanent, is void," then no sentence has been imposed. *Id*. at 211. "Such an order is a mere nullity without force or effect, *as though no order at all had been made*; and the case necessarily remains pending until lawfully disposed of by sentence." *Id*. (emphasis added); *see also, e.g.*, *Berman* v. *United States*, 302 U.S. 211, 213 (1937) (the finality of a criminal sentence "stands * * * unless the judgment against [the defendant] is vacated or reversed," such that his "rights may be determined solely by reference to the judgment"); *Pepper*, 562 U.S. at 507 (vacatur of a sentence "wipe[s] the slate clean").

2. Nothing about the common usage of the term "sentence" has changed in the nearly one hundred years since this Court decided *Miller*. This Court's

precedent, federal statutes, and rules of criminal procedure all understand the term "sentence" to refer only to *valid* sentences.

Law of the Case. Take the law-of-the-case doctrine. As this Court held in *Pepper*, only valid sentences can bind subsequent proceedings; vacated sentences have no effect. In that case, a judge resentencing the defendant after his initial sentence was vacated decided to vary downward from the Guidelines range by a smaller percentage than the original sentencing judge. *See* 562 U.S. at 505-506. The defendant challenged that lower variance, arguing that it violated the law-of-the-case doctrine. Pointing to the effects of vacatur, this Court rejected that argument. As this Court explained, "the Court of Appeals * * * set aside Pepper's entire sentence and remanded for a *de novo* resentencing." *Id.* at 507. This vacatur "effectively wiped the slate clean," freeing the sentencing judge from treating the vacated sentence as the law of the case and allowing her to apply an entirely new sentence on remand. *Id.* at 507-508.

Defendant's Right to Allocution. A defendant's right to allocution similarly demonstrates that a vacated sentence is not one that has been imposed. Federal Rule of Criminal Procedure 32 provides that "[b]efore imposing [a] sentence, the court must * * * permit the defendant to speak or present any information to mitigate the sentence." Fed. R. Crim. P. 32(i)(4)(A)(ii); *see Green* v. *United States*, 365 U.S. 301, 304 (1961) (plurality op.) (noting common-law origins of this right). Circuit courts uniformly require courts to follow these same procedures on resentencing after the defendant's previous sentence "has been vacated." *United States* v. *Garcia-Robles*, 640 F.3d 159, 164 (6th

Cir. 2011) (collecting cases). The courts do so because "the effect of the order to vacate [is] to nullify" the previous sentence from the beginning, *United States* v. *Barnes*, 948 F.2d 325, 330 (7th Cir. 1991), placing the defendant "in the same position as if he had never been sentenced," *United States* v. *Maldonado*, 996 F.2d 598, 599 (2d Cir. 1993) (per curiam).[9]

Defendant's Presence Required. The same is true of the rule that the defendant "must be present at" "sentencing." Fed. R. Crim. P. 43(a)(3). Courts apply that rule to post-vacatur resentencings. *See United States* v. *Flack*, 941 F.3d 238, 240-241 (6th Cir. 2019) (collecting cases). The reason: Where a sentence is vacated and the case is remanded for resentencing, the defendant must be present because "[n]o valid sentence has yet been imposed." *Williamson* v. *United States*, 265 F.2d 236, 239 (5th Cir. 1959).

The Open-Court Requirement. Finally, 18 U.S.C. § 3553(c)'s open-court requirement demonstrates that a vacated sentence is not one that has been imposed. Under that provision, "[t]he court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence." 18 U.S.C. § 3553(c). Even though this provision does not mention resentencing, courts uniformly hold that a statement of reasons "is required upon resentencing" following the vacatur of a defendant's sentence. *Garcia-Robles*, 640 F.3d at 167; *see also, e.g.*,

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[9] *See also, e.g.*, *United States* v. *Mobley*, 833 F.3d 797, 802 (7th Cir. 2016) ("Since the posture of the case on a full remand is just as if sentence has not yet been pronounced, a full remand does require the district court to provide the defendant an opportunity for allocution."); *United States* v. *Muhammad*, 478 F.3d 247, 250 (4th Cir. 2007) (same); *United States* v. *Moree*, 928 F.2d 654, 656 (5th Cir. 1991) (same).

United States v. *Figueroa-Labrada*, 780 F.3d 1294, 1299 (10th Cir. 2015); *Flack*, 941 F.3d at 240 (collecting cases).

B. Other Criminal and Civil Doctrines Confirm That "Sentence" Excludes A Vacated Sentence.

The principle that a vacated sentence is a legal nullity is derived from the general rule that a vacated order is "void from the start" as if it were "never" imposed. *United States* v. *Mitchell*, 38 F.4th 382, 392 (3d Cir. 2022) (Bibas, J., concurring in the judgment) (collecting authorities). This rule is at the foundation of many criminal and civil rules, and is a "relevant background understanding[]" that cannot be disregarded when interpreting statutes like Section 403(b). *Pulsifer*, 601 U.S. at 140-141; *see also Concepcion*, 597 U.S. at 486 (similar).

1. The rule that a vacated order has no legal force is reflected in other criminal contexts, particularly with how the law treats vacated convictions. "[A]s every lawyer of experience in criminal law knows," a vacated conviction is a legal "nullity," devoid of power, effect, or consequence. *Coleman* v. *Tennessee*, 97 U.S. 509, 530 (1878) (Clifford, J., dissenting). Thus, when a court vacates a conviction, the defendant "must stand in the position of any man who has been accused of a crime but not yet shown to have committed it." *Fiswick* v. *United States*, 329 U.S. 211, 223 (1946).

Predicate convictions for firearms crimes. This Court made clear that vacatur nullifies the legal effect of a conviction—even though it does not alter the historical fact of that conviction—in a pair of cases concerning a provision making it unlawful for a defendant "who has been convicted * * * of[] a crime

punishable by imprisonment for a term exceeding one year" to ship, transport, or possess firearms or ammunition. 18 U.S.C. § 922(g)(1). Despite the "sweeping" scope of the phrase "has been convicted," this Court has recognized that the phrase does not reach defendants whose convictions have been vacated. *Lewis* v. *United States*, 445 U.S. 55, 60-61 (1980) (interpreting a predecessor provision). In this Court's view, reading "convicted" to exclude vacated convictions is "common[] sense," *id.* at 61 n.5, and "obvious," *Dickerson*, 460 U.S. at 115 (interpreting different predecessor provision). After all, vacatur "alter[s] the legality of the previous conviction," "signif[ies] that the defendant was innocent of the crime," and renders the conviction a nullity. *Id.* In so holding, this Court explicitly rejected the "extreme argument" that the statute reaches "even a person whose predicate conviction in the interim had been finally reversed on appeal and thus no longer was outstanding." *Lewis*, 445 U.S. at 61 n.5. Thus, even though vacatur does not "alter the historical fact of the conviction," Congress did not intend to disqualify defendants whose convictions have been "nullified" from possessing a firearm. *Dickerson*, 460 U.S. at 114-115.

Double Jeopardy. Likewise, the legal nullity of vacated convictions explains in part why the Double Jeopardy Clause does not forbid a second trial after a defendant secures the reversal of his conviction on appeal. *See Ball* v. *United States*, 163 U.S. 662, 672 (1896); *see also Tibbs* v. *Florida*, 457 U.S. 31, 40 n.14 (1982) (explaining that this retrial rule "appears to coincide with the intent of the Fifth Amendment's drafters"); *United States* v. *Scott*, 437 U.S. 82, 90-91 (1978) (calling this rule a "venerable principle[] of

double jeopardy jurisprudence").[10] This 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). This is so even though jeopardy attaches at *a specific moment in time*: when a jury is empaneled or when the court begins to consider evidence in a bench trial. *Serfass* v. *United States*, 420 U.S. 377, 388 (1975).

Criminal History. The principle that vacated convictions are void ab initio also underpins the law's treatment of vacated convictions at sentencing. Under the Sentencing Guidelines, the length of a defendant's sentence depends on his prior criminal history as well as his "prior sentence[s]." U.S.S.G. § 4A1.1 (2023). The Guidelines define "prior sentence" as "*any* sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere." *Id.* § 4A1.2 (emphasis added). Despite this broad language—which even includes sentences resulting from convictions that have been "set aside" or "pardoned for reasons unrelated to innocence or errors of law," *id.* § 4A1.2 cmt. n.10—this definition *excludes* sentences resulting from convictions that are vacated as legally erroneous, *id.* § 4A1.2 cmt. n.6. Applying this Guideline, courts have held that a defendant can challenge his sentence when the predicate conviction is invalidated after the defendant's sentencing. *E.g.*, *United States* v. *Guthrie*, 931 F.2d 564, 572 (9th Cir. 1991); *United States* v. *Cox*, 245 F.3d 126, 130-131 (2d Cir. 2001). The principle

[10] There is a "narrow" exception when a conviction is reversed for insufficient evidence, which is tantamount to acquittal. *Tibbs*, 457 U.S. at 40-41.

that a conviction is void ab initio explains this rule: It would offend common sense to rely on the historical fact of the conviction even after it has been vacated; in one court's words, a "conviction is just as vacated when pronounced so * * * *after*" the sentencing. *Guthrie*, 931 F.2d at 572.

Capital Sentencing. Finally, courts also treat vacated convictions as void from the start for purposes of capital sentencing. For example, in *Johnson* v. *Mississippi*, a defendant was sentenced to death based, in part, on a prior conviction. 486 U.S. 578, 580 (1988). After the sentencing, another court vacated his prior conviction. The Mississippi Supreme Court held that the death sentence should stand, because "Johnson was [previously] convicted" as a factual matter. *Id.* at 583-584. But this Court reversed and remanded for resentencing, reasoning that "[s]ince that conviction has been reversed, unless and until petitioner should be retried, he must be presumed innocent of that charge." *Id.* at 585. The implication is clear: Vacatur eradicates the legal validity of the conviction ab initio.

2. The principle that a vacated order is void ab initio is likewise fundamental in civil proceedings. *See Greenlaw* v. *United States*, 554 U.S. 237, 243-250 (2008) (interpreting a criminal statute in light of the "general" party-presentation rule that pervades "both civil and criminal cases").

Removal proceedings. Consider immigration. A noncitizen may be removed from the United States if convicted of certain offenses. *See* 8 U.S.C. § 1227(a)(2)(A)(i). "Conviction," defined by statute, means "a formal judgment of guilt of the alien *entered* by a court." 8 U.S.C. § 1101(a)(48)(A) (emphasis

added). Despite that reference to the entry of judgment, the lower courts and the Board of Immigration Appeals hold that a noncitizen "no longer has a 'conviction' within the meaning of" the statute following the vacatur of that sentence based on a defect in the underlying criminal proceedings. *In re Pickering*, 23 I. & N. Dec. 621, 624 (BIA 2003), *rev'd on other grounds sub nom.*, *Pickering* v. *Gonzales*, 465 F.3d 263 (6th Cir. 2006); *see Saleh* v. *Gonzales*, 495 F.3d 17, 21, 24 (2d Cir. 2007).[11] As in many other areas of the law, following vacatur for a legal defect, "there is no longer 'a conviction' for immigration purposes." *Garces*, 611 F.3d at 1344.[12]

Collateral Estoppel. Vacated orders also cannot collaterally estop future litigation, even though, from a historical point of view, the issues "were fully

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[11] *See also, e.g.*, *Rumierz* v. *Gonzales*, 456 F.3d 31, 34-35 (1st Cir. 2006); *Dung Phan* v. *Holder*, 667 F.3d 448, 452 (4th Cir. 2012); *Pickering* v. *Gonzales*, 465 F.3d 263, 266 (6th Cir. 2006); *Nath* v. *Gonzales*, 467 F.3d 1185, 1189 (9th Cir. 2006); *Cruz-Garza* v. *Ashcroft*, 396 F.3d 1125, 1128-29 (10th Cir. 2005); *Garces* v. *U.S. Att'y Gen.*, 611 F.3d 1337, 1344 (11th Cir. 2010).

[12] There is an exception to this rule: When "a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains 'convicted'" for purposes of removability. *Pickering*, 23 I. & N. Dec. at 624; *see id.* at 623 (citing *Herrera-Inirio* v. *INS*, 208 F.3d 299, 306 (1st Cir. 2000)). As with many exceptions, however, this one only "proves the rule." *Mitchell*, 38 F.4th at 393 (Bibas, J., concurring in the judgment). Convictions vacated "based on a defect in the underlying criminal proceeding" are "void from the start" because the defendant should have never been convicted at all. *Id.* (brackets, quotation marks, and citation omitted). By contrast, convictions set aside for other reasons are based on "post-conviction events" that cannot "vitiate" the "original" judgment just because a State labels them "vacated." *Pickering*, 23 I. & N. Dec. at 624; *Herrera-Inirio*, 208 F.3d at 306.

litigated and firmly decided." *Dodrill* v. *Ludt*, 764 F.2d 442, 444 (6th Cir. 1985) (per curiam). The reason, as before, is that vacatur "technically leav[es] nothing to which [a court] may accord preclusive effect." *Id.* This rule applies to vacated criminal judgments, too, prohibiting courts from relying on them in subsequent civil litigation. *Bagley* v. *CMC Real Estate Corp.*, 923 F.2d 758, 762 (9th Cir. 1991). Even *the fact* of the prior decision is not admissible. *Simpson* v. *Motorists Mut. Ins. Co.*, 494 F.2d 850, 854 (7th Cir. 1974).

Precedential Effect. Vacatur also "deprives [a] court's opinion of precedential effect." *O'Connor* v. *Donaldson*, 422 U.S. 563, 577 n.12 (1975) (citing *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950)). Again: Vacatur "return[s] [a] case automatically to the status quo ante." *Bradley* v. *Milliken*, 772 F.2d 266, 272 (6th Cir. 1985); *see Durning* v. *Citibank, N.A.*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991) (explaining that an order "may be *reversed* on other grounds" but there is no such thing as an order "*vacated*" on other grounds—that order simply does not exist).

C. More Than 500 Years Of History and Tradition Confirm That "Sentence" Excludes A Vacated Sentence.

The rule that a vacated order is null and void from the start is at least 500 years old. That "unbroken tradition" confirms that when Congress tethered Section 403(b) to a "sentence," it did not intend to include vacated sentences. *Concepcion*, 597 U.S. at 492.

1. The principle that a vacated judgment is void ab initio has ancient origins. Blackstone explains that at common law, "when judgment, pronounced upon

conviction, is falsified or reversed, all former proceedings are absolutely set aside, and the party stands as if he had never been at all accused." 4 William Blackstone, Commentaries on the Laws of England 386 (1769).

To illustrate, consider what happened to the penalty of attainder in the wake of a reversal. Attainder included "forfeiture," which involved the convicted defendant forfeiting his property to the crown, and "corruption of blood," which barred the defendant's heirs from tracing any inheritance through him. *See id.* at 374-381. Reversal fully resurrected the defendant from this legal death sentence. As Blackstone explains, a judgment's reversal "restored" the defendant "in his credit, his capacity, his blood, and his estates." *Id.* at 386; *accord* Joseph Chitty, A Practical Treatise on the Criminal Law 756 (1816) ("The effect of the reversal of the attainder is to restore the party to all the capacities which he had lost, and to all the honours, fortunes and estates which he had forfeited."); YB 11 Henry 4, fol. 65b, Pasch., pl. 22 (Eng. 1410) (restoring testator's property upon reversal of outlawry).[13] This is so even if the crown had "granted away" the party's estates after the party's attainder. 4 Blackstone, *supra*, at 386; *accord* Chitty, *supra*, at 756. Indeed, reversal even entitled the defendant's tenants to the profits from the estate "taken between" the judgment and its reversal. *Ognell's Case* (1592) 78 Eng. Rep. 526, 526; 34 Cro. Eliz. 270, 271 (Q.B.). As these early courts explained, reversal makes it "as if no [judgment] had been"—not

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[13] *Relevant page in original Anglo-French available at* https://perma.cc/F76A-GFVX; *summary by Boston University School of Law available at* https://perma.cc/99U8-94AZ.

even a "record of it." *Ognell's Case*, 78 Eng. Rep. at 526; 34 Cro. Eliz. at 271; *accord Eyre* v. *Woodfine* (1592) 78 Eng. Rep. 533, 533; 34 Cro. Eliz. 278, 278-279 (Q.B.). Simply put, vacatur has always had a retroactive effect.

2. Since the Founding, American courts have likewise "understood that, under the law, a vacated order never happened." *Mitchell*, 38 F.4th at 392 (Bibas, J., concurring in the judgment). In 1829, Connecticut's highest court explained that vacatur "puts the parties in the state, in which they were, immediately before the [vacated] judgment was rendered." *Lockwood* v. *Jones*, 7 Conn. 431, 436 (1829). In 1845, the North Carolina Supreme Court recognized that it "can take no notice" of an order that "was stricken out," for "it is the same as if the entry had never been made." *Williams* v. *Floyd*, 27 N.C. (5 Ired.) 649, 656 (1845). And this Court in 1869 believed it was "quite clear" that an order "vacating the former judgment" renders that judgment "null and void" and leaves the parties "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).

Courts' application of this principle has continued unabated to the modern day. *See Green* v. *McCarter*, 42 S.E. 157, 158 (S.C. 1902) (when the judge "revoked his first order, the case stood just as if no order had been made therein"); *Mitchell* v. *Joseph*, 117 F.2d 253, 255 (7th Cir. 1941) ("the general rule is that where a court, in the discharge of its judicial functions, vacates an order previously entered, the legal status is the same as if the order had never existed"); *Wynne* v. *Rochelle*, 385 F.2d 789, 796 (5th Cir. 1967) ("When an order is set aside as improvidently granted, the prior status of

the case is restored and the situation is the same as though the order or judgment had never been entered."); *United States* v. *Jerry*, 487 F.2d 600, 607 (3d Cir. 1973) (a vacated order is "a nullity, [and] no rights, constitutional or otherwise, can be considered as accruing from it"); *see also supra* pp. 18-20 (discussing application of this principle in the sentencing context).

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For over 500 years and through all manner of criminal and civil proceedings, our legal system has treated vacated orders as if they never existed at all. Be it a judgment, a conviction, or a sentence, we have deemed it irrelevant that a court issued such an order as a historical matter. Based on that firmly entrenched legal principle, there can be "just one plausible construction" of Section 403(b), *Pulsifer*, 601 U.S. at 142: a defendant whose sentence was vacated after the First Step Act's enactment did not have a "sentence" as of the date of the First Step Act's enactment.

II. THE REMAINDER OF SECTION 403(B)'S TEXT CONFIRMS THAT CONGRESS INTENDED COURTS TO APPLY THE ORDINARY MEANING OF "SENTENCE."

The remainder of Section 403(b)'s text confirms that the provision is best read to exclude invalid sentences. *See, e.g.*, *Lawson* v. *FMR LLC*, 571 U.S. 429, 440-441 (2014) (looking to "the provision as a whole" to confirm that the phrase "an employee" bore its "ordinary meaning"). Congress's decision to tether Section 403's application to whether a sentence has been "imposed" confirms that Congress intended Section 403 to apply at post-vacatur resentencing proceedings. Congress's decision to use the neutral

article "a" to describe the relevant sentence—as opposed to "any"—illustrates that Congress did not intend "sentence" to encompass more than its ordinary meaning of a valid sentence. This is confirmed by Congress's decision to use the present-perfect tense—as opposed to the past-perfect tense—when describing by when the sentence must have been imposed. And Section 403(b)'s reference to the enactment date does not enlarge "sentence" beyond its ordinary meaning to include sentences that were null from the start.

A. Congress's Use Of The Word "Imposed" Confirms That A Vacated Sentence Is Not A "Sentence" Within The Meaning Of Section 403(b).

Congress's choice of the word "imposed" to describe Section 403's applicability confirms that Section 403(b) excludes vacated sentences. Throughout the criminal code, when Congress conditions a rule on whether a "sentence" has been "imposed," Congress intends that rule to reach *both* sentencings and *resentencings*. *See, e.g.*, *Fischer* v. *United States*, 144 S. Ct. 2176, 2187 (2024) (considering "[t]he broader context" of a provision "in the criminal code").

For example, the direction that "[n]o limitation" be placed on information courts may consider in "imposing an appropriate sentence," 18 U.S.C. § 3661, "makes no distinction between a defendant's initial sentencing and a subsequent resentencing after a prior sentence has been set aside on appeal," *Pepper*, 562 U.S. at 491. Absent one subsection, 18 U.S.C. § 3742's rules governing the appeal of "a sentence" do not distinguish between an original sentence and a sentence imposed on resentencing. The same grounds

for appeal apply to both, like whether the sentence "was imposed in violation of law." 18 U.S.C. § 3742(a)(1), (b)(1). The court of appeals then reviews the operative sentence—not some previous, vacated sentence. *Id.* § 3742(e), (f). Similarly, a motion to "modify a term of imprisonment once it has been imposed" for "a defendant who has been sentenced" applies to whatever sentence the defendant is currently serving. *Id.* § 3582(c).

Congress speaks clearly when it intends a different rule for *re*sentencings. For example, if a sentenced defendant fails to pay a fine or restitution, resentencing is not on a clean slate: The court may instead "*re*sentence the defendant to any sentence which might *originally* have been *imposed*." 18 U.S.C. § 3614(a) (emphases added); *see also id.* § 3613A(a)(1). The same is true in certain cases where a conviction supporting a mandatory life sentence is "vitiated"; in those cases, the defendant can likewise be "*re*sentenced to any sentence that was available at the time of the *original sentencing*." *Id.* § 3559(c)(7) (emphases added). Similarly, although the general rule is that when "imposing a sentence," the applicable Sentencing Guidelines are the ones "in effect on the date the defendant is sentenced," *id.* § 3553(a)(4)(A)(ii), Congress has carved out an exception for resentencings following a remand from a successful direct appeal: In that circumstance, the court shall "resentence" the defendant using the Guidelines that were "in effect on the date of the previous sentencing of the defendant prior to the appeal," *id.* § 3742(g)(1); *see infra* pp. 47-50.

Reading Section 403(b) to require the application of Section 403(a) at post-Act resentencing proceedings

fits neatly within this broader context. In Section 403(b), Congress tied the application of Section 403(a) to whether "a sentence * * * has * * * been imposed." That is a broad phrase that does not distinguish between "original sentencing" proceedings and "resentencing" proceedings. In light of Congress's careful delineation between such proceedings elsewhere in the criminal code, had Congress intended to restrict Section 403 to only original sentencings, "it presumably would have done so expressly," as it has done in other statutes. *Russello* v. *United States*, 464 U.S. 16, 23 (1983). And given the absence of such express markers, the broader statutory context indicates that Congress would have expected Section 403(a) to apply at post-Act resentencing proceedings, just like any other post-Act original sentencing proceeding.

B. Congress's Use Of The Word "A" When Describing The Relevant "Sentence" Confirms That "Sentence" Excludes A Vacated Sentence.

In describing the triggering event for Section 403's retroactive application—the imposition of "a sentence"—Congress used the neutral article "a." Yet in the same sentence of Section 403(b), Congress used the more expansive "any" to refer to the "offense[s]" to which Section 403 applies. *See* First Step Act § 403(b) ("*any* offense * * * committed before the date of enactment of this Act" (emphasis added)). Congress likewise used the more expansive "any" in the next section to describe the "limitations" of the statute's sentencing reforms. *See* First Step Act § 404(c) ("Nothing in this section shall be construed to require

a court to reduce *any* sentence pursuant to this section." (emphasis added)).

The plain text thus indicates that "a" sentence is not "any" sentence. *See, e.g.*, *Southwest Airlines Co.* v. *Saxon*, 596 U.S. 450, 457-458 (2022) (under "the meaningful-variation canon," courts presume that different words carry different meanings). This matters because "Congress' use of the word 'any' suggests an intent to use that term expansively." *Smith* v. *Berryhill*, 587 U.S. 471, 479 (2019) (brackets and quotation marks omitted). Congress's contrasting use of the neutral term "a" when defining the scope of Section 403's application accordingly underscores that its carveout should not be read so expansively as to go beyond the ordinary meaning of "sentence" and sweep in so-called sentences that were illegal from the start.

C. Congress's Use Of The Present-Perfect Tense Confirms That "Sentence" Excludes A Vacated Sentence.

Congress's choice of the present-perfect tense in Section 403(b) confirms that "sentence" does not include a vacated sentence. In Section 403(b), Congress used the present-perfect tense (*has* been imposed)—not the past-perfect tense (*had* been imposed)—to describe the relevant "sentence." Congress's use of the present-perfect tense indicates that Congress was focused on the sentence's continuing validity. *See Carr* v. *United States*, 560 U.S. 438, 448 (2010) ("Consistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach.").

That choice is significant because the present-perfect tense and the past-perfect tense signal opposite meanings regarding whether an action

continues into the present. The present-perfect tense suggests the "indefiniteness of past time" (*e.g.*, "I *have played* more than 1,000 rounds of golf.") "or a continuation to the present" (*e.g.*, "I *have played* cards nonstop since 3:00 yesterday."). *Tenses*, Bryan A. Garner, Garner's Modern American Usage, at 779 (2d ed. 2003). But "[i]f neither of those qualities (imprecision about time or, if the time is precise, continuation to the present) pertains to the context, then the present perfect isn't the right tense." *Id.* In that instance—where the speaker refers to "an action as completed at some definite time in the past" (*e.g.*, "By June 26 the money *had disappeared*.")—the right tense is the past-perfect tense. *Id*. The past-perfect tense refers to "an act, state, or *condition that was completed* before another specified." The Chicago Manual of Style ¶ 5.133 (17th ed. 2017).

For example, imagine a group of students gathered outside a lecture hall, and someone says: John "*has lost* his key so he can't get in his" dorm room. Rodney Huddleston & Geoffrey K. Pullum, The Cambridge Grammar of the English Language 146 (2002). We understand that John is still locked out. He is probably late to lecture, standing outside of his room on the phone with a locksmith. By contrast, imagine that same group of students gathered outside the lecture hall, but this time, someone says: John "*had lost* his key so he couldn't get in his" dorm room. *Id*. In that scenario, we understand that John isn't locked out anymore. Perhaps John has just joined the group with his roommate, and the roommate is explaining why they were almost late. Whatever the reason, the speaker who says that John "had lost" his key is describing a historical fact that may no longer be true, while the speaker who says that John "has lost" his

key is describing a past condition whose effects continue into the present.

Congress's choice to phrase the applicability of Section 403's sentencing reform in the present-perfect tense confirms that "a sentence" should be read in accordance with its ordinary meaning of a valid sentence, rather than as an unusual reference to the historical fact of a sentence. If Congress had wanted to refer to the historical fact of a sentence, thereby capturing both *valid* and *invalid* sentences, it would have made eligibility contingent on whether a sentence "*ha[d] not been imposed*." That past-perfect construction would have "represent[ed] an action as completed at some definite time in the past," here, a sentence (whether valid or not) imposed before the statute's enactment. Garner, *supra*, at 779. Instead, Congress stated that the statutory changes "shall apply * * * if a sentence for the offense *has not been imposed* as of such date of enactment," First Step Act § 403(b) (emphasis added), suggesting that the condition "continu[es] to the present," as a valid sentence does. Garner, *supra*, at 779. Congress therefore instructed courts to apply the statutory change unless there is a *valid* sentence.

The decision below reflects the distinction between the present-perfect tense and the past-perfect tense. The Fifth Circuit concluded that Section "403(b)'s use of 'imposed' puts the 'focus on the historical fact' of a sentence's imposition." Pet. App. 8a (quoting *United States* v. *Uriarte*, 975 F.3d 596, 607 (7th Cir. 2020) (en banc) (Barrett, J., dissenting)). But it reached that conclusion only by changing the statute's verb tense—consistently swapping out the present-perfect tense for the past-perfect tense. *See, e.g.*, Pet. App. 9a

(stating that "the First Step Act applies to defendants for whom 'a sentence * * * *ha[d] not been imposed*' as of the enactment date" (alteration in original) (emphasis added)); *id*. ("[I]n the mine run of cases, the statute's application is easy: Criminal defendants who *had not yet had a sentence imposed* as of December 21, 2018, fall within the First Step Act's ambit." (emphasis added)). Other courts adopting the historical-fact approach do the same. *See, e.g.*, *United States* v. *Jackson*, 995 F.3d 522, 524-525 (6th Cir. 2021) ("We must look at Jackson's status as of December 21, 2018 and ask whether—at that point—a sentence *had been imposed* on him." (emphasis added)). These courts' repeated need to change Congress's chosen verb tense to support the historical-fact interpretation shows that the historical-fact interpretation depends on rewriting the statute.

D. Congress's Reference To The Enactment Date Does Not Mean That "Sentence" Includes A Vacated Sentence.

Congress's reference to the enactment date does not support a departure from the ordinary meaning of "a sentence." Section 403(b) is a retroactivity provision. It expressly displaces the default rule that new statutory penalties apply prospectively only to newly committed offenses, *see* 1 U.S.C. § 109; *see also infra* at pp. 44-47; specifying instead that Section 403's reform will "appl[y] to pending cases," First Step Act § 403(b) (capitalization altered). Congress did not, however, make Section 403 fully retroactive to defendants already (validly) sentenced. Because Congress chose that middle path—deviating from the default retroactivity rule, while also declining to apply the change fully retroactively—Congress had to

identify the particular point at which the changes would apply. Section 403(b)'s statement 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*" serves that function; it identifies the date after which Section 403(a)'s reforms are applicable to conduct that predates the First Step Act.

III. THE STATUTORY CONTEXT CONFIRMS THAT CONGRESS INTENDED COURTS TO APPLY THE ORDINARY MEANING OF "SENTENCE."

In "hard cases," this Court has recommended "keeping an eye on [a statute's] history and purpose." *Wooden* v. *United States*, 595 U.S. 360, 370 (2022); *see also, e.g.*, *Pulsifer*, 601 U.S. at 149, 153 (looking to "the statute's * * * designs" and "the scheme Congress devised" to ascertain a provision's meaning). Although this case is not a hard one in light of the ordinary meaning of the terms that Congress employed, the First Step Act's statutory scheme confirms that Section 403(b)'s reference to "a sentence" does not encompass an invalid sentence. The Act's drafting and legislative history lays this bare. Congress's decision to frame Section 403 as a "clarification" of Section 924(c) confirms this, too. And to the extent there is any doubt left, the rule of lenity teaches that Section 403 should be construed in favor of liberty, which here means applying it at post-Act resentencing proceedings.

A. Reading "Sentence" To Include A Vacated Sentence Would Contravene The Statutory Scheme.

1. Section 403's drafting history—and, in particular, the distinction that Congress drew between past and pending cases in prior versions of the First Step Act—indicates that Congress intended Section 403's reforms to apply at resentencing.

Earlier versions of the First Step Act would have made Section 403 fully retroactive. In addition to the language enacted in Section 403(b) for "pending cases," earlier versions of the Act included a separate provision governing the Act's "applicability" to "past cases." *See* Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. § 104(b)(2) (capitalization altered); Sentencing Reform Act of 2015, H.R. 3713, 114th Cong. § 5(b)(2) (capitalization altered); Sentencing Reform and Corrections Act of 2017, S. 1917, 115th Cong. § 104(b)(2) (capitalization altered). That proposal would have allowed some defendants "sentenced to a term of imprisonment" "before the date of enactment" to seek a discretionary "[s]entence reduction," if, among other things, a reduction would be consistent with the Act's amendments to Section 924(c). S. 1917 § 104(b)(2)(A). The proposal would have thus "expressly permitted" a sentencing modification for defendants who have exhausted their appeals—an exception to the strict rule that a "court may not modify a term of imprisonment once it has been imposed." 18 U.S.C. § 3582(c)(1)(B).

This "past cases" proposal envisioned a limited, discretionary "sentence modification" proceeding. Such a proceeding would be akin to what Congress ultimately enacted in Section 404 of the First Step Act,

which allows retroactive sentencing reductions for certain drug offenders, *see Concepcion*, 597 U.S. at 497 n.5, or 18 U.S.C. § 3582(c)(2), which "authorizes a district court to reduce an otherwise final sentence" "[w]hen the Commission makes a Guidelines amendment retroactive," *Dillon* v. *United States*, 560 U.S. 817, 821 (2010). Like these exceptions to Section 3582(c), the "past cases" proposal did not call for the type of "plenary resentencing proceeding" to which a defendant is entitled following a successful appeal or collateral challenge. *Chavez-Meza* v. *United States*, 585 U.S. 109, 119 (2018) (quoting *Dillon*, 560 U.S. at 826); *see also*, *e.g.*, Fed. R. Crim. P. 43(b)(4) (defendant's presence not required at proceeding under 18 U.S.C. § 3582(c)).

Congress ultimately decided not to make Section 403(a) retroactive to "past cases." The enacted law does not allow offenders serving enhanced consecutive sentences for multiple Section 924(c) counts to reopen their cases, although proposed legislation would have permitted that. *See* First Step Implementation Act of 2023, S. 1251, 118th Cong. § 101(c).

Regardless, this initial proposal shows that Congress intended to cover the waterfront of *all* Section 924(c) cases—"pending" and "past." And the distinction that Congress drew between past cases and pending cases indicates that Congress intended Section 403's reforms to apply at resentencing. A plenary resentencing ordered after a sentence is vacated is not a "*past* case" amenable to a sentence reduction. When a sentence is vacated, there is no "term of imprisonment" left to reduce. 18 U.S.C. § 3582(c). Instead, a resentencing must be a "*pending* case" to which the First Step Act applies. And

although Section 403(b) does not provide an independent basis to reopen pre-Act sentences in pending cases, it permits application of the new penalties if that sentence is vacated for some other reason. There are no finality concerns to contend with when a defendant receives a fresh sentencing anyway. *Cf. Pepper*, 562 U.S. at 502 (explaining that any disparity in this situation is "not because of arbitrary or random sentencing practices, but because of the ordinary operation of appellate sentencing review"); *Dorsey*, 567 U.S. at 277-281.

2. Section 403's legislative history likewise indicates that Congress intended it to apply at resentencing. In particular, understanding the First Step Act to apply to *all* post-Act sentencings, whether an initial sentencing or plenary resentencing, is consistent with Congress's decision to target certain mandatory-minimum sentences under Sections 924(c) and 841.

The First Step Act was understood to "eliminate" some of those mandatory penalties. For Section 924(c), the Act "clarifies that sentencing enhancements cannot unfairly be 'stacked,'" to "ensure that sentencing enhancements for repeat offenses apply only to true repeat offenders." 164 Cong. Rec. S7774 (2018) (Sen. Cardin); *see also id.* at H10362 (Rep. Nadler) (similar); *id.* at H10365 (Rep. Richmond) (similar). For Section 841, the Act "eliminate[s] th[e] mandatory life sentence for nonviolent drug offenders," 164 Cong. Rec. S7645 (Sen. Durbin), and reduced other "strict mandatory minimums" that had "forced" judges "to sentence people to decades in prison for low-level drug offenses," even where they "don't think that this sentence ought to be imposed,"

id. at S7756 (Sen. Nelson). For both Sections 924(c) and 841, the First Step Act thus targeted "inflexible mandatory minimum sentences," *id.* at S7644 (Sen. Durbin), that "are very harsh and allow no discretion to a sentencing judge," *id*. at S7773 (Sen. Feinstein).

The Act's "critical sentencing reform[s]" were intended to "give judges discretion back—not legislators but judges who sit and see the totality of the facts." *Id.* at S7764 (Sen. Booker). These reforms would "allow judges to do the job that they were appointed to do—to use their discretion to craft an appropriate sentence to fit the crime," *id.* at S7756 (Sen. Nelson). At the same time, the reductions "do not prevent a judge from giving a defendant the maximum allowed under the law, if that is appropriate," *id.* at S7774 (Sen. Feinstein)—up to life imprisonment for offenses under both Sections 924(c) and 841. It "would simply allow Federal judges to determine * * * on a case-by-case basis, when the harshest penalties should apply." *Id*. at S7645 (Sen. Durbin).

Congress had no reason to continue "forc[ing]" judges to impose since-repealed mandatory-minimum sentences decried as "overly harsh," *id.* at S7649 (Sen. Grassley), and "unfair[ ]," *id.* at H10362 (Rep. Nadler), on defendants resentenced on a fresh slate—proceedings that by definition call upon judges to exercise their discretion. Congress instead drew the line at choosing not to "unwind," *id.* at S7646 (Sen. Durbin), otherwise valid, final sentences for those "currently incarcerated," *id.* at S7776 (Sen. Cardin)—cases in which judges already have no discretion beyond Section 3582(c)'s "narrow exception[s]," *Dillon*, 560 U.S. at 827.

Understanding the First Step Act to apply to *all* post-Act sentencings, whether an initial sentencing or plenary resentencing, is therefore also consistent with Congress's decision to target certain mandatory-minimum sentences under Sections 924(c) and 841.

B. Section 403's Title Indicates That Congress Intended Section 403 To Apply At Resentencing.

The title of Section 403 declares that it is a "clarification" of existing law, as opposed to a change worked by this statute's enactment. *See* First Step Act § 403 (capitalization altered). Section 403 is the only provision of the First Step Act that Congress named a "clarification." Other provisions of the statute have titles that acknowledge Congress is making a change, such as Section 402, which is titled "[b]roadening of existing safety valve," or Section 502, which is titled "[i]mprovements to existing programs." *See* First Step Act § 1 (table of contents).

Section 403(a) clarifies that Congress never intended the result reached in *Deal*, where this Court held that Section 924(c) permitted enhanced sentences for subsequent convictions even when charged in the same indictment as the first conviction. *See* 508 U.S. at 132. The majority reached this conclusion over the dissenting opinion of three Justices, which explained that "the context" of the statute "makes perfectly clear that the word 'subsequent' describes only those offenses committed after a prior conviction has become final." *Id*. at 138 (Stevens, J., dissenting). In the First Step Act, Congress replaced the words that the *Deal* majority had interpreted with the meaning that the *Deal* dissent would have given to those words: striking

"second or subsequent conviction under this section" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final." First Step Act § 403(a).

Congress's embrace of the *Deal* dissent and its framing of Section 403 as a "clarification" indicates that Congress *always* intended Section 924(c) to prohibit the stacking of enhanced mandatory minimums for first-time offenders. And that intent is consistent with reading Section 403 to apply to all post-Act sentencings, including resentencings. After all, if Congress thought stacking was improper at a defendant's original sentencing before the First Step Act, Congress certainly thought that same practice was improper at the same defendant's plenary resentencing after the Act. The statutory scheme therefore counsels against reading Section 403(b) as "imposing upon the pre-Act offender a pre-Act sentence at a time after Congress had specifically found in the [Act] that such a sentence was unfairly long." *Dorsey*, 567 U.S. at 277.

C. The Ordinary Meaning Of "Sentence," Which Excludes A Vacated Sentence, Is The Reading That Favors Liberty.

Although the meaning of Section 403(b), read in context, is clear, the rule of lenity offers an additional reason to read the statute so that it applies at resentencings. Pursuant to the rule of lenity, a court "cannot give the text a meaning that is different from its *ordinary, accepted meaning*, and that disfavors the defendant." *Burrage* v. *United States*, 571 U.S. 204, 216 (2014) (emphasis added).

Thus, for example, in *Burrage*, this Court chose to apply the ordinary meaning of an undefined term in a

criminal statute in part because the rule of lenity compelled that choice. *Burrage* involved a statute imposing a mandatory-minimum sentence for the sale of illegal substances when "death or serious bodily injury *results from* the use of such substance." 21 U.S.C. § 841(a)(1), (b)(1)(A)-(C) (emphasis added). The defendant was charged with violating the statute, but at his trial, the evidence showed that the illegal substance sold by the defendant was only a "contributing" factor in the victim's death. *Burrage*, 571 U.S. at 207. Although acknowledging that the statute could be read to permit application of the mandatory minimum based on that evidence, *id*. at 214-216, this Court reasoned that "it is one of the traditional background principles against which Congress legislates, that a phrase such as 'results from' imposes a requirement of but-for causation." *Id*. at 214 (brackets, quotation marks, and citation omitted). Having acknowledged that the defendant's reading of "results from" was also the "ordinary, accepted meaning" of the phrase, this Court explained that "the rule of lenity" required the Court to adopt that reading. *Id*. at 216.

The same rule applies here. The rule of lenity prevents reading a "sentence" to encompass invalid sentences because that would give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant. *See supra* at pp. 16-28. The rule of lenity is, after all, founded in large part on the consideration that "a fair warning should be given to the world *in language that the common world will understand*, of what the law intends to do if a certain line is passed." *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) (emphasis added). Courts should

therefore apply the meaning that the statute's "words * * * evoke in the common mind." *Id*.

At a minimum, to the extent ambiguity arises from the Fifth Circuit's proposed interpretation, the rule of lenity requires that this Court construe such ambiguity in favor of the defendant. *See Skilling* v. *United States*, 561 U.S. 358, 410 (2010); *see also, e.g.*, *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980). The Fifth Circuit's refusal to apply the rule of lenity in this context violates the policies underpinning the rule, and "turns its back on a liberty-protecting and democracy-promoting rule that is 'perhaps not much less old than construction itself.'" *Abramski* v. *United States*, 573 U.S. 169, 204 (2014) (Scalia, J., dissenting) (quoting *United States* v. *Wiltberger*, 5 Wheat. 76, 95 (1820)).

IV. THE ARGUMENTS ON THE OTHER SIDE FAIL.

The court below and others insist that two "presumptions" demand a contrary reading. Neither does. First, the presumption in the general savings statute, 1 U.S.C. § 109—that statutory changes do not apply to pre-enactment conduct—does not apply where, as here, Congress plainly applied the change to pre-enactment offenses. Second, 18 U.S.C. § 3742(g) does not create a default rule pegging the law at resentencing to that of the original sentencing. Moreover, the historical-fact interpretation advanced by the court below leads to absurd results.

A. The General Savings Statute Does Not Apply.

1 U.S.C. § 109 reverses the common-law presumption that the repeal of a criminal statute

abates "all prosecutions which had not reached final disposition in the highest court authorized to review them." *Bradley* v. *United States*, 410 U.S. 605, 607 (1973). At common law, a statute altering the penalty for a crime and silent as to the effective date resulted in the wholesale dismissal of pending cases. *See United States* v. *Tynen*, 78 U.S. (11 Wall.) 88, 95 (1870). To avoid abatements by legislative silence, Congress in 1871 enacted the general federal saving statute, which in its current form provides that "[t]he repeal of any statute" does not "extinguish any penalty" under that statute, "unless the repealing Act shall so expressly provide." 1 U.S.C. § 109. The savings statute thus sets forth a "background principle of interpretation" that an amended statute's reduced criminal penalties do not apply to offenses committed before the law changed. *Dorsey*, 567 U.S. at 274.

That principle yields when a new criminal statute expressly—or by "plain import" or "fair implication"—indicates that its new penalties apply to offenses committed pre-enactment. *Id.* at 275; *see* Antonin Scalia & Bryan A. Garner, Reading Law: An Interpretation of Legal Texts § 41 (2012) (Section 109 "cannot deny effect to a future legislature's provision applying newly adopted lesser sentences retroactively to offenses committed before their adoption."). New criminal statutes must also be read in light of the "special and different background principle" set forth in the 1984 Sentencing Reform Act, where "the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced," "regardless" of when the offense was committed. *Dorsey*, 567 U.S. at 275, 280.

Against that backdrop, the First Step Act clearly abrogates Section 109's interpretive principle and fits with the "ordinary practice" of federal sentencing. There is no dispute that Section 403 applies at least to *initial* sentencings. The Act thus "defeat[s] the presumption" in Section 109 by "specifically requir[ing] district courts to apply the legal changes in" Section 403(a) at sentencings for pre-Act conduct. *Concepcion*, 597 U.S. at 497-498. Because "Congress itself addresses the Act's applicability to pending cases," the question of how the Act's amendments apply at resentencing turns on the "plain language of section 403(b)." *United States* v. *Richardson*, 948 F.3d 733, 748 & n.1 (6th Cir. 2020). And that plain language, read in context, does not distinguish between sentencings and resentencings.

Congress's decision to draw the line at sentencing, whether initial or plenary resentencing, also fits with the Act's balancing of finality and fairness. *See supra* pp. 39-41. Once imposed, a court may alter a sentence "only in very limited circumstances." *Pepper*, 562 U.S. at 501 n.14; *see* 18 U.S.C. § 3582(b). But there is no procedural impediment to applying revised penalties at resentencing.

That ease of application is why other ameliorative laws applicable to pre-act conduct draw the line at sentencing. Among the States that adopted similar general savings statutes to the federal version, several provide an ameliorative exception allowing reduced penalties to apply up to the date of sentencing. *See* Comment, *Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. Pa. L. Rev. 120, 129, 136 & nn. 66-70 (1972) ("In these states, the crucial date is the date

of sentencing in the trial court."); *see, e.g.*, Ohio Rev. Code Ann. § 1.58(B) (if the "punishment for any offense is reduced," the "punishment, if not already imposed, shall be imposed according to the statute as amended"). Courts in at least some of these States have held that this date-of-sentencing rule applies equally to original sentencings and resentencings. *See, e.g.*, *State* v. *Waxler*, 69 N.E.3d 1132, 1138-39 (Ohio Ct. App. 2016) ("Because defendant's sentences were vacated * * *, no penalty for the offenses at issue had been imposed," so "on remand, the trial court was obligated to comply with all sentencing statutes in effect at the time of resentencing" (quotation marks and citation omitted)); *People* v. *Hunter*, 104 N.E.3d 358, 371 (Ill. 2017) (similar). The First Step Act is best understood as doing the same.

B. Section 3742(g) Does Not Suggest A Different Result.

18 U.S.C. § 3742(g) creates a narrow exception to the general rule that, at sentencing, courts must apply the Sentencing Guidelines "in effect on the date the defendant is sentenced," *id.* § 3553(a)(4)(A)(ii), "regardless of when the offender's conduct occurs," *Dorsey*, 567 U.S. at 273. Under Section 3742(g), when a case is "remanded" for resentencing following a defendant's successful appeal of his sentence, the district court must apply the version of the Guidelines "that were in effect on the date of the previous sentencing of the defendant prior to the appeal." 18 U.S.C. § 3742(g)(1). This exception "does not apply to resentencings that occur for reasons other than when a sentence is overturned on appeal and the case is remanded"—such as "when a sentence is set aside on

collateral review under 28 U.S.C. § 2255." *Pepper*, 562 U.S. at 499.

Section 3742(g) has no bearing on the meaning of Section 403 for three different reasons. First, because Section 924(c) sentences are "dictated by statute rather than derived from the Guidelines," Section 3742(g) "does not control." *Uriarte*, 975 F.3d at 608 (Barrett, J., dissenting). No matter the Guidelines, the result is the same: For Section 924(c) convictions, "the guideline sentence is the minimum term of imprisonment required by statute." U.S.S.G. § 2K2.4(b). But which "minimum term of imprisonment" is required under Section 403(b) is the question presented in this case. Section 3742(g) thus only raises the question here; it does nothing to answer it.

Second, attempting to ascribe broader intent to Section 3742(g)—which was "designed to function as part of the mandatory Guidelines scheme that the Court struck down in *United States* v. *Booker*"—is inconsistent with this Court's post-*Booker* "surgery" excising much of the rest of that section. *Pepper*, 562 U.S. at 515-516 (Alito, J., concurring in part). Congress's pre-*Booker* policy judgment about which version of the Guidelines apply on remand in the specific situation after a defendant secured a vacatur on direct appeal cannot illuminate a provision making a drastic reduction in a *statutory* mandatory-minimum sentence retroactive. The Guidelines and statutory penalties are different in kind. The Guidelines are non-binding, highly individualized, and relatively easy to amend. The Commission has issued 33 different editions of the Guidelines Manual since 1987, *see Guidelines Archive*, U.S. Sentencing

Comm'n;[14] reflecting "more than 800" amendments, Cong. Rsch. Serv., Congressional Review of Proposed Amendments to the U.S. Sentencing Guidelines 1 (June 6, 2023).[15]

Mandatory statutory minimums like those in Section 924(c) are everything the Guidelines are not. Indeed, "sentencing statutes * * * trump[] the Guidelines." *Dorsey*, 567 U.S. at 266. It therefore makes little sense to look to Congress's pre-*Booker* policy decision regarding the temporal reach of Guidelines changes when considering the reach of Section 403's reduction of Section 924(c)'s mandatory statutory penalty. This is especially so considering that Section 403(b) is a *retroactivity* provision. By displacing the general savings statute that new statutory penalties apply prospectively only to newly committed offenses, Congress clearly intended to broaden Section 403's reach. That is consistent with "the ordinary practice" in federal sentencing "to apply new penalties to defendants not yet sentenced," "regardless of when the offender's conduct occurs." *Dorsey*, 567 U.S. at 273, 280. Interpreting this retroactivity provision in light of a provision whose express goal is to *limit* the retroactivity of Guidelines changes is unsound.[16]

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[14] *Available at* https://perma.cc/CX5Z-GG2H.

[15] *Available at* https://perma.cc/A3Y9-XLT5.

[16] If anything, the Guidelines indicate that subsequently reduced statutory minimums should apply on resentencing, even if the original Guidelines apply. *See* U.S.S.G. § 5G1.2 cmt. n.3(D) (on "resentencing," where "the statutorily required minimum sentence no longer applies," the Guidelines range "shall be redetermined without regard to the previous effect or restriction of the statutorily required minimum sentence").

Finally, Section 3742(g) does little to inform Section 403(b)'s meaning because even in the narrow circumstances where Section 3742(g) applies, it pegs the Guidelines to those that applied at "the *previous sentencing* of the defendant *prior to the appeal*," 18 U.S.C. § 3742(g)(1) (emphases added)—not the defendant's *original* sentence. The plain language of Section 3742(g) does not draw the line at an "initial sentence." *Contra Uriarte*, 975 F.3d at 606 (Barrett, J., dissenting); *United States* v. *Taylor*, 648 F.3d 417, 424 n.2 (6th Cir. 2011) ("We acknowledge that the plain language of § 3742(g)(1) * * * is problematic when a case is remanded multiple times for resentencing.").

C. The Historical-Fact Interpretation Leads To Extreme Results.

The court below took the position that Section 403 does not apply to defendants who have had "sentences * * * imposed upon them prior to the First Step[] Act's December 21, 2018 enactment date." Pet. App. 12a. But that historical-fact approach proves far too much.

Consider a defendant who was tried, convicted, and sentenced before the First Step Act, and who—also before the Act—successfully appealed his convictions and won an entirely new trial. Say also that before the defendant's new trial—where he is again convicted—the Act goes into effect. Thus, on the date of enactment, the defendant had no sentence; indeed, he did not even have a conviction.

Under the Fifth Circuit's approach, Section 403's reforms *would not apply* to that defendant. Because that defendant once had a so-called sentence imposed before the First Step Act's enactment, that defendant is *forever* barred from that Act's reforms.

There is no reason to think that Congress intended such a strange outcome. That defendant, just as much as Duffey and Ross, did not have a "sentence" when the First Step Act went into effect. Congress accordingly intended that these defendants receive the full benefit of Section 403 at their post-Act sentencings.

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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ADDENDUM

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ADDENDUM

STATUTORY PROVISIONS INVOLVED

1. **First Step Act of 2018, Pub. L. No. 115-391, tit. IV, 132 Stat. 5194, 5220-22 provides:**

TITLE IV—SENTENCING REFORM

SEC. 401. REDUCE AND RESTRICT ENHANCED SENTENCING FOR PRIOR DRUG FELONIES.

(a) CONTROLLED SUBSTANCES ACT AMENDMENTS.—The Controlled Substances Act (21 U.S.C. 801 et seq.) is amended—

(1) in section 102 (21 U.S.C. 802), by adding at the end the following:

"(57) The term 'serious drug felony' means an offense described in section 924(e)(2) of title 18, United States Code, for which—

"(A) the offender served a term of imprisonment of more than 12 months; and

"(B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense.

"(58) The term 'serious violent felony' means—

"(A) an offense described in section 3559(c)(2) of title 18, United States Code, for which the offender served a term of imprisonment of more than 12 months; and

"(B) any offense that would be a felony violation of section 113 of title 18, United States Code, if the offense were committed in the

special maritime and territorial jurisdiction of the United States, for which the offender served a term of imprisonment of more than 12 months."; and

(2) in section 401(b)(1) (21 U.S.C. 841(b)(1))—

(A) in subparagraph (A), in the matter following clause (viii)—

(i) by striking "If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years" and inserting the following: "If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years"; and

(ii) by striking "after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release" and inserting the following: "after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years"; and

(B) in subparagraph (B), in the matter following clause (viii), by striking "If any person commits such a violation after a prior conviction for a felony drug offense has become final" and inserting the following: "If any person commits such a violation after a prior

conviction for a serious drug felony or serious violent felony has become final".

(b) CONTROLLED SUBSTANCES IMPORT AND EXPORT ACT AMENDMENTS.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

(1) in paragraph (1), in the matter following subparagraph (H), by striking "If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not less than 20 years" and inserting "If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years"; and

(2) in paragraph (2), in the matter following subparagraph (H), by striking "felony drug offense" and inserting "serious drug felony or serious violent felony".

(c) 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.

SEC. 402. BROADENING OF EXISTING SAFETY VALVE.

(a) AMENDMENTS.—Section 3553 of title 18, United States Code, is amended—

(1) in subsection (f)—

(A) in the matter preceding paragraph (1)—

(i) by striking "or section 1010" and inserting ", section 1010"; and

(ii) by inserting ", or section 70503 or 70506 of title 46" after "963)";

(B) by striking paragraph (1) and inserting the following:

"(1) the defendant does not have—

"(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

"(B) a prior 3-point offense, as determined under the sentencing guidelines; and

"(C) a prior 2-point violent offense, as determined under the sentencing guidelines;"; and

(C) by adding at the end the following:

"Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense."; and

(2) by adding at the end the following:

"(g) DEFINITION OF VIOLENT OFFENSE.—As used in this section, the term 'violent offense' means a crime of violence, as defined in section 16, that is punishable by imprisonment.".

(b) APPLICABILITY.—The amendments made by this section shall apply only to a conviction entered on or after the date of enactment of this Act.

SEC. 403. CLARIFICATION OF SECTION 924(c) OF TITLE 18, UNITED STATES CODE.

(a) IN GENERAL.—Section 924(c)(1)(C) of title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final".

(b) 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.

SEC. 404. APPLICATION OF FAIR SENTENCING ACT.

(a) DEFINITION OF COVERED OFFENSE.—In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.

(b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.

(c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously

reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

* * * * *

2. **1 U.S.C. § 109 provides:**

§ 109. Repeal of statutes as affecting existing liabilities

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

* * * * *

3. **18 U.S.C. § 924 provides in pertinent part:**

§ 924. Penalties

* * *

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection--

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm

muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall--

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section--

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition--

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

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4. **18 U.S.C. § 3559 provides in pertinent part:**

§ 3559. Sentencing classification of offenses

* * *

(c) Imprisonment of certain violent felons.--

* * *

(7) Resentencing upon overturning of prior conviction.--If the conviction for a serious violent felony or serious drug offense that was a basis for sentencing under this subsection is found, pursuant to any appropriate State or Federal procedure, to be unconstitutional or is vitiated on the explicit basis of innocence, or if the convicted person is pardoned on the explicit basis of innocence, the person serving a sentence imposed under this subsection shall be resentenced to any sentence that was available at the time of the original sentencing.

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5. **18 U.S.C. § 3582 provides in pertinent part:**

§ 3582. Imposition of a sentence of imprisonment

(a) Factors to be considered in imposing a term of imprisonment.--The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set

forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

(b) Effect of finality of judgment.-- Notwithstanding the fact that a sentence to imprisonment can subsequently be--

(1) modified pursuant to the provisions of subsection (c);

(2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(c) Modification of an imposed term of imprisonment.--The court may not modify a term of imprisonment once it has been imposed except that--

(1) in any case--

(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of

30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant

to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

* * *

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6. **18 U.S.C. § 3614 provides:**

§ 3614. Resentencing upon failure to pay a fine or restitution

(a) Resentencing.--Subject to the provisions of subsection (b), if a defendant knowingly fails to pay a delinquent fine or restitution the court may resentence the defendant to any sentence which might originally have been imposed.

(b) Imprisonment.--The defendant may be sentenced to a term of imprisonment under subsection (a) only if the court determines that--

(1) the defendant willfully refused to pay the delinquent fine or had failed to make sufficient bona fide efforts to pay the fine; or

(2) in light of the nature of the offense and the characteristics of the person, alternatives to imprisonment are not adequate to serve the purposes of punishment and deterrence.

(c) Effect of indigency.--In no event shall a defendant be incarcerated under this section solely on the basis of inability to make payments because the defendant is indigent.

* * * * *

7. **18 U.S.C. § 3661 provides:**

§ 3661. Use of information for sentencing

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

* * * * *

8. **18 U.S.C. § 3742 provides:**

§ 3742. Review of a sentence

(a) Appeal by a defendant.--A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government.--The Government may file a notice of appeal in the district

court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) Plea agreements.--In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure--

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) Record on review.--If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals--

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration.[*]--Upon review of the record, the court of appeals shall determine whether the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that--

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range,

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[*] "[S]ever[ed] and excise[d]" by *United States* v. *Booker*, 543 U.S. 220, 259 (2005).

having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) Decision and disposition.--If the court of appeals determines that--

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was

imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and--

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) Sentencing upon remand.--A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that--

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2)[*] The court shall not impose a sentence outside the applicable guidelines range except upon a ground that--

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) Application to a sentence by a magistrate judge.--An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) Guideline not expressed as a range.--For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) Definitions.--For purposes of this section--

(1) a factor is a "permissible" ground of departure if it--

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

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[*] Recognized as invalid by *Pepper* v. *United States*, 562 U.S. 476, 498 (2011).

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

* * * * *

9. **18 U.S.C. § 924 (1988) provides in pertinent part:**

§ 924. Penalties

* * *

(c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or is equipped with a firearm silencer or firearm muffler, to imprisonment for life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of

violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and-

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

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10. **Sentencing Reform Act of 2015, H.R. 3713, 114th Cong. provides in pertinent part:**

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SEC. 5. CLARIFICATION OF SECTION 924(c) OF TITLE 18, UNITED STATES CODE.

* * *

(b) APPLICABILITY TO PENDING AND PAST CASES.—

(1) 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.

(2) CERTAIN PAST CASES.—

(A) GENERAL RULE.—Except as provided in subparagraph (B), in the case of a defendant who, before the date of enactment of this Act, was convicted of an offense for which the penalty is amended by this section and was sentenced to a term of imprisonment for the offense, the sentencing court may, on motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, upon prior notice to the Government, reduce the term of imprisonment for the offense, after considering the factors set forth in section 3553(a) of title 18, United States Code, the nature and seriousness of the danger to any person or the community, and the post-sentencing conduct of the defendant, if such a reduction is consistent with this section and the amendments made by this section.

(B) EXCEPTION.—Subparagraph (A) does not apply in the case of an offense affected by the amendment made in subsection (a)(2) with regard to a defendant who has a prior conviction for a serious violent felony, as defined in section 102(58) of the Controlled Substances Act.

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11. **Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. provides in pertinent part:**

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SEC. 104. CLARIFICATION OF SECTION 924(c) OF TITLE 18, UNITED STATES CODE.

* * *

(b) APPLICABILITY TO PENDING AND PAST CASES.—

(1) 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.

(2) PAST CASES.—

(A) IN GENERAL.—In the case of a defendant who, before the date of enactment of this Act, was convicted of an offense for which the penalty is amended by this section and was sentenced to a term of imprisonment for the offense, the sentencing court may, on motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, upon prior notice to the Government, reduce the term of imprisonment for the offense, after considering the factors set forth in section 3553(a) of title 18, United States Code, the nature and seriousness of the danger to any person, the community, or any crime victims, and the post-sentencing conduct of the defendant, if such a reduction is consistent with this section and the amendments made by this section. Any proceeding under this paragraph shall be

subject to section 3771 of title 18, United States Code (the Crime Victims' Rights Act).

(B) REQUIREMENT.—For each motion filed under subparagraph (A), the Government shall conduct a particularized inquiry of the facts and circumstances of the original sentencing of the defendant in order to assess whether a reduction in sentence would be consistent with this section and the amendments made by this section.

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12. **Sentencing Reform and Corrections Act of 2017, S. 1917, 115th Cong. provides in pertinent part:**

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SEC. 104. CLARIFICATION OF SECTION 924(c) OF TITLE 18, UNITED STATES CODE.

* * *

(b) APPLICABILITY TO PENDING AND PAST CASES.—

(1) 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.

(2) PAST CASES.—

(A) SENTENCE REDUCTION.—

(i) IN GENERAL.—In the case of a defendant who, before the date of enactment of this Act, was convicted of an offense for which the penalty is amended by this section and was sentenced to a term of

imprisonment for the offense, a term of imprisonment may be reduced only if—

(I) the instant violation was for a drug trafficking offense that did not involve a violation of clause (ii) or (iii) of section 924(c)(1)(A) of title 18, United States Code;

(II) the defendant has not otherwise been convicted of any serious violent felony; and

(III) the sentencing court, on motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, upon prior notice to the Government, after considering the factors set forth in section 3553(a) of title 18, United States Code, the nature and seriousness of the danger to any person, the community, or any crime victims, and the post-sentencing conduct of the defendant, finds a reduction is consistent with this section and the amendments made by this section.

(ii) REQUIREMENT.—Any proceeding under this subparagraph shall be subject to section 3771 of title 18, United States Code (commonly known as the "Crime Victims' Rights Act").

(B) REQUIREMENT.—For each motion filed under subparagraph (A), the Government shall conduct a particularized inquiry of the facts and circumstances of the original sentencing of the defendant in order to assess whether a reduction in sentence would be consistent with

this section and the amendments made by this section, including a review of any prior criminal conduct or any other relevant information from Federal, State, and local authorities.

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