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

REPLY BRIEF FOR PETITIONERS COREY DEYON DUFFEY AND JARVIS DUPREE ROSS

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INTRODUCTION

The Court-Appointed Amicus takes a divide-and-conquer strategy to statutory interpretation. Its principal arguments are that the Court should read Section 403(b) of the First Step Act without considering how the vacatur rule affects the ordinary meaning of "sentence," Court-Appointed Br. 15-39, and without examining the statutory title or the statutory scheme, *id.* at 41-48. That is not how statutory interpretation usually works, and that is certainly not how the Court has approached the First Step Act. A statute "cannot be construed in the abstract"; its

substance must be judged "against relevant background understandings" and "legal context." *Pulsifer* v. *United States*, 601 U.S. 124, 140-141 (2024); *see also Concepcion* v. *United States*, 597 U.S. 481, 486 (2022) (recognizing Congress "enacted the First Step Act of 2018" against the "backdrop" of longstanding sentencing principles).

Centuries' worth of judicial decisions, statutes, and procedural rules establish "the basic principle" that a vacated order is "wholly null[]"—as if it never existed at all. *North Carolina* v. *Pearce*, 395 U.S. 711, 721 (1969). As with any background principle, Congress can depart from it by saying so "expressly." *Concepcion*, 597 U.S. at 491, 494-495. But Amicus cites nothing to suggest that is what Congress did here. Indeed, the remaining text of Section 403(b)—including the neutral article "a," the verb "imposed," and the present-perfect tense—only reinforces the vacatur principle. *See* Duffey Br. 29-36. So does common usage: A judge who asks an advocate for "a case" does not expect to receive a vacated one.

Statutory context—including Section 403's title, its drafting history, and the broader statutory scheme—further confirm Congress's intent for Section 403(b) to apply at plenary resentencing. Amicus brushes those off as "extratextual considerations," Court-Appointed Br. 41 (citation omitted), but they are ordinary tools of statutory interpretation that a court must examine to determine the meaning of the statute. *See Dubin* v. *United States*, 599 U.S. 110, 120-121 (2023); *Pulsifer*, 601 U.S. at 153. Petitioners' interpretation of Section 403(b) is also supported by the rule of lenity, which prohibits deviating from the ordinary meaning of statutory terms in a way that disfavors criminal defendants. *Burrage* v. *United States*, 571 U.S. 204,

216 (2014). Finally, the general savings statute, 1 U.S.C. § 109, which abrogated the common-law rule that new criminal laws applied to all pending cases, is inapplicable; Section 403 plainly displaces Section 109's presumption. The question is thus simply whether Petitioners are covered by Section 403's plain text. The answer is yes.

The Court should reverse.

ARGUMENT

I. THE ORDINARY MEANING OF SECTION 403(B) ESTABLISHES THAT PETITIONERS ARE ELIGIBLE FOR APPLICATION OF THE FIRST STEP ACT.

Congress wrote that Section 403's reforms apply to any offender whose "sentence" "has not been imposed" as of the First Step Act's enactment date. The ordinary meaning of that language turns on the ordinary meaning of "sentence." And the word "sentence" necessarily incorporates the longstanding principle that a vacated sentence is no sentence at all. *See* Duffey Br. 16-28.

Amicus would have the Court read the word "sentence" without considering that background principle, Court-Appointed Br. 15-39, but the Court has never endorsed that kind of "abstract" approach to statutory interpretation. *Pulsifer*, 601 U.S. at 140-141. A background legal principle is not an afterthought; it is the baseline. Amicus thus needs some "express[]" text stating Congress's intention to deviate from that principle. *Concepcion*, 597 U.S. at 491, 494-495. Amicus comes up woefully short.

A. Centuries Of Legal Tradition Establish That Vacated Orders Have No Legal Effect.

For at least half a millennium, Anglo-American courts have recognized that vacated orders, including vacated sentences, are void ab initio. *See* Duffey Br. 17-28. Against this history, Amicus touts a whopping two statutes and eight cases. *See* Court-Appointed Br. 31-35. Amicus misunderstands its own statutes and misreads its own cases. But even if Amicus *were* right, a handful of examples cannot overcome the deeply embedded principle that a vacated sentence is no sentence at all.

1. Reading Section 403(b) against the vacatur principle is consistent with other criminal statutes.

Amicus is wrong (at 31-33) that the background vacatur principle cannot be reconciled with two statutory provisions.

Amicus's reliance (at 32) on 18 U.S.C. § 921(a)(20)'s definition of "a conviction" is misplaced. Amicus sees a distinction in the fact that this provision explicitly excludes *convictions* that have been "expunged, or set aside or for which a person has been pardoned or has had civil rights restored," but is silent about similar *sentences*. Of course it is. That provision defines what it means to be *convicted* of a "crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 921(a)(20). That definition simply has nothing to do with prior sentences.

Amicus also highlights 18 U.S.C. § 3742(g), which instructs courts resentencing a defendant on remand from a direct appeal to apply the Sentencing Guidelines "in effect on the date of the previous

sentencing." This also boomerangs on Amicus. Congress's express reference to a "previous sentencing" proves only that Congress understands how to override the background principle of vacatur "expressly." *Concepcion*, 597 U.S. at 491, 494-495; *see* Duffey Br. 30. Amicus's failure to respond to that point is telling. Nor does Amicus say anything about the multiple reasons that Section 3472(g) is inapplicable—because the sentences here were vacated on collateral review; the Guidelines do not dictate Section 924(c) sentences; and Section 3472(g) pegs the Guidelines to the sentencing "prior to the appeal," not the original sentencing. Duffey Br. 47-50. Amicus is likewise mum on the fact that Section 3742(g) is a remnant of the pre-*Booker* mandatory-sentencing regime that sheds no light on later-enacted provisions like the First Step Act returning discretion to sentencing judges. Duffey Br. 48-49. Section 3742(g) does not reflect any "general congressional policy" overriding the ancient principle that vacated orders have no legal effect, and so has "no bearing" on the Court's analysis. *Pepper* v. *United States*, 562 U.S. 476, 499-500 (2011).

2. Amicus's cases only confirm that courts understand the legal consequences of vacatur.

Amicus next offers eight cases it believes undercut the principle illustrated by Petitioners' centuries' worth of examples that vacated orders have no legal effect. None does.

1. Begin with Amicus's cases involving status offenses—laws that prohibit convicted persons from possessing a gun or require convicted sex offenders to register as such. *See* Court-Appointed Br. 33, 34.

Applying *Lewis* v. *United States*, 445 U.S. 55, 60-62 (1980), those courts held that a conviction that was later invalidated may still serve as a predicate for a status offense, so long as the conviction was in place at the time the defendant committed the offense. *See United States* v. *Snyder*, 235 F.3d 42, 51-53 (1st Cir. 2000); *United States* v. *Padilla*, 387 F.3d 1087, 1091 (9th Cir. 2004); *United States* v. *Roberson*, 752 F.3d 517, 522-525 (1st Cir. 2014). Amicus, however, misunderstands the reasons behind those holdings.

For starters, the principle that vacated convictions have no legal effect is not immediately relevant to status offenses. What matters for a status offense is the defendant's *status* on the date he committed the offense—and that requires considering "the historical fact of the conviction." *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 115 (1983). Even if the predicate conviction is later invalidated, "'knowingly'" disregarding a Congressional sanction—such as by purchasing a firearm as a felon or failing to register as a sex offender—can still be criminalized by Congress. Said another way, "one who has a felony conviction on the books * * * should simply know not to possess a gun." *Snyder*, 235 F.3d at 53 (citation omitted). And looking to the existence of a conviction at the time of the offense is especially appropriate where, as in Amicus's firearms and sex-offender cases, a person can "clear his status *before*" engaging in prohibited conduct. *Lewis*, 445 U.S. at 64 (involving predecessor to 18 U.S.C. § 922(g)(1)). Unsurprisingly, courts deciding these cases have cautioned that there is a meaningful "distinction between the use of a vacated conviction in the sentencing context and in the context of predicate offenses." *Roberson*, 752 F.3d at 524; *see also Snyder*, 235 F.3d at 53.

Even so, *Lewis* and the follow-on cases did not ignore the background principle that vacated convictions are void ab initio. In *Dickerson*, for example, this Court recognized that vacatur "alter[s] the legality of the previous conviction" and "signif[ies] that the defendant was innocent of the crime." 460 U.S. at 115. But in light of the particular statutory context and purpose, this Court and others nonetheless read these provisions to focus on the "historical fact of the conviction." *Id.* As *Lewis* explained, Congress intended to "focus not on reliability, but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons," expressly choosing to be over-inclusive. 445 U.S. at 67; *see also Roberson*, 752 F.3d at 524 (same, regarding sex-offender-registration statute). Here, those interpretive clues all point in the opposite direction: The language, context, and purpose of the First Step Act establish that Congress intended to follow the usual vacatur rule and treat defendants with vacated sentences as if they had no sentence at all.

2. Amicus's reliance on double-jeopardy cases is even more puzzling. Far from disregarding "the general rule" that a vacated conviction has no legal effect, *Bravo-Fernandez* refused "to deviate from" it, permitting the government to retry defendants on a vacated count of conviction despite the fact that the jury acquitted them on related counts. *Bravo-Fernandez* v. *United States*, 580 U.S. 5, 19-21 (2016). To be sure, the Court considered the entire trial record—including the fact that the jury convicted the defendants on the later-vacated count—"to identify the ground for the * * * *acquittals*" and determine whether *the acquittals* had preclusive effect. *Id.* at 22.

But the Court forcefully rejected any suggestion that it was trying to "give effect" *to the vacated convictions*, which are "a legal nullity." *Id.* (quotation marks and citation omitted).

Pearce, for its part, held that a court may "impose whatever sentence may be legally authorized" when resentencing a defendant after his initial conviction is vacated, even if "it is greater than the sentence imposed after the first conviction." 395 U.S. at 720. "To hold to the contrary," the Court observed, "would be to cast doubt upon the whole validity of the basic principle enunciated in *United States* v. *Ball*"—that the Double Jeopardy Clause does not forbid a second trial after a defendant's conviction is vacated—"and upon the unbroken line of decisions that have followed that principle for almost 75 years." *Id.* at 721. At the same time, the Court recognized that because the Double Jeopardy Clause forbids "multiple punishments for the same offense, * * * punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense." *Id.* at 718-719 (footnote omitted). That holding does not disprove the existence of the vacatur principle. It instead reflects the plain fact that failing to credit "punishment already endured" "obviously" means that the defendant "will have received multiple punishments for the same offense." *Id.* at 718.

3. Amicus's fraud and immigration cases (at 35) land even further afield. The fraud case concerns a doctor who argued he should have been acquitted for lying about a suspended license where the suspension was later "vacated." *United States* v. *Miller*, 891 F.3d 1220, 1239 (10th Cir. 2018). The court rejected that argument on plain-error review, explaining that the order was not vacated "based on some defect in the

order itself" but because the doctor had addressed the underlying issues; that for purposes of the state medical board, "vacat[ing]" a suspension "'does not' erase the suspension as if it never happened"; and that the order alternated between "vacate" and "lift." *See id.* at 1239-41. The court therefore simply found that the suspension was not "vacated" in the relevant sense.

The same goes for the immigration cases. As Petitioners already explained, *see* Duffey Br. 24 n.12, convictions set aside or expunged for reasons other than a legal defect in removal proceedings are not truly "vacated" because there is no "suggestion that the conviction had been improperly obtained," and thus "no reason to conclude that the [noncitizen] is any less suitable for removal." *Saleh* v. *Gonzales*, 495 F.3d 17, 25 & n.8 (2d Cir. 2007) (quotation marks and citation omitted). In contrast, "[v]acaturs to cure legal errors still wipe convictions and sentences off the books." *United States* v. *Mitchell*, 38 F.4th 382, 393 (3d Cir. 2022) (Bibas, J., concurring in the judgment).

3. Amicus's scattered objections to Petitioners' examples are unpersuasive.

Petitioners' opening brief collected examples from across the law illustrating the vacatur principle, including in the law-of-the-case doctrine, allocution, the presence and open-court requirements, how the law treats predicate convictions, double jeopardy, how the Guidelines calculate criminal history, capital sentencing, removal proceedings, collateral estoppel, a case's precedential effect, and ancient Anglo-American history and tradition. *See* Duffey Br. 18-28. Amicus ignores the brunt of these examples, choosing instead to nitpick a select few and contending that

whole categories of others are irrelevant. But Amicus's efforts do nothing to discredit the background principle that a vacated sentence is void from the start.

1. Amicus downplays (at 39) *Pepper*'s holding that vacatur "wipes the slate clean" for purposes of the law-of-the-case doctrine as just "a figure of speech." (citations omitted). But the vacatur rule was the reason—indeed, the *only* reason—the Court declined to apply the law-of-the-case doctrine and allowed the sentencing judge to order an entirely new sentence on remand. *See Pepper*, 562 U.S. at 506-508. Indeed, the Court believed the vacatur rule was so entrenched that the issue "merit[ed] only a brief discussion." *Id.* at 505. Amicus also protests (at 39) that *Pepper* did not "creat[e]" the vacatur rule. Of course it didn't. *Pepper*'s holding followed directly from *Pearce*, decided 40 years earlier, which in turn relied on "75 years" of precedent. *See Pearce*, 395 U.S. at 721.[1]

Amicus also attempts to minimize dozens of cases recognizing defendants' fundamental procedural rights at resentencing after their previous sentences were vacated, including the rights to allocution, to be present at sentencing, and to be sentenced in open

[1] Amicus also attempts to distinguish *Miller* v. *Aderhold* because the original order permanently suspending Miller's sentence was never formally set aside on appeal—another district judge simply resentenced the defendant to four years' imprisonment after finding the original order "void" under this Court's precedent. Court-Appointed Br. 38 n.7; 288 U.S. 206, 209-210 (1933). But the lesson *Miller* teaches is exactly on point: A "void" order is "a mere nullity without force or effect, as though no order at all had been made." 288 U.S. at 210-211. Had the original order permanently suspending Miller's sentence had any legal effect, the district court would have lacked jurisdiction to disturb it. *Id.* at 211.

court. Duffey Br. 18-19 & n.9 (collecting cases). According to Amicus (at 36), these cases "have nothing to do with vacatur." That is flat wrong; vacatur is the beating heart of these rulings. *See, e.g.*, *United States* v. *Barnes*, 948 F.2d 325, 330 (7th Cir. 1991) (defendant has right to allocution at resentencing because "the effect of the order to vacate [is] to nullify" the previous sentence); *Williamson* v. *United States*, 265 F.2d 236, 239 (5th Cir. 1959) (defendant must be present at resentencing after vacatur because "[n]o valid sentence has yet been imposed").

Amicus finally takes aim at how the Sentencing Guidelines calculate criminal history, yet *concedes* (at 36) that the Guidelines exclude sentences resulting from "vacated" convictions. That's a clear-cut example of the vacatur principle. Amicus nonetheless argues that the Guidelines undercut the general vacatur rule because they include *other* types of sentences, like sentences resulting from convictions that were "set aside" or "pardoned for reasons unrelated to innocence or errors of law." U.S.S.G. § 4A1.2 cmt. n.10 (2023). Amicus again misses the point; this express carve-out only proves that drafters know how to depart from a background legal principle when they wish to do so.

2. Unable to attack Petitioners' other examples on the merits, Amicus argues they are irrelevant. That is not right, either.

Amicus contends (at 37) that the principle that vacatur "deprives [a] court's opinion of precedential effect," *O'Connor* v. *Donaldson*, 422 U.S. 563, 577 n.12 (1975), is irrelevant because it is a civil doctrine. But the key case here, *United States* v. *Munsingwear, Inc.*, discusses general background principles pervading both civil and criminal cases. 340 U.S. 36, 39-41 (1950).

Such principles obviously inform courts' interpretation of criminal statutes. *See, e.g.*, *Greenlaw* v. *United States*, 554 U.S. 237, 243-250 (2008) (interpreting 18 U.S.C. § 3742 in light of party-presentation rule).

Amicus also claims (at 37) that cases involving vacated convictions are irrelevant because of "important differences between" convictions and sentences. For one thing, that argument flies in the face of Amicus's abbreviated list of contexts where "[t]he historical fact of a vacated order * * * remains legally relevant"—all but one of which concern vacated convictions. *See* Court-Appointed Br. 33-35. For another, the only difference Amicus identifies is that a defendant "must be presumed innocent" following a vacated conviction but not following a vacated sentence. *Id.* at 37 (citation omitted). So what? Petitioners' point is simply that statutes should be read to incorporate the centuries-old principle that when an order is vacated, "all former proceedings are absolutely set aside" and the defendant must be treated as if that order never existed. 4 William Blackstone, Commentaries on the Laws of England 386 (1769). Applied to vacated convictions, that principle means that the defendant is once more presumed innocent. Applied to vacated sentences, it requires the court to "redo the entire sentencing process," affording a defendant all the benefits of the original sentencing, including Section 403's reforms. *United States* v. *Garcia-Robles*, 640 F.3d 159, 166 (6th Cir. 2011) (citation omitted).

As a last-ditch effort, Amicus ventures (at 38-39) that history and tradition are irrelevant to the First Step Act's meaning. But the Court has already interpreted the Act in light of "longstanding

tradition[s]." *Concepcion*, 597 U.S. at 486. History matters.

B. The Remaining Text Of Section 403(b) Does Not Suggest That Congress Departed From The Plain Meaning Of "Sentence."

Amicus argues (at 16-29) that Congress did not intend the word "sentence" to have its longstanding meaning because Congress used the indefinite article "a," the verb "imposed," and the present-perfect tense. Amicus is wrong; those textual clues only confirm Congress's intent that courts apply the ordinary meaning of "sentence." Duffey Br. 28-35.

In any event, this language is not clear enough to displace the ordinary meaning of "sentence." As the Court has recently and repeatedly noted in the sentencing context, "[t]he way a reader assigns meaning to" statutory text necessarily depends on "relevant background understandings." *Pulsifer*, 601 U.S. at 140-141. And where "longstanding tradition in American law" suggests that Congress intended courts to read the text one way, courts should not assign a different meaning to the text unless "Congress or the Constitution expressly limits" that traditional reading. *Concepcion*, 597 U.S. at 486, 491. None of the text that Amicus highlights creates that "express limit."

1. Start with Amicus's argument (at 17-19) that the statute's reference to "*a* sentence" supports the view that the statute captures invalid sentences. Common sense shows that Congress did not displace the vacatur rule with the indefinite article "a." A judge who asks an advocate for "a case" does not expect to receive one that has been reversed or vacated.

Amicus tries (at 17-18) to avoid this reality by redefining "a" to mean "any." But those words are not synonymous. "A" means a "discrete" member of a group, *Niz-Chavez* v. *Garland*, 593 U.S. 155, 163 (2021), while "'any' naturally carries 'an expansive meaning'" and "refer[s] to a member of a particular group or class *without distinction or limitation*"—a signal the Court has repeatedly recognized, *SAS Inst., Inc.* v. *Iancu*, 584 U.S. 357, 362-363 (2018) (emphasis added) (quoting Oxford English Dictionary (3d ed., Mar. 2016)). Indeed, Congress highlighted that distinction by referencing "*any* sentence" "in the very next provision," Section 403(c). *Loughrin* v. *United States*, 573 U.S. 351, 358 (2014) (Congress intends a difference in meaning where Congress "includes particular language in one section of a statute but omits it in another" (citation omitted)).

2. Amicus fares no better with its suggestion (at 21-24) that Congress's use of "imposed" displaces the vacatur rule. Congress has enacted several statutes concerning a "sentence" that has been "imposed." *See* Duffey Br. at 29-31 (collecting examples). But these provisions do not distinguish between an *initial* sentencing and a *re*sentencing in the way one would expect if the word "imposed" demanded a focus on the historical fact of a sentence. *See id.*

Straining to find a counterexample, Amicus pulls together (at 21-22) a handful of statutes and judicial opinions that use the word "imposed" in recounting a case's procedural history. But, as Amicus's examples illustrate, this usage usually requires the past or past-perfect tense. *See, e.g.*, *Young* v. *United States*, 943 F.3d 460, 463 (D.C. Cir. 2019) ("The district court *imposed a sentence* * * * ." (citation omitted)); *Gregg* v. *Georgia*, 428 U.S. 153, 161-162 (1976) (plurality op.)

(referencing "imposed" sentences that "were vacated"); 18 U.S.C. § 3742(a), (f)(1) (relief from "sentence" that "was imposed in violation of law"); 28 U.S.C. § 2255(a) (same). Congress's use of the present-perfect tense in Section 403(b) renders these examples inapposite. Words take on "different meanings in different contexts," *Torres* v. *Lynch*, 578 U.S. 452, 459 (2016), and there is no indication that Congress adopted this specialized usage over the one that appears throughout the criminal code.

3. Amicus finally tries to twist Congress's use of the present-perfect tense to mean that "sentence" includes vacated sentences. Court-Appointed Br. 24-29. But Amicus's focus (at 24-26) on the "date of enactment" further undermines its position. The way to refer to "an act" completed "before another specified * * * past time" is with the past-perfect tense. The Chicago Manual of Style ¶ 5.133 (17th ed. 2017). Indeed, it is impossible to refer to Amicus's theory *without* using the past-perfect—as the court below discovered. *See* Pet. App. 8a.

Amicus tries to rehabilitate its argument (at 27 & n.5) by referencing other provisions drafted in the present-perfect tense. But those statutes turn on the ongoing validity of a conviction. Indeed, each one references a "final action," *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 420 (1999), a "final determination," Pub. L. No. 115-123, § 41108(d), 132 Stat. 64, 158-159 (2018), or a claim that has been "finally adjudicated as of the date of enactment," Pub. L. No. 104-208, § 2505, 110 Stat. 3009, 3009-469 (1996)—*not* the fact that those judgments were "pronounced" in the past. That aligns with the "common-sense notion" the Court recognized in *Lewis* that the phrase "has been convicted" would not apply to someone whose conviction was "finally

reversed on appeal." 445 U.S. at 60-61 & n.5; Court-Appointed Br. 28 & n.6. Congress was concerned with the same thing in Section 403(b): a sentence that is "final" and "valid," not "void." *Miller*, 288 U.S. at 210-211.

Ultimately, each of Amicus's suggestions fall flat. The remaining text of Section 403(b) does not suggest that Congress departed from the ordinary meaning of "sentence" when drafting Section 403(b). Instead, the best reading is one that incorporates the vacatur rule.

II. STATUTORY CONTEXT FURTHER UNDERMINES AMICUS'S READING OF SECTION 403(B).

Amicus's reading of Section 403(b) is undermined by the rest of the statutory text, so it's not surprising to see Amicus urging the Court to read Section 403(b) in isolation. *See* Court-Appointed Br. 41 (dismissing, among other things, "a statutory title" and "drafting history" as "extratextual considerations" (citation omitted)). That is not how statutory interpretation works. The "statutory context also matter[s]" and is distinct from reliance on "legislative history." *Epic Sys. Corp.* v. *Lewis*, 584 U.S. 497, 523 (2018); *see also Bittner* v. *United States*, 598 U.S. 85, 98 (2023) (considering a statute's "drafting history"). The statutory context favors Petitioners, too.

A. Section 403's Title And Drafting History Support Petitioners' Interpretation.

Amicus says (at 42-43) that the Court must ignore Section 403's title. But, as Amicus acknowledges elsewhere in its briefing, the Court routinely looks to section titles to understand the scope and effect of a provision. *See* Court-Appointed Br. 26 (citing *Dubin*, 599 U.S. at 120-121). And, here, Section 403's heading

contradicts Amicus's suggestion that Congress directed courts to read Section 403(b) narrowly. Because Congress used Section 403 to "clarif[y]" that the *Deal* dissent had the better reading of Section 924(c), a broad reading of Section 403(b) is consistent with Congressional intent. Duffey Br. 41-42.

Amicus implies (at 42) that some great distance separates the title of Section 403 from the text at issue here, such that the "clarification" title refers only "to the substantive scope" of Section 403, "not to the scope of retroactivity." But Section 403, as a whole, is just 104 words long. It is hard to imagine that Congress somehow lost track of the section header by the time it got to the retroactivity provision. Congress's statement that Section 403 is a "Clarification of Section 924(c)" bears on the intended scope of the retroactivity provision.

Amicus also suggests (at 43) that there is some tension between Section 403's title and Section 403(b)'s subtitle, such that the Court should ignore the former in favor of the latter. But there is no tension, because the term "pending cases" includes resentencings. Earlier drafts of Section 403(b) included two provisions: one governing the Act's applicability to "pending cases" and the other governing the Act's applicability to "past cases." *See* Duffey Br. 37 (collecting earlier drafts of the statute). The provision governing "past cases" would have permitted defendants to seek a discretionary "[s]entence reduction." *Id*. (citation omitted). Because a defendant can apply for a sentence reduction *only if* the defendant still has a valid sentence, the "past cases" provision could not have applied to unsentenced defendants like Petitioners awaiting resentencing. Resentencings are plainly *pending*, not

past, cases. *See Miller*, 288 U.S. at 211 (where a previous sentencing order is "void," "the case necessarily remains pending until lawfully disposed of by [a new] sentence").

Amicus is therefore wrong (at 14) that the deleted section "would have afforded Petitioners relief" at resentencing. Because Petitioners' sentences were vacated, they were not subject to any "term of imprisonment" that could have been reduced under the deleted provision. *See* 18 U.S.C. § 3582(c)(1)(B). Amicus is likewise wrong that Petitioners are arguing for an interpretation that Congress "earlier discarded." Court-Appointed Br. 41 (citation omitted). Petitioners do not dispute that the enacted law provides no mechanism to reopen cases for a discretionary sentencing reduction. But Petitioners were not asking for their cases to be reopened; Petitioners *already* faced plenary resentencing.

Whatever the merits of allowing past cases to be reopened, the line Congress ultimately drew in dropping that provision "makes perfect—common—sense": "Congress didn't want to burden the courts with resentencing everyone who had ever been sentenced under § 924(c)—but if a court had to sentence someone, anyway, after § 403(b)'s enactment—whether for the first time or because an earlier sentence was vacated—in the interest of fairness, Congress wanted all of them to enjoy the same benefit of the anti-stacking provision." *United States* v. *Hernandez*, 107 F.4th 965, 979 (11th Cir. 2024) (Rosenbaum, J., dissenting). "That choice guaranteed uniformity in sentencings that followed the First Step Act's effective date without wreaking resentencing or finality havoc." *Id*.; *see also* Senators Br. 15-16; ACLU Br. 21-26.

B. Accepting Amicus's Historical-Fact Interpretation Would Result In Inconsistent Applications Of The First Step Act.

More broadly, Amicus's unrelenting focus on the historical fact of a vacated sentence makes a hash of the statute.

First, under Amicus's reading, Section 403's reforms would not apply to a defendant whose *conviction* is vacated before the Act's passage. *See* Duffey Br. 50-51. Amicus's only answer is that the Court should ignore that clearly odd and unjust result. Court-Appointed Br. 47 & n.8. The case that Amicus cites to support playing ostrich instructs only that courts leave "policy consequences" to Congress, not that courts leave off reading statutes as a coherent whole. *See BP P.L.C.* v. *Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1542 (2021).

Second, accepting Amicus's historical-fact-trumps-all interpretation would result in inconsistent applications of the First Step Act's drug reforms and expanded safety valve. Section 402(b)'s safety-valve reforms apply "to a conviction entered on or after the date of enactment." So those reforms would plainly apply to a defendant who is tried, convicted, and sentenced before Congress enacted the First Step Act, whose conviction is then vacated—also before the Act—and who is then retried after the Act. But on Amicus's view, the same defendant would not be eligible for Section 401's drug reforms—which contain identical language as Section 403(b)—because the "historical fact" of his first sentence would forever bar him from relief. Identical language enacted the same day as part of the same statute should not be read to

have such disparate effects. *See* States Br. 4-8 (discussing parallels between Sections 401 and 403).

Third, focusing on the historical fact of a prior sentence will knock Section 403 out of step with the Court's broader sentencing jurisprudence. Since at least the 1930s, the Court has consistently held that a vacated sentence "is a mere nullity without force or effect, as though no order at all had been made." *Miller*, 288 U.S. at 211. And the Court has interpreted all manner of sentencing statutes and constitutional provisions in accordance with that principle. *See id.* at 209-210 (court has jurisdiction to impose a new sentence where the previous sentencing order is void); *Pearce*, 395 U.S. at 720-721 (new sentence can be longer than the original one); *Pepper*, 562 U.S. at 484, 506-508 (previous sentence is not law of the case, and the court can consider evidence of post-conviction rehabilitation even though "the original sentencing" court "could not have considered that evidence" (citation omitted)). Interpreting "a sentence" to refer to "an immutable historical fact," Court-Appointed Br. 24, would require the Court to rethink that entire "sentencing framework." *Pepper*, 562 U.S. at 490. And it would offer nothing in return—courts will still have to conduct de novo sentencing proceedings for defendants whose previous sentences were vacated.

Contextual clues all cut against Amicus's view of the statute. The Court should avoid any interpretation that "makes a hash of the scheme Congress devised." *Pulsifer*, 601 U.S. at 149.[2]

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[2] For those who find it relevant, the legislative history supports this reading. The record is clear that Congress sought to "eliminate" stacking for first-time offenders and restore discretion to sentencing judges. Duffey Br. 39-40. The four "lead

III. THE RULE OF LENITY APPLIES AND SUPPORTS PETITIONERS' READING.

No ambiguity is required for the rule of lenity to apply. *Contra* Court-Appointed Br. 48. Although the Court has often applied the rule of lenity to resolve ambiguities in criminal statues, that is not the only occasion for its use. The rule of lenity also prohibits courts from giving criminal statutes "a meaning that is different from [the] ordinary, accepted meaning, and that disfavors the defendant." *Burrage*, 571 U.S. at 216; *see* Duffey Br. 42-44. The rule of lenity does not depend on the text being ambiguous. *See, e.g.*, *Burrage*, 571 U.S. at 206-219 (making no mention of ambiguity). Here, "traditional background principles against which Congress legislates" suggest that the "ordinary, accepted meaning" of Section 403(b) favors defendants. *Id*. at 214, 216 (brackets, quotation marks, and citation omitted). Therefore, "the rule of lenity" requires courts to respect Congress's choice of "language that imports" a pro-defendant background rule. *Id*.[3]

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drafters" said so. Senators Br. 1. Amicus's contrary argument rests on a single out-of-context statement, read into the record by Senator Cardin, quoting a press release on the ACLU's letter to Congress noting that the Act "falls short" of "the meaningful change that is required to truly reform the system" because "[s]everal sentencing provisions don't apply to individuals currently incarcerated." 164 Cong. Rec. S7775 (2018); *see* ACLU Letter (Dec. 2018), https://tinyurl.com/4hyd54a3. The ACLU was merely criticizing Congress for "rejecting *full* retroactivity," ACLU Br. 23 (emphasis added), by eliminating language in previous drafts that would have extended Section 403's reforms to "past cases," too.

[3] To the extent the Court must look for ambiguity in order to apply the rule, there is no requirement that the ambiguity be

The Court has also already foreclosed Amicus's argument that the rule of lenity applies "only to interpretations of the substantive ambit of criminal prohibitions." *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980). The rule, the Court has made clear, applies "to the penalties," too. *Id.*; *see also Bell* v. *United States*, 349 U.S. 81, 83 (1955) (rule of lenity "resolve[s] doubts in the enforcement of a penal code against the imposition of a harsher punishment"); *Ladner* v. *United States*, 358 U.S. 169, 178 (1958) (rule of lenity applies to statutory ambiguities that would "increase the penalty * * * place[d] on an individual"); *see also* ACLU Br. 28-29 (collecting additional, similar cases). The rule of lenity has the same force in construing a statute that increases the punishment for specified conduct as it does in construing whether the statute reaches that conduct at all.

IV. THE GENERAL SAVINGS STATUTE DOES NOT APPLY.

Amicus's final affirmative argument (at 39-40) is that Congress did not displace the savings statute, 1 U.S.C. § 109, when it enacted Section 403. But that provision cannot save Amicus's argument because it

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intractable. *Contra* Court-Appointed Br. 48. While the Court has occasionally suggested that lenity is reserved only for "*grievous* ambiguity" in criminal statutes, *see Ocasio* v. *United States*, 578 U.S. 282, 295 n.8 (2016) (emphasis added and citation omitted), the Court has—just as often—explained that the rule of lenity applies when there is "*any* ambiguity" in a criminal statute, *Scheidler* v. *Nat'l Org. for Women, Inc.*, 537 U.S. 393, 408-409 (2003) (emphasis added and citation omitted). Moreover, because the "grievous ambiguity" formulation "does not derive from any well-considered theory about lenity or the mainstream of this Court's opinions," *Wooden* v. *United States*, 595 U.S. 360, 392 (2022) (Gorsuch, J., concurring in the judgment), it should not be read as creating a heightened standard for the rule's application.

does not espouse any "countervailing background principle." *Contra* Court-Appointed Br. 39. Congress enacted Section 109 to reverse the common-law presumption that new criminal laws apply to all pending cases, even if the offense was committed before the law was changed. *See* Duffey Br. 44-45. Congress said nothing in that Section—not a peep—about departing from the ancient rule that vacated orders have no effect. Section 109 and the vacatur principle are thus two parallel background rules that Congress is presumed to legislate against.

Even Amicus does not deny that Congress clearly abrogated Section 109's presumption when it said that Section 403's reforms "shall apply" to a defendant who committed the crime "before the date of enactment of this Act" and whose sentence "has not been imposed as of" that date. *See* Court-Appointed Br. 40 (agreeing that Section 403 applies "to at least some prior offenders" (quoting U.S. Br. 24)); Duffey Br. 46. The question here is whether that text includes defendants like Petitioners, whose pre-Act sentences were later vacated. The answer—informed by the background vacatur principle and the full statutory context—is yes. *See, e.g.*, *State* v. *Waxler*, 69 N.E.3d 1132, 1138-39 (Ohio Ct. App. 2016) (applying a similar ameliorative law on resentencing despite a state savings statute "[b]ecause defendant's sentences were vacated" and thus "no penalty for the offenses at issue had been imposed" (quotation marks and citation omitted)); *see also* Duffey Br. 46-47 (collecting other examples).

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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