Nos. 23-1002, 23-1150

In the Supreme Court of the United States

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

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

REPLY BRIEF FOR PETITIONER TONY R. HEWITT

EUGENE R. FIDELL
Yale Law School Supreme Court Clinic
127 Wall Street
New Haven, CT 06511

CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006

RUSSELL WILSON II
Russell Wilson Law
1910 Pacific Avenue
Dallas, TX 75201

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
SARAH P. HOGARTH
ANDREW A. LYONS-BERG
CHARLES SEIDELL
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
mkimberly@mwe.com

Counsel for Petitioner Tony R. Hewitt

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Cases—continued

Statutes

Other Authorities

Other Authorities—continued

INTRODUCTION

The brief of the Court-appointed amicus—like the opinions of the Fifth, Sixth, and Eleventh Circuits—approaches the question presented like a logic puzzle. It identifies various dictionary definitions and obscure rules of grammar and addresses them one after the other, as though each were a predefined step in some inflexible script for interpreting statutes. It takes this approach without a single thought for the backdrop that gives the text its full meaning—the linguistic context, legal background, and legislative purpose—twisting the law's words to accomplish the precise opposite of what everyone acknowledges was Congress's objective.

That is not textualism, but literalism. It is not how ordinary English speakers approach language or how courts are supposed to approach statutory construction. As Justice Scalia famously put it, a "good textualist is not a literalist." *A Matter of Interpretation* 24 (1997).

Textualism is a commitment to the idea that "the best evidence of Congress's intent is the statutory text" (*NFIB* v. *Sebelius*, 567 U.S. 519, 544 (2012)) read through the eyes of "an ordinary speaker of English" (*Comcast Corp.* v. *NAAAOM*, 589 U.S. 327, 333 (2020))—or at least an "ordinary lawyer" (A. Barrett, *Congressional Insiders and Outsiders*, 84 U. Chi. L. Rev. 2193, 2209-2210 (2017)). It does not ask whether "etymologically it is possible" to read a statute in a particular way through the eyes of an expert grammarian dissecting sentence structures and verb tenses; it asks only what the statute means in "everyday speech" given the background, context, purpose, and "phraseology of the statute." *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) (Holmes, J.).

These distinctions are essential. Too easily can a statute be "eviscerated by [a] wooden and literal reading" proffered by a "balky" judge aiming to thwart "a legislature which ha[s] only words" to work with.

K. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395, 400 (1950). That possibility is on clear display here: The lower courts aligned with amicus each expressly eschewed consideration of background legal principles and the statute's acknowledged aims. They fixated instead on a hyper-technical reading that sliced and diced the statute's text in ways that no ordinary English speaker would (and that in any event are wrong), in the end *frustrating* Congress's purpose rather than effectuating it.

Amicus repeats their errors, characterizing anything other than grammar rules and dictionary definitions as "atextual" or "extratextual" considerations, beyond the Court's ken. His brief thus avoids rather than addresses the context, background, and purpose of section 403(b). But the Court cannot blinder itself to these factors. "[T]extualism isn't a mechanical exercise, but rather one involving a sophisticated understanding of language as it's actually used in context." A. Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 Case W. Res. L. Rev. 855, 859 (2020).

All three opening briefs offer an interpretation of section 403(b) that comports not only with relevant dictionary definitions and rules of grammar, but also with the long-settled legal principles against which Congress acted, the full statutory context of the First Step Act, and the undisputed purpose of the statute. They accordingly offer an answer to the question presented based not just on what is etymologically possible, but on the way in which an ordinary English speaker would approach the issue. The Court must do the same—and it must therefore reverse the court of appeals.

A. A "sentence" under Section 403(b) does not include a vacated sentence

At its core, the question presented here is whether Congress intended "a sentence" within the meaning of section 403(b) to include a sentence that has been vacated. As we showed in our opening brief (at 17-24), the answer is no. Amicus's first rejoinder, that background legal principles cannot override statutory text (Br. 29-31), misses the point. His second rejoinder, that there is no background principle that treats vacated sentences as void *ab initio* (Br. 31-39), is simply wrong.

1. Textualism requires considering background legal principles

a. It is fundamental that "language has meaning only in context." *Graham County Soil & Water Conservation District* v. *U.S. ex rel. Wilson*, 559 U.S. 280, 289 (2010). "Interpretation of a word or phrase [thus] depends upon" not just dictionaries and grammar guides, but "the whole statutory text, considering the purpose and context of the statute." *Dolan* v. *Postal Service*, 546 U.S. 481, 486 (2006). Accord A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012) (explaining that "words are given meaning by their context") (hereinafter *Reading Law*).

Context is a broad concept, embracing not just the "linguistic context" of the words themselves, but also "historical and governmental contexts." *Biden* v. *Nebraska*, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) (quoting F. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 Harv. L. Rev. 1876, 1913 (1999)). "Background legal conventions, for instance, are part of the statute's context." *Ibid.* "Even the strictest modern textualists" recognize "that the literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the

literal meaning of language and, in particular, of legal language." J. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2392-2393 (2003).[1]

This is all simply to say that "[t]he notion that some things 'go without saying' applies to legislation just as it does to everyday life." *Biden*, 143 S. Ct. at 2378 (Barrett, J., concurring) (quoting *Bond* v. *United States*, 572 U.S. 844, 857 (2014)). Due attention to the "unexpressed presumptions" that Congress is understood to incorporate into its enactments is therefore "[p]art of a fair reading of statutory text" itself. *Bond*, 572 U.S. at 857.

It follows that, to determine what Congress meant by "sentence"—a legal term peculiar to criminal proceedings—the Court must consider the background legal principles and conventions that give the word its meaning. And as we address further below, one of those settled conventions is that a vacated sentence is no sentence at all; it is a legal nullity *ab initio*.

b. Amicus asserts (at 29) that the backdrop of legal conventions against which Congress acts is an "atextual consideration." As he sees it (*ibid.*), we have turned to the doctrine of vacatur to "overcome" the text rather than to inform its interpretation. That is incorrect, and the cases that he cites do not suggest otherwise.

---

[1] To be sure, a presumption that Congress intends its enactments to incorporate background legal principles may suggest that courts "should interpret statutes through the eyes of an ordinary lawyer rather than an ordinary person." Barrett, *Insiders and Outsiders*, *supra* at 2210. This merely "employ[s] the perspective of the intermediaries on whom ordinary people rely" and is not "inconsistent" with textualism. *Id.* at 2209-2210. Accord J. Manning, *What Divides Textualists from Purposivists?*, 106 Colum. L. Rev. 70, 81 (2006) ("[W]ithin the realm of legal parlance, * * * textualism's premise requires that interpreters consider specialized conventions and linguistic practices peculiar to the law.").

In *Corner Post* v. *Federal Reserve*, the Court held that interpretation of 28 U.S.C. § 2401(a) was not controlled by "congressional intent divined from *other* statutes with very different language." 603 U.S. 799, 815 (2024). We have not made that kind of argument. As to the argument that we *have* made, *Corner Post* lends strong support. The Court there explained that the word "'accrue' had a well-settled meaning" according to a background principle that a claim must come into existence before a limitations period begins to run. *Id.* at 810. "This traditional rule," the Court went on, "constitutes a strong background presumption" against which Congress acted. *Id.* at 811. Because "Congress has [not] told us otherwise," that background rule dictated the meaning of the operative word. *Ibid.* Just so here.

MOAC Mall Holdings v. *Transform Holdco* sheds no meaningful light on the issue here because it involved the question whether 11 U.S.C. § 363(m) is a jurisdictional provision. The Court has held repeatedly that to treat a precondition to relief as a jurisdictional rule requires a clear statement. 598 U.S. 288, 298 (2023). Because a default background principle works tacitly, it cannot, by itself, "indicat[e] a clear statement of jurisdictional intent." *Id.* at 302.

The Court's decision in *Honeycutt* v. *United States* also is inapposite. Unlike here, Congress there gave express textual indications that it "did not [intend to] incorporate [the cited] background principles." 581 U.S. 443, 453 (2017). There is no express disavowal here.

Finally, *Mississippi ex rel. Hood* v. *AU Optronics* confirmed that courts should "infer Congress' intent to incorporate a background principle into a new statute where the principle has previously been applied in a similar manner." 571 U.S. 161, 175 (2014). The Court there declined to apply that rule only because the respondents urged an

outcome that was "quite different" from the background principle they invoked. *Ibid*. No so here.

c. Amicus asserts (at 39-41) that any "background principle that vacatur prohibits courts from looking at the historical fact of a sentence's imposition" is overridden by the "countervailing background principle" codified by the Federal Saving Statute. Not so.

The Federal Saving Statute specifies that repeals of criminal laws do not apply retroactively to pre-enactment conduct "unless the repealing Act shall so expressly provide." 1 U.S.C. § 109. Here, section 403(b) *does* expressly so provide, and the question is the meaning and scope of that provision. That is not an issue on which the Saving Statute sheds light.

In contending otherwise, amicus appears to take the position that, in addition to establishing a default rule against retroactive application of repeals, the Federal Saving Statute also creates a rule of statutory construction requiring express provisions calling for retroactive application to be construed narrowly. That is not what the statute says; in fact, the Court said in *Dorsey v. United States* that the Saving Statute does not bar retroactive application if the repeal statute "either expressly says *or at least by fair implication implies* the contrary." 567 U.S. 260, 273 (2012) (emphasis added). Thus, a fair implication is all that is needed to displace the Saving Statute's default rule. Here, there is that and more.

2. Vacatur wipes the slate clean, as though the sentence never existed

Amicus asserts (at 31-33) that there is no settled background principle that vacatur renders a sentence void from the start. He is wrong.

a. As we showed in our opening brief (at 18-20 & n.2) the law has been settled since before the Founding that a vacated order is ordinarily treated as though it was never

entered in the first place. As the Court has said, "vacating the former judgment * * * render[s] it null and void, and the parties are left in the same situation as if no trial had ever taken place in the cause." *United States* v. *Ayres*, 76 U.S. (9 Wall.) 608, 610 (1869).

Along with the judgment itself, the law treats the proceeding that produced the judgment as though it never happened. This general rule is why (for example) a new trial following a vacated conviction does not violate double jeopardy—the vacatur "effectively erases from history the fact of the jury's empanelment in the original trial" (Hewitt Br. 20), for "the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." *North Carolina* v. *Pearce*, 325 U.S. 711, 721 (1969) (citing *United States* v. *Ball*, 163 U.S. 662 (1896)). This Court has made clear the same is true of sentencing proceedings. When an appellate court "set[s] aside [a defendant's] entire sentence and remand[s] for a *de novo* resentencing," all legal effect from the original sentencing proceeding is nullified, "effectively wip[ing] the slate clean." *Pepper* v. *United States*, 562 U.S. 476, 507 (2011).

Amicus dismisses (at 39) *Pepper*'s clean slate language as a mere "figure of speech." Figure of speech or not, it is the holding of the Court. The defendant in *Pepper* argued that the trial judge's initial decision to grant a downward departure was "law of the case" despite that his sentence had been vacated on unrelated grounds. 562 U.S. at 507. The Court rejected that argument *because* the vacatur order "wiped the slate clean," erasing the prior rulings from the historical record. *Ibid.*

b. According to amicus (at 31), criminal sentencings are exempt from this time-tested understanding of a vacatur's effect. Rather than treating a vacated sentence as though it was never imposed, he insists, "Congress has in fact required the opposite" in the Sentencing Reform Act.

We explained in our opening brief (at 23-24) why the Sentencing Reform Act—which instructs district courts to apply the Sentencing 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))—is irrelevant here. Amicus talks past this point without response.

Beyond that, amicus asserts (at 32) that Congress showed in sections 921(a)(20) that when it means to limit the effect of vacated judgments, it says so expressly. But section 921(a)(20)—which specifies what "constitutes a conviction" for certain violent felonies—does not use the words "vacate" or "vacatur." It instead carves out convictions that have been "expunged" or "set aside," or "for which a person has been pardoned or has had civil rights restored." Those carveouts are more inclusive than judicial vacatur and thus require enumeration.

Moreover, Congress elected with section 921 to provide an express definition of "conviction" that incorporates state law. 18 U.S.C. § 921(a)(20)(B). It thus makes sense that Congress would take care to specify express federal exceptions to possibly conflicting state-law doctrine. Here, Congress did not provide a general, state-law definition of "a sentence" from which enumerated federal exceptions were required.

c. Amicus lists (at 33) several examples supposedly where "[t]he historical fact of a vacated order * * * remains legally relevant to the application of a statute." Those examples do not hold up.

Amicus cites (at 33-35) two statutes under which a prior conviction is an element of the offense. But the question whether convictions under felon-in-possession and failure-to-register laws must be vacated when the defendant's predicate conviction is vacated is an open one in this Court, so it's hard to see what relevance those provisions have. We note, however, that a defendant who received an

enhanced sentence under the ACCA may petition to have the sentence corrected if a predicate conviction is later vacated. See *Johnson* v. *United States*, 544 U.S. 295, 303-304 (2005). The rationale for this rule is "not controversial": "When a state court 'vacates' a prior conviction, it, in effect, nullifies that conviction; it is as if that conviction no longer exists." *United States* v. *Sanders*, 909 F.3d 895, 902 (7th Cir. 2018).

The same goes for amicus's reference (at 35) to the immigration laws. True, some courts have held that a conviction vacated "because the defendant had rehabilitated himself or suffered some hardship" may still be considered under the Illegal Immigration Reform and Immigrant Responsibility Act. *United States* v. *Mitchell*, 38 F.4th 382, 393 (3d Cir. 2022) (Bibas, J., concurring). But the opinion of the Board of Immigration Appeals on that point historically has been granted *Chevron* deference, so the question whether it is correct has not been explored independently by the lower courts or resolved by this Court. And even under IIRIRA, "if a conviction is legally defective" on its merits, "it is void from the start" and "no longer counts as a conviction for immigration purposes." *Mitchell*, 38 F.4th at 393 (Bibas, J., concurring).

Amicus's citation to fraud (at 35) is also unhelpful. When someone lies about a past conviction, the statement is not made retroactively truthful by a later vacatur. What makes a lie untruthful are the facts at the time of the speaking. And an offense is committed when it is completed. *Toussie* v. *United States*, 397 U.S. 112, 115 (1970).

Finally, amicus points (at 33-34) to *Bravo-Fernandez* v. *United States*, but that case supports our position. The Court there confirmed that courts cannot "give[] effect to [a] vacated judgment," which is why retrial following vacatur does not "offend[] double jeopardy principles." 580 U.S. 5, 18 (2016). At the same time, this Court has said that when a verdict is vacated for lack of sufficient

evidence, retrial is not permissible because an appellate determination that "the evidence [was] insufficient to convict is equivalent to an acquittal." *Id.* at 20. That general rule does not give the original verdict continuing effect; on the contrary, it calls for entry of a *new* judgment of dismissal because the government lacks sufficient evidence to sustain a retrial. *Ibid.* The question in *Bravo-Fernandez* was only whether the petitioners there were entitled to such relief. The Court's answer (no) does not call into question the general rule that a vacatur eliminates the legal effect *ab initio* of a prior judgment.

In all events, these strained examples are at most narrow exceptions that prove the rule. A background legal principle does not have to be perfectly exceptionless for the text of a statute presumptively to incorporate it.

B. The surrounding text confirms our reading

The text surrounding "sentence" confirms our interpretation. When amicus asserts (at 2) that we "seek to rewrite" the text "in multiple ways," he has it backward.

1. Congress's uses of the present-perfect tense and "as of" indicate an ongoing condition

a. We explained in the opening brief (at 25-28) that Congress's decision in section 403(b) to use the present-perfect tense ("has not been") indicates that it was concerned with the imposition of a sentencing "beginning in the past and extending up to now." R. Huddleston & G. Pullum, *The Cambridge Grammar of the English Language* 143 (2002). If Congress had intended to focus only with the historical fact that a sentence was imposed at a singular point in time prior to the FSA's enactment, it would have used the past-perfect tense ("had been imposed") or simple past tense ("was imposed") with a preposition like "before" or "prior to."

Perhaps the most striking support for this point is that amicus alters the text in precisely these ways to make

his position grammatical. For instance, on page 16 of his brief, he explains (emphasis ours) that "[p]etitioners indisputably *had been* sentenced for the offenses at issue (twice) *before* the First Step Act took effect." The lower courts aligned with the amicus have done the same. See, *e.g.*, Pet. App. 11a (denying relief because "[a]ppellants' offenses *had been* imposed upon them *prior to* the * * * enactment date") (emphasis added); *United States* v. *Uriarte*, 975 F.3d 596, 610 (7th Cir. 2020) (Barrett, J., dissenting) ("Here, Congress picked a line: the applicability of the First Step Act turns on whether a sentence *had been* imposed on the defendant *before* the date of enactment.") (emphasis added).

The distinction is especially notable because, as we observed in the in our opening brief (at 29-30), Congress elsewhere in the FSA conditioned relief on the historical fact of past pronouncement of a sentence by using the past tense. See FSA § 404(c) ("[n]o court shall entertain a motion made under this section to reduce a sentence if the sentence *was previously imposed or previously reduced*" under certain circumstances) (emphasis added). Again ignoring context, amicus gives no response.

b. Amicus insists that his position does not require revising the tense and preposition that Congress chose, but his efforts are not persuasive.

First, amicus characterizes (24-25) the present-perfect tense as describing a "condition that is *either* now completed *or* continues to the present," asserting that the former is "the more logical application" here. But that is a distinction without a relevant difference: both meanings concern the "now" or the "present." Rather than describing a "historical fact" (*id.* at 24) that was completed at a definite point in the past, the present-perfect tense describes a "combin[ation] [of] past and present" (*Cambridge Grammar* 142) under either meaning.

And amicus does himself no good to suggest (at 25) that section 403(b) describes a sentence "as having been completed at some indefinite time in the past" because the crux of his argument is that a sentence was imposed at a definite "fixed point in time" in the past. *Ibid.*

Second, amicus says (at 25) that "Congress pegged the inquiry" to whether a sentence has been imposed "as of the Act's date of enactment," which is in the past.

We do not disagree. Out position is simply that the combination of the present-perfect tense with "as of" must be taken to ask *not only* whether the sentence was pronounced at a fixed time prior to the FSA's enactment, *but also* whether it remains imposed *now*, at the time of reading the statute.

Third, amicus—quoting from *United States v. Hernandez*, 107 F.4th 965, 970 (11th Cir. 2024)—says (at 26) that using the past-perfect would have made a "syntactical hash" of the statute. But to reach that conclusion, the Eleventh Circuit assumed that a statute is read from the drafters' perspective at the time of enactment, allowing the court to "paraphrase" section 403(b) as saying "as of today" rather than "as of [the] date of enactment." 107 F.4th at 970. And it would make no sense to say that "a sentence *had* been imposed *as of today*." *Ibid.* (emphasis added).

That argument rests on a clear error of construction. Congress drafts laws to "speak at the time of reading" and not "at the time of their adoption." Hewitt Br. 27 n.3 (quoting *Carr* v. *United States*, 560 U.S. 438, 464 (2010) (Alito, J., dissenting)). The House Legislative Counsel's Manual on Drafting Style states this expressly: A statute is to be written so that it "speaks as of whatever time it is being read (rather than as of when drafted, enacted, or put into effect)." HLC No. 104–1, § 102(c), p. 2 (1995). The question posed by section 403(b), therefore, is whether at

the time of the *reading* of the statute—that is, at the time of a resentencing—a sentence "has been" imposed "as of [the] date of enactment."

From that perspective, using the past-perfect would have been the only way to reach the Fifth Circuit's result in this case. The past-perfect refers to a past action that occurred anterior to a more recent past action. See generally *Cambridge Grammar* 139-142. Thus, if the question were whether, at the time of resentencing, some past event (the pronouncement of a sentence) *had* taken place before some other past event (the enactment of the FSA), the past-perfect tense would be the only appropriate tense to use. That, of course, is not the tense that Congress selected. And the only logical way to understand its use of the present-perfect, instead, is that it intended to ask whether a sentence was imposed prior to the FSA's enactment *and* remains imposed now.

c. Amicus's reliance (at 28-29) on *Lewis* v. *United States* is bewildering. The Court there addressed whether an "*extant* prior conviction * * * may constitute the predicate for a subsequent conviction" when the defendant has not yet obtained a vacatur but contends the conviction was unlawful. 445 U.S. 55, 56 (1980). The Court held not. In doing so, it expressly distinguished the facts presented there from a case (like this one) in which a conviction has actually been reversed or vacated and "thus no longer [is] outstanding." *Id.* at 61 n.5. As to *that* scenario, the Court readily "reject[ed]" the notion that a vacated conviction could be used as a predicate, characterizing as "extreme" any argument to the contrary. *Ibid.*

2. The words "imposed" and "a" do not counsel a different result

a. Against all this, amicus leans (at 21-24) on the word "imposed." As he sees it, when Congress said that section 403(a) shall apply "if a sentence for the offense

has not been imposed as of" December 21, 2018 (FSA § 403(b)), it actually meant "if a sentence was not *pronounced* before" that date. But we explained in our opening brief (at 28-29) that "imposed" has two possible meanings, one of which refers to an ongoing condition: A sentence remains imposed until it is vacated. Section 403(b)'s use of the present-perfect and "as of" indicate unambiguously that Congress intended the "ongoing condition" version of the word.

Amicus talks past this argument, citing other statutes and cases in which "impose" has been interpreted to refer to a singular past event. None of that responds to our point that the unique context of section 403(b)—including the "phraseology" (*McBoyle*, 283 U.S. at 27) and "purpose" (*Reading Law* 56) of the statute—compel a different outcome here.

Amicus's only other attempt at a response is to say (at 22) that Congress could not have meant an ongoing condition because it did not use an "'imposed on' structure." But the "on" preposition is neither necessary nor sufficient to indicate the ongoing-condition meaning of the word. The version that Congress intended (singular event or ongoing condition) therefore must be determined "by context." *Deal* v. *United States*, 508 U.S. 129, 131-132 (1993). Amicus's preferred interpretation requires the Court to read "imposed" in a vacuum.

b. Amicus contends (at 17-18) that Congress's use of the indefinite article ("a") must be taken as a reference to "any sentence that has been imposed for the offense, even one that was subsequently vacated."

There are two problems with that position. To begin with, it ignores our argument concerning vacatur and the background principle against which Congress acted. Again, Congress would not have understood "a sentence" to include a vacated sentence, because a vacated sentence

is no sentence at all. If Congress had wanted to override that ancient background principle, it would have said so expressly. It did not.

That aside, amicus is wrong that "a" and "any" are synonymous. "As this Court has repeatedly explained, the word 'any' has an expansive meaning," indicating "one or some indiscriminately of whatever kind." *Patel* v. *Garland*, 596 U.S. 328, 338 (2022) (cleaned up). The term "any" thus "leaves no doubt as to the congressional intention to include all" members of the category identified, without any limitation. *United States* v. *Rosenwasser*, 323 U.S. 360, 363 (1945).

As amicus acknowledges (at 17), the indefinite article "a" simply "means 'some undetermined or unspecified particular.'" *McFadden* v. *United States*, 576 U.S. 186, 191 (2015). Congress's use of the indefinite article before "sentence" thus indicates only that it was referring to a non-specific, rather than a particular, sentence. If *the* original sentence had been vacated, but *a* new and valid sentence "has been imposed as of" the enactment date, relief would be unavailable. That is a different meaning from "any," which is why Congress does not vacillate between "a" and "any" willy nilly, as though the two were perfectly interchangeable. Amicus thus once again proposes to rewrite the statute.

C. All remaining considerations support reversal

We have shown that amicus's position is inconsistent with long settled background principles and requires rewriting the statute in at least two ways. That is more than enough for reversal. But there is more.

1. Our reading is the only one consistent with the FSA's undisputed purpose

a. To start, amicus's position creates nonsensical results that are directly counter to the undisputed purpose of section 403.

No one disputes that one of Congress's prime objectives with the FSA was to ensure that sentence stacking stopped on the date of enactment. It thus included section 403(b) to make clear that the act's sentencing reforms would apply not just to all crimes *committed* after the date of enactment, but to all crimes *sentenced* after that date.

There is no logical reason Congress would have intended to forbid sentence stacking for plenary *sentencings* taking place after enactment, while preserving the practice for plenary *re*sentencings. All textual evidence is that Congress meant to draw the line at finality: The FSA does not authorize reopening final criminal judgments that imposed stacked sentences. Balancing fairness against finality, it instead bars only the imposition of *new* stacked sentences in post-enactment plenary proceedings. As a matter of common sense, that includes *de novo* resentencings just as well as initial sentencings. See Hewitt Br. 31-35; ACLU et al. Br. 23-26.

Amicus denies finality is the principle that Congress used to draw the line between relief and no relief. But he offers no alternative line-drawing principle that Congress would have chosen instead. He does suggest (at 46) that Congress was concerned with administrability and notes that his rule "can be easily applied." But that is equally true of our rule—it is hardly a challenge to determine whether a plenary resentencing takes place after the date of the FSA's enactment.

Beyond that, amicus asserts that our reading of section 403(b) "would invite unfairness." But arbitrary differences in sentencing decisions are an inevitable result of any law that changes sentencing rules. See *Dorsey*, 567 U.S. at 280 (some degree of unfairness "will exist whenever Congress enacts a new law changing sentences"). The focus of "modern sentencing statutes" is fairness in "roughly contemporaneous sentencing." *Id.* at 277. Amicus, for his part, highlights different treatment

between those sentenced at *different times*: Under our rule, any sentence imposed prior to December 21, 2018, may be stacked, whereas any imposed afterward may not be. Amicus's rule, in contrast, produces disparities among those sentenced at "the same time, the same place, and even by the same judge" for the same or similar offense conduct. *Ibid.* That is the "kind of unfairness" that Congress is presumed to avoid. *Ibid.*[2, 3]

Reading section 403(b) to apply the FSA's reforms at all plenary post-enactment sentencing and resentencings is by far the more sensible of the two proposed approaches. See Hewitt Br. 31; Gov. Br. 23-25; Duffey Br. 36. The Senators' amicus brief confirms our argument on this score. It explains (at 15) that "[t]he purpose of the First Step Act was to enact comprehensive, ameliorative reforms to the overly harsh mandatory minimum sentencing schemes." But Congress "balanced this retroactive purpose with an interest in preserving sentences that were actually valid and final." *Ibid.* Petitioners' reading of section 403(b) "best fulfills [the FSA]'s statutory objectives" so understood. *Brown* v. *United States*, 602 U.S. 101, 113 (2024).

b. Unable to offer an account of *why* Congress would have intended his proposed reading, amicus characterizes (at 44-47) any attention to Congress's "purpose" or

---

[2] Amicus asserts (at 46) that our rule would "illogically" favor a defendant who delayed his district court or appellate proceedings to obtain a post-enactment vacatur. But the same is true of amicus's rule, which would reward the delay tactics of defendants waiting for initial sentencings in the months before the FSA's adoption.

[3] Amicus is wrong that only defendants engaged in "*more* dangerous behavior" get the benefit of our rule. Br. 47. For example, after *United States* v. *Taylor*, 596 U.S. 845 (2015), offenders who only attempted a Hobbs Act Robbery are entitled to resentencing, while those who completed their crimes are not.

"objective" as an impermissible, atextual "policy concern." That is wrong.

Again, a court construing a statute must always "interpret the relevant words not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'" *Abramski* v. *United States*, 573 U.S. 169, 179 (2014) (quoting *Maracich* v. *Spears*, 570 U.S. 48, 76 (2013)). Authorities sometimes refer to these considerations together as the complete "context" of the statute. *E.g.*, *Biden*, 143 S. Ct. at 2378 (Barrett, J., concurring) (citing Easterbrook, *Speluncean Explorers*, *supra* at 1913). In that sense, "context includes the purpose of the text." *Harrington* v. *Purdue Pharma*, 144 S. Ct. 2071, 2110 (2024) (Kavanaugh, J., joined by Roberts, C.J.; Sotomayor, J.; and Kagan, J., dissenting) (quoting *Reading Law* 56). Accord *Reading Law* 63 ("interpretation always depends on context" and "context always includes evident purpose").

To say so is not to make "textualist interpretation" synonymous with "purposive interpretation." *Reading Law* 56. Rather, it is simply to acknowledge that part of the context that gives meaning to statutory language is the purpose for which it was adopted—at least as long as "the purpose [can be] derived from the text." *Ibid.*

As we have said, the text here reveals a single, clear purpose: to ensure that no new stacked sentences would be imposed after the date of the FSA's enactment. Section 403(b) best effectuates that purpose when it is interpreted to provide that the FSA's sentencing reforms apply to *all* plenary sentencings after that date, no matter whether it is a plenary initial sentencing or a plenary resentencing.

In making this argument, we do not ask the Court to "override" the text of the statute. See Amicus Br. 44. Our point is only that if the Court concludes that there are two

theoretically possible readings of the relevant statutory phrase, and the first effectuates the evident purpose of the provision while the second flatly contradicts it, the Court should conclude that the "single, best meaning" (*Loper Bright Enterprises* v. *Raimondo*, 144 S. Ct. 2244, 2266 (2024)) is the first one. In other words, "[f]aced with a choice between two [alternative] readings," the Court ought "to adopt the interpretation that makes the most sense" in light of Congress's clear objective. *Johnson* v. *United States*, 529 U.S. 694, 714 (2000) (Kennedy, J., concurring).

To contend otherwise is to say that the Court must use grammar rules to override Congress's intent with section 403(b), interpreting it to achieve the opposite of Congress's clear purpose. That is not the law. And it is telling how strongly amicus pushes back on that point.

2. The rule of lenity forecloses amicus's interpretation

If there is any doubt about Section 403(b)'s meaning, the rule of lenity breaks the tie for petitioners. Amicus's policy reasons why the rule of lenity should not apply in the context of the "retroactivity of a sentencing provision" (Br. 48) do not support a different conclusion.

As a starting point, this Court has already held that the rule of lenity applies "not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980) (collecting cases)); *United States* v. *Granderson*, 511 U.S. 39, 42-43 (1994) (applying lenity to resentencing after probation revocation). We described this precedent in our opening brief (at 35, 37), but amicus nowhere addresses these cases or explains why they should be overruled.

Anyway, the two policy rationales amicus offers are unpersuasive on their own terms.

First, amicus contends (Br. 48-49) that there are no "fair warning" concerns that lenity would fulfill in this context. But fair warning is just one of the several reasons why the rule of lenity exists. See *Pulsifer* v. *United States*, 601 U.S. 124, 185 (2024) (Gorsuch, J., dissenting). Those weighty interests include the "presumption of individual liberty," ensuring that "only the people's elected representatives, not their judges, are vested with the power to 'define a crime, and ordain its punishment,'" and "guarding against the possibility that judges might condemn unpopular individuals to punishment" based on their own views of "good public policy" or "no more than a guess as to what Congress intended." *Id.* at 755-756. All of those considerations have powerful force here.

Second, amicus suggests (at 49) that the rule of lenity does not apply here because the Federal Saving Statute overrides it. That simply is not so. That statute creates a default rule against retroactive application of defendant-favorable repeals of criminal laws. It does *not* create a canon requiring narrow constructions of express statutory exceptions to the default rule. See *supra*, at 6.

Petitioners here contend that section 403(b) applies to them; amicus contends that it does not. We believe our interpretation is correct as a matter of plain language, properly read in its full context. But if the Court concludes that section 403(b)'s text is ambiguous, the rule of lenity must break the interpretive logjam in petitioners' favor.

CONCLUSION

The court of appeals' judgment should be reversed and the case should be remanded for resentencing.

Respectfully submitted.

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511

CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street NW
Washington, DC 20006

RUSSELL WILSON II
Russell Wilson Law
1910 Pacific Avenue
Dallas, TX 75201

MICHAEL B. KIMBERLY
Counsel of Record
PAUL W. HUGHES
SARAH P. HOGARTH
ANDREW A. LYONS-BERG
CHARLES SEIDELL
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
mkimberly@mwe.com

Counsel for Petitioner Tony R. Hewitt