No. 23-____

IN THE
Supreme Court of the United States

COREY DEYON DUFFEY, JARVIS DUPREE ROSS,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented here is the same as that presented in *Hewitt* v. *United States*, No. 23-1002:

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 was also an appellant below; he has filed a separate petition for certiorari. *See Hewitt* v. *United States*, No. 23-1002 (U.S. Mar. 8, 2024).

The United States of America, respondent on review, was the appellee below.

RELATED PROCEEDINGS

U.S. Supreme Court:

- *Hewitt* v. *United States*, No. 23-1002 (Mar. 8, 2024) (petition for writ of certiorari filed)

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. *Duffey*, No. 3:08-cr-00167-B (Mar. 29, 2022) (Ross judgment on resentencing)
- *United States* v. *Duffey*, No. 3:08-cr-00167-B (Mar. 14, 2022) (Duffey judgment on resentencing)
- *United States* v. *Duffey*, No. 3:08-cr-00167-B (Nov. 2, 2021) (granting Ross's second 28 U.S.C. § 2255 motion)
- *United States* v. *Duffey*, No. 3:08-cr-00167-B (June 14, 2021) (granting Duffey's second 28 U.S.C. § 2255 motion)
- *United States* v. *Duffey*, No. 3:08-cr-00167-B (July 14, 2020) (denying Ross's motion to reduce sentence under the First Step Act of 2018)
- *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-023233-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) (Duffey amended judgment)
- *United States* v. *Duffey*, No. 3:08-cr-00167-B (Sept. 28, 2012) (Ross amended judgment)
- *United States* v. *Duffey*, No. 3:08-cr-00167-B- (Feb. 22, 2010) (Ross judgment)
- *United States* v. *Duffey*, No. 3:08-cr-00167-B (Feb. 3, 2010) (Duffey judgment)

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PETITION FOR A WRIT OF CERTIORARI

Corey Deyon Duffey and Jarvis Dupree Ross respectfully petition for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

OPINION BELOW

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

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.

INTRODUCTION

This case deepens an entrenched and acknowledged circuit split over an issue on which the government now agrees with Petitioners.

For years, defendants convicted of multiple counts under 18 U.S.C. § 924(c) 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 extraordinarily 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 of 2018 ended this practice. The upshot of this provision is that a defendant convicted of multiple section 924(c) convictions in one proceeding now faces a five-year—rather than a

25-year—mandatory minimum sentence on each of those offenses.

As the courts of appeals have acknowledged, there is a split over whether section 403's reforms apply to defendants who were originally sentenced before the First Step Act but who, due to the vacatur of their pre-Act sentences, are resentenced after the Act. The Third and the Ninth Circuits interpret the Act to provide that section 403's sentencing reforms apply at a pre-Act defendant's post-Act resentencing. *See United States* v. *Mitchell*, 38 F.4th 382, 385 (3d Cir. 2022); *United States* v. *Merrell*, 37 F.4th 571, 573 (9th Cir. 2022). The Fourth and Seventh Circuits have addressed similar questions and have indicated that they agree. *See United States* v. *Uriarte*, 975 F.3d 596, 602 (7th Cir. 2020) (en banc); *United States* v. *Bethea*, 841 F. App'x 544, 549 (4th Cir. 2021). In stark contrast, the Fifth and Sixth Circuits interpret section 403(b) to mean that section 403's reforms *do not* apply at a pre-Act defendant's post-Act resentencing. *See* Pet. App. 11a-12a; *United States* v. *Jackson*, 995 F.3d 522 (6th Cir. 2021).

The question presented has percolated long enough. In majority opinions, concurring opinions, and dissenting opinions, circuit judges have picked apart section 403's language, finding contrary meanings in its verb tense and its articles. They have debated the legal effect of vacatur, grappled with the statute's context, and weighed the statute's purpose. Few issues reach this Court after such thorough, well-considered analysis.

The time is now for this Court to restore uniformity to the courts of appeals on this important issue. The decision below is wrong. Every tool of statutory

interpretation makes clear that a defendant whose pre-Act sentence is vacated is entitled to section 403's reforms at his post-Act resentencing. The Fifth Circuit's contrary reading re-writes the statute, ignores bedrock legal principles, and gives legal effect to nullified sentences. And the Fifth Circuit's misreading of the statute had devastating consequences in this case: Congress did not call for the 105 years' of imprisonment that Petitioners will serve. The Court should grant the petition and reverse.

STATEMENT

A. Legal Background

Under 18 U.S.C. § 924(c), it is a federal crime to use, carry, or possess 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. *Id.* § 924(c)(1)(A)(i). Each subsequent conviction triggers a mandatory-minimum sentence of 25 years. *Id.* § 924(c)(1)(C). Sentences for multiple section 924(c) 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 enhanced sentence for subsequent convictions applied "[i]n the case of [the defendant's] second or subsequent conviction." 18 U.S.C. § 924(c)(1) (1998). This Court interpreted that provision to mean that a defendant convicted of multiple "§ 924(c) violations in a single prosecution face[s] a 25-year minimum for the second violation," and for the third, and for the fourth,

and so on. *United States* v. *Davis*, 139 S. Ct. 2319, 2324 n.1 (2019) (citing *Deal* v. *United States*, 508 U.S. 129, 132 (1993)). This interpretation often yielded extremely long prison sentences.

Congress legislatively overruled this Court's interpretation of section 924(c) in the First Step Act of 2018. Section 403 of the First Step Act amended section 924(c) "so that, going forward, only a second § 924(c) violation committed 'after a prior [§ 924(c)] conviction * * * has become final' will trigger the 25-year minimum" for subsequent section 924(c) convictions. *Davis*, 139 S. Ct. at 2324 n.1 (quoting First Step Act § 403(a)). Thus, a defendant convicted of multiple section 924(c) violations in one prosecution now faces a mandatory-minimum sentence of five years for each conviction—as opposed to a 25-year mandatory-minimum sentence on every conviction past the first.

Congress also chose to depart from default retroactivity principles in overruling this Court's interpretation of section 924(c). Section 403(b) expressly provides that its 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." First Step Act § 403(b).

B. Factual Background

1. In 2009, a jury convicted Petitioners and other defendants of various charges related to a series of bank robberies. *See United States* v. *Duffey*, 456 F. App'x 434, 436-438 (5th Cir. 2012). As relevant here, Petitioners were convicted of over a dozen section 924 counts. *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 id.* at 439; Duffey Judgment, N.D. Tex. Case No. 3:08-cr-00167-B, Dkt. No. 314 (Feb. 3, 2010).[1] The court sentenced Ross to a total of 330 years in prison, 305 years of which were similarly mandated by section 924(c). *See Duffey*, 456 F. App'x at 439; Ross Judgment, D. Ct. Dkt. No. 322 (Feb. 22, 2010).

On direct appeal, the Fifth Circuit reversed some of the convictions for insufficient evidence "and remanded to the district court for resentencing." Pet. App. 2a.

The district court resentenced Duffey to roughly 304 years' imprisonment, 280 years of which were the result of stacked section 924(c) sentences. *See* Duffey Am. Judgment, D. Ct. Dkt. No. 506 (Nov. 15, 2012). The court resentenced Ross to a little over 285 years in prison, 255 of which were required by section 924(c). *See* Ross Am. Judgment, D. Ct. Dkt. No. 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, the Fifth Circuit granted Petitioners' motions for leave to file successive 28 U.S.C. § 2255 motions in light of this Court's decision in *Davis*. *See* Pet. App. 3a-4a. *Davis* "held that conspiracy-predicated § 924(c) convictions do not qualify as 'crimes of violence.'" Pet. App. 3a (quoting *Davis*, 139 S. Ct. at 2336).

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[1] Unless otherwise stated, all subsequent references to "D. Ct. Dkt." refer to this docket.

The district court agreed with Petitioners that their section 924(c) convictions predicated on conspiracy to commit bank robbery were unlawful after *Davis*. Pet. App. 4a. The court accordingly vacated those six convictions, "vacated the sentences on all remaining convictions, and ordered resentencing." *Id.*

3. To take stock, Petitioners now faced resentencing on their five surviving section 924(c) convictions, as well as on their other convictions. Before their resentencing hearings, Petitioners 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. *Id.* Under section 403, Petitioners' five section 924(c) convictions would require cumulative minimum sentences of 25 years. The government opposed Petitioners' objections, arguing that section "403 did not apply because [Petitioners] were serving valid sentences at the time that the First Step Act was enacted on December 21, 2018." Pet. App. 4a.

The district court sided with the government. *See* Pet. App. 30a-31a, 62a. It accordingly resentenced Duffey to 105 years' imprisonment for his five section 924(c) counts, on top of another 25 years on his other counts. *See* Pet. App. 33a-54a. The court similarly resentenced Ross to 105 years' imprisonment for his section 924(c) counts, on top of another roughly 29 years on his other counts. *See* Pet. App. 66a-87a.

4. Petitioners appealed. The government, reversing course from its position before the district court, agreed on appeal with Petitioners' position that section 403 applies at resentencing proceedings taking place after the First Step Act's enactment. *See* Gov. Br. at 8, 5th Cir. Case No. 22-10265, Dkt. No. 85 (June

20, 2023) ("[T]he government * * * has now concluded that * * * the amended statutory penalties set forth in Section 403 apply at any sentencing on Section 924(c) counts that takes place after the Act's effective date."). Despite the parties' agreement that Petitioners' sentences should be vacated, the Fifth Circuit affirmed Petitioners' sentences. *See* Pet. App. 18a.

The Fifth Circuit first recognized that the question whether section 403 applies to "prior offenses for which a pre-Act sentence is later vacated" has "vexed[] and split[] our sister circuits." Pet. App. 6a (quoting *Mitchell*, 38 F. 4th at 386). The court counted the division of its sister circuits as having three courts on one side and only one court on the other: "On one side of the split," the Third, Fourth, and Ninth Circuits have held that section 403 applies in such circumstances, and "[o]n the other side, the Sixth Circuit has held that [it] does not." Pet. App. 6a-7a.

After consideration of both sides' arguments, the Fifth Circuit adopted the position on the short side of the split, balancing the previously lopsided division. *See* Pet. App. 7a. In the Fifth Circuit's view, 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 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. The court rejected that "the impact of sentence vacatur" has anything to do with section 403(b)'s meaning. Pet. App.

10a. The court accordingly 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. It therefore affirmed Petitioners' century-long sentences. Pet. App. 18a.

This petition follows.[2]

REASONS FOR GRANTING THE PETITION

The split is clear and indisputable, and has been recognized by multiple circuits. *See* Pet. App. 6a (noting that the interpretation of section 403 has "vexed[] and split[] our sister circuits" (quoting *Mitchell*, 38 F.4th at 386)); *see also United States* v. *Carpenter*, 80 F.4th 790, 796 (6th Cir. 2023) (Bloomekatz, J., dissenting from the denial of rehearing en banc) (noting that the Sixth Circuit's decision in *Jackson* "splits from all our sister circuits to have reached the question"). Given the considerable importance of the question presented, this confusion is intolerable. This Court should grant the petition and reverse.

I. THERE IS A CLEAR, ACKNOWLEDGED, AND ENTRENCHED CIRCUIT SPLIT ON THE QUESTION PRESENTED.

On one side of the split, the Third and Ninth Circuits hold that section 403 applies to pre-Act defendants who are resentenced after the Act. *Mitchell*, 38 F.4th

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[2] The decision below also resolved the appeal of Tony Hewitt, Petitioners' co-defendant. Hewitt filed a petition for writ of certiorari on March 8, 2024. *See Hewitt* v. *United States*, No. 23-1002 (U.S. Mar. 8, 2024) ("*Hewitt* Pet.").

at 385 (3d Cir.); *Merrell*, 37 F.4th at 573 (9th Cir.). Addressing similar questions in similar contexts, another two circuits have indicated that they agree. *Uriarte*, 975 F.3d at 602 (7th Cir.); *Bethea*, 841 F. App'x at 549 (4th Cir.). In stark contrast, the Fifth and Sixth Circuits hold that Section 403 does not apply in these circumstances. Pet. App. 11a-12a; *Jackson*, 995 F.3d at 525 (6th Cir.).

A. The Third And Ninth Circuits Hold That Section 403 Of The First Step Act Applies At Resentencing Following The Vacatur Of A Defendant's Pre-Act Sentence.

The Third and Ninth Circuits hold that when a defendant's pre-First Step Act sentence is vacated, the Act's reforms apply at the defendant's post-Act resentencing proceeding.

In *Mitchell*, the Third Circuit interpreted section 403 "to allow the Act's provisions to apply to a defendant whose pre-Act-unconstitutional sentence is vacated after the Act's enactment." 38 F.4th at 389. The court reasoned that this is the "more natural" reading of the statute, "because '[t]here is no reason to think that Congress excluded from its remedy pre-Act offenders facing plenary resentencing.'" *Id.* at 387 (quoting *Uriarte*, 975 F.3d at 603). The court continued that its interpretation better accords with "the legislative purpose of the Act," which is "to reduce the harsh length of sentences for certain crimes." *Id.* And the court finally observed that, in light of the court's "vacatur" of the defendant's sentence, the defendant "had no sentence at the time of his post-Act sentencing" and thus "should have received the Act's benefits." *Id.*

The Ninth Circuit agrees. The Ninth Circuit held in *Merrell* "that the First Step Act applies when sentences imposed before the Act's passage are vacated and defendants are resentenced after the Act's passage." 37 F.4th at 573. Like Petitioners here, the *Merrell* defendants' pre-Act section 924(c) convictions were vacated under section 2255 in light of this Court's decision in *Davis*. *See id.* at 573-574. On appeal from the defendants' post-Act resentencing, the Ninth Circuit recognized the division of authority over whether section 403 applies at such resentencing proceedings. *See id.* at 575. In the court's view, "because vacatur of the prior sentences in the cases before us wiped the slate clean, a sentence had not been imposed for purposes of § 403(b) at the time of resentencing." *Id.* (alterations, quotation marks, and citations omitted). Reading section 403(b)'s reference to "a sentence" to mean "an existing valid sentence, not a prior invalid one," the Ninth Circuit concluded, is "the most reasonable reading." *Id.* at 577 (emphases omitted).

B. The Fifth And Sixth Circuits Hold That Section 403 Of The First Step Act Does Not Apply At Resentencing Following The Vacatur Of A Defendant's Pre-Act Sentence.

The Fifth and Sixth Circuits have explicitly rejected the Third and Ninth Circuits' interpretation of section 403(b). *See* Pet. App. 7a; *Jackson*, 995 F.3d at 525. These circuits instead hold that section 403(b) applies only to those defendants who had no sentence on the date of the First Step Act's enactment. The upshot of this historical approach is that section 403's reforms do not apply at a pre-Act defendant's post-Act resentencing.

The Sixth Circuit first articulated this rule in *Jackson*. That case concerned a defendant whose pre-Act section 924(c) sentences were vacated on direct appeal after the Act's passage. 995 F.3d at 524. Over Judge Moore's dissent, the Sixth Circuit held that because the defendant was "under sentence pending appeal" on the day the First Step Act was enacted, section 403 did not apply at the defendant's post-Act resentencing. *Id.* at 525. The court rooted this historical approach in section 403(b)'s use of the "present-perfect tense" and "use of the indefinite article 'a.'" *Id.* at 524. The court rejected that the vacatur of the defendant's original sentence had any bearing on section 403(b)'s meaning. *See id.* at 525-526.

In the decision below, the Fifth Circuit "agree[d] with the Sixth Circuit's interpretation of § 403(b)." Pet. App. 7a. Quoting liberally from then-Judge Barrett's dissenting opinion in *Uriarte*, the Fifth Circuit reasoned that section "403(b)'s use of 'imposed' puts 'the focus on the historical fact' of a sentence's imposition." Pet. App. 8a (quoting *Uriarte*, 975 F.3d at 607 (Barrett, J., dissenting)). And like the Sixth Circuit, the panel concluded that "vacatur has no effect on our interpretation." Pet. App. 10a. The court accordingly "read § 403(b) as drawing 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. And so "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.

C. Two Other Courts Of Appeals Have Also Grappled With This Issue.

The Fourth and Seventh Circuits have confronted this question in slightly different contexts. These courts have suggested that they would side with the Third and Ninth Circuits on the interpretation of section 403(b). *See Uriarte*, 975 F.3d at 602 (7th Cir.); *Bethea*, 841 F. App'x at 549 (4th Cir.).

Take, for example, the Seventh Circuit's decision in *Uriarte*. *Uriarte* concerned a defendant whose multiple section 924(c) sentences were both imposed and vacated before the First Step Act, but who was resentenced after the Act. 975 F.3d at 601. In an en banc opinion, and over the dissent of then-Judge Barrett, the Seventh Circuit held that section 403 governed the defendant's post-Act resentencing. *See id.* at 602. The court explained that Congress drafted section 403 "against the backdrop of the existing legal landscape," one feature of which is that "vacating a sentence 'wipe[s] the slate clean.'" *Id.* (quoting *Pepper* v. *United States*, 562 U.S. 476, 508 (2011)). The court saw no "indication that [Congress] intended to depart from [these] settled principles." *Id.* And after considering the Act's text and purpose, the court concluded that "[t]here is no reason to think that Congress excluded from its remedy pre-Act offenders facing plenary resentencing." *Id.* at 603.

The Seventh Circuit reserved judgment over whether section 403 applies to "a defendant who was under a sentence at the time of enactment, but subsequently had his sentence vacated." *Id.* at 602 n.3. But the Seventh Circuit's holding in *Uriarte* would logically apply in such a circumstance, as illustrated by the fact that the Third and Ninth Circuits applied

Uriarte in reaching the conclusion that when a defendant's pre-First Step Act sentence is vacated after the Act, the Act's reforms apply at the defendant's post-Act resentencing proceeding. *See Mitchell*, 38 F.4th at 387; *Merrell*, 37 F.4th at 575-576.

The Fourth Circuit has similarly signaled that it is likely to join the Third and Ninth Circuits. *Bethea*, 841 F. App'x at 549. *Bethea* concerned whether section 401(c) of the First Step Act, a retroactivity provision identical to section 403(b), applied at the post-Act resentencing of a pre-Act defendant. *See id.* at 546-547. Construing the same language used in section 403(b) and relying extensively on the Seventh Circuit's decision in *Uriarte*, the Fourth Circuit concluded that "[a]ny new sentence imposed after" the First Step Act's "enactment must comply with the FSA's requirements." *Id.* at 551. Like the Third, Seventh, and Ninth Circuits, the Fourth Circuit reasoned that "the district court's vacatur * * * nullified [the defendant's] original sentence such that a sentence cannot legally be said to have been imposed until" the district court reentered judgment. *Id.* at 550. And so because the defendant is "a pre-FSA offender serving a post-FSA sentence," section 401 "applied to his corrected sentence." *Id.* at 549. Although the Fourth Circuit addressed section 401 and not section 403, every case involved in the split over section 403(b) that postdates *Bethea* reads *Bethea* as the Fourth Circuit's definitive ruling on both sections 401 and 403. *See Merrell*, 37 F.4th at 575; *Mitchell*, 38 F.4th at 386 n.22; *Jackson*, 995 F.3d at 525-526; Pet. App. 6a-7a.[3]

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[3] Although the Second Circuit has not yet ruled on this issue, that circuit likewise "appears likely to join this side of the circuit

II. AS THE GOVERNMENT NOW CONCEDES, THE FIFTH CIRCUIT RESOLVED THE QUESTION INCORRECTLY.

Section 403(b) of the First Step Act provides that the sentencing amendments to section 924(c) "shall apply" to all "pending cases" where the "offense * * * was committed before the date of enactment of th[e] Act" as long as "a sentence for the offense has not been imposed as of" the Act's effective date. First Step Act § 403(b) (capitalization omitted). Under a straightforward reading of section 403(b), the First Step Act's reduced penalties apply whenever a sentence is imposed after the law went into effect.

1. Start with the text. In section 403(b) of the First Step Act, entitled "Applicability to Pending Cases," Congress provided: "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." Consequently, the applicability of the First Step Act's amendments turn on whether a pre-Act sentence that is vacated after enactment "has not been imposed as of such date of enactment." For multiple reasons, the statute's text

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split, if given the opportunity to decide the issue directly." *United States* v. *Jackson*, No. 22-3958, 2023 WL 8847859, at *8 (6th Cir. Dec. 21, 2023) (Moore, J., concurring in part and dissenting in part) (citing *United States* v. *Brown*, 935 F.3d 43, 49 (2d Cir. 2019), and *United States* v. *Walker*, 830 F. App'x 12, 17 n.2 (2d Cir. 2020)); *see also, e.g.*, *United States* v. *Figueroa*, 530 F. Supp. 3d 437, 443 & n.5 (S.D.N.Y. 2021) (also citing these cases and holding that section 403 applies at a pre-Act defendant's post-Act resentencing).

definitively instructs district courts to apply section 403 in post-Act resentencings.

First, section 403(b) anchors the application of section 403(a) to whether "a *sentence* * * * has not been imposed" as of a particular date. *Id.* (emphasis added). A "vacated sentence," however, is "something that the existing law treats as null and void" from the start. *Merrell*, 37 F.4th at 576; *see Mitchell*, 38 F.4th at 392 (Bibas, J., concurring in the judgment) ("Historical treatment, modern precedent, and a narrow immigration exception reveal that vacatur makes a sentence void from the start."). As this Court has explained, when an appellate court "set[s] aside" a sentence and "remand[s] for a *de novo* resentencing," it "wipe[s] the slate clean." *Pepper*, 562 U.S. at 507. Put simply, "a vacated order never happened." *Mitchell*, 38 F.4th at 392 (Bibas, J., concurring in the judgment). And because Congress is presumed to be "aware of existing law when it passes legislation," *Hall* v. *United States*, 566 U.S. 506, 516 (2012) (quotation marks omitted), section 403(b)'s reference to "'a sentence' means an *existing valid sentence,* not a *prior invalid one*." *Merrell*, 37 F.4th at 577. "Nothing in the text of the statute suggests that Congress intended to create an exception to the ordinary effect of the vacatur of a sentence." *Uriarte*, 975 F.3d at 602. A "sentence" thus "has not been imposed as of" the First Step Act's date of enactment on any defendant whose pre-Act sentence was subsequently vacated. And like any other unsentenced post-Act defendant, the plain text of section 403(b) requires applying section 403(a)'s reforms at the defendant's sentencing.

Section 403(b)'s reference to "*a* sentence" points in the same direction. In describing the triggering event

for section 403's retroactive application—the "impos[ition]" of "a sentence"—Congress used the neutral article "a" instead of the more expansive word "any," which Congress had employed earlier in the same textual sentence when referring 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). Because "Congress' use of the word 'any' suggests an intent to use that term expansively," *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1774 (2019) (brackets and quotation marks omitted), Congress's contrasting use of the neutral term "a" when defining the scope of section 403's application underscores that its carveout should not be read so expansively as to cover sentences that were void from the start. As the Ninth Circuit has observed (adopting the Seventh Circuit's reasoning), "'[h]ad Congress intended the phrase "a sentence" to convey a very broad meaning, it could have used the word "any," as it did earlier in the same sentence.'" *Merrell*, 37 F.4th at 575-576 (quoting *Uriarte*, 975 F.3d at 604).

Section 403(b)'s grammar likewise shows that Congress intended that section 403(a) should apply at the post-Act resentencing of pre-Act defendants. Congress used the present-perfect tense—"*has * * * been imposed*"—to describe the relevant sentence. First Step Act § 403(b) (emphasis added); *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."). The present-perfect tense signifies "an act, state, or condition" that "is now completed or continues up to the present." The Chicago Manual of Style ¶ 5.132 (17th ed. 2017). Congress's use of this tense indicates that Congress was focused on the sentence's

continuing validity. And as just explained, a vacated sentence is not one with continuing validity. *See supra* pp. 16-17.

Congress's chosen verb tense is powerful evidence of its intent, especially when considering that Congress could have easily tethered section 403(b) to the historical fact of a sentence by using the past-perfect tense. 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). This perfectly captures the historical fact of a sentence being imposed on a defendant "as of" the Act's "date of enactment." If Congress had wanted to refer to the historical fact of a sentence, it thus would have more likely made eligibility contingent on whether a sentence "*had* * * * been imposed." Congress's contrary choice must be given meaning.

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 *Uriarte*, 975 F.3d at 607 (Barrett, J., dissenting)). But it reached that conclusion only by changing the verb tense of the statute throughout its analysis—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).

The Fifth Circuit's repeated need to change Congress's chosen verb tense to support its historical-fact interpretation shows that that interpretation depends on re-writing the statute.

Finally, Congress has previously used this construction—referring to a "sentence" that has been "imposed"—to refer to the *current sentence*, as opposed to a *previously vacated* sentence in other criminal sentencing statutes. For example, 18 U.S.C. § 3582(c) provides that a court "may not modify a term of imprisonment once it has been imposed." Despite that limitation, section 3582(c) does not circumscribe the sentencing court's authority to deviate from a *prior, vacated* sentence when other developments require a resentencing. *See Pepper*, 562 U.S. at 507. Similarly, 18 U.S.C. § 3742 provides for the right of a defendant or the government to appeal a sentence if it "was imposed in violation of law." 18 U.S.C. § 3742(a)(1), (b)(1). Following a resentencing, if a party believes that the sentence "imposed" "was * * * in violation of law" and takes an appeal, the court of appeals reviews that *new* sentence—not a *prior, vacated* sentence. *Id.* § 3742(e)-(e)(1). Because courts "normally presume" that words "carry the same meaning when they appear in * * * related sections," *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 536 (2013), the way that Congress referred to "sentences" that had been "imposed" in section 3582 and section 3742 suggest that section 403 similarly refers to a current sentence, not a vacated one.

2. To the extent section 403's text is ambiguous, there are good reasons to read it as the Third and Ninth Circuits do.

Chief among them: any ambiguities in the First Step Act must be resolved in a defendant's favor. *See Davis*, 139 S. Ct. at 2333. The rule of lenity applies equally to criminal statutes and criminal penalties. *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980); *see also United States* v. *Granderson*, 511 U.S. 39, 42-43, 54 (1994) (applying the rule of lenity to a question of sentencing). Accordingly, when two readings of a statute are equally plausible, the Court must adopt the reading that results in the lesser penalty. *Bifulco*, 447 U.S. at 400; *Wooden* v. *United States*, 595 U.S. 360, 390 (2022) (Gorsuch, J., concurring in the judgment) ("[W]here uncertainty exists, the law gives way to liberty."). Here, the rule of lenity requires applying section 403's sentence-stacking prohibition at Petitioners' resentencings.

Reading section 403 to apply to resentencings is also consistent with the statute's purpose. Section 403's purpose is unambiguous: to prevent the stacking of enhanced section 924(c) sentences for first-time offenders moving forward. Members of Congress, in the course of passing the First Step Act, repeatedly "drew attention to the harshness of § 924(c) stacking for first-time offenders, and the Act's attempt to mitigate it." *United States* v. *Henry*, 983 F.3d 214, 224 (6th Cir. 2020) (collecting citations to the Congressional Record). Indeed, Senators Richard Durbin, Charles Grassley, and Cory Booker—the lead sponsors of the Act—have made clear that Congress intended defendants resentenced after the enactment of the First Step Act to benefit from the Act's amendments, explaining that Congress intended the identically worded section 401(c) to cover both "individuals facing an initial sentencing proceeding and individuals facing resentencing following vacatur of a prior sentence." Brief for

Amici Curiae United States Senators Richard J. Durbin, Charles E. Grassley, and Cory A. Booker in Support of Defendant-Appellant and Vacatur at 2, *United States* v. *Mapuatuli*, No. 19-10233 (9th Cir. May 12, 2020), Dkt. No. 22. Disqualifying pre-Act defendants whose sentences have been vacated limits the First Step Act's reach based on "a legal nullity." *Merrell*, 37 F.4th at 577. This "would be fundamentally at odds with the First Step Act's ameliorative nature." *Uriarte*, 975 F.3d at 603.

3. The government now agrees with this analysis. The government initially took the view that section 403 did not apply to a defendant who was sentenced prior to the Act's enactment, even if that defendant's section 924(c) sentence was subsequently vacated and he obtained a resentencing. *See* Pet. App. 4a. The government argued accordingly at Petitioners' resentencing hearings. *See* Pet. App. 29a-30a ("[I]t's the Government's position that the best reading of the * * * amendment's language, itself, is that, was there a valid sentence on the date of enactment, and if there was, the amendment does not apply."); Pet. App. 61a (arguing that, under the "plain language of the amendment," the fact that Ross was serving a sentence on the date of enactment meant that section 403 did not apply). These arguments carried the day in the district court. *See* Pet. App. 62a (The court: "I'm going to go with the Government.").

However, the government later changed position. On appeal, the government explained that "Section 403's text, context, and purpose confirm that it applies at a resentencing." Gov. Br. at 10. In the government's view, "Congress intended the reduced statutory minimum penalties to apply at future

sentencings, including resentencings." *Id.* The government accordingly urged the Fifth Circuit to "vacate [Petitioners'] sentences and remand to the district court for resentencing with instructions to apply Section 403 of the First Step Act." *Id.* at 29.

III. THE COURT SHOULD GRANT CERTIORARI NOW.

A. The Question Presented Has Percolated Long Enough To Fully Ventilate The Issue.

Four circuits have addressed the issue in fully reasoned opinions. Another two have grappled with the issue in slightly different contexts. And the issue has been contentious. In addition to the six majority opinions discussed above, the judges facing this issue have also penned one concurring opinion and four dissenting opinions. *See Mitchell*, 38 F.4th at 392-393 (Bibas, J., concurring in the judgment); *Bethea*, 841 F. App'x at 556-557 (Quattlebaum, J., dissenting); *Uriarte*, 975 F.3d at 606-611 (Barrett, J., dissenting); *Merrell*, 37 F.4th at 578-579 (Boggs, J., dissenting); *Jackson*, 995 F.3d at 526-528 (Moore, J., dissenting). And a rehearing petition in the Sixth Circuit in turn generated one opinion concurring in the denial of rehearing en banc that further justified that circuit's approach, *see Carpenter*, 80 F.4th at 790-793 (Kethledge, J.); and one dissenting opinion that explained why that circuit's approach is wrong, *see id.* at 793-795 (Griffin, J.).

These competing opinions analyze the question presented from every angle. To take one example, the Sixth Circuit concluded that section 403(b)'s use of the present-perfect tense demands a historical inquiry into the defendant's status on the day the First Step Act was enacted. *See Jackson*, 995 F.3d at 524-525.

Judge Griffin relied on that tense to conclude that the opposite is true: "Section 403(b) refers * * * to a sentence's ongoing condition." *Carpenter*, 80 F.4th at 794 (Griffin, J., dissenting from the denial of rehearing en banc). And the Fourth Circuit expressly rejected drawing any "inference from the verb tense used in the Act." *Bethea*, 841 F. App'x at 549.

There are more examples. The courts of appeals have debated the provision's text, including the significance of Congress's reference to "a sentence" instead of "the sentence." *Compare, e.g.*, *Jackson*, 995 F.3d at 525-526, *with, e.g.*, *Bethea*, 841 F. App'x at 549. They have debated the provision's context, including Congress's use of similar terms in other sentencing statutes. *See, e.g.*, *Merrell*, 37 F.4th at 576-577. They have debated the provision's purpose, including the broader purpose of the First Step Act, as well as the narrower purpose of this provision in the statute. *See, e.g.*, *Mitchell*, 38 F.4th at 387-388. They have debated the role of the canons of construction, including the rule of lenity. *Compare, e.g.*, *Merrell*, 37 F.4th at 577, *with, e.g.*, *Uriarte*, 975 F.3d at 604 n.7. And they have debated the practical consequences of adopting one interpretation over the other. *Compare, e.g.*, *United States* v. *Hodge*, 948 F.3d 160, 164 (3d Cir. 2020), *with, e.g.*, *Uriarte*, 975 F.3d at 603. The issues are well ventilated. Further percolation would not aid in this Court's review.

The courts of appeals' differing positions are also entrenched. The Sixth Circuit declined to rehear this issue en banc even after the government changed its position. *See* Order, *United States* v. *Jackson*, No. 22-3958 (6th Cir. Apr. 2, 2024) ("*Jackson* Order"). Although a 2023 rehearing petition in the Sixth Circuit

in turn generated one opinion concurring in the denial of rehearing en banc that further justified that circuit's approach, *see Carpenter*, 80 F.4th at 790-793 (Kethledge, J.), and one dissenting opinion that explained why that circuit's approach is wrong, *see id.* at 793-795 (Griffin, J.), the wider court continues to rebuff en banc petitions on this issue, *see Jackson* Order.

This split will not resolve itself. Only this Court's intervention will resolve this deep, entrenched, and acknowledged split.

B. The Question Presented Is Recurring And Extremely Important.

1. The question presented is extremely important, for all the reasons already identified by the petitioner in *Hewitt*. *See Hewitt* Pet. 16-18. The "real human costs" at stake are incredibly high. *Carpenter*, 80 F.4th at 796 (Bloomekatz, J., dissenting from the denial of rehearing en banc). The Fifth Circuit's interpretation of section 403 resulted in 105-year sentences for Petitioners on their section 924(c) counts—*de facto* life sentences. In contrast, under the Third and Ninth Circuits' interpretation of the First Step Act, Petitioners would be subject to cumulative minimum sentences of 25 years. Geography alone should not dictate whether Petitioners will die in prison. *Cf.* ACLU Amicus Br. at 11, *Hewitt*, No. 23-1002 (U.S. Apr. 4, 2023) ("*Hewitt* ACLU Amicus Br.") (explaining that whether or not the First Step Act applies is often the "difference between being sentenced to certain death in prison, and serving a long but survivable sentence").

The question presented would be important enough if it affected only defendants convicted under section 924(c). Such defendants make up roughly 13% of

the federal-prison population. *See* U.S. Sentencing Comm'n, *QuickFacts: Federal Offenders in Prison* 1 (2023).[4] And this Court's evolving interpretation of section 924(c) means that scores of defendants may be able to vacate those convictions under section 2255 in the future. *See, e.g.*, *United States* v. *Taylor*, 596 U.S. 845 (2022) (attempted Hobbs Act robbery is not a crime of violence); *Davis*, 139 S. Ct. 2319 (section 924(c)'s "residual clause" is void for vagueness). Whether or not section 403 applies to such defendants will determine whether these defendants are resentenced to the more humane sentences Congress enacted in section 403, or whether they will continue to serve "unjustly harsh" sentences that Congress has since repudiated. 164 Cong. Rec. S7649 (daily ed. Dec. 17, 2018) (statement of Sen. Grassley).

The question presented, however, is not limited to section 403(b)—it also allows this Court to resolve the meaning of section 401(c). *See* NACDL Amicus Br. at 7-8, *Hewitt*, No. 23-1002 (U.S. Apr. 11, 2024); *Hewitt* ACLU Amicus Br. at 12. Section 401(c) governs the retroactivity of section 401(a) and (b), which reformed the penalty scheme for certain drug offenses in 21 U.S.C. § 841. *See Hewitt* ACLU Amicus Br. at 12-14 (explaining reforms in more detail). Like section 403, section 401 ameliorated some of the most unjust aspects of federal sentencing; for example, it eradicated the enhanced mandatory life sentence in 21 U.S.C. § 841(b)(1)(A). *See* First Step Act § 401(a)(2)(A). And because section 401(c) is identical to section 403(b), those provisions must be "construed * * * to have the same meaning." *Bethea*, 841 F. App'x at 548 n.5. This

[4] *Available at* https://perma.cc/Q4PZ-JBTE.

petition thus offers this Court a rare opportunity to settle the meaning of two provisions of a statute this Court has already grappled with in three different opinions. *See Pulsifer* v. *United States*, 144 S. Ct. 718 (2024); *Concepcion* v. *United States*, 597 U.S. 481 (2022); *Terry* v. *United States*, 593 U.S. 486 (2021).

2. This Court's denial of this question in *Carpenter* v. *United States*, No. 23-531 (U.S. Feb. 20, 2024), does not bear on this petition. The government there agreed with the petitioner that, properly construed, section 403 applies to pre-Act defendants at post-Act resentencing proceedings. *See* Br. in Opp. 8-12, *Carpenter*, No. 23-531 (U.S. Jan. 17, 2024). But the government argued certiorari was not warranted because the Sixth Circuit—which at the time was the only circuit holding otherwise—could eliminate the split by rehearing a related case en banc, a step the government agreed was warranted. *See* Letter, *Carpenter*, No. 23-531 (U.S. Jan. 26, 2024).

Unlike in February, it is now clear that only this Court can bring uniformity to the courts of appeals. The Sixth Circuit denied the en banc petition brought to this Court's attention in *Carpenter*. *See supra* p. 23. And now that the Fifth Circuit has joined the Sixth Circuit, no one circuit can eliminate the split. Only this Court can do so.

C. This Case Is The Best Vehicle To Resolve The Question Presented.

This case is an ideal vehicle to resolve the question presented. The question presented is outcome determinative to Petitioners' appeals. Petitioners preserved the argument that section 403 applies at their post-Act resentencing proceedings at every stage of

proceedings, and the Fifth Circuit rejected that argument in a detailed opinion.

Indeed, this is the best vehicle to decide this question that the Court has ever been presented with. Petitioners are aware of one other petition presenting this question that is currently before the Court. *See Hewitt* v. *United States*, No. 23-1002.[5] The petitioner in that case, however, conceded in the Fifth Circuit that "Section 403(a)[] * * * is ambiguous as to whether it refers to the historical fact of the imposition of a sentence, * * * or whether it refers to the imposition of a sentence with continuing validity." Hewitt Opening Br. at 9, 5th Cir. Case No. 22-10265, Dkt. No. 81 (Apr. 19, 2023); *see also* Pet. App. 8a (recognizing this "ambiguity argument"). In contrast, Petitioners here explicitly rejected in the lower court "that the statute is ambiguous." Duffey Opening Br. at 15, 5th Cir. Case No. 22-10265, Dkt. No. 37-1 (Sept. 9, 2022); Ross Opening Br. at 10, 5th Cir. Case No. 22-10265, Dkt. No. 39 (Sept. 9, 2022) ("There is no ambiguity in the applicability provision * * * ."). Similarly, despite affirmatively arguing for ambiguity, the petitioner in Hewitt did not argue that the court should apply the rule of lenity. Conversely, Petitioners here explained that, should the court find any ambiguity in the statute, it should resolve such ambiguity by applying the rule of lenity. *See* Duffey Opening Br. at 15-19; Ross Opening Br. at 19-20; Pet. App. 12a n.4 (referring to "Duffey and Ross's arguments that the rule of lenity

[5] Petitioners here and the petitioner in *Hewitt* were co-defendants at their trial. Their direct appeals to the Fifth Circuit were resolved in the same consolidated opinion. *See United States* v. *Duffey*, 456 F. App'x 434 (5th Cir. 2012).

requires [the court] to read § 403(b) in the light most favorable to them").

Moreover, the government in *Hewitt* opposed Petitioners' section 403 argument in the district court. *See* Pet. App. 4a. Indeed, the district court at Hewitt's resentencing rejected applying section 403 because it thought "the government is making a policy determination [based] on two circuit cases." Hewitt Resentencing Transcript at 18-23, D. Ct. Dkt. No. 785 (Nov. 2, 2022). In contrast, the court at Petitioners' resentencing proceedings made clear that it was rejecting Petitioners' section 403 arguments on the merits. *See* Pet. App. 30a ("I don't see how someone can't be serving a sentence when they are serving a sentence."); Pet. App. 62a ("I'm going to go with the Government"). This petition thus comes to this Court after "a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests." *Flast* v. *Cohen*, 392 U.S. 83, 96-97 (1968) (quotation marks omitted).

CONCLUSION

The petition for a writ of certiorari should be granted and the decision reversed.

Respectfully submitted,

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