Nos. 23-1002 and 23-1150

# In the Supreme Court of the United States

TONY R. HEWITT, PETITIONER

*v.*

UNITED STATES OF AMERICA

COREY DEYON DUFFEY AND JARVIS DUPREE ROSS, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

**REPLY BRIEF FOR RESPONDENT SUPPORTING PETITIONERS**

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As the government explained in its opening brief, Section 403(b) of the First Step Act—which "appl[ies]" Section 403's ameliorated sentencing scheme "if a sentence for the offense has not been imposed as of [the Act's] date of enactment," § 403(b), 132 Stat. 5222—covers an offender who no longer has a sentence imposed for that offense. An offender whose pre-Act sentence has been vacated—and thus needs a sentence to *be* "impose[d]" under 18 U.S.C. 3553—is not an offender on whom "a sentence * * * *has* * * * *been* imposed" under Section 403(b).

Amicus cannot dispute that his alternative reading would require district courts to sentence such offenders to decades of imprisonment under a scheme that the same Congress discarded as overly harsh, while providing no offsetting benefit in protecting the finality of criminal judgments. He nonetheless insists (Br. 15-29) that the text cannot be read any other way. In making that assertion, he reads Congress's choice of the present-perfect tense—which focuses on continuation—out of the statute. If Congress had wanted amicus's version of the statute, it would have used the *past*-perfect tense—but there is no foothold in the statute to turn "has" into "had."

Amicus's effort to find support in the wording of other statutes disregards the most pertinent one, 18 U.S.C. 3582(c), which is worded similarly and plainly focuses on continuing validity. Amicus's arguments about how Congress could have written Section 403(b) more clearly cut just as strongly against his proposed interpretation and disregard the import of what Congress *did* write. And contrary to amicus's alternative argument, Section 403(b)'s "as of" clause does not require a court to completely ignore everything that happened after the Act's enactment.

Nor can amicus identify any sound reason why Congress, in enacting such a major sentencing reform, would have chosen to exclude pre-Act offenders who need fresh sentences from the Act's reformations. Petitioners' and the government's understanding of Section 403(b) honors both the particular words that Congress chose and the evident purpose of the provision it crafted. Amicus's reading does neither. This Court should reject it and reverse the judgments below.

### A. Amicus Fails To Show That Validity Is Irrelevant Under Section 403(b)

As the government has explained, whether "a sentence for the offense has * * * been imposed" under Section 403(b) turns on the continuing existence of a valid sentencing judgment. U.S. Br. 16-20. Congress's use of the present-perfect tense indicates that the sentence at issue is one that remains valid in the present—*i.e.*, at the time of the sentencing proceeding to which Section 403(b) is relevant. *Id.* at 17-19. Congress's reference to "*a* sentence," rather than "*any* sentence," when describing the triggering condition underscores that interpretation. *Id.* at 19-20. Amicus does not show otherwise.

#### *1. Amicus's textual arguments cannot overcome Congress's use of the present-perfect tense*

At bottom, amicus's reading of the text transforms "has" into "had." That revision of the present-perfect tense into the past-perfect tense is impermissible. As "the Dictionary Act instructs," "the present tense generally does not include the past." *Carr* v. *United States*, 560 U.S. 438, 448 (2010).

a. Amicus observes that an ordinary speaker could use the word "imposed" to refer to the historical fact that a sentence was pronounced. See, *e.g.*, *North Carolina* v. *Pearce*, 395 U.S. 711, 713-714 (1969) (discussing a sentence "originally imposed" and describing a holding that "the longer sentence imposed upon retrial was unconstitutional and void") (citation and internal quotation marks omitted). But an ordinary speaker could also use "imposed" to refer to a legally operative sentence. For example, if a prison official asks "Is a death sentence imposed on Jones?", when Jones had once

been sentenced to death but received a life sentence after a retrial, the correct answer would be "No."

That is the sense in which "imposed" is used in Section 403(b), which differs markedly in form from the examples on which amicus relies. Amicus's examples all use the participle "imposed" as an *adjective*. See Amicus Br. 21-22, 30-31 ("the *death sentences imposed* for armed robbery, however, were vacated"; "the *sentence originally imposed* on those particular counts"; "receive a longer sentence than the *one originally imposed*") (emphases altered; brackets and citations omitted). Section 403(b), however, uses "imposed" as a *verb*: "has * * * been imposed." And the verb tense Congress used—the present-perfect—clarifies that the provision refers to a legally operative sentence. See U.S. Br. 16-17, 20-22. Section 403(b) therefore does not encompass sentences that have been vacated.

To take one of amicus's own examples, see Amicus Br. 21, saying "[t]he death sentences [that *were*] imposed for armed robbery * * * were vacated" comports with ordinary speech; saying "the death sentences [that *are*] imposed for armed robbery * * * were vacated" does not. *Gregg* v. *Georgia*, 428 U.S. 153, 161-162 (1976). Or, even more pertinently, saying "[t]he death sentence[] [that *had been*] imposed for armed robbery * * * w[as] vacated" comports with ordinary speech; saying "the death sentence[] [that *has been*] imposed for armed robbery * * * w[as] vacated" does not. *Ibid.*[1]

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[1] Amicus's citation (Br. 22) of 18 U.S.C. 3742(f)(1) and 28 U.S.C. 2255(a), which provide for relief in certain circumstances if "the sentence was imposed in violation" of the law, cut against his reading. In both cases, the phrase refers to a sentence that remains in force at the relevant time. See 18 U.S.C. 3742 (discussing relief following

b. Amicus is wrong to suggest (Br. 24-27) that the present-perfect tense supports his own reading. Amicus cites *Garner's Modern English Usage* for the proposition that the present-perfect tense "sometimes represents an action as having been completed at some indefinite time in the past." Amicus Br. 25 (citing Bryan A. Garner, *Garner's Modern English Usage* 1082 (5th ed. 2022) (Garner)). But on the very same page that amicus cites, Garner explains that it would be "error" to use the present-perfect tense where "the action is *wholly* in the past—and the time is relatively definite." Garner 1082 (emphasis added). That is the very error that amicus makes when he reads Section 403(b) to refer—using the present-perfect tense—to sentences that are no longer valid because the imposition of a sentence "occurs at a *fixed* point in time." Amicus Br. 25 (emphasis added; citation omitted).

Relatedly, amicus's interpretation violates the principle that the present-perfect tense "is not used in contexts where the 'now' component of" a time period "is explicitly or implicitly excluded." Rodney Huddleston & Geoffrey K. Pullum, *The Cambridge Grammar of the English Language* 143 (2002). An ordinary English speaker might say that "Alice *had* visited the park dozens of times before its closure last year." But the speaker could not equivalently substitute the statement

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"review of an otherwise final sentence" under subsection (a) or (b) of the statute); 28 U.S.C. 2255(a) (allowing a claim by "[a] prisoner * * * *under sentence of a court* * * * claiming * * * that the sentence was imposed in violation of the Constitution or laws of the United States") (emphasis added). A legal flaw in a previously invalidated sentence would obviously provide no basis for relief under either statute.

that "Alice *has* visited that park dozens of times," because that statement implies that the park remains open to visitors. And that latter statement is analogous to the phrasing that Congress employed in Section 403(b)—just replacing open parks with operative sentences.

c. Amicus contends that if Congress intended to exclude only defendants whose sentences remained valid, it might have spoken more clearly, for instance by referring to "a valid sentence," "the sentence," or (somewhat more verbosely) "a sentence that continues to legally bind the defendant." Amicus Br. 17 (citation and emphases omitted). But Congress had various reasons to eschew each of amicus's proposed reformulations. A reference to "the sentence," for example, might have been interpreted to capture only cases that had reached a final disposition, allowing any defendant with a pending appeal to reopen his validly imposed sentence. See U.S. Br. 25 & n.3. And a reference to "a valid sentence" could have raised questions about the degree to which Section 403(b) allowed collateral attacks on sentences that were already final.

Amicus's reliance (Br. 32) on 18 U.S.C. 921(a)(20), which he identifies as a model for an express carveout of "vacated sentences or convictions," actually undermines his argument. Section 921(a)(20) defines a relevant "conviction" for certain firearms laws to exclude "[a]ny conviction which," among other things, "has been expunged[] or set aside." 18 U.S.C. 921(a)(20). The present-perfect tense there obviously refers to an expungement with continuing validity: a defendant with a currently valid conviction cannot, for example, lawfully possess a firearm simply because the conviction was once erroneously expunged but later reinstated. See 18

U.S.C. 922(g); cf. *Lewis* v. *United States*, 445 U.S. 55, 64 (1980).

In any event, amicus himself ultimately acknowledges that the possibility that "Congress could have expressed itself more clearly" is not a reason to depart from the best interpretation of the statute that it did enact. Amicus Br. 18 (quoting *Luna Torres* v. *Lynch*, 578 U.S. 452, 472-473 (2016)). And any potential basis for faulting Congress for not choosing some purportedly clearer alternative disappears entirely where, as here, Congress could have been clearer in either direction. See U.S. Br. 31; *Pulsifer* v. *United States*, 601 U.S. 124, 138 (2024). A Congress that wanted amicus's approach could have referred to an "initial sentence" or other clearer alternative, see U.S. Br. 31—or could have simply worded the provision to apply to a defendant who "had never been sentenced."

***2. Amicus's reading does not accord with statutory context***

As the government has explained, the broader statutory context further supports the ordinary inference that follows from Section 403(b)'s use of the present-perfect tense. See U.S. Br. 22-23. Amicus fails even to respond to the government's observations about the most analogous provision, and his attempt to draw support from unrelated statutes is misplaced.

a. The most informative piece of the contextual backdrop is Congress's use of the same language that appears in Section 403(b)—"has * * * been imposed"—in the closely related context of 18 U.S.C. 3582(c). See U.S. Br. 22-23. Section 3582 provides that, except in certain delimited circumstances, "[t]he court may not modify a term of imprisonment once it has been im-

posed." 18 U.S.C. 3582(c); see U.S. Br. 22-23. That language unequivocally refers to sentences that remain valid; a court is free to deviate from a previously imposed sentence that was vacated, notwithstanding that, as a matter of historical fact, it was at one point imposed. See *Pepper* v. *United States*, 562 U.S. 476, 507 (2011).

Amicus does not acknowledge Section 3582(c) at all. That omission is glaring because the critical language of Section 403(b) mirrors the language of Section 3582(c). Section 403(b) applies when "a sentence for the offense *has not been* imposed," § 403(b), 132 Stat. 5222 (emphasis added); Section 3582(c) applies to "a term of imprisonment *once it has been* imposed," 18 U.S.C. 3582(c) (emphasis added). The "has * * * been imposed" language is thus most naturally understood the same way in both places. Amicus's failure to reconcile Congress's use of "has * * * been imposed" in Section 403(b) with its use of the same language in Section 3582(c) makes his historical-fact reading particularly incongruous.

b. Though he does not address Section 3582(c), amicus points to other statutes, involving confirmation of bankruptcy plans and other nonsentencing matters, that use the present-perfect tense. See Amicus Br. 27 & nn.4-5. But amicus has not identified any instances where a court has read any of those provisions in the manner he urges here, *i.e.*, to apply to an event that happened in the past but no longer holds force, such as a reopened bankruptcy plan.

Nor can amicus dispute that still other statutes use the *past*-perfect tense to convey the type of meaning that he would attribute to Section 403(b)'s use of the *present*-perfect tense. See U.S. Br. 18. Thus, even his

efforts to survey the entirety of the U.S. Code do not move the needle in his direction. The provisions he invokes instead simply confirm that Congress had a choice of tenses, and here used the present-perfect—a choice that signals continuing validity, rather than a blinkered focus on the past.

***3. No background rule resolves this case***

a. Amicus is correct that there is no general background rule that a vacated conviction or sentence is void ab initio and so "must be disregarded for all purposes." Amicus Br. 31 (capitalization omitted); see *id.* at 33-39; but see Hewitt Br. 17-21; Duffey Br. 16-28. Sometimes, the historical fact of a conviction or sentence is itself relevant. See U.S. Br. 16, 26 & n.4. Other times—like here—it is important that a particular conviction or sentence remains operative. See *id.* at 14-26; see pp. 3-9, *supra*.

The issue is statute-specific, and no background rule supports either petitioners' "void ab initio" position or amicus's own "historical fact" position, as illustrated by this Court's decision in *Lewis* v. *United States*, on which amicus himself relies (Br. 31-32). *Lewis* addressed a prohibition on firearm possession by "[a]ny person who * * * has been convicted * * * of a felony." 445 U.S. at 56 n.1. And the Court's consideration of invalid or vacated convictions there cannot be squared with a one-size-fits-all rule like the ones that amicus and petitioners propose.

The Court did not embrace a void ab initio approach, instead making clear that a defendant generally would violate the statute so long as he had a prior conviction on the books when he possessed a firearm, even if that conviction turned out to be constitutionally infirm. See *Lewis*, 445 U.S. at 60-61. At the same time, the Court

did not embrace a historical fact approach, indicating that the statute permitted firearm possession if a defendant secured vacatur of a prior conviction "*before* obtaining a firearm," even though the defendant had at some point been convicted in the past. *Id.* at 64; see *id.* at 61 n.5. So too here, the Court should not presumptively embrace either amicus's or petitioners' approach as a background rule.

b. Amicus's effort (Br. 39-40) to invoke the background rule of the federal saving statute, 1 U.S.C. 109, is likewise misplaced. Section 109 provides that the penalty scheme in effect at the time of the offense applies *unless* the "'plain import' or 'fair implication,'" of a new criminal statute is "to apply its new penalties to a set of pre-Act offenders." *Dorsey* v. *United States*, 567 U.S. 260, 275 (2012). And even on amicus's own reading, Section 403(b) supplies the necessary "fair implication."

If the saving statute's default rule applied, then even the initial sentencings of defendants who committed their crimes before the First Step Act's enactment would be subject to the harsher pre-Act penalties. But amicus does not urge that result; it is therefore common ground that Section 403(b) supplants the default rule. And amicus identifies (Br. 40) no authority for the proposition that where, as here, Congress has enacted a statute that clearly overrides the default rule, it must nonetheless rebut that rule's application to every possible circumstance that might arise under that statute.

**B. Amicus's Additional Arguments Are Unsound**

Amicus's further arguments are either back-channel efforts to bolster his transformation of "has" into "had," or attempts to minimize the implications of the present-perfect tense's focus on continuing validity. Both sets of contentions lack merit.

***1. Amicus's reliance on the "as of" clause is misplaced***

a. In trying to defuse Congress's choice of verb tense, amicus maintains that using the past-perfect tense would have "ma[de] no sense" because Section 403(b) asks if a sentence has been imposed "as of such date of enactment," which amicus reads to mean "'as of *today*,' when we (Congress) enact this law." Amicus Br. 25-26 (citation omitted). He argues that a statute written with the past-perfect tense, asking whether "a sentence for the offense *had* not been imposed as of today," would have been "a syntactical hash" if read on the precise date of the statute's enactment. *Id.* at 26 (brackets and citation omitted). But amicus's premise—that the provision was written to be read only on the one specific day on which it was enacted—disregards basic precepts of statutory drafting.

Statutory provisions typically do not require the reader to travel back in time; instead, they are generally drafted to "speak[] as of whatever time [they are] being read (rather than as of when drafted, enacted, or put into effect)." The Office of the Legis. Counsel, U.S. House of Reps., *House Legislative Counsel's Manual on Drafting Style* § 102(c), at 5 (Dec. 2022). Section 403(b) should therefore be presumed to have been written from the perspective of the judges who would later read and apply it—for whom it would no longer be December 21, 2018. And from the perspective of a judge about to conduct a sentencing, the use of the past-perfect tense ("had") would have been not only sensible

but preferable if Section 403(b) in fact had the meaning that amicus ascribes to it.[2]

b. For similar reasons, amicus is wrong to suggest (Br. 2-3, 12-13, 20, 25-26, 29) that even if "a sentence" that "has * * * been imposed" does indeed refer to a sentence with continuing validity, the "as of" clause limits the validity to a specific time period. As amicus would have it, the effect of the clause would be that the sentence's validity need only have continued until December 21, 2018—after which, for amicus, all bets are off. That, however, is not the clause's function.

Instead, the "as of" clause simply clarifies when Section 403(a) begins to apply: namely, on the date of its enactment. Whether or not that would have been presumed in the absence of such a specification, Congress has regularly included similar language in other statutes.[3] The inclusion of such typical "as of" phrasing in Section 403(b) does not require a court conducting a resentencing to turn a blind eye to everything that happened after December 21, 2018—including even the very invalidation that precipitated the resentencing.

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[2] In any event, there would be nothing unusual about asking whether an event *had* occurred before today. "Had he been suspended as of today?" could be understood to inquire as to whether the student was previously suspended.

[3] See, *e.g.*, SECURE 2.0 Act of 2022, Pub. L. No. 117-328, Div. T, Tit. III, § 301(c), 136 Stat. 5338 ("The amendments made by this section shall apply as of the date of the enactment of this Act."); Cooperative and Small Employer Charity Pension Flexibility Act, Pub. L. No. 113-97, § 103(d), 128 Stat. 1120 ("The amendments made by this section shall apply as of the date of enactment of this Act."). Cf., *e.g.*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7079(b), 102 Stat. 4406 (specifying that amendments to 18 U.S.C. 709 "shall take effect 90 days after the date of enactment of th[e] Act").

As just discussed, a statute is typically written from the time perspective of the reader. And that perspective can change how past events are viewed. For instance (and even using the past-perfect tense), it would be perfectly ordinary to say in December, looking back on the baseball season of a pitcher who peaked early, that "the pitcher had played two of his three best games as of May 5." That statement conveys that the relevant games were played on May 5 or earlier, although their status—numbering among the top three games of the pitcher's season—depends on subsequent events and cannot be ascertained until the season is complete.

Even more analogously to this case, suppose that a wealthy tycoon dying of a rare disease directs in his will that a portion of his estate should be given to "any individual who has been diagnosed with the disease as of the date of my death." Someone who was diagnosed with the disease when the tycoon died, but learned before the will was executed that the diagnosis was in error, could not reasonably expect to claim funds nonetheless. Instead, the later invalidation of the diagnosis would take it outside the scope of the bequest. A similar logic applies here, with invalid sentences taking the place of invalid diagnoses.

Tellingly, amicus's own primary argument is that the historical fact that a sentence was once imposed is dispositive, regardless of its validity on the enactment date. See, *e.g.*, Amicus Br. 24 (whether a sentence was imposed "is an immutable historical fact"). Under that view, even a pre-enactment vacatur of the sentence is irrelevant. And that view is incompatible with the argument that the "as of" clause means that the touchstone of Section 403(b) analysis is validity measured on December 21, 2018.

c. At a minimum, amicus is mistaken in placing heavy emphasis on the "as of" clause. When coupled with a date, "as of" can bear opposite meanings. It can refer to the conditions that existed "[a]s things stood" on a particular date. *Oxford English Dictionary* (3d ed. Dec. 2024). Conversely, it can refer to a period of time beginning "from" or "after" a particular date. In light of the inherent imprecisions of the prepositional phrase "as of," *Garner's English Usage* warns that it "should be used with caution," and is most appropriately used simply to set "the effective date of a legal document," Garner 93, as it should be understood to do here.

***2. Section 403(b)'s title does not bear on the question presented***

Amicus also attempts (Br. 26) to draw support from Section 403(b)'s title, "applicability to pending cases," 403(b), 132 Stat. 5222 (capitalization omitted), suggesting that petitioners' cases "were not 'pending' on the date of [Section 403(b)'s] enactment." But the title does not advance amicus's position.

As noted above, see p. 11, *supra*, statutes are generally written from the reader's, not the drafter's, perspective. And on a contemporaneous reading, cases like petitioners' are indisputably "pending" when awaiting "[i]mposition of a sentence," 18 U.S.C. 3553.

Amicus's argument also proves too much. Even on his reading, an offender who committed his offense before the First Step Act was enacted, but was indicted and prosecuted only thereafter, is covered by Section 403(b)—even though the case was not "pending" on the enactment date.

### *3. Nothing in the legislative history indicates that Congress intended amicus's reading*

Amicus's similar argument (Br. 44) based on legislative history likewise lacks merit. In addition to drawing unfounded inferences, his invocation of history undercuts his own position.

Amicus notes (Br. 44) that shortly before the Act's enactment, Senator Cardin stated that the bill fell short, in his view, because "[s]everal sentencing provisions don't apply to individuals currently incarcerated." 164 Cong. Rec. S7775 (daily ed. Dec. 18, 2018). But that does not suggest that petitioners are excluded from Section 403(b) simply because they were "currently incarcerated" when the First Step Act was passed.

It is not clear that Senator Cardin was referring specifically to Section 403(b). Even assuming that he was, he may simply have been noting that Section 403(b) does not allow for the reopening of sentences that are otherwise final. And even beyond that, amicus's reliance on the statement proves too much: after all, even on his interpretation, Section 403(b) *does* apply to some then-incarcerated individuals, like convicted defendants awaiting an initial sentence. See 18 U.S.C. 3143(a)(1) (establishing general rule that "a person who has been found guilty of an offense and who is awaiting imposition or execution of a sentence * * * be detained").

### *4. Amicus errs in suggesting that petitioners' vacated sentences are actually still valid*

Finally, amicus contends (Br. 1, 20) that there was no legal flaw in petitioners' sentences on the counts at issue here. But while it is true that the sentences were not invalid for any intrinsic reason, cf. Br. in Opp. at 10, *Jackson* v. *United States*, 142 S. Ct. 1234 (2022) (No. 21-

5875) (cert. denied Mar. 7, 2022), they no longer had continuing legal force at the time of petitioners' resentencing because they had been vacated. Otherwise, they would remain "imposed," and the district court could not "impose a sentence," 18 U.S.C. 3553(a), to replace them.

### C. Amicus Cannot Reconcile His Reading With Section 403's Design

Amicus is also unable to explain how his interpretation would further, rather than undermine, Section 403's objectives. As the government has explained, Section 403(b) is carefully crafted to strike a balance between fairness and finality. See U.S. Br. 23-26; see Hewitt Br. 31-35. Allowing defendants like petitioners, who are already undergoing a plenary resentencing, to be sentenced under the ameliorated scheme adopted in Section 403(a) imposes no finality cost. Amicus's reading, in contrast, would perpetuate a prior sentencing scheme that Congress deemed unfair, without any offsetting finality benefit.

1. Amicus first attempts to characterize reliance on the Act's evident purpose as a "policy" argument that ignores Section 403(b)'s actual text. Amicus Br. 45; see *id.* at 44-46. But in construing statutory text, this Court often asks which interpretation "best fulfills [an Act's] statutory objectives." *Brown* v. *United States*, 602 U.S. 101, 113 (2024); see Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 20 (2012) (explaining that an "essential element of context that gives meaning to words" is the "evident purpose of what a text seeks to achieve"). Considering the statute's purpose is appropriate here, where Congress's balance between fairness and finality is apparent from the text.

There can be no serious question that, by extending the application of the ameliorated sentencing scheme to some but not all pre-Act offenders, Congress was striking a balance between fairness and the finality of existing convictions. Unlike a neighboring provision of the First Step Act (Section 404), Section 403 does not allow for revisitation of still-"impose[d]," nonvacated, sentences. § 404(b), 132 Stat. 5222; see *Concepcion* v. *United States*, 597 U.S. 481, 504 (2022) (Kavanaugh, J., dissenting) (describing Section 404(b) as a limited exception to "[t]he finality of criminal judgments"). But Section 403 also spares pre-Act offenders from sentencing under the harsher scheme that would apply by default under the federal saving statute. See p. 10, *supra*. And Section 403 strikes that balance by using language that mirrors Section 3582(c), the provision that sets out the general rule of finality applicable in federal sentencing law. See pp. 7-8, *supra*; U.S. Br. 22.

Amicus's position would upset Section 403's balance by applying the discarded harsher penalties more often without any offsetting finality benefits. Applying Section 403(a) to offenders like petitioners does not require reopening a final sentence—it only reaches offenders who do not have a legally operative sentence and require resentencing in any event.

2. Amicus contends (Br. 46-47) that his reading makes Section 403(b) more easily administrable and that it is fairer to similarly situated defendants. Neither argument is correct.

First, amicus claims that his rule is "clear," asserting that it "can be easily applied from the date of enactment onward" because "the full universe of defendants who qualify under § 403(b) could be fully and easily ascertained." Amicus Br. 26, 46. That assertion is mistaken.

Section 403(b) unequivocally applies the ameliorated scheme to at least some offenders whose identity and number remained unknown on the Act's date of enactment—namely, pre-Act offenders who had not yet been charged.

More fundamentally, the relevant question in assessing administrability is not how easily Congress could enumerate the offenders affected by a particular provision, but how easy the statute would be for a court to apply in a particular case. And when a Section 924(c) sentence needs to be imposed at a sentencing proceeding in a particular case, the easiest thing to do is just to apply the First Step Act sentencing scheme, irrespective of whether some previous sentence had been vacated or when the vacatur occurred.

Second, amicus suggests (Br. 46-47) that his approach would be the fairest. But "disparities, reflecting a line-drawing effort, will exist whenever Congress enacts a new law changing sentences (unless Congress intends re-opening sentencing proceedings concluded prior to a new law's effective date)." *Dorsey*, 567 U.S. at 280. And, on anyone's reading, Congress accepted at least some disparities. For example, if two coconspirators' separate initial proceedings straddle the First Step Act's enactment date because one evaded arrest for longer or delayed trial proceedings by repeatedly firing his counsel, only the dilatory coconspirator would be subject to the newer, lighter penalties. Once Congress departed from a time-of-offense rule, the next most relevant principle here is finality, and an offender whose sentence is vacated, requiring a plenary resentencing, is differently situated in a critical way from an offender whose sentence remains valid and in effect.

Amicus cannot explain away the disparities that arise under his own reading. See Duffey Br. 50-51. Amicus accepts (Br. 47 n.8) that on his view, a district court would be required to impose the harsh pre-Act sentencing provisions on a defendant whose pre-Act Section 924(c) convictions are vacated, and who, after the Act's enactment, is retried, convicted, and sentenced anew. Amicus asserts that there is nothing odd about requiring the imposition of the pre-Act stacking regime for such a newly convicted offender because that offender is treated the same as "other offenders who committed the same crimes on the same dates." Amicus Br. 47 n.8. But that argument disregards Congress's contrary judgment: Congress expressly departed from the default rule that the date of offense determines the applicable penalties. § 403(b), 132 Stat. 5222. Congress thus indicated that the proper rule is uniformity among post-Act impositions of sentences (all of which should be subject to the new regime)—not the (partial) uniformity that amicus tries to create between pre-Act and post-Act offenders.

**D. Resort To The Rule Of Lenity Is Unwarranted**

Petitioners' invocation (Hewitt Br. 35-37; Duffey Br. 42-44) of the rule of lenity is misplaced. That rule applies only to "interpretations of the substantive ambit of criminal prohibitions, [and] to the penalties they impose." *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980). Section 403(b), however, is an act of legislative grace that extends the application of a new sentencing scheme to offenders who committed their crimes under the older regime—thereby overriding the default rule in the saving statute. The rule of lenity does not supercharge a provision that is already an act of lenity. Cf. *Freeman* v. *Quicken Loans, Inc.*, 566 U.S. 624, 637

(2012) (per curiam) ("No legislation pursues its purposes at all costs.") (brackets and citation omitted).

In any event, the rule of lenity comes into play only if, after employing all of the traditional tools of statutory construction, "there remains a grievous ambiguity" such that "the Court must simply guess as to what Congress intended." *United States* v. *Castleman*, 572 U.S. 157, 173 (2014) (citation omitted). The possibility of "two grammatically permissible readings of the statute when viewed in the abstract" is not enough. *Pulsifer*, 601 U.S. at 152. Petitioners' position is the correct one not because of the rule of lenity, but because the text, context, and design of Section 403(b) show that Congress did not intend to subject petitioners to the harsher pre-Act punishment scheme.

* * * * *

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
*Solicitor General*

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