No. 23-___

IN THE

Supreme Court of the United States

TIMOTHY IVORY CARPENTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Harold Gurewitz
GUREWITZ & RABEN, PLC
333 W. Fort Street
Suite 1400
Detroit, MI 48226

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
Easha Anand
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

QUESTION PRESENTED

Two provisions of the First Step Act (Sections 401 and 403) significantly reduce mandatory minimum sentences for certain federal firearm and drug offenses. First Step Act of 2018, Pub. L. No. 115-391, §§ 401, 403, 132 Stat. 5194, 5220-22 (FSA). These reduced minimums apply to all offenses committed after December 21, 2018, the Act's date of enactment. As relevant here, they also 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." FSA §§ 401(c), 403(b).

The question presented here is: Do the sentencing reforms in Section 403 of the First Step Act apply when a district court sentences an individual whose offense was committed before the Act's effective date but whose initial sentence was vacated afterwards?

RELATED PROCEEDINGS

United States v. Green et al., No. 12-cr-20218-004 (E.D. Mich. Apr. 28, 2014)

United States v. Carpenter, No. 14-1572 (6th Cir. Apr. 13, 2016)

Carpenter v. United States, No. 16-402 (U.S. June 22, 2018)

United States v. Carpenter, No. 14-1572 (6th Cir. June 11, 2019)

United States v. Carpenter, No. 14-1572 (6th Cir. Dec. 19, 2019)

United States v. Green et al., No. 12-cr-20218-004 (E.D. Mich. Mar. 3, 2022)

United States v. Carpenter, No. 22-1198 (6th Cir. May 2, 2023)

United States v. Carpenter, No. 22-1198 (6th Cir. Sept. 18, 2023)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Legislative Materials

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Timothy Ivory Carpenter respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The panel decision of the United States Court of Appeals for the Sixth Circuit is unpublished and reprinted in the Appendix to the Petition ("Pet. App.") at 1a-5a. The order denying rehearing en banc and accompanying opinions (Pet. App. 6a-24a) are published at 80 F.4th 790. The relevant proceedings in the district court are unpublished.

JURISDICTION

The judgment of the court of appeals that gives rise to this petition was entered on May 2, 2023. Pet. App. 1a. A timely petition for rehearing was denied on September 18, 2023. Pet. App. 7a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant provisions of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, are reproduced at Pet. App. 25a-30a.

STATEMENT OF THE CASE

This case presents an important question of federal sentencing law over which the courts of appeals are openly divided, and where the Government agrees the lower court's position on the issue is incorrect.

A. Statutory background

The First Step Act of 2018 made "once-in-a-generation reforms to America's prison and sentencing system." *Senate Passes Landmark Criminal Justice Reform*, U.S. Senate Comm. on the Judiciary (Dec. 18, 2018). "[T]he product of a remarkable bipartisan effort," the Act sought "to remedy past overzealous use of mandatory-minimum sentences." *United States v. Henry*, 983 F.3d 214, 218 (6th Cir. 2020).

Section 403 of the Act—the provision directly at issue in this case—amends 18 U.S.C. § 924(c), which forbids using, carrying, or possessing a firearm in connection with a "crime of violence or drug trafficking crime." 18 U.S.C. § 924(c)(1)(A). A defendant's first Section 924(c) conviction carries a mandatory minimum sentence of at least 5 years. *Id.* Sentences for additional Section 924(c) convictions must be "stack[ed]," meaning they must run consecutively rather than concurrently to any other term of imprisonment. *See Henry*, 983 F.3d at 217-18.

Before the Act, each "second or subsequent" Section 924(c) conviction triggered a 25-year mandatory minimum sentence. 18 U.S.C. § 924(c)(1)(C) (2017). And this Court held that this heightened mandatory minimum applied even to additional Section 924(c) convictions obtained in the same proceeding as a defendant's first Section 924(c)

conviction. *Deal v. United States*, 508 U.S. 129, 134-35 (1993).

The practice of stacking multi-decade sentences for first-time Section 924(c) offenders, often resulting in de facto life sentences, drew widespread condemnation. *See, e.g.*, U.S. Sent'g Comm'n, *2011 Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 359-62 (2011); Hum. Rts. Watch, *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty* (2013); *Hearings Before the Over-Criminalization Task Force of 2014 of the H. Comm. on the Judiciary*, 113th Cong. (2014) (Hon. Irene M. Keeley, Judicial Conference of the United States).

Congress enacted Section 403 to ensure that Section 924(c)'s heightened mandatory minimums apply "only to defendants who [a]re truly recidivists." *Henry*, 983 F.3d at 218. To that end, Section 403(a) clarifies that the 25-year mandatory minimum is triggered only when a Section 924(c) violation "occurs after a prior conviction under this subsection has become final." FSA § 403(a). (Otherwise, any stacking under Section 924(c)(1)(A)(i) will involve just the 5-year mandatory minimum for each offense.)

Section 403, of course, applies to future criminal offenses. It also applies to certain "[p]ending [c]ases." FSA § 403(b). Specifically, Section 403(b) provides that Section 403's sentencing reforms 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." *Id.*

An identically worded applicability provision also appears within Section 401 of the Act. That section reduces mandatory sentences and alters related

sentencing rules for various federal drug offenses. For example, before the Act, a mandatory sentence of "life without release" attached to certain violations of 21 U.S.C. § 841(a) where the defendant had "two or more prior convictions for a felony drug offense." FSA § 401(a)(2)(A)(ii). Section 401 reduces that mandatory life sentence to 25 years and alters which prior offenses trigger the recidivist enhancement to include only "serious drug felon[ies] or serious violent felon[ies]." *Id.* Section 401(c) is the applicability provision for these reforms. Like Section 403(b), it provides that the new sentencing rules "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." *Id.* § 401(c).

Because Sections 401(c) and 403(b) use exactly the same language, "circuit courts have construed them to have the same meaning." *United States v. Bethea*, 841 Fed. Appx. 544, 548 n.5 (4th Cir. 2021). Indeed, the courts treat holdings regarding the reach of either of these provisions as definitive constructions of the other. *See, e.g.*, *United States v. Mitchell*, 38 F.4th 382, 389 (3d Cir. 2022).

B. Factual and procedural background

1. About a decade ago, petitioner Timothy Carpenter acted "mostly as a lookout" in a series of robberies of Radio Shack and T-Mobile stores. Pet. App. 1a. For this conduct, he was convicted after trial of six counts of Hobbs Act robbery and five counts of using or carrying a firearm during a crime of violence under 18 U.S.C. § 924(c). *Id.* 2a. In 2014, the district court sentenced him to 116 years of imprisonment. *Id.*

The length of this sentence was largely due to the Section 924(c) mandatory minimums in place at the time. Pet. App. 2a. Mr. Carpenter received 135 months (11.25 years) for his Hobbs Act convictions. *Id.* Even though he had never previously been convicted of violating Section 924(c), he received 1,260 months (105 years) for his five Section 924(c) convictions: 5 years for the first count and 25 years for each of the four additional counts. *See id.* All of those sentences were stacked. *See id.*

2. Mr. Carpenter appealed, and the Sixth Circuit affirmed. *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016). This Court then granted certiorari to decide whether cell-site location information introduced against Mr. Carpenter at trial was obtained in violation of the Fourth Amendment. The Court held that it was and remanded for further proceedings. *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018).

3. On remand, the Sixth Circuit again upheld Mr. Carpenter's convictions, holding that the good-faith exception to the exclusionary rule allowed the admission of the cellular location evidence at issue. *United States v. Carpenter*, 926 F.3d 313, 317-18 (6th Cir. 2019).

Mr. Carpenter then sought rehearing. As relevant here, he argued that this Court's intervening decision in another case, *Dean v. United States*, 581 U.S. 62 (2017), made clear that his sentence was invalid. *Dean* held that sentencing courts may consider the length of mandatory minimum sentences under Section 924(c) when calibrating sentences for predicate offenses. *Id.* at 69. Yet the sentencing court in Mr. Carpenter's case had thought it lacked that authority. The Sixth Circuit

accordingly vacated Mr. Carpenter's sentence and remanded for resentencing. *United States v. Carpenter*, 788 Fed. Appx. 364, 364-65 (6th Cir. 2019).

4. At his resentencing, Mr. Carpenter argued that the district court should apply the newly enacted First Step Act. He emphasized that Section 403(b) renders the Act applicable to pre-Act offenses where "a sentence has not been imposed." Pet. App. 4a. Under the Act, Mr. Carpenter's mandatory minimum sentence for his five Section 924(c) convictions would have been 25 years (that is, 5 years for each count, stacked on top of one another), as opposed to the 105-year mandatory minimum that Section 924(c) previously required. *Id.* 3a.

The Government responded that the Sixth Circuit's decision in *United States v. Jackson*, 995 F.3d 522 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 1234 (2022), foreclosed Mr. Carpenter's position. In *Jackson*, the Sixth Circuit held that Section 403(b) does not apply where a sentence existed on the Act's effective date, even if that sentence is later vacated. *Id.* at 525.

The district court agreed with the Government and applied the version of Section 924(c) that the Act had superseded. Pet. App. 4a. Again, the district court sentenced Mr. Carpenter to 116 years imprisonment—105 years of which was attributable to the Section 924(c) counts. *Id.* 1a.

5. A panel of the Sixth Circuit affirmed. Pet. App. 5a. It agreed with the district court that, under *Jackson*, the First Step Act's sentencing reforms do not apply to a defendant's resentencing "when his first sentence was not vacated until after the Act became law." *Id.* 4a.

Mr. Carpenter then sought rehearing en banc. He stressed that decisions from the Third, Fourth, and Ninth Circuits conflict with *Jackson*'s interpretation of Section 403(b) and that the Government had changed its position on the issue. The Government agreed with Mr. Carpenter that rehearing was warranted and urged the Sixth Circuit to adopt the majority rule. U.S. Resp. Defendant-Appellant's Pet. Reh'g En Banc 1, ECF No. 27. The Government explained that "[b]ased on text, context, and purpose," the Act's applicability provisions are "best read as adopting a middle ground between the default regime of imposing more lenient penalties only on post-enactment offenders and allowing the reopening of final judgments with the administrative and finality costs that entails." *Id.* at 13 (citation omitted).

The Sixth Circuit nevertheless refused to grant rehearing en banc. Pet. App. 7a. Four judges maintained that *Jackson* was "correct." *Id.* 8a (Kethledge, J., concurring). Three other judges dissented on the ground that "*Jackson* was wrongly decided" because a sentence vacated after the Act's effective date is, as a matter of law, "void from the start, including on the date the Act was enacted." *Id.* 14a, 16a (Griffin, J., dissenting). These judges also explained that "this case involves a question of exceptional importance." *Id.* 14a. Three additional judges dissented simply on the ground that the question is one "of exceptional importance" that requires uniformity across the circuits. *Id.* 21a (Bloomekatz, J., dissenting). The six remaining active judges did not sign any opinion or otherwise reveal their votes.

6. This petition for certiorari follows.

REASONS FOR GRANTING THE WRIT

Sections 401 and 403 of the First Step Act ushered in historic sentencing reforms for certain drug and firearm offenses. They also contain identically worded applicability provisions stating that their reforms "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." FSA §§ 401(c), 403(b).

The courts of appeals are split over whether these applicability provisions cover defendants in Mr. Carpenter's position—namely, individuals whose original sentences, entered prior to the Act, have been vacated after the Act's effective date. As the Government itself has recognized, the Sixth Circuit erred below in holding that the provisions do not so apply. Mr. Carpenter's case presents this important question in a clean vehicle that highlights the stakes involved. The Court should grant review and reverse.

I. There is a square and entrenched conflict over whether the First Step Act applies in this situation.

The courts of appeals are openly divided over the scope of the applicability provisions in Sections 401 and 403. This split is likely to deepen further, and only this Court can resolve it.

1. Published decisions from the Third and Ninth Circuits, as well as an unpublished decision from the Fourth Circuit, hold that the applicability language in Sections 401 and 403 of the Act covers individuals in Mr. Carpenter's position. These courts reason that whenever a defendant's sentence has been vacated, his sentence is "null and void," such that "a sentence has

not been imposed" upon him for purposes of the Act's applicability provisions. *United States v. Merrell*, 37 F.4th 571, 576 (9th Cir. 2022) (construing Section 403); *see also United States v. Mitchell*, 38 F.4th 382, 389 (3d Cir. 2022) (Sections 401 and 403); *United States v. Bethea*, 841 Fed. Appx. 544, 551 (4th Cir. 2021) (Section 401).

2. As numerous judges on the Sixth Circuit and other courts recognize, the Sixth Circuit rejects this majority rule and holds Section 403 inapplicable in this situation. Pet. App. 18a-19a (Griffin, J., dissenting); *id.* 22a (Bloomekatz, J., dissenting); *see also Mitchell*, 38 F.4th at 386 ("Interpreting [Section 403] has vexed, and split, our sister circuits."); *Merrell*, 37 F.4th at 575 (referencing "varying results" among the circuits).

In *United States v. Jackson*, 995 F.3d 522 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 1234 (2022), the Sixth Circuit refused to follow the Fourth Circuit's holding in *Bethea*—the sole on-point appellate decision at the time. The Sixth Circuit held that a court imposing a new sentence on someone in Mr. Carpenter's position must apply the penalty provisions that Section 403 superseded, even though the defendant's original sentence has "'no legal effect' anymore." *Jackson*, 995 F.3d at 525 (citation omitted).

Although the Third and Ninth Circuits rejected *Jackson* before this case reached the Sixth Circuit, the panel below was "compelled [by *Jackson*] to conclude" the First Step Act did not apply at Mr. Carpenter's resentencing. Pet. App. 2a, 4a. The full Sixth Circuit then refused to grant rehearing en banc to reconsider its interpretation of Section 403(b). *Id.* 7a.

3. The split is even deeper than 3-1 in practice. The Second Circuit has remanded at least one case following post-Act vacatur of a pre-Act sentence while emphasizing that "the government agreed" the defendant "would benefit from the Act's reforms" at resentencing. *United States v. Walker*, 830 Fed. Appx. 12, 17 n.2 (2d Cir. 2020). And district courts in the Second Circuit are applying the First Step Act's reforms to other defendants in Mr. Carpenter's position. *See, e.g.*, *United States v. Figueroa*, 530 F. Supp. 3d 437, 444 (S.D.N.Y. 2021); *United States v. Nix*, 2023 WL 4457894, at *2 (W.D.N.Y. July 11, 2023). A district court within the Eleventh Circuit has applied Section 403 to a defendant in Mr. Carpenter's position as well. *See United States v. Daniels*, 2023 WL 2588172, at *3 (M.D. Ala. Mar. 21, 2023).

By contrast, at least one district court within the Fifth Circuit has repeatedly held that the Act's sentencing reforms do not apply to defendants whose pre-Act sentences are vacated after the Act's effective date. Three defendants have appealed such orders, and those appeals are now pending in the Fifth Circuit. *See United States v. Duffey*, No. 22-10265 (5th Cir.). That forthcoming decision promises to deepen the conflict even further.

4. This conflict is ready for resolution. To start, the question presented has amply percolated. Panels of the Fourth and Ninth Circuits have issued majority and dissenting opinions regarding whether the First Step Act applies to defendants in Mr. Carpenter's position. *See Bethea*, 841 Fed. Appx. at 556 (Quattlebaum, J., dissenting); *Merrell*, 37 F.4th at 578 (Boggs, J., dissenting). For the Sixth Circuit's part, the judges who have expressed views on the issue have

divided 5-3, issuing four separate opinions. *See* Pet. App. 8a (Kethledge, J., concurring); *id.* 14a (Griffin, J., dissenting); *Jackson*, 995 F.3d at 523 (majority opinion); *id.* at 526 (Moore, J., dissenting).

Two other opinions have made significant contributions to the debate as well. First, in *United States v. Uriarte*, 975 F.3d 596 (7th Cir. 2020) (en banc), the Seventh Circuit declined to address the specific question presented here. *Id.* at 602 n.3. But in a lengthy dissent, then-Judge Barrett opined that Section 403 does not apply to defendants in Mr. Carpenter's position. *Id.* at 606 (Barrett, J., dissenting). Second, when the Third Circuit decided the question presented, Judge Bibas wrote separately to explain that then-Judge Barrett's interpretation of Section 403(b) cannot be squared with the legal and historical conception of vacatur. *See Mitchell*, 38 F.4th at 392 (Bibas, J., concurring in the judgment).

The split is also entrenched. The Third and Ninth Circuits have expressly considered and rejected the Sixth Circuit's reading of the Act's applicability provisions. *Mitchell*, 38 F.4th at 386 n.22, 389; *Merrell*, 37 F.4th at 575. And in this case, the Sixth Circuit refused to reconsider the issue en banc, despite the Government urging it to do so. Pet. App. 7a. Only this Court can resolve the conflict.

II. The question presented is important.

1. As noted above, the First Step Act made "once-in-a-generation reforms to America's prison and sentencing system." *Senate Passes Landmark Criminal Justice Reform*, U.S. Senate Comm. on the Judiciary (Dec. 18, 2018). And the "changes to mandatory minimums" in Sections 401 and 403 were among the Act's "most important." 164 Cong. Rec.

S7748 (daily ed. Dec. 18, 2018) (Sen. Klobuchar); *see also id.* at S7781 (Sen. Cruz) (lauding this "major bill that moves in the direction of justice" by "lower[ing] mandatory minimums").

Indeed, the "real human costs" at stake with respect to the applicability provisions are enormous. Pet. App. 23a (Bloomekatz, J., dissenting). Before Section 403, the average sentence in cases including second or subsequent convictions under Section 924(c) was 52 years. *See* U.S. Sent'g Comm'n, *Sentence and Prison Impact Estimate Summary, S. 756, The First Step Act of 2018*, at 5 (2019), https://perma.cc/YN63-KN5T. In other words, the average pre-Act defendant received a "de facto life sentence." U.S. Sent'g Comm'n, *Life Sentences in the Federal System* 1 (2022). But under Section 403, the average sentence plummets to less than 25 years—a difference of nearly three decades. *See* U.S. Sent'g Comm'n, *Sentence and Prison Impact Estimate Summary, S. 756, The First Step Act of 2018*, at 5 (2019).

Section 401 also brought dramatic change. Its amendments to drug penalty provisions reduce affected sentences by an average of over 20%. U.S. Sent'g Comm'n, *Sentence and Prison Impact Estimate Summary, S. 756, The First Step Act of 2018*, at 3 (2019). Of particular note, one subsection of Section 401 lowers the prior mandatory minimum of life without release to 25 years for certain drug crimes. FSA § 401(a)(2)(A)(ii).

2. The liberty interest at stake on a defendant-by-defendant basis is reason enough to grant certiorari. That the question presented arises regularly makes review all the more warranted. To begin, the population of federal prisoners with sentences under

the penalty provisions that Sections 401 and 403 amended is quite substantial. Section 403 amended 18 U.S.C. § 924(c). Nearly 13% of the individuals in federal custody for a federal offense were convicted under Section 924(c). U.S. Sent'g Comm'n, *QuickFacts: Federal Offenders in Prison* 1 (2023). Many—like Mr. Carpenter—are serving multiple "stacked" Section 924(c) sentences. U.S. Sent'g Comm'n, *The First Step Act of 2018: One Year of Implementation* 36 (2020). In addition, Section 401 amended the penalty provisions of "the most commonly prosecuted drug offenses" in the country. U.S. Sent'g Comm'n, *Primer: Drug Offenses* 1 (2023), https://perma.cc/6B46-8AHL.

The question presented can arise for defendants with these sorts of convictions in at least three scenarios. First, there are defendants whose pre-Act sentences have been vacated and who argue that Section 401 or 403 applies to them at resentencing. Such vacaturs might have occurred on direct review (as with Mr. Carpenter) or because defendants obtained post-conviction relief under 28 U.S.C. § 2255.

Second, there are defendants whose sentences have not yet been vacated but who will obtain such relief in the future either on direct appeal or on an initial Section 2255 proceeding. Sentences may be vacated for myriad reasons, from misapplication of the sentencing guidelines, *e.g.*, *United States v. Reed*, 755 Fed. Appx. 350, 351 (5th Cir. 2018), to ineffective assistance of counsel, *e.g.*, *Hesser v. United States*, 40 F.4th 1221, 1229 (11th Cir. 2022), to violations of procedural due process, *e.g.*, *United States v. Mitchell*, 944 F.3d 116, 120-23 (3d Cir. 2019).

Section 2255 also enables defendants to seek relief when this Court construes the federal statutes under which they were convicted or sentenced more narrowly than the lower courts in which they were prosecuted. *See* 28 U.S.C. § 2255(a); *see also Davis v. United States*, 417 U.S. 333, 342-47 (1974). The limitations period for those filings runs from the date the Court issues such decisions. 28 U.S.C. § 2255(f)(3). Therefore, future rulings from this Court construing the criminal statutes to which Sections 401 and 403 apply—namely, certain controlled-substances laws and 18 U.S.C. § 924(c)—could enable new groups of defendants to move for vacatur. And in the past four years, this Court has issued two such decisions in the Section 924(c) context alone. *See United States v. Taylor*, 142 S. Ct. 2015 (2022) (holding that attempted Hobbs Act robbery cannot be a predicate for a Section 924(c) charge); *United States v. Davis*, 139 S. Ct. 2319 (2019) (voiding the "residual clause" of Section 924(c)(3)(B) for vagueness).

Third, individuals sentenced before the Act who have already lost a motion for relief under Section 2255 can potentially file second or successive motions that result in resentencing. Defendants may file such motions when this Court announces new constitutional rules that apply retroactively. 28 U.S.C. § 2255(h)(2). This Court periodically does so. As just noted, this Court recently held that the residual clause of Section 924(c)(3)(B) is unconstitutionally vague. *Davis*, 139 S. Ct. at 2336. And the Court has made clear that this type of holding applies retroactively. *Welch v. United States*, 578 U.S. 120, 130 (2016); *see also United States v. Bowen*, 936 F.3d 1091, 1100-01 (10th Cir. 2019).

III. This case presents an ideal vehicle to resolve this pressing question.

This case provides an excellent vehicle for clarifying the scope of the First Step Act's applicability provisions.

1. The question was presented and addressed at each stage below. During his resentencing, Mr. Carpenter asked the district court to apply the Act to him. *See* Def.'s Sent'g Mem. 5-11, ECF No. 600; Sent'g Hr'g Tr. 5-6, ECF No. 616. The district court rejected his argument and held the "First Step Act doesn't apply." Sent'g Hr'g Tr. 6, ECF No. 616.

Mr. Carpenter pressed the issue again on direct appeal to the Sixth Circuit, and the court of appeals rejected his claim on the merits. Pet. App. 2a. Then, when Mr. Carpenter petitioned for rehearing en banc, the court of appeals denied review, *id.* 7a, generating two more opinions on the merits, *id.* 8a, 14a.

2. The question presented is outcome-determinative for Mr. Carpenter's appeal, and his case highlights the stakes involved in interpreting the applicability provisions. Under the Sixth Circuit's holding that the Act does not apply here, four of Mr. Carpenter's five Section 924(c) convictions remain subject to the pre-Act mandatory minimums of 25 years, resulting in a 105-year sentence for those five counts. Pet. App. 3a. This sentence (coupled with the 11-year sentence for the robbery counts) is "extreme by any measure." *Id.* 13a (Kethledge, J., concurring); *see also United States v. Walker*, 830 Fed. Appx. 12, 16 (2d Cir. 2020) (noting that a district judge decried a 105-year sentence for similar conduct under the previous version of Section 924(c) as "unrealistic, unbelievable, and incredible").

Under the rule in the Third, Fourth, and Ninth Circuits, the district court would have applied the First Step Act's reforms at Mr. Carpenter's resentencing. *See* Pet. App. 18a-19a (Griffin, J., dissenting). As a result, the mandatory minimum sentence for his Section 924(c) convictions would be "*eighty* years" shorter, *id.* 23a (Bloomekatz, J., dissenting), giving 38-year-old Mr. Carpenter a reasonable prospect of freedom someday.

3. Finally, this is the right time for the Court to resolve this circuit split. Now that the Government agrees with Mr. Carpenter's position on the merits, no petitions for certiorari will be forthcoming from any court of appeals that applies the majority rule. And nothing would be gained by waiting for another case from the Sixth Circuit or any other court of appeals that adopts a conflicting view of the Act. As explained above, the issue has sufficiently percolated, and the conflict has no prospect of disappearing on its own. *See supra* at 10-11.

IV. The Sixth Circuit's construction of the Act is incorrect.

As the Government itself has recognized, the Sixth Circuit's interpretation of the First Step Act is wrong. Sections 401(c) and 403(b) declare that the Act's sentencing amendments apply to "any offense" committed before enactment, so long as "a sentence for the offense has not been imposed" as of the Act's date of enactment. An individual facing resentencing after their original sentence was vacated is, in the eyes of the law, a person upon whom a sentence has never been imposed.

1. Sections 401 and 403 apply at sentencing when "a sentence has not been imposed." FSA §§ 401(c),

403(b). As Judge Bibas has explained, the "key question" is thus whether vacatur "void[s] the sentence ab initio, as if it had never happened. Or does it just erase the sentence's legal effect going forward?" *United States v. Mitchell*, 38 F.4th 382, 392 (3d Cir. 2022) (Bibas, J., concurring) (citation omitted). If vacatur makes a sentence "void from the start," then a vacated sentence cannot legally be said to have been imposed. *Id.*

In *United States v. Jackson*, 995 F.3d 522 (6th Cir. 2021), the Sixth Circuit characterized vacatur's legal effect as purely "prospective," reasoning that it "does not retroactively change" the defendant's status before the Act became effective. *Id.* at 525. But history, tradition, and modern practice establish that vacatur voids a past judgment in both directions—rendering it not just a nullity for future purposes, but also something that, legally speaking, never happened.

In the nineteenth and early twentieth centuries, this Court and others "uniformly understood" that "a vacated order never happened." *Mitchell*, 38 F.4th at 392 (Bibas, J., concurring); *see also, e.g.*, *United States v. Ayres*, 76 U.S. 608, 610 (1870) (after a judgment has been vacated, the judgment is "null and void, and the parties are left in the same situation as if no trial had ever taken place"); *Lockwood v. Jones*, 7 Conn. 431, 436 (1829) (vacatur "puts the parties in the state, in which they were, immediately before the judgment was rendered"); *Williams v. Floyd*, 27 N.C. 649, 656 (1845) (when an order is "stricken out" by the court, "it is the same as if such order had never existed"). Numerous courts of appeals have since confirmed that "when a sentence has been vacated, the defendant is placed in the same position as if he had

never been sentenced." *United States v. Maldonado*, 996 F.2d 598, 599 (2d Cir. 1993).[1] This Court has likewise recognized that vacatur of a sentence "wipe[s] the slate clean." *Pepper v. United States*, 562 U.S. 476, 507 (2011).

Modern legal dictionaries are in accord, explaining that to "vacate a ruling is to annul it, treating it as if it had not been issued." *Vacatur (Vacate)*, *Wolters Kluwer Bouvier Law Dictionary* (compact ed. 2011); *accord Vacate*, *Black's Law Dictionary* (11th ed. 2019) ("To nullify or cancel; make void; invalidate"); Karen M. Ross, *Essential Legal English in Context: Understanding the Vocabulary of US Law and Government* 156 (2019) ("An award, judgment, or sentence that is vacated is set aside or nullified, in effect removing it from existence.").

Lest there be any doubt, numerous legal doctrines depend on the rule that vacatur renders a past judgment something that, in the eyes of the law, never happened. Consider, for example, double jeopardy. This Court has long made clear that defendants retried following vacatur of their original convictions are not put in jeopardy a second time. *See North Carolina v. Pearce*, 395 U.S. 711, 719-20 (1969) (citing *United States v. Ball*, 163 U.S. 622 (1896)). "[T]his 'well-established part of our constitutional jurisprudence'" rests on the premise—admittedly a "fiction" from a purely historical perspective—that the

---

[1] *Accord United States v. Lee*, 2023 WL 5422727, at *2 (8th Cir. Aug. 23, 2023); *United States v. Burke*, 863 F.3d 1355, 1359 (11th Cir. 2017); *United States v. Barnes*, 948 F.2d 325, 330 (7th Cir. 1991).

original conviction, upon being vacated, has been "wholly nullified and the slate wiped clean." *Id.* at 720-21 (citation omitted). The new sentence is the "single punishment for the offense." *Id.* at 721.

Doctrine governing a defendant's right to allocute—that is, the right to address the court before sentencing—is in accord. That right exists "only before the imposition of sentence, not in all sentencing situations." *United States v. Barnes*, 948 F.2d 325, 329 (7th Cir. 1991). Still, courts hold that defendants facing post-vacatur resentencing have the right to address the court again, even if they exercised that right when they were initially sentenced. *Id.* at 330; *see also United States v. Muhammad*, 478 F.3d 247, 250 (4th Cir. 2007) (collecting other decisions in accord). Here too, the vacatur creates a "clean slate." *Barnes*, 948 F.2d at 330.

Perhaps recognizing that the Sixth Circuit's conception of vacatur in *Jackson* is flawed, Judge Kethledge asserted below that vacatur's "legal effect" is beside the point. *See* Pet. App. 11a-12a (opinion concurring in the denial of rehearing en banc). In his view, Section 403(b)'s phrase "has not been imposed" asks simply whether, as a "historical fact," the defendant was ever sentenced. *Id.* 11a. If so, then the Act does not apply, even when a defendant is being resentenced from scratch. *Id.* 10a-11a. But "[w]e should ask not whether a sentence was imposed as a historical fact, but whether the law treats it as imposed." *Mitchell*, 38 F.4th at 392 (Bibas, J., concurring). "Part of a fair reading of statutory text is recognizing that 'Congress legislates against the backdrop' of certain unexpressed presumptions." *Bond v. United States*, 572 U.S. 844, 857 (2014)

(citation omitted). Chief among those presumptions is that "common-law adjudicatory principles"—such as vacatur's legal effect—"apply except 'when a statutory purpose to the contrary is evident.'" *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (citation omitted).

After all, we are engaged here in reading *law*—and not just any law, but law describing legal procedure. The law of procedure is replete with background principles, terms of art, and legal fictions that make the judicial process work. The background principle of equitable tolling, for example, sometimes allows claims to be filed beyond their statutorily defined limitations periods. *See, e.g.*, *Holland v. Florida*, 560 U.S. 631, 645-49 (2010). By a similar token, statutory rules that require "final" judgments or orders for an appeal sometimes allow appellate review where the underlying litigation is not complete. *E.g.*, *Abney v. United States*, 431 U.S. 651, 657-59 (1977) (construing 28 U.S.C. § 1291); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-81 (1975) (construing 28 U.S.C. § 1257). And a second-in-time habeas petition is not even necessarily "second or successive." *Magwood v. Patterson*, 561 U.S. 320, 323-24 (2010). The bottom line is that "when the law is the subject, ordinary *legal* meaning is to be expected, which often differs from common meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 73 (2012) (emphasis added). The interplay between Section 403(b)'s phrase "a sentence has not been imposed" and the legal import of vacatur is no different.

2. Construing Section 403(b) to apply to defendants in Mr. Carpenter's position comports with other aspects of the statute's wording as well.

Most notably, the present-perfect verb tense of the phrase "has not been imposed" requires an inquiry into the ongoing legal validity of a previously imposed sentence, not merely its past existence as a historical fact. The present-perfect tense typically denotes a condition that "continues up to the present." Chicago Manual of Style § 5.132 (17th ed. 2017). A vacated sentence flunks that test. To be sure, the present perfect can also denote "an act, state, or condition that is now completed." *Id.* But even then, it would be inappropriate to use this verb tense to capture a vacated sentence. When the present-perfect tense references a past act, it implies that the referent has not since been discredited or invalidated. *See, e.g.*, *Ask the Editor: Past Perfect and Present Perfect Tenses*, Britannica Dictionary, https://perma.cc/3A64-V6MP. That is not true with regard to a vacated sentence. If Congress had wanted to bar Sections 401 and 403 from applying in this context, it would at the very least have rendered them inapplicable whenever a sentence "*was* imposed" or "*had been* imposed" as of the date of enactment.

Concurring below in the denial of rehearing en banc, Judge Kethledge disagreed, contending that "the statute's use of the verb 'imposed'" emphasizes "'the historical fact' of the sentence's imposition." Pet. App. 9a (citation omitted). But this argument turns on a grammatical misstep. Nominalizing "has been imposed" into "imposition" shifts focus from the present state of affairs to a discrete historical event. It may well be that the *imposition* of a sentence occurs at

a fixed point in time. The relevant question, however, is whether a sentence "has not been imposed" when an individual faces resentencing following vacatur of his original sentence. FSA § 403(b). For the reasons stated above, the verb tense of the phrase "has not been imposed" demands inquiry into a sentence's continued validity.

Judge Kethledge also opined that the statute's use of the indefinite article "a" before "sentence" "means any kind of sentence, not just a valid or non-vacated one." Pet. App. 10a. This is also incorrect. If the phrase "a sentence" were intended to capture vacated sentences, Congress would have written "*any* sentence" or even "an *original* sentence." In fact, Congress used the term "any" earlier in the applicability provisions, in the phrase "any offense," to indicate an inclusive group of offenses. FSA §§ 401(c), 403(b). Congress's decision to use different terms should be given effect. *See, e.g.*, *Ysleta Del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1939 (2020).

3. Beyond grammar and linguistic meaning in isolation, it is also a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)). Here, the majority interpretation of the Act's applicability provisions is the only one that makes sense in the overall context of the Act.

The First Step Act was simultaneously monumental and incremental. In dramatic fashion, Congress determined that sentences imposed for decades under some of the most commonly prosecuted

federal crimes had been "overly harsh." 164 Cong. Rec. S7649 (daily ed. Dec. 17, 2018) (Sen. Grassley); *see also id.* at S7828 (daily ed. Dec. 19, 2018) (Sen. Schumer) (the Act "will make an extraordinary difference in countless lives by making our sentencing laws fairer and smarter"). In light of the implications of these reforms for personal liberty and the fair administration of justice, Congress made the reforms applicable not only to future cases but also to "[p]ending [c]ases." FSA §§ 401(c), 403(b).

But the First Step Act does not apply to *all* pending cases. "Finality is essential to both the retributive and the deterrent functions of criminal law." *Calderon v. Thompson*, 523 U.S. 538, 554 (1998). So the Act respects that principle. For example, "the Act does not apply to a direct appeal by a defendant sentenced before its enactment" whose sentence remains valid. *United States v. Merrell*, 37 F.4th 571, 574 (9th Cir. 2022); *accord United States v. Jordan*, 952 F.3d 160, 171-72 (4th Cir. 2020) (citing other courts holding same).

Sections 401(c) and 403(b) are designed to harmonize the competing interests of sentencing reform and finality. And only the majority rule carries out this objective. That rule ensures that courts will follow current law when—but only when—they have to impose a sentence anyway, either for the first time or because a defendant's initial sentence has been vacated. In other words, "Congress stanched, to the degree that it could without overturning valid and settled sentences," the effects of "sentencing policies that it considered no longer in the Nation's best interest." *United States v. Uriarte*, 975 F.3d 596, 601 (7th Cir. 2020).

By contrast, the Sixth Circuit's rule limits the reach of the Act's sentencing reforms with "no benefit to finality." U.S. Resp. Defendant-Appellant's Pet. Reh'g En Banc 13, ECF No. 27. The Sixth Circuit agrees that Sections 401 and 403 apply to an individual whose sentence was vacated before the Act became effective. *See United States v. Henry*, 983 F.3d 214, 216 (6th Cir. 2020). But the Sixth Circuit holds that those sentencing reforms do not apply to an individual like Mr. Carpenter whose sentence is vacated afterwards. Pet. App. 4a; *Jackson*, 995 F.3d at 525. There is no legitimate reason to distinguish between these two situations. In either case, a defendant's sentence has been vacated and the court must impose a new sentence.

Perhaps sensing difficulty in defending the line the Sixth Circuit has drawn, Judge Kethledge instead endorsed the position previously espoused by then-Judge Barrett—namely, that the Act does not apply to *any* defendant who received a pre-Act sentence, without regard to whether or when that sentence was vacated. Pet. App. 9a-10a; *see also Uriarte*, 975 F.3d at 606-09 (Barrett, J., dissenting). But that position is even less true to the overall context of the Act. It excludes an even larger swath of defendants from the Act's reforms with zero benefit to finality.

Worse still, deeming Sections 401 and 403 inapplicable to all defendants who received pre-Act sentences would "create disparities of a kind" that modern sentencing statutes are designed to prevent. *See Dorsey v. United States*, 567 U.S. 260, 276 (2012). Consider how this unfairness could play out for two co-defendants charged before the Act took effect:

> One defendant pleads guilty. Another goes to trial. The first defendant is sentenced and appeals. The court of appeals vacates the sentence and remands for resentencing by which time the defendant who took the case to trial is awaiting sentencing. Congress passes the First Step Act at this point. The two defendants stand convicted of the same offenses and will stand before the same judge to be sentenced. If the First Step Act does not apply on remand for resentencing, one defendant will be subject to a 25-year mandatory minimum sentence; the defendant who went to trial will not.

United States v. Uriarte, 2019 WL 1858516, at *4 (N.D. Ill. Apr. 25, 2019). There is no reason to believe the First Step Act is designed to require the imposition of "radically different sentences" in "roughly contemporaneous sentencing[s]." *Dorsey*, 567 U.S. at 277.

In the face of this unfairness, Judge Kethledge shrugged: Congress's decisions as to when sentencing reforms apply, he said, "will always yield results that seem arbitrary." Pet. App. 13a. But we know that's not so. As explained above, the line Congress drew in the applicability provisions—when properly understood—is not arbitrary at all. It implements a carefully considered balance between reform and finality.

4. Judge Kethledge advanced two other arguments below, but both lack merit.

First, Judge Kethledge framed the interpretive question of this case in light of a clear-statement rule derived from the federal saving statute, 1 U.S.C. § 109. Pet. App. 8a. Enacted to guard against implied repeals caused by "legislative inadvertence," *Warden,*

Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 660 (1974), that statute provides that an amendment to a sentencing law applies to pre-amendment offenses only if Congress "expressly provide[s]" for such coverage. 1 U.S.C. § 109; *see also Dorsey*, 567 U.S. at 272. Here, Sections 401(c) and 403(b) plainly satisfy this condition: They govern sentencing for "offense[s] . . . committed before the date of enactment." FSA §§ 401(c), 403(b). Determining which pre-Act offenses are subject to Section 403 is thus nothing more than an ordinary question of statutory interpretation.

Even if the saving statute were relevant not just to *whether* the Act applies to pre-Act conduct but to *exactly when* it applies to such conduct, it would not matter. Though the saving statute says "expressly provide," 1 U.S.C. § 109, this Court "has long recognized" that the statute "creates what is in effect a less demanding interpretive requirement." *Dorsey*, 567 U.S. at 273-74. Because "one Congress cannot bind a later Congress," this Court requires only a "fair implication" to satisfy the saving statute. *Id.* at 274. For all of the reasons stated above, there is at least a fair implication here that the Act applies to defendants in Mr. Carpenter's situation.

Second, Judge Kethledge lamented that "the judiciary was largely denied any role in determining" the length of Mr. Carpenter's sentence. Pet. App. 13a. On the contrary, the judiciary is the lone branch of government standing in the way of a fair sentence here.

Congress put provisions into the Act to maximize the applicability of its sentencing reforms without disrupting finality. Indeed, the Act's co-sponsors have

confirmed that they "tailor[ed] the language" in Sections 401(c) and 403(b) to apply to "pre-Act offenders" whose "original sentences are vacated as unlawful for other reasons." Amicus Brief of U.S. Senators Durbin, Grassley, and Booker at 11, *United States v. Mapuatuli*, No. 19-10233 (9th Cir. May 12, 2020). The Executive Branch now agrees that the Act applies in this context. Pet. App. 19a. Other courts of appeals have reached the same conclusion. Because of the Sixth Circuit's intransigence, however, it now falls to this Court to give the Act its proper reach.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Harold Gurewitz
GUREWITZ & RABEN, PLC
333 W. Fort Street
Suite 1400
Detroit, MI 48226

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
Easha Anand
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

November 15, 2023