APPENDIX

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APPENDIX A

NOT RECOMMENDED FOR PUBLICATION
File Name: 23a0209n.06

No. 22-1198

[Filed May 2, 2023]

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TIMOTHY I. CARPENTER, Defendant-Appellant.	On Appeal from the United States District Court for the Eastern District of Michigan **OPINION**

Before: GUY, KETHLEDGE, and STRANCH, Circuit Judges.

KETHLEDGE, Circuit Judge. This case is before us for a third time. In this appeal, Timothy Carpenter appeals his sentence of 116 years in prison, imposed by the district court in 2022 for Carpenter's role (mostly as a lookout) in a string of armed robberies of Radio Shack and T-Mobile stores in and around Detroit. That was the same sentence that the district court first imposed on Carpenter in 2014, mostly because of mandatory-minimum terms required by Congress. Carpenter argues that, as a result of Congress's enactment of the First Step Act in 2018, he was not subject to those mandatory

minimums at his 2022 resentencing. But Congress chose not to make the First Step Act fully retroactive; and we find ourselves compelled to conclude, as did the district court, that the Act did not apply to Carpenter's resentencing. We therefore affirm.

I.

This case has a long procedural history, but the relevant chronology is as follows. In 2013, after a jury trial, Timothy Carpenter was convicted on six counts of robbery in violation of the Hobbs Act, 18 U.S.C. § 1951(a), and five counts of using or carrying a firearm during a crime of violence under 18 U.S.C. § 924(c). At that time, § 924(c)(1)(C) mandated a minimum sentence of 25 years (*i.e.*, 300 months) in prison for any "second or subsequent conviction" under that section—including when the second or subsequent conviction came in the same case as the defendant's first conviction under that provision. *See* 18 U.S.C. § 924(c)(1)(C)(i); *Deal v. United States*, 508 U.S. 129, 132–37 (1993). Moreover, § 924(c)(1)(D)(ii) required that every such 300-month sentence be consecutive to—meaning stacked on top of—the sentences for the predicate offenses (here, the Hobbs Act robberies) and any other § 924(c) sentences imposed in the case. Accordingly, in 2014, the district court sentenced Carpenter to a total of 1,395 months' imprisonment—comprising 135 months on each of the robbery counts, to run concurrently, followed by a consecutive 60-month sentence for the first § 924(c) count and four consecutive 300-month sentences on the remaining gun counts.

Carpenter appealed his criminal judgment. We affirmed—holding, among other things, that the FBI's use of cell-tower data for Carpenter's phone

was not the result of a Fourth Amendment "search." *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016).

In June 2018, the Supreme Court reversed our Fourth Amendment holding and remanded Carpenter's case back to this court. *Carpenter v. United States*, 138 S. Ct. 2206 (2018). That December, Congress passed the First Step Act. *See* Pub. L. No. 115-391, 132 Stat. 5194 (2018). As relevant here, the Act amended § 924(c)(1)(C) to mandate a minimum (and consecutive) sentence of 25 years for violation of § 924(c) only when a § 924(c) conviction occurs "after a prior conviction under this subsection has become final." *See* First Step Act § 403(a). That amendment, if applied in Carpenter's case, would reduce his mandatory-minimum sentence on his § 924(c) convictions by 80 years (from 105 years to 25). Yet Congress limited the Act's retroactive effect: Section 403(b) provides that "the amendments made by this section, shall apply to any offense that was committed before" the Act's effective date—December 21, 2018—"if a sentence for the offense has not been imposed as of such date of enactment."

Six months after the First Step Act became effective, we again affirmed Carpenter's criminal judgment, albeit on somewhat different grounds than before. *United States v. Carpenter*, 926 F.3d 313 (6th Cir. 2019). Carpenter then petitioned for rehearing in this court, arguing that a recent Supreme Court decision afforded the district court more discretion than before as to Carpenter's sentences on the Hobbs Act counts. *See Dean v. United States*, 581 U.S. 62, 69 (2017). We agreed with that argument, vacated Carpenter's sentence, and remanded his case "to

allow the district court to sentence him anew." *United States v. Carpenter*, 788 F. App'x 364, 364–65 (6th Cir. 2019).

On remand, Carpenter argued that the First Step Act's amendments applied to his resentencing because it would take place after December 2018. The district court disagreed, holding that—under § 403(b) of the Act as interpreted in *United States v. Jackson*, 995 F.3d 522 (6th Cir. 2021), *cert. denied*, 142 S. Ct. 1234 (2022)—the Act did not apply to Carpenter's resentencing. This appeal followed.

II.

We review de novo whether Carpenter is eligible for relief under § 403 of the First Step Act. *United States v. Jeffries*, 958 F.3d 517, 519 (6th Cir. 2020).

Under § 403(b), the Act's amendments applied to Carpenter's resentencing only if "a sentence" for his offenses "ha[d] not been imposed as of" the Act's date of enactment, namely December 21, 2018. As of that date, the district court had already imposed Carpenter's original sentence of 1,395 months; and that sentence remained in effect on that same date, since we did not vacate it until almost a year later, in December 2019. For purposes of § 403(b), therefore, the posture of Carpenter's case is identical to that of the defendant in *Jackson*: in each case, on the Act's date of enactment, the defendant was "under sentence pending appeal." *Jackson,* 995 F.3d at 525. We held in *Jackson* that the Act's amendments did not apply to the defendant's resentencing when his first sentence was not vacated until after the Act became law. *Id.* at 525–56 (disagreeing with *United States v. Bethea*, 841 F. App'x 544, 550 (4th Cir. 2021)). We must therefore hold the same here.

Relatedly, we agree with the government that our holding in *Jackson* did not conflict with our holding in *United States v. Henry*, 983 F.3d 214 (6th Cir. 2020). In *Henry*, unlike this case, the defendant's sentence had been vacated before the Act's effective date, and he had not yet been resentenced by that date. *Id.* at 217. And the majority opinion in *Henry* distinguished cases—like this one and Jackson's—where the defendants' "sentences were vacated and remanded *after* the First Step Act's enactment[.]" *Id.* at 222 n.2 (emphasis in original). The two cases are thus distinguishable on the ground that *Henry* itself distinguished them. *See Jackson*, 995 F.3d at 525.

Jackson dictates that § 403 of the First Step Act did not apply to Carpenter's resentencing. Yet one can argue that, in this case, Congress's sentencing provisions are working at cross-purposes. Here, the pre-Act version of § 924(c) mandated a minimum sentence of 105 years' imprisonment; whereas 18 U.S.C. § 3553(a) separately mandates that the court "impose a sentence sufficient, but not greater than necessary, to comply with" the purposes of sentencing. The latter mandate rings hollow here; perhaps Congress will eventually see fit to revisit retroactive application of the First Step Act's amendment to § 924(c)(1)(C).

* * *

The district court's judgment is affirmed.

APPENDIX B

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32 (1(b)

File Name: 23a0215p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TIMOTHY I. CARPENTER, Defendant-Appellant.	No. 22-1198

On Petition for Rehearing En Banc.
United States District Court for the Eastern District of Michigan at Detroit.

No. 2:12-cr-20218-4—Sean F. Cox, District Judge.

Decided and Filed: September 18, 2023

Before: GUY, KETHLEDGE, and STRANCH, Circuit Judges.

COUNSEL

ON PETITION FOR REHEARING EN BANC: Harold Gurewitz, GUREWITZ & RABEN, PLC, Detroit, Michigan, Jeffrey L. Fisher, O'MELVENY & MYERS LLP, Menlo Park, California, for Appellant.

ON RESPONSE: Andrew C. Noll, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., Blake S. Hatlem, Andrew Picek, UNITED STATES ATTORNEY'S OFFICE, Detroit, Michigan, for Appellee.

The court issued an order. KETHLEDGE, J. (pp. 3–6), delivered a separate opinion, in which SUTTON, C.J., and THAPAR and BUSH, JJ., joined, concurring in the denial of the petition for rehearing en banc. GRIFFIN, J. (pp. 7–11), delivered a separate opinion, in which MOORE and STRANCH, JJ., joined, dissenting from the denial of the petition for rehearing en banc. BLOOMEKATZ, J. (pp. 12–14), delivered a separate opinion, in which MOORE, CLAY, GRIFFIN, STRANCH and MATHIS, JJ., joined, dissenting from the denial of the petition for rehearing en banc.

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision. The petition then was circulated to the full court.[*] Less than a majority of the judges voted in favor of rehearing en banc.

Therefore, the petition is denied.

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[*] Judge Davis recused herself from participation in this decision.

APPENDIX C

[OPINIONS REGARDING ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, DENYING PETITION FOR REHEARING EN BANC, Filed September 18, 2023]

CONCURRENCE

KETHLEDGE, Circuit Judge, concurring in the denial of rehearing en banc. Our panel applied binding circuit precedent in this appeal, but I write to explain why I think that precedent (namely *United States v. Jackson*, 995 F.3d 522 (6th Cir. 2021)) was correct.

As an initial matter, we must apply something of a clear-statement rule here. The federal savings statute—codified at 1 U.S.C. § 109—provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide[.]" The word "repeal[,]" as used in § 109, "applies when a new statute simply diminishes the penalties that [an] older statute set forth." *Dorsey v. United States*, 567 U.S. 260, 272 (2012). The First Step Act is plainly such a "repeal." *Cf. id.*; *see also United States v. Hughes*, 733 F.3d 642, 644 (6th Cir. 2013). Thus, according to the Supreme Court, "we must assume that Congress did *not* intend" for such a repeal to apply retroactively in a defendant's case "unless [Congress] clearly indicated to the contrary." *Id.* at 264 (emphasis in original); *see also Hughes*, 733 F.3d

at 644. So the question is whether Congress has clearly indicated that the Act should apply here.

Section 403(b) of the First Step Act provides: "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*." (Emphasis added). The interpretive question is whether that last, restrictive phrase requires the absence of a particular historical fact—namely the imposition of a sentence—or the absence of a sentence with ongoing legal effect.

We usually give the words of statutes their ordinary meaning; and on that score—for all the opinions written on this issue—nobody has come close to dismantling then-Judge Barrett's grammatical exegesis as to why § 403(b) demands the absence of a particular historical fact. *See United States v. Uriate*, 975 F.3d 596, 606-09 (7th Cir. 2020) (Barrett, J., dissenting). Section 403(b) refers not merely to a "sentence" but to the *imposition* of one; and the statute's use of the verb "imposed[,]" plainly enough, puts the section's "focus on the historical fact" of the sentence's imposition. *Id.* at 607. That comports with the section's use of the present-perfect tense, which 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). Here, the sentence's imposition is "now completed." And the act of imposing a sentence could not possibly "continue up to the present"—because the imposition of a sentence occurs at a fixed point in time, when the district court "state[s] in open court the reasons for

its imposition of the particular sentence[.]" 18 U.S.C. § 3553(c).

Moreover—for purposes of precluding the Act's retroactivity as to the sentence for a particular conviction—the imposition of any sentence will do. For § 403(b) simply asks whether, as of the Act's date of enactment (December 21, 2018), "a" sentence has or "has not been imposed[.]" First Step Act of 2018, Pub. L. No. 115-391, § 403, 132 Stat. 5194, 5222. That usage of "a"—which here the government calls the "neutral article," but which everyone else calls the "indefinite article," *see The Chicago Manual of Style* ¶ 5.71—refers to "'a nonspecific object, thing, or person that is not distinguished from the other members of a class.'" *Uriate*, 975 F.3d at 608 (Barrett, J., dissenting) (quoting Garner, *Garner's Modern Legal Usage* 991 (4th ed. 2016)); *see also United States v. Merrell*, 37 F.4th 571, 578 (9th Cir. 2022) (Boggs, J., dissenting) (same). Thus, "a sentence" as used in § 403(b) means any kind of sentence, not just a valid or non-vacated one; and it does not mean "a valid sentence that survives constitutional challenge on direct appellate review and is therefore not subject to a vacatur and full remand for resentencing." *United States v. Mitchell*, 38 F.4th 382, 386 (3d Cir. 2022).

Hence the ordinary meaning of § 403(b) is straightforward: it simply asks whether, as of December 21, 2018, a sentence (meaning any sentence) has been imposed on the defendant. Carpenter's sentence had been imposed as of that date, and indeed had not even been vacated yet. Thus—even under the reasoning of the Seventh Circuit opinion from which then-Judge Barrett

dissented—the First Step Act does not apply to Carpenter's resentencing. *See Uriate*, 975 F.3d at 602 n.3.

The best argument to the contrary is that we should disregard the ordinary meaning of § 403(b) in favor of a technical meaning. Specifically, a sentence's vacatur typically "wipe[s] the slate clean" for purposes of resentencing, which means—the reasoning goes—that "'a sentence ha[s] not been imposed' for purposes of § 403(b) at the time of resentencing." *Merrell*, 37 F.4th at 575. Respectfully, however, that reasoning gives technical legal effect to a figure of speech. Expressions like "wipe the slate clean," or that after a sentence's vacatur "the defendant is placed in the same position as if he had never been sentenced," *id.* at 576 (cleaned up), are merely a shorthand for describing a district court's discretion in sentencing a defendant on remand: namely, that the court "generally should be free to consider any matters relevant to sentencing, even those that may not have been raised at the first sentencing hearing[.]" *Id.* (internal quotation marks omitted). Those expressions reflect that a vacated sentence is a sentence without legal effect; but that does not mean the court may proceed as if the earlier sentencing never happened. To the contrary, another statutory provision—entitled "Sentencing upon remand"—provides in relevant part that "[a] district court to which a case is remanded . . . shall apply the guidelines . . . that were in effect *on the date of the previous sentencing* of the defendant prior to the appeal[.]" 18 U.S.C. § 3742(g) (emphasis added); *see also Hughes*, 733 F.3d at 645.

Section 3742(g) references the fact of a defendant's earlier sentencing in the same way that § 403(b) does—namely, as a temporal marker that identifies the substantive rules (guidelines in the case of § 3742(g), mandatory minimums for § 403(b)) that the district court must apply when sentencing a particular defendant. And using the historical fact of a defendant's prior sentencing as such a marker does not amount to giving the vacated sentence itself legal effect. A sentence has legal effect when it restrains a defendant's liberty, not when it marks a particular point in time. *See Merrell*, 37 F.4th at 579 (Boggs, J., dissenting).

Nor is the word "sentence," as used in § 403(b), a term of art that means only a sentence that has not been vacated. That is just another way of saying that a vacated sentence is one that the district court must pretend never happened. Moreover, the Supreme Court has said that courts must not "assume that a statutory word is used as a term of art where that meaning does not fit." *Johnson v. United States*, 559 U.S. 133, 140 (2010). "Ultimately, context determines meaning, and we do not force term-of-art definitions into contexts where they plainly do not fit and produce nonsense." *Id.* (cleaned up). The relevant "context" here is the one governed by § 3742(g), namely "[s]entencing upon remand." And the historical fiction that Carpenter advocates would produce nonsense and incoherence alike. Nonsense, because under Carpenter's interpretation—as in *Merrell*—a defendant who had been in prison for 20 years pursuant to a later-vacated sentence "is somehow a defendant on whom a sentence has not been imposed as of" the First Step Act's effective

date. *Merrell*, 37 F.4th at 578 (Boggs, J., dissenting). (Meanwhile, a sentence cannot be vacated until it is first "imposed.") And incoherence because, under Carpenter's interpretation, a district court must recognize the fact of the defendant's prior sentence for purposes of determining his guidelines range (as required by § 3742(g)), but at the same time pretend that sentence never happened for purposes of determining the defendant's mandatory minimum. This kind of cognitive dissonance is hardly the "clear indication" of retroactivity that the Court demanded in *Dorsey.*

Congress's decision as to where to draw the line for a statute's retroactive effect will always yield results that seem arbitrary. Here, the line that Congress drew was simply between defendants who had already been sentenced and those who had not. Our role is not to redraw that line, even for a statute that is "remedial." Thus, as in *Hughes*, "[n]either policy concerns, nor some general sense of the statute's overriding purpose, nor the spirit of the age, provides us with any lawful basis to do what [the defendant] asks us to do here." 733 F.3d at 647.

All that said, Carpenter's sentence was extreme by any measure. His sentence was largely dictated by mandatory minimums, which means the judiciary was largely denied any role in determining it. Carpenter's case therefore illustrates the importance of dividing government power among three branches: for if the power to determine his sentence had not been consolidated in only two—Congress and the executive—the sentence here would never have been imposed.

DISSENT

GRIFFIN, Circuit Judge, dissenting.

This appeal arises under the First Step Act, which amended several criminal statutes and reduced mandatory-minimum sentences for certain federal crimes. For defendant Timothy Carpenter, the Act, if applied, "would reduce his mandatory-minimum sentence on his [18 U.S.C.] § 924(c) convictions by 80 years (from 105 years to 25)." *United States v. Carpenter*, 2023 WL 3200321, at *1 (6th Cir. May 2, 2023). But despite the Act's retroactivity provision extending its benefits to defendants awaiting sentencing, and despite the vacatur of Carpenter's earlier, invalid, pre-Act sentence, the panel here—following circuit precedent—concluded Carpenter must now be resentenced under the old version of the statute with its outdated sentencing scheme. *Id.* at *2 (citing *United States v. Jackson*, 995 F.3d 522, 524–25 (6th Cir. 2021)). In my view, *Jackson* was wrongly decided, and this case involves a question of exceptional importance. Accordingly, I respectfully dissent from the denial of the petition for rehearing en banc.

I.

The default rule for sentencing statutes is that offenders are subject to the version that was in effect when the crime was committed. *See Dorsey v. United States*, 567 U.S. 260, 272–73 (2012). But the Act departed from that rule. Section 403(b) provides:

> 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.

First Step Act of 2018, Pub. L. No. 115-391, § 403, 132 Stat. 5194, 5221–22.

This language raises the question of whether "a sentence" refers to a historical fact or one with legal effect—i.e., does it encompass a *prior, invalid sentence* or does it require an *existing, valid one*?

Under *Jackson*, whether the Act applies turns on a historical inquiry: was any sentence (even an illegal or unconstitutional one) imposed on the defendant on or before December 21, 2018? 995 F.3d at 524–25. If so, the defendant is to be resentenced under the old version of the statute, without the benefit of the Act's sentencing reforms. As Judge Moore thoughtfully explained, *Jackson* was wrongly decided—"[t]he plain language, structure, and purpose of First Step Act § 403 suggest" that the Act applies at resentencing where an earlier sentence was vacated. *Id.* at 526 (Moore, J., dissenting).

Beginning with the text, *Jackson* failed to account for the common-law meaning of "a sentence" and the effect of vacatur on "a sentence." When we interpret statutory language with common-law terms, we presume that Congress employs their common-law meaning. *United States v. Hansen*, 143 S. Ct. 1932, 1944 (2023) ("When Congress transplants a common-law term, the 'old soil' comes with it."); *see*

also Universal Health Servs., Inc. v. United States, 579 U.S. 176, 187 (2016); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981). At common law, "a sentence" that was vacated was void "ab initio, as if it had never happened." *United States v. Mitchell*, 38 F.4th 382, 392–93 (3d Cir. 2022) (Bibas, J., concurring) (discussing historical treatment, modern precedent, and an immigration exception demonstrating this meaning); *see also Pepper v. United States*, 562 U.S. 476, 508 (2011) (Vacatur "wipe[s] the slate clean."); *Jordon v. Gilligan*, 500 F.2d 701, 710 (6th Cir. 1974) ("[A] void judgment is no judgment at all and is without legal effect."); *Mitchell v. Joseph*, 117 F.2d 253, 255 (7th Cir. 1941) (stating "the general rule is that where a court, in the discharge of its judicial functions, vacates an order previously entered, the legal status is the same as if the order had never existed" and collecting cases).

True, "we do not assume that a statutory word is used as a term of art where that meaning does not fit." *Johnson v. United States*, 559 U.S. 133, 139 (2010). But here, the "void from the start" meaning fits like a glove. If a pre-Act sentence is later vacated, then that sentence was void from the start, including on the date the Act was enacted. That meaning, in turn, comports with the Act's purpose—to reduce the harsh length of mandatory-minimum sentences for certain crimes for defendants awaiting sentencing for those crimes.

II.

Relying on then-Judge Barrett's dissent in *United States v. Uriarte*, the concurrence dismisses this common-law argument as a "technical" meaning that

does not fit with the text's "ordinary meaning." Conc. at 3–5 (citing *Uriarte*, 975 F.3d 596, 606–609 (7th Cir. 2020) (en banc) (Barrett, J., dissenting)). But even the *Uriarte* dissent's grammar discussion leaves one unsure of how the statute's "ordinary meaning" results in a "historical fact" approach. *See id.*

To state the "historical fact" conclusion in a way that makes grammatical sense, one must use a verb tense different than the statute's—replacing "has" with "had." Conc. at 4 ("Carpenter's sentence *had* been imposed as of that date, and indeed had not even been vacated yet.") (emphasis added); *see Uriarte*, 975 F.3d at 610 ("[T]he applicability of the First Step Act turns on whether a sentence *had* been imposed on the defendant before the date of enactment.") (emphasis added).

But the statute uses the *present*-perfect tense (has), not the past-perfect one (had). The present-perfect tense "denotes 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) (emphases added). As particularly relevant here, our caselaw provides that one of the "multitude of definitions of 'imposed'" is one describing the *ongoing condition* of a sentence. *United States v. Henry*, 983 F.3d 214, 223 (6th Cir. 2020) ("When our court reviews a sentence on direct appeal, that sentence *remains* '*imposed*' unless we vacate and remand for resentencing.") (emphasis added). With this understanding, Section 403(b) refers not to a district court's past action, but rather to a sentence's ongoing condition.

First, Congress wrote the statute in the passive voice—"a sentence" is the thing that "has been imposed." There is no mention of the district court.

Second, if the text were referring to an act that occurred at a specific time in the past (like when a district court "imposed" an invalid sentence at an earlier sentencing), then the correct verb tense would have been the past tense or even the past-perfect tense. The present-perfect tense "is distinguished from the past tense because it refers to (1) a time in the indefinite past {I have played golf there before} or (2) a past action [or state or condition] that comes up to and touches the present {I have played cards for the last eighteen hours}." The Chicago Manual of Style ¶ 5.132 (17th ed. 2017) (emphases omitted). "The past tense, by contrast, indicates a more specific . . . time in the past." *Id.* The Act's use of the present-perfect tense indicates that it is *not* asking about an act at a specific time in the past, rather, it is concerned with a condition that "comes up to and touches the present." *Id.*

If a "sentence remains 'imposed'" until we vacate it, *Henry*, 983 F.3d at 223, then *has* Carpenter's sentence been imposed as of December 21, 2018? No. It *was* imposed as of that date. It *had been* imposed as of that date. But it *has not been* imposed as of that date. In my view, if there is an "ordinary meaning" to this language, it supports the Act's application here.

III.

All our sister circuits that have considered the meaning of "a sentence" in the Act have disagreed with *Jackson*—that term does not encompass a vacated sentence. *United States v. Mitchell*, 38 F.4th

382, 386–89 (3d Cir. 2022); *United States v. Merrell*, 37 F.4th 571, 575–76 (9th Cir. 2022); *United States v. Bethea*, 841 F. App'x 544, 549–51 (4th Cir. 2021) (analyzing an identical provision in § 401(c)); *see also United States v. Uriarte*, 975 F.3d 596, 601–06 (7th Cir. 2020) (en banc) (analyzing whether the Act applies to defendants whose sentences were vacated before December 21, 2018, but noting that vacatur renders a sentence "a nullity" and "wipe[s] the slate clean") (citation omitted). And in a rare show of agreement on a petition for rehearing en banc, the government agrees that *Jackson* was wrongly decided and supports Carpenter's petition.

Moreover, our interpretation of the statutory language at issue matters to more than just cases involving firearms in connection with crimes of violence, like Carpenter's. 18 U.S.C. § 924(c). The Act uses identical language in § 401(c), which applies the Act's benefits to offenders sentenced for certain drug offenses under 21 U.S.C. § 841. First Step Act of 2018, Pub. L. No. 115-391, § 401, 132 Stat. 5194, 5221. How we interpret this language will continue to matter for years to come, as defendants' pre-Act sentences or convictions are considered (and potentially vacated) on post-conviction review under 28 U.S.C. § 2255.

IV.

When "construing a statute, courts ought not deprive it of the obvious meaning intended by Congress, nor abandon common sense." *Uriarte*, 975 F.3d at 603 (citation omitted). We did so in *Jackson*, and today, we miss an opportunity to correct our error. For these reasons, and those set forth in Judge

Moore's dissent in *Jackson*, I respectfully dissent from the denial of Carpenter's unopposed petition for rehearing en banc.

* * *

DISSENT

BLOOMEKATZ, Circuit Judge, dissenting from the denial of rehearing en banc. My colleagues have set forth thoughtful analyses on the merits of the interpretive question that this case presents about the First Step Act's retroactivity provision. I write separately to emphasize a predicate point—that this case has all the hallmarks of one that warrants the full court's consideration. In *United States v. Jackson*, 995 F.3d 522 (6th Cir. 2021), we held that the Act's retroactivity provision did not cover a defendant who had been sentenced before the Act's effective date but whose sentence had been vacated after that date. *Id.* at 524–25. *Jackson*'s holding not only clashes with our own prior precedent, but also departs from every other circuit to have considered the issue. And it does so on a question of exceptional importance, where both the federal government and the defendant seek en banc review. We should have agreed.

Federal Rule of Appellate Procedure 35 provides that rehearing en banc "is not favored and ordinarily will not be ordered unless" either of two requirements are met: (1) "en banc consideration is necessary to secure or maintain uniformity of the court's decisions," or (2) "the proceeding involves a question of exceptional importance." This case more than satisfies these requirements.

First, consider the uniformity requirement. In my view, *Jackson* is irreconcilable with this Court's previous decision in *United States v. Henry*, 983 F.3d

214 (6th Cir. 2020). *Henry* held that defendants whose sentences under 18 U.S.C. § 924(c) were vacated before the First Step Act's effective date should be sentenced under the Act's amended § 924(c) at resentencing. Yet *Jackson* read the Act's retroactivity provision not to apply to anyone who had received "a sentence" as a matter of "historical fact" before the Act's effective date—even if the sentence was void. Conc. at 3; *Jackson*, 995 F.3d at 524–25 ("[V]acatur does not erase Jackson's prior sentence from history."). *Jackson* attempts to distinguish *Henry* by noting that Henry's sentence was vacated before the Act's effective date and Jackson's was vacated after. *Id.* at 525. If following *Jackson*, however, the critical question is whether "a" sentence had ever been imposed as a historical matter, then *Henry* is in direct conflict. *Id.* at 527 (Moore, J., dissenting) (noting that the majority opinion "adopts a reading of the text that we rejected in *Henry*").

Jackson also splits from all our sister circuits to have reached the question. *See United States v. Mitchell*, 38 F.4th 382 (3d Cir. 2022); *United States v. Merrell*, 36 F.4th 571 (9th Cir. 2022); *United States v. Bethea*, 841 F. App'x 544 (4th Cir. 2021). This case, then, presents both an intra- and inter-circuit conflict, weighing in favor of en banc review.

Second, consider the myriad ways this issue is exceptionally important. The concurring and dissenting opinions have already identified several. Judge Kethledge opines that Carpenter's sentence, in absence of the First Step Act's application, "was extreme by any measure." Conc. at 6. And he earlier reflected that *Jackson*'s decision not to apply the Act

could frustrate the basic federal sentencing requirement that sentences be "'sufficient, but not greater than necessary, to comply with' the purposes of sentencing." *United States v. Carpenter*, No. 22-1198, 2023 WL 3200321, at *2 (6th Cir. May 2, 2023) (quoting 18 U.S.C. § 3553(a)). As Judge Griffin likewise recognizes, *Jackson*'s interpretation "will continue to matter for years to come" and could also affect one of the Act's other retroactivity provisions, which uses identical language to govern the retroactive effect of amendments to certain drug offenses. Dissent at 10.

The real human costs that this esoteric legal issue presents also should not be overlooked. Because our circuit has split from every other to reach this issue, defendants in Kentucky, Michigan, Ohio, and Tennessee will often have to serve decades longer sentences than those in most of the other states. Carpenter proves this point. His sentence is *eighty* years longer than it would be if he had been resentenced in the seventeen states that comprise the Third, Fourth, and Ninth Circuits. *See* Dissent at 7. The resulting sentencing disparity, along with the other reasons I have outlined, should give us pause enough to consider the decision as a full court. Indeed, the circuit split, the federal government's position, the dissent from then-Judge Barrett in *Uriate*, and the dueling opinions on this en banc petition underscore that the scope of the retroactivity provision is far from clear. *See United States v. Uriate*, 975 F.3d 596, 606–09 (7th Cir. 2020) (en banc) (Barrett, J., dissenting).

This case is a textbook example of the rare case that deserves the full court's attention. I respectfully dissent from the denial of the petition.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX D

FIRST STEP ACT OF 2018
Pub. L. 115-391 (Dec. 21, 2018)
S. 756

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[S. 756-27]

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TITLE IV—SENTENCING REFORM

SEC. 401. REDUCE AND RESTRICT ENHANCED SENTENCING FOR PRIOR DRUG FELONIES.

(a) CONTROLLED SUBSTANCES ACT AMENDMENTS.—The Controlled Substances Act (21 U.S.C. 801 et seq.) is amended—

(1) in section 102 (21 U.S.C. 802), by adding at the end the following:

"(57) The term 'serious drug felony' means an offense described in section 924(e)(2) of title 18, United States Code, for which—

"(A) the offender served a term of imprisonment of more than 12 months; and

"(B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense.

"(58) The term 'serious violent felony' means—

"(A) an offense described in section 3559(c)(2) of title 18, United States Code, for which the offender served a term of imprisonment of more than 12 months; and

"(B) any offense that would be a felony violation of section 113 of title 18, United States Code, if the offense were committed in the special maritime and territorial jurisdiction of the United States, for which the offender served a term of imprisonment of more than 12 months."; and

(2) in section 401(b)(1) (21 U.S.C. 841(b)(1))—

(A) in subparagraph (A), in the matter following clause (viii)—

(i) by striking "If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years" and inserting the following: "If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years"; and

(ii) by striking "after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release" and inserting the following: "after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years"; and

(B) in subparagraph (B), in the matter following clause (viii), by striking "If any person commits such a violation after a prior conviction for a felony drug offense has become final" and

inserting the following: "If any person commits [S. 756-28] such a violation after a prior conviction for a serious drug felony or serious violent felony has become final".

(b) CONTROLLED SUBSTANCES IMPORT AND EXPORT ACT AMENDMENTS.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

(1) in paragraph (1), in the matter following subparagraph (H), by striking "If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not less than 20 years" and inserting "If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years"; and

(2) in paragraph (2), in the matter following subparagraph (H), by striking "felony drug offense" and inserting "serious drug felony or serious violent felony".

(c) 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.

SEC. 402. BROADENING OF EXISTING SAFETY VALVE.

(a) AMENDMENTS.—Section 3553 of title 18, United States Code, is amended—

(1) in subsection (f)—

(A) in the matter preceding paragraph (1)—

(i) by striking "or section 1010" and inserting ", section 1010"; and

(ii) by inserting ", or section 70503 or 70506 of title 46" after "963)";

(B) by striking paragraph (1) and inserting the following:

"(1) the defendant does not have—

"(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

"(B) a prior 3-point offense, as determined under the sentencing guidelines; and

"(C) a prior 2-point violent offense, as determined under the sentencing guidelines;"; and

(C) by adding at the end the following:

"Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense."; and

(2) by adding at the end the following:

"(g) DEFINITION OF VIOLENT OFFENSE.—As used in this section, the term 'violent offense' means

a crime of violence, as defined in section 16, that is punishable by imprisonment."

(b) APPLICABILITY.—The amendments made by this section shall apply only to a conviction entered on or after the date of enactment of this Act.

SEC. 403. CLARIFICATION OF SECTION 924(c) OF TITLE 18, UNITED STATES CODE.

(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 [S. 756-29] 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.

SEC. 404. APPLICATION OF FAIR SENTENCING ACT.

(a) DEFINITION OF COVERED OFFENSE.—In this section, the term "covered offense" means a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372), that was committed before August 3, 2010.

(b) DEFENDANTS PREVIOUSLY SENTENCED.—A court that imposed a sentence for a covered offense may, on motion of the defendant, the Director of the

Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) were in effect at the time the covered offense was committed.

(c) LIMITATIONS.—No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits. Nothing in this section shall be construed to require a court to reduce any sentence pursuant to this section.

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