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

BRIEF FOR RESPONDENT SUPPORTING PETITIONERS

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
NICOLE M. ARGENTIERI
Principal Deputy Assistant Attorney General
ERIC J. FEIGIN
Deputy Solicitor General
MASHA G. HANSFORD
Assistant to the Solicitor General
ANDREW C. NOLL
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether Section 403 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5221-5222, which reduced certain mandatory consecutive sentences under 18 U.S.C. 924(c) for "any offense that was committed before the date of enactment of [the] Act, if a sentence for the offense has not been imposed as of such date of enactment," applies at a post-Act resentencing following the vacatur of a pre-Act sentence.

TABLE OF CONTENTS

Page

Opinions below ... 1
Jurisdiction ... 1
Statutory provision involved ... 2
Statement ... 2
A. Legal background ... 4
B. Factual and procedural background ... 7
Summary of argument ... 11
Argument:
Section 403 of the First Step Act applies at a post-Act resentencing following the vacatur of a pre-Act sentence ... 14
A. The text of the Act focuses on whether a defendant is subject to a valid pre-Act sentence, not whether a defendant once received a since-invalidated sentence ... 16
1. Congress's use of the present-perfect tense focuses on a sentence's continuing validity ... 17
2. Congress's contrasting use of "a" and "any" similarly indicates its focus on a valid sentence rather than an invalid one ... 19
B. Statutory context confirms that the Act's revised penalties apply whenever a court replaces an invalid sentence with a valid one ... 20
1. The "imposition" of a new sentence following vacatur presupposes that a sentence "has not been imposed" at a prior time ... 20
2. This Court's understanding of 18 U.S.C. 3583(c) illuminates the proper understanding of similar language in the Act ... 22
C. Applying the First Step Act's fairer sentencing scheme to post-Act resentencings furthers the Act's purposes ... 23

Table of Contents—Continued: Page

D. The court of appeals identified no sound basis for its contrary conclusion 28
Conclusion 33

TABLE OF AUTHORITIES

Cases:

Bartenwerfer v. *Buckley*, 598 U.S. 69 (2023) 23, 29
Borden v. *United States*, 593 U.S. 420 (2021) 29
Bravo-Fernandez v. *United States*, 580 U.S. 5 (2016) 27
Brown v. *Gardner*, 513 U.S. 115 (1994) 19
Brown v. *United States*, 144 S. Ct. 1195 (2024) 23
Burrell v. *United States*, 384 F.3d 22 (2d Cir.), cert. denied, 543 U.S. 993 (2004) 27
Calderon v. *Thompson*, 523 U.S. 538 (1998) 24
Carr v. *United States*, 560 U.S. 438 (2010) 17
Deal v. *United States*, 508 U.S. 129 (1993) 5
Dillon v. *United States*, 560 U.S. 817 (2010) 22
Dorsey v. *United States*, 567 U.S. 260 (2012) ... 14, 24, 26, 30
Gundy v. *United States*, 588 U.S. 128 (2019) 17
Gwaltney of Smithfield, Ltd. v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987) 19
Lora v. *United States*, 599 U.S. 453 (2023) 4
Pepper v. *United States*, 562 U.S. 476 (2011) 13, 22, 23
Pulsifer v. *United States*, 601 U.S. 124 (2024) 6, 20, 31
Ramos v. *Louisiana*, 590 U.S. 83 (2020) 24
Russello v. *United States*, 464 U.S. 16 (1983) 19
Smith v. *Berryhill*, 587 U.S. 471 (2019) 19
Teague v. *Lane*, 489 U.S. 288 (1989) 24
United States v. *Bethany*, 975 F.3d 642 (7th Cir. 2020) 21

Cases—Continued: Page

United States v. *Cruz-Rivera*, 954 F.3d 410 (1st Cir.), cert. denied, 141 S. Ct. 601 (2020) 25

United States v. *Davis*, 588 U.S. 445 (2019) 9

United States v. *Eldridge*, 2 F.4th 27 (2d Cir. 2021), cert. granted, vacated, and remanded on other grounds, 142 S. Ct. 2863 (2022)........ 25

United States v. *Frady*, 456 U.S. 152 (1982)....................... 24

United States v. *Gomez*, 960 F.3d 173 (5th Cir. 2020) 25

United States v. *Henry*, 983 F.3d 214 (6th Cir. 2020)........ 21

United States v. *Hodge*, 948 F.3d 160 (3d Cir.), cert. denied, 141 S. Ct. 347 (2020) 25

United States v. *Jefferson*, 989 F.3d 1173 (10th Cir.), cert. denied, 142 S. Ct. 353 (2021) 25

United States v. *Jordan*, 952 F.3d 160 (4th Cir. 2020), cert. denied, 141 S. Ct. 1051 (2021)......... 25

United States v. *Merrell*, 37 F.4th 571 (9th Cir. 2022) 20

United States v. *Mitchell*, 38 F.4th 382 (3d Cir. 2022) 27

United States v. *Reece*, 938 F.3d 630 (5th Cir. 2019), cert. denied, 142 S. Ct. 364 (2021) 9

United States v. *Richardson*, 948 F.3d 733 (6th Cir.), cert. denied, 141 S. Ct. 344 (2020) 25

United States v. *Roberson*, 752 F.3d 517 (1st Cir. 2014) 27

United States v. *Smith*, 967 F.3d 1196 (11th Cir. 2020), cert. denied, 141 S. Ct. 2538 (2021)... 5, 25

United States v. *Snyder*, 235 F.3d 42 (1st Cir. 2000), cert. denied, 532 U.S. 1057 (2001) 27

United States v. *Sparkman*, 973 F.3d 771 (7th Cir. 2020)... 25

United States v. *Smith*, 756 F.3d 1179 (10th Cir. 2014) 5

Cases—Continued: Page

United States v. *Uriarte*,
975 F.3d 596 (7th Cir. 2020) 20, 21, 26, 31
United States v. *Voris*, 964 F.3d 864
(9th Cir. 2020), cert. denied,
141 S. Ct. 2464 (2021) 25
United States v. *Wilson*, 503 U.S. 329 (1992) 17
Whalen v. *United States*, 445 U.S. 684 (1980) 20
Young v. *United States*, 943 F.3d 460 (D.C. Cir. 2019) 25

Constitution and statutes:

U.S. Const. Amend. V (Double Jeopardy Clause) 27
Crime Control Act of 1990, Pub. L. No. 101-647,
104 Stat. 4789 18
Tit. XXV:
§ 2505(a), 104 Stat. 4862 18
§ 2505(b), 104 Stat. 4862 18
First Step Act of 2018, Pub. L. No. 115-391,
132 Stat. 5194 .... 2, 6, 14
§ 401(a), 132 Stat. 5220-5221 7
§ 401(b), 132 Stat. 5221 .... 7, 11
§ 401(c), 132 Stat. 5221 .... 7, 11, 23, 25
§ 403, 132 Stat. 5221-5222 ... 9, 11, 15, 19, 21, 23-25, 27, 30
§ 403(a), 132 Stat. 5221-5222 .... 6, 10, 15
§ 403(b), 132 Stat. 5222 .... 6, 7, 11-25, 28-32
§ 603(b), 132 Stat. 5238-5239 23
Sentencing Reform Act of 1984, Pub. L. No. 98-473,
Tit. II, ch. II, 98 Stat. 1987 22
§ 212(a), 98 Stat. 1998 22
1 U.S.C. 9 30
1 U.S.C. 109 .... 15, 24
10 U.S.C. 863(a) 31
10 U.S.C. 950e 31

Statutes—Continued: Page

18 U.S.C. 521(b) 18
18 U.S.C. 521(d)(3) 18
18 U.S.C. 922(g)(1) 27
18 U.S.C. 924(c) 3-11, 15, 24, 26-28, 32
18 U.S.C. 924(c)(1)(A) 4, 6
18 U.S.C. 924(c)(1)(A)(i) 4
18 U.S.C. 924(c)(1)(A)(ii) 4
18 U.S.C. 924(c)(1)(A)(iii) 4
18 U.S.C. 924(c)(1)(C)(i) (2006) 5, 8, 10
18 U.S.C. 924(c)(1)(C)(i) (2018) 10
18 U.S.C. 924(c)(1)(D)(ii) 4
18 U.S.C. 924(c)(3)(A) 9
18 U.S.C. 924(c)(3)(B) 9
18 U.S.C. 1963(m) 18
18 U.S.C. 3293 18
18 U.S.C. 3551 22
18 U.S.C. 3553 .... 12, 20, 22
18 U.S.C. 3553(a)(4) 30
18 U.S.C. 3553(a)(4)(i) 30
18 U.S.C. 3582(c) 13, 22, 23
18 U.S.C. 3584(a) 4
18 U.S.C. 3742(g) 18, 30
18 U.S.C. 3742(g)(1) 29, 30
18 U.S.C. 4214(d)(4) (1982) 31
28 U.S.C. 2255 .... 3, 9
28 U.S.C. 2255(h)(2) 9
42 U.S.C. 16911(1) (2012) 27

Miscellaneous:

Black's Law Dictionary (11th ed. 2019) 16

Miscellaneous—Continued: Page

Bryan A. Garner, *Garner's Modern English Usage* (4th ed. 2016) 29

164 Cong. Rec.:

p. S7649 (daily ed. Dec. 17, 2018) 14, 15, 24

p. S7748 (daily ed. Dec. 18, 2018) 15

p. S7749 (daily ed. Dec. 18, 2018) 14, 15, 24

p. S7774 (daily ed. Dec. 18, 2018) 15

Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834 and H.R. 1466 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary, 111th Cong., 1st Sess. (2009) 6

The Chicago Manual of Style (17th ed. 2017) 12, 17, 28

U.S. Sentencing Commission, *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Oct. 2011) 5

In the Supreme Court of the United States

No. 23-1002

TONY R. HEWITT, PETITIONER

v.

UNITED STATES OF AMERICA

No. 23-1150

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

BRIEF FOR RESPONDENT SUPPORTING PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Hewitt Pet. App. 1a-16a; Duffey & Ross Pet. App. 1a-19a) is reported at 92 F.4th 304. Prior opinions of the court of appeals are not published in the Federal Reporter but are reprinted at 582 Fed. Appx. 528 and 456 Fed. Appx. 434.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2024. The petitions for writs of certiorari were filed on March 8, 2024 (Hewitt), and April 19, 2024

(Duffey and Ross), and were granted on July 2, 2024. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 403 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5221-5222, provides:

> **SEC. 403. CLARIFICATION OF SETION 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 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.

Ibid.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioners were convicted on multiple counts of conspiracy, attempted bank robbery, and bank robbery, as well as corresponding counts of using or carrying a firearm during and in relation to a crime of violence, in violation

of 18 U.S.C. 924(c). Hewitt Judgment 1-4; Duffey Judgment 1-4; Ross Judgment 1-4; see Hewitt Pet. App. 2a.[1] Hewitt was sentenced to 4260 months of imprisonment, to be followed by five years of supervised release; Duffey was sentenced to 4253 months of imprisonment, to be followed by five years of supervised release; and Ross was sentenced to 3960 months of imprisonment, to be followed by five years of supervised release. Hewitt Judgment 2, 5; Duffey Judgment 2, 5; Ross Judgment 2, 5.

The court of appeals vacated four of the counts but affirmed the remainder of petitioners' convictions, 456 Fed. Appx. 434, and this Court denied Hewitt's petition for a writ of certiorari, 566 U.S. 1029. On remand, the district court resentenced Hewitt to 3660 months of imprisonment, Duffey to 3653 months of imprisonment, and Ross to 3425 months of imprisonment, with each petitioner's term to be followed by five years of supervised release. Hewitt Am. Judgment 2, 5; Duffey Am. Judgment 2, 5; Ross Am. Judgment 4-6. The court of appeals affirmed, 582 Fed. Appx. 528, and this Court denied Hewitt's petition for a writ of certiorari, 574 U.S. 1201. Petitioners later filed motions for post-judgment relief under 28 U.S.C. 2255, which were denied by the district court. Pet. App. 3a.

In 2020 and 2021, the court of appeals granted each petitioner authorization to file a second or successive Section 2255 motion. 20-cv-1686 D. Ct. Doc. 10 (Jan. 7, 2021) (Duffey); 20-cv-2245 D. Ct. Doc. 6 (Dec. 14, 2020) (Ross); 21-cv-1397 D. Ct. Doc. 2 (Jan. 28, 2021) (Hewitt). The district court subsequently vacated seven of

---

[1] Unless otherwise specified, all citations to district court documents are to the record in No. 08-cr-167, and all citations to the petition appendix are to the appendix in *Hewitt*, No. 23-1002.

Hewitt's and Duffey's Section 924(c) convictions and six of Ross's Section 924(c) convictions, and ordered resentencing on petitioners' remaining counts. D. Ct. Doc. 672 (June 14, 2021) (Duffey); D. Ct. Doc. 683 (Aug. 19, 2021) (Hewitt); D. Ct. Doc. 700 (Nov. 2, 2021) (Ross). Hewitt was resentenced to 1625 months of imprisonment, Duffey was resentenced to 1560 months of imprisonment, and Ross was resentenced to 1625 months of imprisonment, with each petitioner's term to be followed by five years of supervised release. Hewitt Second Am. Judgment 3-4; Ross Second Am. Judgment 3-4; Duffey Second Am. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-16a.

A. Legal Background

1. Section 924(c)(1)(A) provides that "any person who, during and in relation to any crime of violence or drug trafficking crime * * * uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime," receive a sentence of "not less than 5 years." 18 U.S.C. 924(c)(1)(A)(i). The statutory minimum increases to seven years if the firearm is brandished, and ten years if the firearm is discharged. 18 U.S.C. 924(c)(1)(A)(ii) and (iii). In addition, the statute provides that "no term of imprisonment imposed on a person under [Section 924(c)] shall run concurrently with any other term of imprisonment imposed on the person." 18 U.S.C. 924(c)(1)(D)(ii). Section 924(c) thus displaces the ordinary discretion of a district court to impose concurrent sentences, rather than consecutive sentences, for multiple counts of conviction. See 18 U.S.C. 3584(a); *Lora* v. *United States*, 599 U.S. 453, 455 (2023).

At the time of petitioners' offenses in 2008, Section 924(c) provided that "in the case of a second or subsequent conviction under this subsection, the person shall * * * be sentenced to a term of imprisonment of not less than 25 years." 18 U.S.C. 924(c)(1)(C)(i) (2006). In *Deal* v. *United States*, 508 U.S. 129 (1993), this Court construed the reference to a "second or subsequent conviction" to include circumstances in which the second or subsequent Section 924(c) conviction was obtained in the same proceeding as the defendant's first Section 924(c) conviction. *Id.* at 132-137. As a result, when a defendant was convicted of multiple Section 924(c) offenses in a single proceeding, the district court was required to impose a statutory minimum 25-year sentence for the second and each additional conviction. See *ibid.* And because the district court lacked discretion to have those sentences run concurrently, the 25-year sentences "stacked" on top of each other and any other sentences imposed in the same proceeding. Pet. App. 2a; see *Deal*, 508 U.S. at 137.

As a result, in certain cases, Section 924(c) required district courts to impose a statutory minimum "prison term of many decades" that was "certain to outlast the defendant's life and the lives of every person [then] walking the planet." *United States* v. *Smith*, 756 F.3d 1179, 1181 (10th Cir. 2014). And Section 924(c)'s mandatory stacked consecutive sentences came under substantial criticism—including by the Sentencing Commission and the Judicial Conference's Criminal Law Committee—as excessive and unjust. See, *e.g.*, U.S. Sentencing Commission, *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 359 (Oct. 2011) ("The 'stacking' of mandatory minimum penalties for multiple violations of

section 924(c) results in excessively severe and unjust sentences in some cases."); *Mandatory Minimums and Unintended Consequences: Hearing on H.R. 2934, H.R. 834 and H.R. 1466 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 111th Cong. 1st Sess., 35 (2009) (testimony of Chief Judge Julie E. Carnes on behalf of the Criminal Law Committee of the Judicial Conference of the United States) (explaining that Section 924(c) "is so draconian that the Conference has taken a specific position against it").

2. On December 21, 2018, Congress enacted the First Step Act of 2018 (Act), Pub. L. No. 115-391, 132 Stat. 5194. The Act is "a significant sentencing reform law," *Pulsifer* v. *United States*, 601 U.S. 124, 151 (2024), that included an amendment that eliminated Section 924(c)'s requirement to stack 25-year sentences on a defendant convicted of multiple Section 924(c) offenses in the same proceeding.

Specifically, Section 403(a) of the Act, 132 Stat. 5221-5222, amended the statute to provide that a minimum consecutive 25-year sentence of imprisonment would be required only in the case of a "violation of [Section 924(c)] that occurs after a prior conviction under [Section 924(c)] has become final." *Ibid.* As a result, Section 924(c) now requires only the default statutory minimums—not automatic 25-year minimums—for additional Section 924(c) convictions entered in a single proceeding. See 18 U.S.C. 924(c)(1)(A), (C); Pet. App. 4a n.1.

Congress provided that the reduced penalties would retrospectively apply to pre-Act offenses in certain circumstances. Specifically, Section 403(b) states that the

amendment "appl[ies] to any offense that was committed before the date of enactment of [the First Step Act] if a sentence for the offense has not been imposed as of such date of enactment." 132 Stat. 5222.

An identically worded provision appears in Section 401(c) of the Act, see 132 Stat. 5221, which specifies the applicability of amendments that reduce the statutory minimum penalties associated with certain recidivist drug-trafficking offenses and narrow the kinds of predicate convictions that trigger those penalties, see § 401(a) and (b), 132 Stat. 5220-5221.

B. Factual And Procedural Background

1. Between January and June 2008, petitioners and others conspired to commit a series of bank robberies in the Dallas-Fort Worth area of Texas. See Hewitt Presentence Investigation Report (Hewitt PSR) ¶¶ 5-26. The group stole a total of more than $350,000 from several financial institutions. *Id.* ¶ 26. On June 2, 2008, petitioners and several of their confederates were arrested while preparing to commit an armed robbery of a bank in Garland, Texas. *Id.* ¶¶ 6, 8-10.

A federal grand jury charged each petitioner with multiple counts of conspiracy, attempted bank robbery, and bank robbery; Ross was also charged with kidnapping. Pet. App. 2a; Superseding Indictment 1-55. In addition, the grand jury charged Hewitt and Duffey with 14 counts of using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c), and charged Ross with 13 counts of violating Section 924(c). Superseding Indictment 1-55. Petitioners and two other codefendants proceeded to trial, and a jury returned a guilty verdict against each petitioner on all counts. D. Ct. Doc. 238 (Aug. 12, 2009).

2. Under the then-current version of Section 924(c), the district court was required to impose a minimum 25-year sentence for all but one of each petitioner's Section 924(c) offenses. See 18 U.S.C. 924(c)(1)(C)(i) (2006). Applying that requirement, the court sentenced each petitioner to a term of over 300 years of imprisonment. Hewitt Judgment 2 (4260 months); Duffey Judgment 2 (4253 months); Ross Judgment 2 (3960 months). Those sentences included 13 consecutive minimum 25-year terms of imprisonment for Hewitt, 12 consecutive minimum 25-year terms of imprisonment for Duffey, and 12 consecutive minimum 25-year terms of imprisonment for Ross. Hewitt Judgment 2; Duffey Judgment 2; Ross Judgment 2.

Petitioners appealed, and the court of appeals vacated two of each petitioner's convictions for attempted bank robbery as well as the associated Section 924(c) convictions, but otherwise affirmed. 456 Fed. Appx. at 435. This Court denied Hewitt's petition for a writ of certiorari. 566 U.S. 1029. On remand, the district court resentenced petitioners on the remaining counts, with each petitioner receiving a sentence of over 280 years of imprisonment. Hewitt Am. Judgment 2 (3660 months); Duffey Am. Judgment 2 (3653 months); Ross Am. Judgment 4-5 (3425 months). Those sentences again included mandatory consecutive 25-year terms of imprisonment for all but one of each petitioner's Section 924(c) offenses—11 such terms for Hewitt, and ten such terms for Duffey and Ross. Hewitt Am. Judgment 2; Duffey Am. Judgment 2; Ross Am. Judgment 4-5.

Following resentencing, the court of appeals affirmed Hewitt's and Ross's sentences, 582 Fed. Appx. at 529-530, and dismissed Duffey's appeal, No. 12-11021 (Nov. 7, 2013). This Court denied Hewitt's petition for

a writ of certiorari. 574 U.S. 1201. Petitioners later moved to vacate their convictions and sentences under 28 U.S.C. 2255 and the district court denied those motions. 15-cv-500 D. Ct. Doc. 23 (Jan. 17, 2018) (Duffey); 16-cv-603 D. Ct. Doc. 58 (Aug. 13, 2018) (Hewitt); 15-cv-3233 D. Ct. Doc. 9 (Aug. 3, 2017) (Ross).

3. In 2019, this Court held in *United States* v. *Davis*, 588 U.S. 445 (2019), that the "crime of violence" definition in Section 924(c)(3)(B) is unconstitutionally vague, *id.* at 470. The court of appeals then recognized that conspiracy to commit bank robbery does not qualify as a predicate crime of violence under the remaining "crime of violence" definition in Section 924(c)(3)(A). See *United States* v. *Reece*, 938 F.3d 630, 635-636 (5th Cir. 2019), cert. denied, 142 S. Ct. 364 (2021). And based on that precedent, the court of appeals granted each petitioner authorization to file a second or successive motion under Section 2255 to request vacatur of Section 924(c) convictions that were predicated on conspiring to commit bank robbery. See 28 U.S.C. 2255(h)(2); 20-cv-1686 D. Ct. Doc. 10 (Duffey); 20-cv-2245 D. Ct. Doc. 6 (Ross); 21-cv-1397 D. Ct. Doc. 2 (Hewitt).

The government agreed that the convictions should be vacated, and the district court granted each petitioner's motion, vacated the relevant Section 924(c) convictions, and ordered resentencing on the remaining counts. D. Ct. Doc. 672, at 2 (Duffey); D. Ct. Doc. 683, at 2 (Hewitt); D. Ct. Doc. 700, at 2 (Ross).

4. The resentencing hearings occurred after Congress's enactment of the First Step Act. At the time of the resentencing hearings for petitioners Duffey and Ross, the government took the view that the reduced penalties adopted in Section 403 of the First Step Act

did not apply when a defendant had been sentenced before the Act's enactment, even if the sentence was subsequently vacated and he obtained a resentencing. The government therefore opposed Duffey's and Ross's contentions that they should be resentenced pursuant to Section 403(a)'s amendment to Section 924(c). D. Ct. Doc. 730, at 1-3 (Feb. 7, 2022); D. Ct. Doc. 747, at 1-3 (Mar. 21, 2022).

The district court agreed with the government's position and declined to apply Section 403(a). 3/2/22 Duffey Sent. Tr. 13; 3/24/22 Ross Sent. Tr. 22-23. Applying the pre-First Step Act version of Section 924(c), the court resentenced Duffey and Ross to over 100 years of imprisonment, with each sentence including four consecutive 25-year sentences, as required by the previous —but not the current—version of Section 924(c). Duffey Second Am. Judgment 3 (1560 months); Ross Second Am. Judgment 3 (1625 months); compare 18 U.S.C. 924(c)(1)(C)(i) (2006), with 18 U.S.C. 924(c)(1)(C)(i) (2018).

By the time of Hewitt's resentencing, the government had reexamined its position and determined "that the best reading of Section 403" is that someone receiving a fresh post-Act sentence following the vacatur of a pre-Act sentence "should receive the benefit of the Act's reduced statutory minimum sentences." D. Ct. Doc. 771, at 2-3 (Oct. 5, 2022). The government therefore joined Hewitt in objecting to the Probation Office's conclusion that stacked 25-year statutory minimum sentences, under the prior version of Section 924(c), applied to all but one of Hewitt's Section 924(c) convictions. *Id.* at 1.

The district court overruled the parties' objections and adhered to its view that it was required to apply the

25-year penalties mandated by the former version of Section 924(c), notwithstanding Section 403's elimination of that mandate. 11/2/22 Hewitt Sent. Tr. 22-23. The court resentenced Hewitt to over 130 years of imprisonment, which included consecutive 25-year terms of imprisonment for four of his five 924(c) offenses. Hewitt Second Am. Judgment 3-4 (1625 months).

5. The court of appeals affirmed, rejecting the position of petitioners and the government that the new sentence should be governed by the current version of Section 924(c). Pet. App. 5a-11a. The court construed Section 403 as "drawing the line for" application of the amended penalties "at the date on which a sentence—whether later-vacated or with ongoing validity—was imposed." *Id.* at 10a. In the court's view, "because sentences for [petitioners'] offenses had been imposed * * * prior to the First Step Act's December 21, 2018 enactment date," the current version of Section 924(c) "does not apply." *Id.* at 11a.

SUMMARY OF ARGUMENT

The court of appeals erred in requiring that petitioners, and others similarly situated, be sentenced under an unduly harsh penalty scheme that Congress has discarded. Section 403(b) of the First Step Act, like Section 401(c) of that Act, directs a court to apply the Act's reduced statutory penalties to any pre-Act offense "if a sentence for the offense has not been imposed as of [the Act's] date of enactment." § 403(b), 132 Stat. 5222; § 401(c), 132 Stat. 5221. Where, as here, a sentence has been vacated, no sentence "*has* * * * *been* imposed" within the meaning of the Act. Instead, a sentence *will be* imposed in the future. Accordingly, Sections 401(b) and 403(b) of the Act require application of the amended penalties at the resentencing.

A. The Act's text indicates that whether "a sentence for the offense has * * * been imposed" turns on the continued existence of a valid sentencing judgment.

Most tellingly, Congress's use of the present-perfect tense ("has not been imposed") signifies a condition that "is now completed or continues up to the present." *The Chicago Manual of Style* ¶ 5.132 (17th ed. 2017). It thus directs the focus to the continuing state of affairs "now" or in "the present." *Ibid.* For that reason, an ordinary speaker of English would not say that "a sentence *has* been imposed as of 2018, but it has since been vacated." Instead, the speaker would say, "a sentence *had* been imposed as of 2018, but it has since been vacated." Here, Congress deliberately chose the former locution, showing that it was concerned with the pronouncement of a *valid* sentence that has continuing effect up to the present, not an invalid sentence that has been vacated.

That interpretation is further indicated by Congress's reference to "*a* sentence," not "*any* sentence," in describing the triggering condition. That usage contrasts with the broader reference to "any offense" in describing the universe of offenses that are potentially subject to the Act's reduced penalties. And that contrast illustrates Congress's intent to establish a comparatively narrow carveout of pre-Act offenses that do not receive the benefit of the Act's sentencing reforms.

B. Statutory context confirms that understanding of Section 403(b). When a defendant's prior sentence has been vacated because it was invalid, the resentencing constitutes a proceeding where the "[i]mposition of a sentence" will occur. 18 U.S.C. 3553. That indicates that a sentence "has not" already "been imposed" for purposes of the Act. A defendant cannot have two sentences at once. Accordingly, as both courts of appeals to have

considered the issue have recognized, a defendant whose original sentence was vacated before the Act, and who was awaiting resentencing when the Act was enacted, should be sentenced under the Act's revised penalty structure. And the same result is warranted when, as in petitioners' cases, the original sentence was vacated after the Act's enactment. Nothing in the Act's text, which looks to whether a sentence "has * * * been *imposed* as of" the enactment date, turns on the timing of when the sentence was *vacated*.

Interpreting the reference to whether "a sentence * * * has * * * been imposed" as a reference to a valid sentence is consistent with the provision of the U.S. Code that most directly addresses the finality of imposed sentences. That provision states that a district court "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. 3582(c). But as indicated by this Court's decision in *Pepper* v. *United States*, 562 U.S. 476 (2011), Section 3582(c)'s reference to "a" sentence that "has been imposed" refers only to valid sentences, not ones that have been vacated. The similar language in Section 403(b) should be understood in a similar way.

C. Declining to apply the Act's new sentencing provisions to pre-Act offenses only when a valid sentence has already been imposed and remains in effect is also the interpretation of the Act that best comports with its objectives. The Act made future sentencings fairer, but did not disrupt finality by requiring courts to reopen and revise existing sentences. When the original sentence is invalidated, however, only the fairness interest remains. If a post-Act resentencing is going to occur anyway, "imposing upon the pre-Act offender a pre-Act sentence" that "Congress ha[s] specifically found * * *

[i]s unfairly long," *Dorsey* v. *United States*, 567 U.S. 260, 277 (2012), does not further any finality interest. On the contrary, it resurrects a sentencing regime that Congress rejected and subjects defendants to new decades-long sentences—like the century-plus sentences imposed on petitioners here—that present law makes clear are excessive and unjust.

D. The court of appeals identified no sound basis for construing the Act to nevertheless require the imposition of a congressionally disapproved, excessively severe, pre-Act sentence. The court interpreted Section 403(b)'s application to turn exclusively on the historical fact that a district court once pronounced any sentence—even an invalid one. But the court ignored Congress's choice of verb tense and overall focus on the status of the sentence rather than the act of the sentencing court. The court of appeals also drew an unwarranted comparison between the advisory Sentencing Guidelines and statutory minimum sentences. And the court placed undue emphasis on the notion that Congress could have used even clearer language—a possibility that cuts both ways and provides no reason to misinterpret the language that Congress did adopt.

ARGUMENT

SECTION 403 OF THE FIRST STEP ACT APPLIES AT A POST-ACT RESENTENCING FOLLOWING THE VACATUR OF A PRE-ACT SENTENCE

Recognizing "unfairness in how" certain "mandatory minimum sentences are sometimes applied," Congress —with overwhelming support in both chambers— passed the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. 164 Cong. Rec. S7649 (daily ed. Dec. 17, 2018) (Sen. Grassley); see 164 Cong. Rec. S7749 (daily ed. Dec. 18, 2018) (Sen. Leahy). "The First Step Act

takes modest but important steps to remedy some of the most troubling injustices within our sentencing laws and our prison system," including by "recogni[zing] that one-size-fits-all sentencing is neither just nor effective." 164 Cong. Rec. at S7749 (Sen. Leahy).

Some of the Act's "most important reforms" are its "changes to mandatory minimum[s]." 164 Cong. Rec. at S7748 (Sen. Klobuchar); see 164 Cong. Rec. at S7774 (Sen. Feinstein) ("Most importantly, in my view, [the Act] reduces some of the harshest mandatory minimum sentences."). Sections 401 and 403 of the Act address perceived unfairness in the application of statutory minimums by significantly reducing the "overly harsh and expensive mandatory minimums" for certain drug and gun offenses. 164 Cong. Rec. at S7649 (Sen. Grassley); see § 403, 132 Stat. 5221-5222. Section 403 in particular eliminates the former requirement to stack minimum consecutive 25-year terms of imprisonment on a defendant who was convicted of multiple violations of 18 U.S.C. 924(c) in the same proceeding. See pp. 16-17, *supra*.

Congress's effort to "ensure that sentencing enhancements for repeat offenses apply only to true repeat offenders," 164 Cong. Rec. at S7774 (Sen. Cardin), is not limited to future offenders. Ordinarily, a statutory modification to a criminal penalty would apply only to new violations committed after its enactment. See 1 U.S.C. 109. In Section 403(b) of the Act, however, Congress specified that Section 403(a)'s reduced penalties "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." § 403(b), 132 Stat. 5222. That language unambiguously shows Congress's intent that the reduced

penalties apply to pre-Act offenses in at least some circumstances.

Those circumstances include resentencings like petitioners'. A sentence that is not valid, has been vacated, and therefore has no continuing effect is not a sentence that "has * * * been imposed." First Step Act § 403(b), 132 Stat. 5222. Petitioners therefore should have received the benefit of the First Step Act's reduced penalties at their 2021 resentencings.

A. The Text Of The Act Focuses On Whether A Defendant Is Subject To A Valid Pre-Act Sentence, Not Whether A Defendant Once Received A Since-Invalidated Sentence

An invalid pre-Act sentence is not "a sentence" that "has * * * been imposed as of" the date of on which the First Step Act was enacted. The term "sentence" refers to "[t]he judgment that a court formally pronounces after finding a criminal defendant guilty." *Black's Law Dictionary* 1636 (11th ed. 2019). Thus, the term can be employed not only in a context that focuses on the historical fact of the "pronounce[ment]," but also in a context that focuses on the continuing existence of the "judgment." A simple example illustrates the point: if Jones is awaiting resentencing following the vacatur of a previous sentence, and a relative considering whether to travel to his sentencing hearing asks whether "a sentence has been imposed on Jones," the natural answer would be "no." And as two principal features of the Act's text indicate, the answer is likewise "no" when the court imposing a new sentence asks whether a sentence "has * * * been imposed as of" the date on which the First Step Act was enacted.

1. Congress's use of the present-perfect tense focuses on a sentence's continuing validity

First and foremost, Congress used the present-perfect tense—"has * * * been imposed." § 403(b), 132 Stat. 5222. "Congress' use of a verb tense is significant in construing statutes." *United States* v. *Wilson*, 503 U.S. 329, 333 (1992); *Gundy* v. *United States*, 588 U.S. 128, 142 (2019) (plurality opinion) (observing that this Court "has often 'looked to Congress' choice of verb tense to ascertain a statute's temporal reach' ") (quoting *Carr* v. *United States*, 560 U.S. 438, 447-448 (2010)).

The present-perfect tense signifies an "act, state, or condition," that "is *now* completed *or continues up to the present*." *The Chicago Manual of Style* ¶ 5.132 (emphases added). That is, it focuses on the state of affairs "now" or in "the present" rather than at some earlier point in time. *Ibid.* Congress's use of the present-perfect tense in Section 403(b) therefore indicates that continuing validity, not historical fact, is the touchstone—*i.e.*, that Congress intended only to capture sentences that both had been pronounced before the Act's enactment date *and* continued into the present.

If Congress intended a court to focus exclusively on the historic imposition of a sentence, it would have employed the *past*-perfect tense, looking to whether a sentence "*had* not been imposed." See *The Chicago Manual of Style* ¶ 5.133 (past-perfect tense "is formed by using had with the principal verb's past participle" and "refers to an act, state, or condition that was completed before another specified or implicit past time or past action") (emphasis omitted). As a matter of ordinary English, it is not coherent to say "a sentence *has* been imposed as of 2018, but it has since been vacated." Instead, an ordinary speaker would say that "a sentence

had been imposed as of 2018, but it has since been vacated." Congress would use the same formulation.

Indeed, in a prior applicability provision with a similar structure, Congress did in fact use the past-perfect tense. As part of the Crime Control Act of 1990 (Crime Control Act), Pub. L. No. 101-647, 104 Stat. 4789, Congress amended the statute of limitations in 18 U.S.C. 3293 applicable to certain offenses against financial institutions. See Crime Control Act, Tit. XXV, § 2505(a), 104 Stat. 4862. When doing so, Congress provided that the amendment "shall apply to any offense committed before the date of the enactment of this section, if the statute of limitations applicable to that offense *had* not run as of such date." § 2505(b), 104 Stat. 4862 (emphasis added). Congress took a different, and contrasting, approach in Section 403(b), using the present-perfect—not the past-perfect—tense.

Congress often employs the present-perfect tense when directing the sentencing court to consider the particular state of affairs that exists at the time of sentencing or resentencing. See, *e.g.*, 18 U.S.C. 1963(m) (when ordering forfeiture, district court must consider whether property, *inter alia*, "has been transferred or sold to * * * a third party," "has been placed beyond the jurisdiction of the court," or "has been substantially diminished in value").[2] That is what Congress did here. "Congress could have phrased its requirement in language that looked to the past" exclusively, "but it did

[2] See also 18 U.S.C. 521(b) and (d)(3) (district court must impose an enhanced term of imprisonment where, *inter alia,* the person "has been convicted within the past 5 years" for certain offenses); 18 U.S.C. 3742(g) (district court must "resentence a defendant in accordance with * * * such instructions as may have been given by the court of appeals").

not choose this readily available option," *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57 (1987), instead choosing a phrase with a present-day focus.

2. Congress's contrasting use of "a" and "any" similarly indicates its focus on a valid sentence rather than an invalid one

Second, in describing the triggering condition for application of the First Step Act, Congress referred to "a sentence," not "any sentence." Congress's choice of the neutral article "a" contrasts with its use of "any" earlier in the provision to identify the "offense[s]" to which Section 403 potentially applies—namely, "*any* offense * * * committed before the date of enactment of this Act." § 403(b), 132 Stat. 5222 (emphasis added). The "presum[ption] that Congress acts intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another section of the same Act," *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted), counsels against reading Section 403(b)'s reference to "a sentence" to encompass "any sentence." Cf. *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) (observing that the "presumption that a given term is used to mean the same thing throughout a statute" is "surely at its most vigorous when a term is repeated within a given sentence").

"Congress' use of the word 'any' suggests an intent to use that term 'expansively.'" *Smith* v. *Berryhill*, 587 U.S. 471, 479 (2019) (brackets and citation omitted). And the choice to use an expansive term in defining the universe of offenses potentially subject to Section 403, but to describe the limitation on that universe of offenses using a more neutral term, underscores that the

limitation lacks similar breadth. "Had Congress intended the phrase 'a sentence' to convey" that "very broad meaning, it could have used the word 'any,' as it did earlier in the same sentence." *United States* v. *Merrell*, 37 F.4th 571, 575-576 (9th Cir. 2022) (quoting *United States* v. *Uriarte*, 975 F.3d 596, 604 (7th Cir. 2020) (en banc)).

B. Statutory Context Confirms That The Act's Revised Penalties Apply Whenever A Court Replaces An Invalid Sentence With A Valid One

Section 403(b)'s focus on whether a sentence has continuing validity, not whether an invalid sentence was previously pronounced, is confirmed by the broader context of the statutory scheme. See *Pulsifer* v. *United States*, 601 U.S. 124, 133 (2024) (explaining that the "choice between" two possible readings "can sensibly be made only by * * * reviewing text in context").

1. The "imposition" of a new sentence following vacatur presupposes that a sentence "has not been imposed" at a prior time

In petitioners' cases, the precise phrasing of the Act's inquiry into whether "a sentence * * * has * * * been imposed" has particular significance because it arises in the context of a proceeding at which the "[i]mposition of a sentence," 18 U.S.C. 3553, is *about* to occur. A defendant cannot simultaneously have two sentences for the same crime. Cf. *Whalen* v. *United States*, 445 U.S. 684, 688 (1980) ("The Fifth Amendment guarantee against double jeopardy protects * * * 'against multiple punishments for the same offense.'") (citation omitted). The imposition of a new sentence accordingly presupposes that no sentence has already been imposed.

Consistent with that observation, both courts of appeals that have addressed the issue directly have recognized that where a court previously pronounced a sentence, but that sentence was vacated before the First Step Act was enacted, "a sentence for the offense has not been imposed as of [the] date of enactment." *United States* v. *Henry*, 983 F.3d 214, 222-224 (6th Cir. 2020) (Section 403); *Uriarte*, 975 F.3d at 601-605 (Section 403); *United States* v. *Bethany*, 975 F.3d 642, 649-650 (7th Cir. 2020) (Section 401). But if "has * * * been imposed" included the pronouncement of a sentence known to be invalid, and "a sentence" were to include invalid sentences as well as still-valid ones, then even a pre-Act vacatur would be irrelevant.

If all that mattered was the historical fact of a prior sentencing, then the mere pronouncement of a sentence before the Act's passage would be wholly dispositive of Section 403's application—even if the sentence had already been vacated, and resentencing had not yet occurred, when the Act was enacted. On that view, if a sentence was subsequently recognized to rest on, say, an involuntary plea, application of the First Step Act's ameliorated sentencing scheme nevertheless would forever be precluded. The courts of appeals' rejection of such a reading comports with common sense and necessarily recognizes—consistent with the text—that the critical event for purposes of Section 403(b) is not simply the pronouncement of a sentence, but the pronouncement of a valid one that has continuing effect up to the present.

That logic applies equally to both pre-Act and post-Act vacaturs. The historical pronouncement of an invalid sentence does not control Section 403's applicability simply because the sentence was not yet *vacated* "as of"

the date of the Act's enactment. Section 403(b) looks to whether "a sentence * * * has * * * been *imposed* as of" the Act's enactment date, not whether it has been *vacated* as of that date.

2. This Court's understanding of 18 U.S.C. 3583(c) illuminates the proper understanding of similar language in the Act

The provision of the U.S. Code that most directly addresses the finality of imposed sentences indicates that Congress intended courts to answer the question whether a "sentence * * * has * * * been imposed," § 403(b), 132 Stat. 5222, by evaluating whether a defendant is subject to an otherwise valid sentence that remains in effect.

As part of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Title II, ch. II, 98 Stat. 1987, Congress provided that—subject to certain limited exceptions—a district court "may not modify a term of imprisonment once it has been imposed." Title II, ch. II, § 212(a), 98 Stat. 1998. That provision, codified at 18 U.S.C. 3582(c), establishes "the general rule of finality" applicable in federal sentencing law. *Dillon* v. *United States*, 560 U.S. 817, 824 (2010). But it obviously does not apply to invalid sentences. It makes no sense to speak of "modify[ing]" a sentence that has been recognized to be invalid. Instead, such a sentence must be replaced. See 18 U.S.C. 3551, 3553.

This Court's decision in *Pepper* v. *United States*, 562 U.S. 476 (2011), reinforces that Section 3582(c)'s reference to a sentence that "has been imposed" refers solely to a valid sentence. In *Pepper*, the Court declined to apply the finality-protective law-of-the-case doctrine to a sentence that had been vacated (there, on appeal). See *id.* at 481. The Court explained that the vacatur had

"effectively wiped the slate clean," allowing for a different term of imprisonment at a resentencing that could account for the defendant's conduct during the interim. *Id.* at 507; see *id.* at 481. And the Court distinguished that circumstance from one in which, under Section 3582(c), a sentence "[o]nce imposed * * * may be modified only in very limited circumstances." *Id.* at 502 n.14.

The similar language of Section 403 should be understood in a similar way. Indeed, Congress was presumably aware of this Court's decision in *Pepper* when it adopted the First Step Act in 2018, particularly given that the Act made modest amendments to other aspects of Section 3582(c). See § 603(b), 132 Stat. 5239; see also *Bartenwerfer* v. *Buckley*, 598 U.S. 69, 80 (2023) ("'This Court generally assumes that, when Congress enacts statutes, it is aware of this Court's relevant precedents.'") (citation omitted).

C. Applying The First Step Act's Fairer Sentencing Scheme To Post-Act Resentencings Furthers The Act's Purposes

Application of the First Step Act's reduced penalty scheme to resentencings like petitioners' "also best fulfills" the Act's "statutory objectives," *Brown* v. *United States*, 144 S. Ct. 1195, 1205 (2024). Sections 403(b) and 401(c) embody the careful balance Congress struck between competing concerns of fairness and finality. When a sentence has been vacated and a resentencing will take place no matter what, finality interests no longer carry any weight and do not override Congress's special emphasis on the fairness of broadly applying the First Step Act's reduced penalties.

a. By default, congressional changes to a sentencing scheme do not apply to already completed offenses. See

1 U.S.C. 109; *Dorsey* v. *United States*, 567 U.S. 260, 272-273 (2012). Section 403(b), however, unambiguously overrides that default rule by applying the newly ameliorated Section 924(c) sentencing scheme to at least some prior offenders. The extent to which it does so necessarily reflects a balance between the competing considerations of fairness and finality. Cf. *Ramos* v. *Louisiana*, 590 U.S. 83, 109 (2020) (explaining that this Court's retroactivity precedents balance interests in "the finality of * * * criminal judgments" alongside interests in "'fundamental fairness and accuracy'") (brackets and citation omitted).

On the one hand, Congress's override of the default rule illustrates the special strength of the fairness considerations underlying Section 403. Having concluded that the prior sentencing regime for Section 924(c) offenses was "overly harsh and expensive," 164 Cong. Rec. at S7649 (Sen. Grassley), and "neither just nor effective," 164 Cong. Rec. at S7749 (Sen. Leahy), Congress opted to apply the Act's reforms retrospectively to offenses committed before the Act was passed. In doing so, Congress recognized that the application of the previous harsher scheme was unfair even for pre-Act offenders who had every reason to expect the penalties in place at the time of their offenses.

On the other hand, Congress did not extend the ameliorated sentencing scheme to sentences that were already final. Under general principles of retroactivity with longstanding roots, new legal developments rarely provide cause to disrupt the system's "essential" interest in finality, *Calderon* v. *Thompson*, 523 U.S. 538, 555 (1998). See, *e.g.*, *Teague* v. *Lane*, 489 U.S. 288, 309 (1989); *United States* v. *Frady*, 456 U.S. 152, 166 (1982). And here, by limiting the universe of covered offenses

to situations in which "a sentence for the offense has not been imposed," § 403(b), 132 Stat. 5222, Congress made clear that it was not reopening valid sentences. Thus, as the courts of appeals have uniformly recognized, Section 403 leaves valid sentences untouched—even ones that remained pending on direct appeal at the time the Act was enacted.[3]

Where a defendant's sentence is found invalid and vacated on other grounds, however, the finality concerns that counsel against reopening a valid sentence are no longer present. From the perspective of finality, there is no difference between: (1) an offender who was convicted before the First Step Act but who has not had an initial sentencing; (2) an offender who had an initial sentencing but obtained vacatur of the judgment before the enactment of the First Step Act; and (3) an offender who obtained vacatur of the judgment after the enactment of the First Step Act. None of those offenders has an operative judgment; a court will therefore need to undertake a plenary sentencing proceeding for each of them.

---

[3] See *United States* v. *Cruz-Rivera*, 954 F.3d 410, 412-413 (1st Cir.), cert. denied, 141 S. Ct. 601 (2020); *United States* v. *Eldridge*, 2 F.4th 27, 40-41 (2d Cir. 2021), cert. granted, vacated, and remanded on other grounds, 142 S. Ct. 2863 (2022); *United States* v. *Hodge*, 948 F.3d 160, 162-164 (3d Cir.), cert. denied, 141 S. Ct. 347 (2020); *United States* v. *Jordan*, 952 F.3d 160, 171-174 (4th Cir. 2020), cert. denied, 141 S. Ct. 1051 (2021); *United States* v. *Gomez*, 960 F.3d 173, 177-178 (5th Cir. 2020); *United States* v. *Richardson*, 948 F.3d 733, 750-753 (6th Cir.), cert. denied, 141 S. Ct. 344 (2020); *United States* v. *Sparkman*, 973 F.3d 771, 774-775 (7th Cir. 2020); *United States* v. *Voris*, 964 F.3d 864, 873-875 (9th Cir. 2020), cert. denied, 141 S. Ct. 2464 (2021); *United States* v. *Jefferson*, 989 F.3d 1173, 1176-1177 (10th Cir.), cert. denied, 142 S. Ct. 353 (2021); *United States* v. *Smith*, 967 F.3d 1196, 1210-1213 (11th Cir. 2020), cert. denied, 141 S. Ct. 2538 (2021); see also *Young* v. *United States*, 943 F.3d 460, 462-464 (D.C. Cir. 2019) (construing Section 401(c)).

When the court does so, no sound reason exists for the court to "impos[e] upon the pre-Act offender a pre-Act sentence" that "Congress ha[s] specifically found * * * [i]s unfairly long," *Dorsey*, 567 U.S. at 277. To the contrary, subjecting offenders with vacated sentences to "the exact harsh and expensive mandatory minimum sentences that § 403 restricts and reduces"—with no offsetting benefit in terms of finality—"would be fundamentally at odds with the First Step Act's ameliorative nature." *Uriarte*, 975 F.3d at 603.

The facts of these cases illustrate the point. In post-Act resentencings, petitioners have each been sentenced to over 100 years of imprisonment, even though Congress determined that stacking 25-year statutory minimum sentences for Section 924(c) offenses arising from a single judgment is excessive and unjust. While Congress gave courts no authority to revisit or revise valid sentences imposed under the pre-Act scheme to protect finality interests, Congress made clear that it considered that scheme too harsh for purposes of future sentencings. Having chosen to override the default rule requiring imposition of the penalties in place at the time of the crime's commission, Congress did not resurrect those very penalties when no finality interest exists because a pre-Act sentence is invalid for other reasons and has been vacated. The mandatory century-long sentences imposed on petitioners here run roughshod over the balance Congress struck between finality and fairness in the Act.[4]

---

[4] In other contexts, especially those regulating substantive conduct rather than seeking to balance finality and fairness in determining the reach of a revised sentencing regime, the historical fact that a sentence was once imposed has legal significance even if that

D. The Court Of Appeals Identified No Sound Basis For Its Contrary Conclusion

The court of appeals nevertheless held that notwithstanding Congress's elimination of the unduly harsh pre-Act sentencing regime for Section 924(c) offenses, district courts must continue to apply that regime when they resentence offenders who received invalid sentences before the First Step Act's adoption. See Pet. 5a-11a. None of the considerations identified by the

---

sentence (or the related conviction) is subsequently vacated. For example, the prohibition of firearm possession by a person "who has been convicted" of a felony, 18 U.S.C. 922(g)(1), turns on the person's status on the date he possesses a firearm, even if he subsequently succeeds in vacating the predicate conviction. See, *e.g.*, *Burrell* v. *United States*, 384 F.3d 22, 27-28 (2d Cir.) ("[I]t is the 'mere fact of a prior conviction' at the time of the charged possession, not the 'reliability' of the conviction, that establishes the § 922(g)(1) predicate.") (brackets and citation omitted), cert. denied, 543 U.S. 993 (2004); *United States* v. *Snyder*, 235 F.3d 42, 53 (1st Cir. 2000) (a defendant's "belated success in vacating his [conviction] bears no relevance to his conviction under § 922(g)(1)"), cert. denied, 532 U.S. 1057 (2001); see also *United States* v. *Roberson*, 752 F.3d 517, 519-522 (1st Cir. 2014) (reaching similar conclusion with respect to registration requirements for sex offenders under 42 U.S.C. 16911(1) (2012)). And the historical fact that a jury returned a guilty verdict can preclude certain Double Jeopardy Clause claims even if that verdict was subsequently vacated for independent reasons. See *Bravo-Fernandez* v. *United States*, 580 U.S. 5, 8-9 (2016). It would therefore be incorrect to adopt any general "background legal principle[]" that "vacatur makes a sentence void from the start" for all purposes. *United States* v. *Mitchell*, 38 F.4th 382, 392 (3d Cir. 2022) (Bibas, J., concurring in the judgment). For the reasons explained in this brief, however, the text, context, and purpose of Section 403 indicate that Congress did not intend to give weight to vacated sentences when determining the retrospective application of the First Step Act's penalty reductions for Section 924(c) offenses.

court of appeals supports that counterintuitive and unjust result.

1. The court of appeals stated that because "a sentence is 'imposed' 'when the district court pronounces it,'" the question of "whether a sentence has been 'imposed' appears to hinge on a district court's action or inaction—not on a defendant's status." Pet. App. 7a-8a (citation omitted). And the court took the view that Section 403(b)'s "use of 'imposed,'" combined "with § 403(b)'s delineation that the First Step Act applies to defendants for whom 'a sentence . . . ha[d] not been imposed' as of the enactment date," requires that the harsh pre-Act sentencing regime be perpetuated for anyone "who already had a sentence imposed by" the time the Act was passed—even if his sentence has since been vacated. *Id.* at 8a (citation omitted; brackets in original). That set of inferences—which would appear to preclude application of the ameliorated scheme even when a sentence was vacated *before* the Act's passage, see p. 21, *supra*—is flawed in multiple ways.

For one thing, it fails to respect Congress's use of the present-perfect tense. As discussed above, pp. 17-19, *supra*, the phrase "*has* not been imposed," § 403(b), 132 Stat. 5222 (emphasis added), focuses the applicability inquiry on whether the defendant has a sentence that "is *now* completed or *continues up to the present*," *The Chicago Manual of Style* ¶ 5.132 (emphasis added). The court of appeals, however, rephrased the statutory language to substitute "had" for "has," stating "that the First Step Act applies to defendants for whom 'a sentence . . . *ha[d]* not been imposed' as of the enactment date." Pet. App. 8a (emphasis added; brackets in original). But "statutory construction does not work that

way: A court does not get to delete inconvenient language and insert convenient language to yield the court's preferred meaning." *Borden* v. *United States*, 593 U.S. 420, 436 (2021) (plurality opinion).

In addition, the court of appeals' view that Section 403(b) turns solely "on a district court's action or inaction" in pronouncing a sentence, Pet. App. 8a, disregards Congress's use of the passive voice. If Congress were truly focused "on a district court's action or inaction," as the court of appeals supposed (*ibid.*), it could have used the past-perfect tense and directed that the reduced penalties apply only to offenses for which "a court had not imposed" a sentence "as of" or "before" the date of enactment. "Passive voice," however, "pulls the actor off the stage." *Bartenwerfer*, 598 U.S. at 75. Its use signifies that "the actor is unimportant" or "unknown" and that "the focus * * * is on the thing being acted on," Bryan A. Garner, *Garner's Modern English Usage* 676 (4th ed. 2016). Accordingly, Section 403(b)'s reference to whether "a sentence * * * has not been imposed," § 403(b), 132 Stat. 5222, suggests that what matters is the status of the sentence, not the mere prior act of imposing a sentence that was invalid.

2. The decision below also purported to find support for its approach in 18 U.S.C. 3742(g)(1), which provides that when "a case is remanded" for "resentenc[ing]," the district court "shall apply the guidelines issued by the Sentencing Commission * * * that were in effect on the date of the previous sentencing of the defendant prior to the appeal." *Ibid.* In the court of appeals' view, Section 3742(g)(1) is "a helpful analogue" because it indicates that Congress sometimes "pegs the rules that apply to a resentencing on remand to the historical fact of the prior sentence." Pet. App. 10a.

As a threshold matter, the reasoning of the court of appeals would once again imply that even a sentence vacated *before* the First Step Act's passage could not be replaced by a sentence under the First Step Act's fairer penalty scheme. In any event, the court's reasoning was mistaken. As this Court has previously recognized, application of the Sentencing Guidelines follows a different paradigm than application of statutory penalties. See *Dorsey*, 567 U.S. at 273-275. And Section 3742(g)(1)'s explicit directive to apply an *old* regime is in no way a model for Section 403's directive to apply a *new* regime.

The default rule for the Guidelines is that the court imposing a sentence "shall consider * * * the guidelines * * * issued by the Sentencing Commission * * * that * * * are in effect on the date the defendant is sentenced." 18 U.S.C. 3553(a)(4). Section 3742(g) is an explicit carveout from that focus on the present day, expressly instructing sentencing courts to look to the past. See 18 U.S.C. 3553(a)(4)(i) (explicit carveout for Section 3742(g)); 18 U.S.C. 3742(g)(1); *Dorsey*, 567 U.S. 273-275. In contrast, as noted above, see pp. 15-16, *supra*, the default rule for statutes is to apply the penalties in place when the offense was committed. See 1 U.S.C. 9; *Dorsey*, 567 U.S. at 272-273. And Section 403(b) is an explicit carveout from that focus on the past.

The two statutes thus apply in different (indeed, opposite) contexts, with different (indeed, opposite) purposes, and different (indeed, opposite) text. There is no reason to suppose that the interpretation of one bears on the interpretation of the other. The court of appeals accordingly erred in suggesting (Pet. App. 11a) an incongruity in applying both statutes when a pre-First Step Act sentence is vacated on appeal. Section 3742(g)(1) looks to the Guidelines from "the previous

sentencing of the defendant prior to the appeal"—a purely historical event. Section 403(b), in contrast, looks to whether a valid sentence "has * * * been imposed." Applying the revised penalty scheme in resentencing an offender who originally received an invalid sentence is not "pretend[ing]" the original "sentence never happened," Pet. App. 10a (citation omitted); it is instead simply giving effect to the Act's text, context, and purpose.

3. Finally, the decision below asserted that "[i]f Congress meant for the First Step Act's retroactivity bar to apply only to valid sentences, it could easily have said so." Pet. App. 8a. But the same criticism applies equally to the court of appeals' own reading: If Congress had wanted to exclude offenders like petitioners, it could easily have said that, too, such as by making application of the Act to pre-Act offenders turn on whether "'*an original* sentence' or '*an initial* sentence,'" had been imposed. *Uriarte*, 975 F.3d at 604; see 10 U.S.C. 863(a) (prohibiting imposition of any "sentence in excess of or more severe than the original sentence" in certain circumstances); 10 U.S.C. 950e (similar); 18 U.S.C. 4214(d)(4) (1982) (providing for a parolee's referral to a treatment center "for all or part of the remainder of his original sentence" upon a parole violation).

The question presented here therefore cannot be resolved by hypothesizing other language that Congress could have written. See *Pulsifer*, 601 U.S. 138 at ("We have 'routinely construed statutes to have a particular meaning even as we acknowledged that Congress could have expressed itself more clearly.'") (citation omitted). The case must instead be resolved through the usual

methods of statutory interpretation, including text, context, and purpose. And for all of the reasons discussed above, the better understanding of Section 403(b) of the First Step Act is that Congress meant to end the imposition of stacked Section 924(c) statutory minimums at resentencings like petitioners', where no finality interest can support the renewed application of a repealed sentencing regime that Congress determined was excessive and unjust.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
NICOLE M. ARGENTIERI
Principal Deputy Assistant Attorney General
ERIC J. FEIGIN
Deputy Solicitor General
MASHA G. HANSFORD
Assistant to the Solicitor General
ANDREW C. NOLL
Attorney

SEPTEMBER 2024