SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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TONY R. HEWITT,	)
Petitioner,	)
v.	) No. 23-1002
UNITED STATES,	)
Respondent.	)

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COREY DEYON DUFFEY AND	)
JARVIS DUPREE ROSS,	)
Petitioners,	)
v.	) No. 23-1150
UNITED STATES,	)
Respondent.	)

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Pages: 1 through 101

Place: Washington, D.C.

Date: January 13, 2025

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16   Washington, D.C.

17   Monday, January 13, 2025

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19   The above-entitled matter came on for oral

20   argument before the Supreme Court of the United States

21   at 10:04 a.m.

22

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24

25

1   APPEARANCES:

2   MICHAEL B. KIMBERLY, ESQUIRE, Washington, D.C.; on

3   behalf of the Petitioners.

4   MASHA G. HANSFORD, Assistant to the Solicitor General,

5   Department of Justice, Washington, D.C.; on behalf

6   of the Respondent in support of the Petitioners.

7   MICHAEL H. McGINLEY, ESQUIRE, Washington, D.C.;

8   Court-appointed amicus curiae in support of the

9   judgment below.

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1   C O N T E N T S

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1   P R O C E E D I N G S

2   (10:04 a.m.)

3   CHIEF JUSTICE ROBERTS: We will hear

4   argument first this morning in Case 23-1002,

5   Hewitt versus United States, and the

6   consolidated case.

7   Mr. Kimberly.

8   ORAL ARGUMENT OF MICHAEL B. KIMBERLY

9   ON BEHALF OF THE PETITIONERS

10   MR. KIMBERLY: Mr. Chief Justice, and

11   may it please the Court:

12   After decades of urging by sentencing

13   judges and the Sentencing Commission, Congress

14   in 2018 enacted Section 403 of the First Step

15   Act. The point of Section 403 was to override

16   Deal against United States, which called for

17   extraordinarily harsh mandatory-minimum

18   sentences even for first-time offenders.

19   In enacting this override, Congress

20   had to balance two countervailing values:

21   first, justice in sentencing, and, second,

22   finality of judgments. Congress struck the

23   balance in 403(b) by making 403(a) retroactively

24   applicable to offenders whose conduct predated

25   the Act but whose cases were pending and

 1   non-final as of that date, those for whom "a

 2   sentence for the offense has not been imposed."

 3   For at least four reasons, that

 4   language calls for application of 403(a) to all

 5   post-enactment plenary sentencing proceedings,

 6   including plenary resentencings following

 7   vacatur.

 8   First, a sentence that has been

 9   imposed does not include a sentence that has

10   been vacated because a sentence that has been

11   vacated is treated as though it never was

12   imposed.

13   Second, Congress's use of the

14   present-perfect tense with the preposition "as

15   of" connotes an ongoing condition. It makes no

16   sense to say that a sentence has been imposed as

17   of the date of enactment but that it has since

18   been vacated.

19   Third, the statutory structure

20   confirms that when Congress wishes to accomplish

21   the objective that the amicus is defending, it

22   uses the past tense and a different preposition.

23   And, finally, Your Honors, the rules

24   of statutory construction do not require the

25   Court to turn a blind eye to common sense.

1   Amicus's interpretation produces an anomalous

2   result which there is no evidence Congress

3   intended, and it's one that is flatly contrary

4   to its acknowledged purpose.

5   I welcome the Court's questions.

6   JUSTICE THOMAS: Would you make any

7   distinction or do you think there -- it's a

8   better argument -- there is a better argument

9   for pre-Act vacaturs as opposed to post-Act

10   vacaturs?

11   MR. KIMBERLY: I don't think so, Your

12   Honor. I think, regardless when the vacatur

13   occurs, the upshot is that the case is pending,

14   and it's one as to which the finality interests

15   which drove Congress's rejection of what had

16   been introduced as Section 403(b)(2) do not

17   attach at that point.

18   JUSTICE THOMAS: It seems to me that

19   the -- the Act actually focuses more on

20   imposition of the vacatur as opposed to the

21   vacatur itself.

22   What do you make of that argument? I

23   think that was an argument that the dissent in

24   the Seventh Circuit case made.

25   MR. KIMBERLY: Well, Your Honor, I --

1   I -- as I understand the -- the position of

2   Justice Barrett in the Uriarte case in the

3   Seventh Circuit and other courts that aligned

4   with her position, it -- it turned on the word

5   "imposed" and the idea that "imposed" describes

6   a sort of immutable historical fact.

7   But I think there are two things to

8   say about that. The first is the effect of a

9   vacatur is, in fact, by operation of law, by

10   operation of a legal fiction, to undo that

11   historical fact on a prospective basis. So, at

12   the time of application of 403(b), which is at

13   the time of resentencing, the judge has to ask

14   whether a sentence that was imposed

15   pre-enactment but has since been vacated is one

16   that has been imposed as of December 21st, 2018.

17   And the answer to that question is no because it

18   has been vacated and because a vacated sentence

19   is treated as though it was never imposed. I --

20   CHIEF JUSTICE ROBERTS: Well, this

21   is -- I mean, it is a fortuitous windfall for

22   your client, right? The -- the sentence was

23   vacated for reasons having nothing to do with

24   the pertinent sentence that's at issue here. Is

25   that right? They're totally unrelated issues?

1   MR. KIMBERLY: It's true, Your Honor,

2   that the basis upon which the vacatur of this

3   sentence was entered did not have to do with

4   these -- the convictions on which the sentences

5   were being reestablished.

6   CHIEF JUSTICE ROBERTS: Well, putting

7   aside -- and I'm not saying that the technical

8   nuances won't control -- but, sort of as a

9   matter of substantive fairness, this is just a

10   windfall -- he's just lucky that there were

11   those errors with respect to other unrelated

12   issues, right?

13   MR. KIMBERLY: Well, he -- he may have

14   been lucky, Your Honor. I think luck plays a

15   large role in sentencing across the board. What

16   I would say is what's clear is Congress was

17   focused on finality. It made clear that it did

18   not want Deal to continue applying to newly

19   imposed sentences. And, at the same time, it

20   wanted to -- to respect the finality of ongoing

21   valid sentences in past cases.

22   And, once a vacatur has been entered,

23   the case is no longer a past case as to which

24   any finality interests are any longer present.

25   And I would note in addition, Your

1   Honor, that the use of the present-perfect tense

2   and the preposition "as of" are entirely

3   consistent with our perspective on the role that

4   a vacatur plays.

5   You know, consider, for example,

6   this -- this hypothetical: An award will be --

7   an award ceremony will be held for anyone who

8   has been awarded a medal as of January 1st. And

9   now imagine that Jones was awarded a medal

10   before January 1st but that after January 1st

11   and before the award ceremony, the award was

12   stripped from him.

13   Nobody would say that he's still

14   entitled to attend the award ceremony as an

15   honoree despite that he had technically been

16   awarded a medal before January 1st, before the

17   January 1st cutoff, and the reason is because

18   nobody would say that I have been awarded a

19   medal or he has been awarded a medal unless he

20   still had the medal.

21   If the medal had been stripped, one

22   would say he was awarded a medal, but then it

23   was taken away.

24   JUSTICE KAVANAUGH: I don't know if

25   that context really translates here. Whenever

1   Congress is enacting a new sentencing law and

2   determining how retroactive to make it, they

3   have to draw a line. And the draw -- the line

4   could be, as it is in other provisions of the

5   First Step Act, to everyone, or it could be to

6   everyone but not if you have a conviction. So

7   conviction could be the key moment. Or it could

8   be to everyone but not if you've been sentenced.

9   Or it could be -- you know, they could draw

10   those lines.

11   And each of those lines is going to

12   create anomalies, to your point in your opening

13   about anomalies. For example, yours, to pick up

14   on the Chief Justice's question, creates the

15   anomaly that two people committed the acts on

16   the exact same day, the exact same acts, one of

17   whom got the sentence vacated, will get the

18   benefit of this new provision, whereas the other

19   person on the same day committed the same acts

20   but doesn't, for whatever technical reason, get

21   a vacated sentence, is still stuck with the old

22   regime with the -- without the benefit of the

23   anti-stacking provision.

24   So that -- anomalies are going to

25   always exist, is my point, and so I don't know

1   that the common sense that you reference really

2   translates to retroactive sentencing provisions.

3   MR. KIMBERLY: So, Your Honor, I -- I

4   meant something a little bit different when I

5   said common sense. What I meant was, is there

6   any reason -- and -- and I appreciate there are

7   unfairnesses and anomalies on both sides. It's

8   inevitable whenever Congress changes a law like

9   this concerning sentencing, especially one --

10   JUSTICE KAVANAUGH: Well, can I just

11   stop you there then? Because there are always

12   going to be anomalies, why not just read the

13   language as written?

14   You say sometimes in your brief -- and

15   I agree with this, and I've said this -- you got

16   to look at the broader context, don't be a

17   literalist. I appreciated the language you had

18   in the brief on that, and I agree with that.

19   But, here, it's not as if, if we move

20   the line, suddenly, the anomalies will disappear

21   and that makes more sense.

22   MR. KIMBERLY: So -- so what --

23   JUSTICE KAVANAUGH: That's -- that's

24   my concern about departing from the language

25   here.

1   And I take the literalist point, but,

2   here, there are going to be anomalies either

3   way.

4   MR. KIMBERLY: So what I meant, Your

5   Honor, when -- when I referred to an anomaly is

6   that the -- the line that the amicus ascribes to

7   403(b) is not one that is relevant at all to the

8   considerations that were before the Congress.

9   If Congress was concerned to respect

10   finality on the one hand while ensuring that

11   Deal would cease applying in future sentencings

12   on the other hand, the line that we propose

13   respects that distinction.

14   JUSTICE KAVANAUGH: And that's a good

15   point for you, but Congress was well aware --

16   and I think that's one of the better points for

17   you -- but Congress was well aware that lots of

18   sentences get vacated. And --

19   MR. KIMBERLY: Well, that --

20   JUSTICE KAVANAUGH: -- and yet,

21   Congress could have easily -- you can always say

22   this to both sides -- but Congress could have

23   easily put in language that referred to those

24   whose sentences were vacated and are going to

25   face a resentencing. That would have been very

1   easy to write.

2   MR. KIMBERLY: As would the inverse,

3   Your Honor.

4   JUSTICE KAVANAUGH: Yeah.

5   MR. KIMBERLY: So, certainly, Congress

6   could have said "initial sentence." Just the

7   same, it -- it could have said "valid sentence."

8   So the question is: Presented with

9   that linguistic possibility one way or the

10   other, how do you determine which Congress

11   intended? And I think the answer is you have to

12   look to the background legal conventions that

13   Congress is presumed to comply with when it

14   enacts laws like this.

15   JUSTICE ALITO: Mr. Kimberly, have you

16   been employed by Mayer Brown?

17   MR. KIMBERLY: Yes, I have.

18   JUSTICE ALITO: Well -- but you're not

19   anymore?

20   MR. KIMBERLY: Correct.

21   JUSTICE ALITO: So what does that do

22   with your -- what you tried to derive from the

23   use of the present-perfect tense?

24   MR. KIMBERLY: Well, I -- I think

25   the -- the natural way to describe the fact that

1   I've been employed by one firm before being

2   employed by another firm is to use the past

3   perfect.

4   And in further response to Justice

5   Kavanaugh's question, Congress did exactly that

6   in the surrounding provisions.

7   JUSTICE ALITO: Well, was the sentence

8   that I -- the question that I asked you

9   grammatically confusing? Should I have said:

10   Mr. Kimberly, had you ever been employed by

11   Mayer Brown?

12   MR. KIMBERLY: I think it would be

13   perfectly acceptable to put it in those terms.

14   You could use the past tense as well.

15   JUSTICE ALITO: Well, I could say

16   "were you ever." But "had you ever been,"

17   wouldn't that be very odd?

18   MR. KIMBERLY: Well, that would

19   because the past-perfect tense is used to

20   describe a discrete past event antecedent to

21   some other past event.

22   So, here, it would be the imposition

23   of a sentence before December 21st, 2018. In

24   Your Honor's hypothetical, there's no other past

25   event to which my prior employment is

1   antecedent.

2   JUSTICE ALITO: Did the trial judge

3   have an obligation to vacate these sentences?

4   MR. KIMBERLY: No, there was no

5   obligation. It is the standard practice when

6   other counts of a conviction -- of a verdict are

7   vacated to vacate the sentence.

8   JUSTICE ALITO: But -- so you refer to

9   these as invalid convictions, but -- or invalid

10   sentences, but they weren't invalid. They were

11   sentences that were vacated based on a

12   convention.

13   And the only reason I can think of for

14   this convention -- you'll tell me that I'm wrong

15   if there are other reasons -- but the only

16   reason I can think of for this convention is a

17   reason that cuts against the interests of the

18   defendant. It is to allow the judge to impose a

19   more severe sentence on the remaining valid

20   counts have -- in light of the -- the vacatur of

21   the invalid counts.

22   MR. KIMBERLY: Your Honor, I don't

23   think it follows necessarily that the imposition

24   of a new sentence would necessarily be more

25   severe.

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 1                    JUSTICE ALITO:  No, it wouldn't

 2    necessarily be more severe.  But what's the

 3    reason for vacating perfectly valid sentences

 4    just because some other sentences -- sentences

 5    on other counts were vacated?

 6                    MR. KIMBERLY:  Well, I -- if that --

 7                    JUSTICE ALITO:  What's the reason for

 8    that convention?

 9                    MR. KIMBERLY:  It's as the Court said

10    in Pepper, that a sentencing on a multi-count

11    case is sort of a -- a holistic package.  And

12    the way that the judge might approach sentencing

13    would differ if it's a different subset of

14    underlying convictions.

15                    JUSTICE ALITO:  Thank you.

16                    CHIEF JUSTICE ROBERTS:  Thank you,

17    counsel.

18                    Anything further?

19                    JUSTICE THOMAS:  No.

20                    CHIEF JUSTICE ROBERTS:  Justice Alito?

21                    JUSTICE ALITO:  What do you make of

22    the fact that the Solicitor General does not

23    defend the -- your argument that the vacatur of

24    a sentence means that the sentence was void ab

25    initio for all purposes?
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1   MR. KIMBERLY: Your Honor, I

2 understand the government's hesitation on this

3 front to concern status offenses.

4   And so I want to be clear that when we

5 say a -- a -- a vacated order or judgment or

6 sentence is treated as void ab initio by a

7 vacatur, what we mean is that it is treated as

8 void ab initio prospectively. So moving

9 forward, that order or sentence or judgment is

10 treated as though it never happened.

11   You -- you've got to understand that

12 principle from the point of application of the

13 statute that depends on the thing that's being

14 vacated.

15   So, when you're talking, for instance,

16 about a status offense, that's the point at

17 which the offense conduct takes place. And so,

18 if at the time the offense conduct takes place a

19 prior conviction had been vacated, it would not

20 serve as a predicate fact giving rise to

21 criminal liability.

22   JUSTICE ALITO: All right. Thank you.

23   CHIEF JUSTICE ROBERTS: Justice

24 Sotomayor?

25   JUSTICE SOTOMAYOR: We -- the

1   questioning started in part with the

2   arbitrariness of this point. In fact, the First

3   Step Act, in its retroactivity, is arbitrary --

4   MR. KIMBERLY: That's right.

5   JUSTICE SOTOMAYOR: -- because it's

6   not tied to the time of the commission of the

7   offense, correct?

8   MR. KIMBERLY: That's correct, Your

9   Honor.

10   JUSTICE SOTOMAYOR: And so there are

11   some defendants who committed the crime earlier

12   and got convicted earlier and their sentence

13   stands. And there are some defendants who

14   happen to commit it on the exact same day, it

15   could be co-defendants, and one of them was

16   sentenced after the First Step Act, and they

17   wouldn't -- they wouldn't get the benefit of it

18   under this interpretation, correct?

19   MR. KIMBERLY: That's correct. The

20   date of finality of the sentence doesn't turn on

21   the date of the conduct.

22   JUSTICE SOTOMAYOR: The part of this

23   conversation that hasn't been discussed is the

24   fortuity to the defendant, but I thought that

25   one of the motivating facts for this change was

1   not the effect on defendants but the effect on

2   courts, meaning that there was an outcry -- I

3   think many, many decisions by judges --

4   complaining that their hands were tied in an

5   unfair way in calculating a proper sentence

6   because prosecutors held the decision of whether

7   to charge multiple crimes or a single crime.

8   So, if in a jurisdiction where

9   multiple crimes were charged as having been

10   committed after one incident, they were stacked

11   indefinite -- they were stacked. In other

12   jurisdictions, where multiple incidents were

13   charged as one crime, they weren't stacked.

14   Correct?

15   MR. KIMBERLY: That's correct, Your

16   Honor.

17   JUSTICE SOTOMAYOR: And so that us

18   ruling in favor of the argument raised by amicus

19   would go back to tying the hands of district

20   courts, correct?

21   MR. KIMBERLY: That's right, Your

22   Honor.

23   JUSTICE SOTOMAYOR: And answering or

24   responding to Justice Alito's point, that is one

25   of the reasons to vacate the entire sentence,

1   isn't it?

2   MR. KIMBERLY: It's certainly a

3   consideration that a judge could take into

4   account.

5   JUSTICE SOTOMAYOR: And to the extent

6   that a judge in a resentence like this

7   situation, where there's less of a mandatory

8   minimum, would have the freedom now to craft a

9   sentence higher than the mandatory minimum,

10   they're at liberty to do that, correct?

11   MR. KIMBERLY: That's correct.

12   JUSTICE SOTOMAYOR: Thank you,

13   counsel.

14   CHIEF JUSTICE ROBERTS: Justice Kagan?

15   JUSTICE KAGAN: Mr. Kimberly, I want

16   to give you my intuition about this statutory

17   language, and then you tell me either or both

18   why that intuition is wrong and, even if I --

19   even if that intuition is right, why you

20   nonetheless can win.

21   So my intuition about this statutory

22   language is that it just was not meant with this

23   case in mind, that they -- that the drafters of

24   this language had front and center in their

25   heads the view that, you know, someday we're

1   going to pass this statute, and on that day,

2   there are going to be a bunch of people who have

3   committed crimes but who haven't been sentenced

4   yet, and we need a provision to take care of

5   those people.

6   And they weren't talk -- thinking

7   about resentencings, and they especially weren't

8   thinking about resentencings where the vacatur

9   happened after the date of enactment.

10   And if you think that my intuition --

11   like, my intuition about what they were thinking

12   about totally fits the language. I mean, has,

13   had, as of. I mean, if you're thinking about

14   that set of people, they wrote exactly the

15   language that one would expect. And I guess my

16   intuition is that you're trying to sort of

17   shoehorn in a different case.

18   Now I'm not saying that they -- like,

19   obviously, the drafters of this statute -- we

20   know this because they filed an amicus brief.

21   You know -- you know, presented with this case,

22   they think it should come out the same way and

23   probably thought at the day they drafted this

24   statute it should come out the same way. But my

25   intuition is they wrote a provision without this

 1   in their heads at all.

 2   So what should I do with that if I

 3   think that's right? And do you think I'm just

 4   wrong about that?

 5   MR. KIMBERLY: I -- I think,

 6   respectfully, Your Honor, you -- you may be

 7   mistaken. I think what they were singularly

 8   focused on was finality, and we know this from

 9   the drafting history. There was an earlier

10   version introduced in the House with a

11   subparagraph 2 under (b) that allowed for

12   modifications of past sentences. We know they

13   stripped that out.

14   So we know that Congress was concerned

15   to respect the finality of sentences that were

16   final and valid as of the date of enactment.

17   The -- the situation that we have here

18   falls into the other side, the other sort of

19   bucket of sentences -- of cases, those that are

20   pending, where finality interests simply don't

21   attach.

22   And I would tell you, even if we don't

23   have you just purely on the language, we've got

24   to have you instead on the background legal

25   convention that a vacatur undoes a sentence.

1   And I would point the Court, as an

2   example, to 922(g)(1), which is the unlawful --

3   excuse me -- the felon in possession statute.

4   That also uses the present tense -- the

5   present-perfect tense. It says it shall be

6   unlawful for any person who has been -- who has

7   been convicted in any court of a felony to

8   possess a firearm.

9   But this Court said in Lewis in

10   Footnote 5, rightly so, where I am certain that

11   if you're -- if you have been convicted, but

12   your conviction has been vacated, you may

13   lawfully possess a firearm.

14   If that's right, then our

15   interpretation of 403(b) also has to be right.

16   CHIEF JUSTICE ROBERTS: Justice

17   Gorsuch?

18   JUSTICE KAVANAUGH: Just to follow up

19   on that, and I think that may -- Justice Kagan's

20   intuition kind of seems -- seems consistent with

21   what I think too about what was going on.

22   On the other hand, I guess, why

23   weren't they thinking about this is not a

24   unusual permutation to have a resentencing

25   proceeding?

 1   MR. KIMBERLY: Well, I -- I'm not --

 2   I -- I can't speak to why specifically they

 3   weren't thinking about it. What I would say is

 4   that background legal conventions exist to

 5   answer precisely this question.

 6   JUSTICE KAVANAUGH: Well, on that

 7   point, there are a couple things that -- that go

 8   the other way on that, and this is why I think

 9   this is a really close case.

10   And so the things that go the other

11   way are the general federal provision that says

12   you don't apply statutes retroactively. And,

13   obviously, this does to some extent. But then

14   the corollary to that principle might be -- and

15   I know you can test this -- that you -- you

16   don't construe it more broadly than the text

17   goes in terms of the retroactivity of the

18   provision. And that would obviously hurt you

19   here, that background convention.

20   The other is the general principle

21   that the Sentencing Guidelines in effect at the

22   time of sentencing are -- are used even in a

23   resentencing provision sometimes.

24   MR. KIMBERLY: So I think both of

25   those considerations cut in our direction. As

1   to Section 109, this Court in Dorsey made very

2   clear that you don't need an express clear

3   statement overriding the general principle that

4   retroactivity is not the norm. All you need is

5   a fair implication.

6   And so there's no question that 403(a)

7   does apply retroactively. The question here is,

8   is there a fair implication that it applies not

9   only to cases where no sentence was initially

10   imposed but cases like this one?

11   And I would say that fair implication,

12   my friend on the other side's position is a

13   linguistic possibility at best. But ours is

14   also a linguistic possibility. And so, to break

15   that tie, I think you've got to look at context.

16   You -- you've got the linguistic

17   context with use of the present-perfect tense,

18   the statutory context, 3582(c), which uses the

19   "has been imposed" locution to refer to ongoing

20   valid sentences that can be modified.

21   You've got the legal context, which is

22   the background presumption that I mentioned.

23   You've got the historical context, which

24   indicates that Congress meant to clarify its

25   view -- the 115th Congress meant to clarify its

1 view that Deal was never rightly decided. So

2 why would Congress want it to continue to apply

3 to any new resentencings? You've got the

4 drafting history as part of the historical

5 context, and you've got the purpose context,

6 with you -- which you, Your Honor, in Harrington

7 against Purdue, said is an important part of the

8 consideration.

9   All of those favor Petitioner. None

10 favor the --

11   JUSTICE KAVANAUGH: That was -- that

12 was a dissent, but anyway.

13   (Laughter.)

14   JUSTICE KAVANAUGH: Thank you.

15   MR. KIMBERLY: Thank you.

16   JUSTICE BARRETT: Well, my cards are

17 on the table, but don't worry, I'm not going to

18 be hard -- hard on you.

19   I -- I think that the best argument is

20 the background legal principle argument, best

21 argument for your side, not the best argument

22 overall, the best argument on your side.

23   (Laughter.)

24   JUSTICE BARRETT: And I actually -- I

25 wonder if you could say a little bit about how

 1   to think about this background legal convention

 2   in this case as a matter of interpretation

 3   because, I mean, I do think, you know, Judge

 4   Bibas's opinion going through this is the best

 5   one, you know, for -- for -- at least in the way

 6   I would think about the case on the other side.

 7   But, normally, when we look at those

 8   background conventions, I mean, one context

 9   would be, like, the old soil principle, and so

10   we would look at a word and say this is the old

11   soil principle and this is how it works.

12   Or we might say there are statutory

13   gaps, so we know, if Congress doesn't say

14   anything about a statute of limitations or if it

15   doesn't mention criminal defenses, we assume

16   they apply.

17   But this is really different because

18   the statute doesn't use the word "vacatur." And

19   it's not like it's coming in from the background

20   to fill in gaps in the same way we would think

21   of as a statute of limitations. So could you

22   say a little bit about that or how you might

23   think of that working? Because I think, just as

24   a matter of the theory of statutory

25   interpretation, it's not evident. I can't think

1   of another analogue, which is the thing that

2   gives me pause about that argument.

3   MR. KIMBERLY: Well, Your Honor, I'd

4   point to your opinion in Biden against Nebraska,

5   where you explained the importance of background

6   legal conventions and you cited two examples.

7   You mentioned the rule that when Congress enacts

8   a statute of limitations, it's presumed to

9   incorporate equitable tolling. That is not a

10   principle that is -- you know, emanates from any

11   particular word. It's just a principle that

12   Congress is presumed to adopt with respect to

13   statute of limitations. And -- and -- and there

14   are -- there are additional examples as well.

15   I think the -- the general -- here, I

16   think the idea that something has been imposed

17   connotes a -- an action by a court, and -- and

18   when a vacatur has the effect by a legal

19   fiction, which is -- you know, it's an

20   assumption in law that something that is true

21   is -- is false for some limited legal purpose.

22   When that -- when -- when what is that's been

23   imposed is undone, it's a natural application of

24   that principle.

25   So I think, in this case, you get it

 1   from the word "imposed." I think you get it

 2   from the word "sentence." What was -- what was

 3   done pre-enactment is neither of those things we

 4   know by operation of this principle.

 5   JUSTICE BARRETT: Thank you.

 6   CHIEF JUSTICE ROBERTS: Justice

 7   Jackson?

 8   JUSTICE JACKSON: So I guess I'm a

 9   little surprised at your surprise to Justice

10   Kagan, and I'm trying to see if I understand

11   your argument.

12   I think that if Congress was

13   singularly focused on finality, then I would

14   think that they would be relying or would have

15   relied exclusively on the background default

16   rule that courts apply the law in effect at the

17   time of sentencing -- excuse me, at the time of

18   the offense. That's the background principle.

19   And everybody would be out of luck. You just

20   look at the date of the enactment and anybody

21   who offended after that would get the benefit.

22   But, here, it appears as though

23   Congress was actually trying to target a

24   particular group and allow them to do something

25   other than the default, allow them to have the

        1   benefit even though they had offended prior to

        2   the Act. So that's the group of people that

        3   Justice Kagan says we're focused on. And maybe

        4   Congress wasn't really homing in on resentencing

        5   versus sentencing.

        6   But what I thought your argument was,

        7   was that in focusing on that group of people,

        8   Congress was drawing the line around whether you

        9   had already been sentenced and you were serving

       10   what was in effect a final sentence or you still

       11   had to be sentenced for this offense.

       12   And, if that's the line they're

       13   drawing, partly in response to Justice

       14   Kavanaugh, I guess the question becomes why

       15   would Congress have wanted to further delineate

       16   in the world of people who still have to be

       17   sentenced between people who had previously been

       18   sentenced and their sentence was vacated and

       19   people who hadn't.

       20   What I can't figure out is why it

       21   makes sense to distinguish in the group of

       22   people who still have to be sentenced for this

       23   offense between those who previously had one and

       24   those who didn't. So can you offer -- and I'll

       25   certainly ask the other side this question, but

1   it seems to me that that's the key question that

2   we need to really ferret out when we're trying

3   to understand where the lines are being drawn in

4   this statute.

5   MR. KIMBERLY: And -- and, Your Honor,

6   I don't see any reason Congress would have

7   wanted to draw that line. I think the issue

8   is -- you know, this is sort of a -- a problem

9   that's underlying the questions in the briefing

10   that isn't really openly addressed until the

11   replies.

12   The question is: What is the time

13   perspective at which you're applying 403(b)? If

14   your -- the general rule, the -- the -- the

15   standard understanding, is that statutes are

16   written to be read and interpreted from the time

17   of their reading and application, not the time

18   of their adoption.

19   So, if you're sitting in the seat of a

20   sentencing judge applying this law at the time

21   that somebody is before you for a plenary

22   resentencing, you're asking the question: Okay,

23   this individual was sentenced before the Act,

24   but can I say today that he has been sentenced

25   as of December 21st, 2018, when, in fact, his

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1     sentence has been vacated?
2              JUSTICE JACKSON:  And my question, I
3     guess, is why would it have mattered from
4     Congress's --
5              MR. KIMBERLY:  Well, exactly right.
6              JUSTICE JACKSON:   -- perspective?
7     That's the key.  So, fine.  Even if the question
8     is, okay, he was sentenced back then, why would
9     Congress have said, and, therefore, while you're
10    sentencing him today, don't take the First Step
11    into account, whereas the next guy who walks in
12    who you're sentencing today would get the
13    benefit because he didn't get sentenced before?
14             MR. KIMBERLY:  Right.
15             JUSTICE JACKSON:  I don't understand
16    why that -- that line is there --
17             MR. KIMBERLY:  I --
18             JUSTICE JACKSON:  -- and what it's
19    doing.
20             MR. KIMBERLY:  -- I don't understand
21    it either, Your Honor.  And I think it's -- I
22    think it's negated by some of the broader
23    contexts, including the -- the headings of the
24    paragraphs at issue here.
25             Congress made clear in paragraph (a)
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1   that it was clarifying its view that Deal was

2   never rightly decided and that 924(c)(1) should

3   not apply to any future plenary sentencings.

4   There's no reason to think Congress

5   would have meant to distinguish between a

6   plenary sentencing, as to which there is no

7   finality, cost, following a vacatur that's a

8   resentencing or simply an initial sentencing.

9   JUSTICE JACKSON: Thank you.

10   MR. KIMBERLY: Thank you.

11   CHIEF JUSTICE ROBERTS: Thank you,

12   counsel.

13   Ms. Hansford.

14   ORAL ARGUMENT OF MASHA G. HANSFORD

15   ON BEHALF OF THE RESPONDENT

16   IN SUPPORT OF THE JUDGMENT BELOW

17   MS. HANSFORD: Mr. Chief Justice, and

18   may it please the Court:

19   Section 403 can reduce an offender's

20   sentence by decades. It applies where "a

21   sentence for the offense has not been imposed as

22   of the enactment date."

23   The reference to a sentence imposed on

24   its own creates an ambiguity: Does it cover

25   sentences that were imposed as a matter of

 1   historical fact or sentences whose imposition

 2   was not subsequently undone?

 3   That ambiguity is familiar. When we

 4   speak of medals received by an athlete or

 5   articles published by a scholar or diagnoses

 6   given by a doctor, sometimes we mean to include

 7   medals that were stripped based on doping

 8   allegations, articles retracted based on data

 9   problems, and diagnoses corrected. And other

10   times we don't. The answer depends on context.

11   And two aspects of the context here

12   indicate that Congress meant to refer to

13   operative sentences, sentences that stuck.

14   First is the use of the

15   present-perfect tense. And, second, focusing on

16   the operative sentence perfectly reflects the

17   compromise Congress struck between fairness and

18   finality or breadth and finality, whereas

19   amicus's historic fact interpretation excludes

20   offenders based on a consideration that has, as

21   Justice Jackson just indicated, little

22   conceivable relevance.

23   I welcome the Court's questions.

24   JUSTICE THOMAS: What's the difference

25   between your argument and Petitioners' argument?

1   MS. HANSFORD: The -- the difference

2   is that we disagree that the background

3   principle resolves this case, and we disagree on

4   lenity. But, in terms of the best

5   interpretation of the statute, our argument is

6   the same.

7   JUSTICE KAGAN: Do you disagree on

8   those matters because you have a wealth of other

9   cases where those -- where, if you agreed on

10   those matters, it would come back to haunt you?

11   MS. HANSFORD: Yes, Justice Kagan.

12   (Laughter.)

13   MS. HANSFORD: So I -- I think the way

14   that Petitioner has kind of narrowed the

15   background principle is a little bit better for

16   us, but we're very concerned about the idea that

17   some kind of void ab initio principle would

18   suggest that a felon in possession statute, if

19   a -- a prior conviction is vacated after the

20   fact or a SORNA conviction for failing to

21   register, if a conviction is vacated after the

22   fact, void ab initio would suggest it never

23   existed, and it would imperil those, false

24   statement convictions, immigration contexts.

25   There's a wealth of contexts where we

1   think kind of a robust view of that would create

2   all kinds of problems and goes against what the

3   Court has already decided in cases like Lewis.

4   And we don't think it's needed in this case

5   because we think just the term "sentence

6   imposed" on its own is ambiguous.

7   And I think we're willing to spot

8   Petitioner that maybe it's particularly

9   ambiguous when you're talking about a sentence

10   or a conviction because a vacated sentence is a

11   particularly void thing, but that's as far as

12   we're willing to go.

13   JUSTICE KAVANAUGH: I don't --

14   JUSTICE KAGAN: I mean, I do think

15   that you're giving away, as Justice Barrett

16   said, your best argument here as to this case.

17   And I -- I guess what I'm wondering is, is there

18   a version of the argument that Mr. Kimberly made

19   that you think would not come back to haunt you

20   in other cases but that could benefit your

21   reading here?

22   MS. HANSFORD: So two reactions to

23   that, Justice Kagan.

24   First, I think the version that would

25   not come back to haunt us is just a recognition

1   that on its own, a reference to a sentence, a

2   sentence imposed, does have some ambiguity and

3   you do need to look to other contextual tools to

4   resolve that ambiguity. And so I think that

5   that's the thrust of Petitioners' argument, and

6   I think we're comfortable with that to that

7   extent.

8   I do think that is sufficient for us

9   to win this case. I don't think you need

10   something more robust than that. And I think

11   that the contextual considerations are

12   incredibly strong.

13   So I -- I -- I think that the line

14   that is crystal-clear that Congress was drawing

15   here is between breadth, given this

16   transformative modification of the prior

17   sentencing penalty that makes a difference for

18   each of Petitioners of 80 years, it decided to

19   apply it broadly.

20   How do we know that? It departed from

21   the traditional rule that pre-Act offenders

22   don't benefit.

23   And that is the key rule and I think

24   the most fair way to minimize disparities.

25   After all, pre-Act offenders are on notice when

1   they offend of this really harsh stacking

2   regime, and yet still Congress wanted these

3   people to benefit, but it drew the line.

4   And I think exactly what Congress was

5   thinking about, to go back to your question to

6   Petitioners' counsel, is the principle that

7   Congress was trying to reflect is it did not

8   want Section 403 to be the tool for reopening

9   otherwise final sentences. Congress went back

10   and forth in the various drafts on how much to

11   impair finality, and it decided not to.

12   And I think that's the precise

13   compromise Congress struck. And I think our

14   interpretation tracks that compromise perfectly,

15   whereas amicus's interpretation, it narrows the

16   universe but in a kind of arbitrary way based on

17   something that doesn't have any conceivable

18   relevance, what the initial sentence was.

19   And just to go back to what Congress

20   was thinking, I think you might be right,

21   Justice Kagan, that it wasn't considering this

22   particular scenario, but I think that what it

23   was thinking is this finality consideration of

24   how do we capture sentences without hurting

25   finality.

1   And I think the best indication of

2   that is that Congress -- the -- the language

3   here perfectly mirrors the language of 3582(c),

4   which is the provision that defines the

5   imposition -- or that defines the finality

6   concerns that attach to a criminal sentence, and

7   that provision says the court may not modify a

8   term of imprisonment once it has been imposed.

9   So I think what happened here is

10   Congress pulled open that provision and said:

11   Oh, we don't want to do that. Once it's been

12   imposed and finality attaches, we don't want to

13   capture it. And so it drafted this language in

14   precisely the way to dovetail with that

15   provision, and I think our interpretation --

16   JUSTICE KAVANAUGH: You --

17   MS. HANSFORD: -- respects that

18   judgment by Congress.

19   JUSTICE KAVANAUGH: -- you said that

20   it's ambiguous a few times. I guess I don't see

21   it on its face as ambiguous. It just says "has

22   been imposed." "Has a sentence been imposed?"

23   Yes.

24   The question to me really is how does

25   it apply to this circumstance that -- where

1   Congress might not have meant it to apply. But

2   I don't really see that as ambiguity as much as

3   maybe context informing how to -- how broadly to

4   read it.

5   MS. HANSFORD: We disagree with that,

6   Justice Kavanaugh. So, if I ask, "How many

7   articles did she publish as of 2022?" -- to take

8   it outside the sentencing context -- you might

9   be meaning to include in that articles that she

10   published that were subsequently retracted or

11   you might not be.

12   And I think the way that we would

13   address that is we would -- we would say: What

14   are you wondering about? Are you wondering

15   about the strength of the early body of her

16   work? In which case it suggests that articles

17   retracted based on data problems are not the

18   kinds of things you're asking about.

19   JUSTICE KAVANAUGH: To me, it's more

20   like a literal -- and maybe this is what you're

21   saying -- a literalism versus how an ordinary

22   reader would understand it in context. Maybe

23   that's not -- maybe this is too theoretical.

24   MS. HANSFORD: I --

25   JUSTICE KAVANAUGH: But the point --

1   the reason why I'm concerned about this case --

2   and the government's obviously been on both

3   sides of this, so I feel good about that in

4   terms of my own thinking -- is there are still

5   disparities, like really, really big disparities

6   and really big unfairness, even under your

7   reading, which, usually, when we say, well, the

8   literal reading can't be right, it's because the

9   non-literal reading makes more sense in context.

10   And, here, there are still going to be big-time

11   disparities.

12   MS. HANSFORD: So a few reactions to

13   that.

14   The first is that I do think the

15   disparities are worse on amicus's reading,

16   but -- and -- and -- and then -- and then I'll

17   get to a couple of other thoughts.

18   I think the --

19   JUSTICE SOTOMAYOR: Explain that.

20   MS. HANSFORD: I think the disparities

21   are worse on amicus's reading because, if you

22   have two co-defendants who offend at the same

23   time, but one is rushed into a plea that's

24   involuntary or that's inadequately counseled,

25   before the enactment day of sentence, before the

 1   enactment date is then -- then has the sentence

 2   go up on appeal, the court of appeals throws it

 3   out. The co-defendant goes back down.

 4   But now, because there's this initial

 5   completely unlawful sentence, he is stuck with

 6   the application of the old, outdated, unjust,

 7   unduly expensive regime, whereas his

 8   co-defendant, who wasn't rushed in that way,

 9   gets to benefit.

10   And I don't think that makes any

11   sense, but I also think that if we're thinking

12   about fairness, the -- the -- the best principle

13   is this time of offense principle, and the fact

14   that Congress is departing from that suggests

15   that Congress wants to go more broadly than

16   that. And I think that the next most relevant

17   principle is finality.

18   And -- and I think that if you --

19   under any reading, including amicus's, people

20   who are more dilatory, who evade arrest, who ask

21   for continuances do still get to benefit from

22   the First Step Act's enactment if their sentence

23   is a post-enactment sentence. And that's

24   precisely because I don't think what Congress is

25   trying to do --

1   JUSTICE KAVANAUGH: But the -- the --

2   MS. HANSFORD: -- is minimize

3   disparities.

4   JUSTICE KAVANAUGH: You used the --

5   sorry to prolong this, but the bank robber --

6   MS. HANSFORD: Yeah.

7   JUSTICE KAVANAUGH: -- who has the

8   conspiracy charge tacked on gets the benefit of

9   Davis and therefore gets the benefit of what

10   you're offering here. The bank robber who

11   didn't have a conspiracy charge tacked on does

12   not even though they might have participated in

13   the same bank robbery.

14   MS. HANSFORD: Yes. Correct. And

15   that gets to the Chief Justice's initial

16   question about the windfall as well. I think

17   those two people are fundamentally differently

18   situated because one has a final sentence

19   imposed. So there's a profound cost to

20   reopening that sentence to give him the benefit

21   of this new scheme, whereas the person whose

22   sentence was vacated for whatever reason,

23   regardless of his merit or how good his crime

24   was, he does not have a final sentence, so there

25   isn't that same cost to impose.

1   And that's exactly why an individual

2   who is on the lam and delayed his initial

3   sentencing until after the enactment gets to

4   benefit as well. I think the principal

5   distinction is based on who has the final

6   sentence. And if there's no final sentence,

7   there's really no downside. There's no cost.

8   And I think that the only way that

9   amicus's view reduces any disparities is in --

10   by narrowing the class of offenders in this

11   arbitrary way.

12   JUSTICE ALITO: As I understand your

13   question -- your answer, it has nothing to do

14   with fairness to these two defendants. It has

15   to do with the burden on the court.

16   MS. HANSFORD: I think it does have to

17   do with the -- the -- Congress's view that the

18   old regime was an unfair one and also did not

19   give district courts sufficient discretion.

20   JUSTICE ALITO: Well, you have --

21   MS. HANSFORD: But I don't think it

22   has to --

23   JUSTICE ALITO: In Justice Kavanaugh's

24   example, you have a defendant who is -- sentence

25   has invalid sentences on -- on -- on a couple of

    1   counts, valid sentences on other counts. You

    2   say that person gets the benefit of the First

    3   Step Act. But, if you have an identical -- a

    4   person who's identical except there were no

    5   invalid sentences, then that person doesn't get

    6   the benefit of the First Step Act.

    7   I don't see why that is fair and why

    8   treating the -- the former person more favorably

    9   than the latter is supported by fairness. Your

   10   argument, as I understood it, was, well, it's a

   11   big burden for the court to have to reconsider

   12   cases that were completely sentenced and there

   13   was nothing wrong.

   14   MS. HANSFORD: I think there's no

   15   reason to ask the court to apply a discarded

   16   sentencing scheme at a post-enactment Act

   17   resentencing because I think those individuals

   18   whose sentences were vacated for any reason no

   19   longer have an imposed sentence. There's no

   20   longer a finality cost. In Pepper, this Court

   21   says that the differences in procedural

   22   opportunities that result because some have

   23   their sentences vacated are not a kind of

   24   unwarranted disparity. And I think that fits

   25   perfectly the situation here.

1   But I think that your intuition,

2   Justice Alito, would support Congress's drafting

3   the statute in a different way and not -- and

4   not applying it to any pre-Act offenders at all.

5   Why apply it to any pre-Act offenders? Because

6   that's how important Congress thought it was.

7   And the operative sentence

8   interpretation tracks that finality cost

9   perfectly. It means that Section 403 does not

10   allow reopening of otherwise final sentences,

11   but it also allows a court to impose this new

12   updated scheme that reflects Congress's updated

13   judgment about what is fair and makes a huge

14   difference to individuals whenever it can do so

15   without harming the critical principle of the

16   finality of sentences.

17   JUSTICE GORSUCH: Ms. -- Ms. Hansford,

18   I just want to see if I understand how you've

19   squared your view with -- with Petitioners on

20   what's void and voidable.

21   As I understand it, you're -- and I

22   just want to see if I've got it, okay -- that

23   you would say that the felon in possession and

24   the SORNA cases are different because those

25   statutes ask about a status in a time past and

1   prior to the vacatur of the sentence, of the

2   conviction.

3   Here, we have a vacatur, and once it's

4   vacated, it's treated as void ab initio. Is --

5   is that fair? Is that a fair summary?

6   MS. HANSFORD: That -- that -- that --

7   that's -- that's really close. I would say that

8   for the 9 --

9   JUSTICE GORSUCH: Well, I'm glad I'm

10   in the neighborhood.

11   (Laughter.)

12   MS. HANSFORD: Yeah. And -- and I

13   don't know if this is -- if this is important,

14   but I'll just put this caveat out there. I

15   think that the -- the 922(g) asks for a

16   conviction at the present time, and the relevant

17   present --

18   JUSTICE GORSUCH: Yes. The relevant

19   time --

20   MS. HANSFORD: -- is the time of the

21   conduct when the penalty attaches.

22   JUSTICE GORSUCH: That -- that's the

23   time with respect to those. Here, the time is

24   the present at the moment of sentencing.

25   MS. HANSFORD: Exactly.

1   JUSTICE GORSUCH: Okay.

2   MS. HANSFORD: That's exactly right,

3   Justice Gorsuch.

4   JUSTICE GORSUCH: All right. I got

5   it. And then I'm just curious, without stack --

6   with stacking, these defendants face a hundred

7   years or -- or so in prison. Without stacking,

8   what's the maximum they could receive?

9   MS. HANSFORD: With -- without, I

10   think the maximum is still life --

11   JUSTICE GORSUCH: Yeah.

12   MS. HANSFORD: -- for the various

13   offenses. So I -- the minimum goes from 130 to

14   135 years based on Petitioner to -- to 50 to 55

15   years based on Petitioner. That's the minimum.

16   Of course, the district court can go above that.

17   And I think that also helps go to the

18   exchange I was covering --

19   JUSTICE GORSUCH: We all wind up in

20   the same place anyway.

21   MS. HANSFORD: The -- the sentences

22   are still extremely, extremely harsh, reflecting

23   the severity of their crimes, but --

24   JUSTICE GORSUCH: And the district

25   judge on -- on resentencing could issue the same

1   sentence he issued before.

2   MS. HANSFORD: Absolutely.

3   JUSTICE GORSUCH: All right.

4   MS. HANSFORD: And this was a

5   provision that was trying to give district

6   courts discretion, and that's part of the reason

7   that Congress was applying it as broadly as it

8   could.

9   JUSTICE ALITO: Do you have any idea

10   how many cases fall into the category that's

11   involved here?

12   MS. HANSFORD: Yes. So the -- the

13   current universe of cases, there are 16

14   offenders that we're aware of who have already

15   benefited from this interpretation. And then

16   there are eight additional ones that we're aware

17   of who -- whose -- for whom this question is

18   open.

19   Now I do want to note that the

20   universe could increase anytime this Court

21   issues a decision that affects the validity of

22   924(c) sentences. Additional individuals might

23   be able to get into court on a 2255. So

24   Petitioners actually ended up getting in court

25   after -- into court after this Court's decision

1   in Davis.

2   So I think it's a small universe, but

3   it's not a closed universe. So I do want to --

4   to -- to caveat that.

5   CHIEF JUSTICE ROBERTS: Thank you,

6   counsel.

7   Justice Thomas?

8   Justice Alito?

9   JUSTICE ALITO: The sense -- you talk

10   about void ab initio, but in what sense were

11   these -- the sentences on these counts void ab

12   initio? There was nothing wrong with them when

13   they were imposed. There was nothing wrong with

14   them at the time when they were vacated. There

15   was nothing wrong with them when -- at the time

16   when the sentence was imposed later.

17   They were vacated based on a -- a

18   practice that is not required.

19   MS. HANSFORD: We completely agree

20   with that, Justice Alito. We don't think these

21   were void ab initio. We think these were

22   perfectly valid. But we think the relevant

23   question is whether it's a historical sentence

24   or an operative sentence. And we think that

25   these are not operative sentences because they

1   were vacated, and that means there's no finality

2   consideration that attaches to them.

3   But we don't think there was anything

4   wrong with the sentences inherently.

5   JUSTICE ALITO: And what is your

6   understanding of the basis for this -- this

7   practice of vacating all the sentences on all

8   counts if the sentence on one or more counts

9   must be vacated?

10   MS. HANSFORD: The idea is that a

11   district court should be able -- because a

12   district court's understanding of the sentence

13   it's imposing on other counts may affect its

14   judgment of the appropriate sentence on this

15   count, its weighing of the 3553(a) factors, the

16   district court should be able to, when sentences

17   are vacated, reweigh the sentencing package as a

18   whole.

19   And, of course, that is a

20   discretionary judgment and -- but that is a

21   judgment that courts of appeals often make or

22   district courts often make when vacating some

23   counts.

24   CHIEF JUSTICE ROBERTS: Justice

25   Sotomayor?

1   JUSTICE SOTOMAYOR: I'm looking at the

2   wealth -- I was looking at the wealth of

3   statutes that both -- everybody here cited about

4   when Congress was applying the purported

5   background principle of retroactivity or not,

6   and the principle I came to in reading

7   everything is taken from Minerva -- Minerva

8   Surgical, where we said Congress "legislates

9   against the background of common law

10   adjudicatory principles," but it does not expect

11   those principles to apply "when a statutory

12   purpose to the contrary is evident." Correct?

13   MS. HANSFORD: Yes, I -- I do think

14   this is a case that --

15   JUSTICE SOTOMAYOR: All right. So now

16   what you're saying to me, I thought, was a

17   statutory purpose is evident to the contrary --

18   or not to the contrary, is evident here because,

19   first, they use the present-perfect tense. Is

20   that -- my judgment, is that correct?

21   MS. HANSFORD: So we think the

22   present-perfect tense is one of the textual

23   clues that that's not what Congress meant --

24   JUSTICE SOTOMAYOR: What's the second?

25   MS. HANSFORD: -- and the purpose

1   is -- is reflected in the text that Congress

2   used, the fact that the text mirrors 3582(c) and

3   how the various provisions strike the finality

4   bounds. So I think there are all kinds of

5   textual indicia here about what Congress's

6   purposes was.

7   JUSTICE SOTOMAYOR: No, I was -- I was

8   dealing -- one of the main purposes that the

9   other -- the amici and most of the decisions

10   that have relied have taken a contrary position

11   has been on the use of this -- of the word

12   "sentence imposed."

13   So I went back to why you think there

14   was an ambiguity, and I found it, which is I

15   looked at every single dictionary, and every

16   dictionary that uses "sentence imposed" or

17   "conviction imposed," Black's Law Dictionary,

18   Webster's, American Heritage, and the Oxford

19   English Dictionary, does exactly what you say.

20   It says it can mean a historical date

21   or it can mean continuing validity. So that's

22   why you saying "sentence imposed" can't tell you

23   anything, right?

24   MS. HANSFORD: I --

25   JUSTICE SOTOMAYOR: Because it's

1   ambiguous on its face?

2   MS. HANSFORD: Yes, I think "sentence

3   imposed" is ambiguous on its face, whether it's

4   a historic sentence or operative sentence.

5   And I think that there is a grammar

6   mistake that amicus's view ascribes to Congress

7   because the -- the present-perfect tense cannot

8   be used when the "now" component of the period

9   is excluded.

10   And so you can say: He has played

11   hundreds of rounds of golf. But you would say:

12   He had played hundreds of rounds of golf until a

13   recent knee surgery forced him to the sidelines.

14   And I think that's precisely the

15   mistake that amicus has Congress making. And I

16   think having Congress both make a mistake of

17   grammar and draw this kind of arbitrary line, I

18   think that's -- that's a worse interpretation

19   than ours, which has Congress not make a mistake

20   of grammar, use the tense precisely, and also

21   have a purpose that's coherent.

22   JUSTICE SOTOMAYOR: So, for your

23   purposes or -- I -- I went back to

24   dictionaries -- to the Chicago Manual of Style

25   and to the Cambridge Grammar of the English

1   Language, and both of them make it very clear

2   that present-perfect tense "denotes an act,

3   state, or condition that is now completed and

4   continues up to the present." Correct?

5   MS. HANSFORD: Yes, that's correct.

6   JUSTICE SOTOMAYOR: And you used the

7   past tense. In fact, what was striking to me is

8   all of the opinions that support amici,

9   including that of the Seventh Circuit, had to

10   change the present-perfect tense to say "had

11   been sentenced," correct?

12   MS. HANSFORD: Yes, that's right,

13   because you would say -- you could say, "A

14   sentence was imposed on Jones," if you're

15   referring to the past. But you would say, "A

16   sentence had been imposed on Jones but was

17   vacated."

18   You could not say, "A sentence has

19   been imposed on Jones but has been vacated."

20   That makes a grammar mistake that Huddleston and

21   Pullum, for example, describe.

22   JUSTICE SOTOMAYOR: All right. Thank

23   you, counsel.

24   CHIEF JUSTICE ROBERTS: Justice Kagan?

25   Justice Gorsuch?

           1   JUSTICE KAVANAUGH: On the closed

           2   universe that you mentioned, is it closed as to

           3   Davis claims? You had a caveat, and I wanted

           4   to -- just on the caveat, is it closed as to

           5   Davis claims?

           6   MS. HANSFORD: Yes, I think it's

           7   closed as to Davis claims because of the

           8   one-year period and the 2255.

           9   So, if there's a future decision of

          10   this Court, which, of course, the government

          11   hopes there will not be, that is shedding light

          12   on predicates in 924(c). And, of course, it's

          13   the same language in 401, so it could come up in

          14   that context as well.

          15   But we do think that the universe is

          16   going to be very, very small. Even if there is

          17   another decision of that sort, which could, if

          18   it's a constitutional decision, create a new

          19   one-year period for 2255 decisions, we still

          20   think it would be on the order of a couple of

          21   dozen offenders. We think the universe is very

          22   small here.

          23   JUSTICE KAVANAUGH: Then, on Justice

          24   Sotomayor's question, I just want to make sure.

          25   The purpose derived from the text, I don't think

1   you got to the second point, which is that

2   there's fairness and finality, and we've asked

3   you, and I was asking you, fairness -- there's

4   still going to be unfairness.

5   I think what you are saying, but

6   correct me if I'm wrong, is Congress was

7   concerned about fairness and correcting

8   unfairness up to the point where it would

9   infringe on finality?

10   MS. HANSFORD: That's exactly right,

11   Justice Kavanaugh. I think -- I think that's

12   what Congress was thinking here.

13   And -- and I think it's really

14   inexplicable otherwise how -- why it would draw

15   this particular line. I think, if it just

16   wanted to minimize disparities, it would stick

17   with a time of offense line.

18   And so I think, if you look at the

19   whole universe of disparities, we think we have

20   fewer disparities, but we also think we have the

21   more principled set of disparities where the

22   differences are based on offenders who have

23   different finality considerations, which this

24   Court has recognized is significant and not

25   arbitrary.

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1                JUSTICE KAVANAUGH:  The question for

2     me then is whether you can really get that out

3     of the text, but I'll explore that with amicus.

4                Thank you.

5                CHIEF JUSTICE ROBERTS:  Justice

6     Barrett?

7                Justice Jackson?

8                Thank you, counsel.

9                Mr. McGinley.

10               ORAL ARGUMENT OF MICHAEL H. McGINLEY

11                 COURT-APPOINTED AMICUS CURIAE

12                IN SUPPORT OF THE JUDGMENT BELOW

13               MR. McGINLEY:  Mr. Chief Justice, and

14     may it please the Court:

15               Petitioners do not qualify for

16     retroactive relief under Section 403(b) of the

17     First Step Act.  The plain text of that

18     provision says that Section 403(a)'s changes

19     apply to a pre-Act offense only if a sentence

20     for the offense has not been imposed as of the

21     date of enactment.

22               Petitioners each indisputably received

23     a sentence before the date of enactment.  It

24     makes no difference that their sentences were

25     later vacated after that date for unrelated
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 1   reasons.

 2   This is the most natural common-sense

 3   understanding of the statute's text read as a

 4   whole. Indeed, Congress's use of the indefinite

 5   article "a" captures any sentence that has been

 6   imposed before enactment, even those that are

 7   later vacated.

 8   Section 403(b) does not refer to "the

 9   final sentence" or "a sentence that has not

10   later been vacated." It refers to "a sentence."

11   The statute's use of the

12   present-perfect tense has not been imposed, also

13   confirms this reading. The present-perfect

14   tense denotes an act, state, or condition that

15   is either completed or continues to the present.

16   Here, the former meaning is more fitting.

17   Imposing a sentence is a discrete

18   historical event that occurs when the sentence

19   is pronounced in open court. And Congress drew

20   the dividing line as of the date of enactment.

21   Petitioners and the government would

22   nullify this statutory phrase by arguing that a

23   sentence must remain in place until the present

24   day. That is not what Congress said.

25   If Congress had wished to adopt that

1   approach, it could have said that Section 403(a)

2   applies to a sentence imposed after the date of

3   enactment. But, under the actual statutory

4   text, Petitioners do not qualify. And if there

5   were any ambiguity, the federal savings statute

6   would preclude retroactive effect here.

7   I welcome the Court's questions.

8   JUSTICE THOMAS: What -- assuming that

9   I agree that there is a background vacatur rule,

10   what role does it play in your analysis?

11   MR. McGINLEY: So the Court has said

12   repeatedly that a background vacatur rule cannot

13   override clear statutory text. And so, here,

14   the statutory text is whether a sentence has

15   been imposed.

16   If you think the vacatur rule applies,

17   for example, as it did in Lewis, then that still

18   would not save Petitioners here. And I think

19   the government's argument essentially concedes

20   this without saying it because the vacatur did

21   not occur before the date of enactment in this

22   setting.

23   And so repeat -- repeat -- sorry, Your

24   Honor.

25   JUSTICE SOTOMAYOR: No.

1   MR. McGINLEY: Repeatedly, the Court

2   has said that a background principle can't

3   override the plain text. We think the plain

4   text is clearly in our favor here.

5   We also think that's why the

6   government agrees with us that there is no

7   background vacatur principle that could apply in

8   this way because, if it did, it would

9   essentially gut 922(g) for people who have their

10   sentences vacated after they possessed the

11   weapon.

12   JUSTICE SOTOMAYOR: Counsel, I just

13   don't know how you can say "sentence imposed" is

14   clear when every dictionary I look at -- I

15   mentioned them before, Black's Law, Webster's,

16   American Heritage, the Oxford English

17   Dictionary -- all say, when you use the phrase

18   "sentence imposed," you can mean one of two

19   things. You can mean a historical moment when a

20   sentence was pronounced in court, which is the

21   way you're using it, or you can refer to the

22   continuing application of a legal judgment to

23   the defendant.

24   So, if every dictionary says that's

25   ambiguous, that's where the government starts,

1   then you have to look to other contextual clues

2   to support your view. Tell me what they are.

3   MR. McGINLEY: I have three contextual

4   clues for you, Your Honor.

5   JUSTICE SOTOMAYOR: Outside of that

6   one, because "sentence imposed" is ambiguous.

7   MR. McGINLEY: So --

8   JUSTICE SOTOMAYOR: Because it -- it

9   could mean one of two things. You have to look

10   at the context.

11   MR. McGINLEY: Sure.

12   JUSTICE SOTOMAYOR: What's the context

13   here?

14   MR. McGINLEY: So the context -- the

15   first thing I'd point you to is 3553(c), which

16   is how the Congress has defined when imposition

17   happens.

18   3553(c) says that imposition happens

19   when a sentence is pronounced in open court,

20   when the judge looks the defendant in the eye,

21   provides his reasons under 3553 -- his or her

22   reasons under 3553 for imposing the sentence.

23   And that's a historical event that occurs.

24   JUSTICE SOTOMAYOR: But there -- but

25   that's for purposes of appeal and for -- not

 1   for -- not for all interpreted purposes.

 2   MR. McGINLEY: So let me give you a

 3   few more, Your Honor.

 4   So then the second contextual clue I

 5   would point you to is, in this particular

 6   statute, it says "as of the date of enactment."

 7   That is telling you whether or not -- the

 8   analysis is whether or not this historical event

 9   has happened or even if the -- if you wish to

10   adopt the condition language, it's still --

11   JUSTICE SOTOMAYOR: So why use the

12   present-perfect tense? Why not use the past

13   tense, which is the cleanest way to do do it?

14   MR. McGINLEY: Because it makes --

15   JUSTICE SOTOMAYOR: Was --

16   MR. McGINLEY: I'm sorry, Your Honor.

17   JUSTICE SOTOMAYOR: Was imposed as of

18   the date. But, instead, they choose -- chose a

19   different tense. So go to your third.

20   MR. McGINLEY: Sure. The -- so,

21   actually, then I'll have four.

22   So the third one in that context is

23   "as of the date of enactment" tells you what is

24   the now in that -- in that construction of the

25   sentence. You say "As of the date of enactment,

1   has a sentence been imposed."

2   JUSTICE SOTOMAYOR: Now at the date

3   that a sentence is being imposed?

4   MR. McGINLEY: No, Your Honor. The --

5   the statutory phrase is "as of the date of

6   enactment."

7   And the last thing I'll say, my fourth

8   point, is, if you think this is ambiguous, then

9   109 governs and it precludes retroactive relief.

10   JUSTICE GORSUCH: Mr. McGinley --

11   JUSTICE SOTOMAYOR: And then -- I'm

12   sorry.

13   JUSTICE GORSUCH: I'm sorry. No,

14   please.

15   JUSTICE SOTOMAYOR: What do you do

16   with the 109, Dorsey, where we say Congress

17   doesn't have to use magical words? And this

18   statute has already illuminated the question of

19   retroactivity. It's saying, yes, you make it

20   retroactive. You want something -- you want a

21   clear statement even further. Make it even

22   clearer.

23   MR. McGINLEY: So what Dorsey says is

24   that there has to be a clear indication that

25   Congress intended to do this. And what -- what

1   that clearly means --

2   JUSTICE SOTOMAYOR: They meant some

3   retroactivity.

4   MR. McGINLEY: Sure. But the question

5   is always how much retroactivity, and that's how

6   Dorsey addressed the question. Dorsey asked

7   whether the particular people in that setting,

8   the petitioners there, who had not yet received

9   an initial sentence, I want to be clear, whether

10   they qualified for retroactive relief.

11   And then Dorsey looked to the way that

12   the Fair Sentencing Act very explicitly

13   interacted with the Sentencing Reform Act and

14   with the guidelines and said that for those

15   particular set of people, there was

16   retroactivity.

17   JUSTICE GORSUCH: Mr. McGinley, most

18   of your examples that you rely on to show the

19   continuing legal effect of a vacated sentence

20   inquire into the defendant's conduct while he

21   was subject to the disabling effect of the then

22   valid order. That's the felon in possession

23   cases, the SORNA cases, the fraud cases.

24   Those seem meaningfully different

25   here, or maybe, because there's no valid

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1    sentence at the relevant time here, which is

2    resentencing.  Why should we give weight to

3    those --

4              MR. McGINLEY:  So --

5              JUSTICE GORSUCH:  -- cases then?

6              MR. McGINLEY:  -- with all respect, I

7    think the relevant time according to the

8    statutory language is as of the date of

9    enactment.

10             JUSTICE GORSUCH:  I thought that's

11   what you were going to say.

12             MR. McGINLEY:  Yeah.

13             JUSTICE GORSUCH:  So let's suppose

14   we're at resentencing in this case, vacated,

15   vacated -- vacated sentences.  In what world

16   does the judge say that he -- he's -- the judge

17   is going to issue a sentence for the offense

18   that has been -- for -- is going to -- is going

19   to issue a sentence for and say that a sentence

20   has -- for this offense has been imposed already

21   in 2018?

22             MR. McGINLEY:  So the same way that

23   Pepper spoke about a sentence that had been

24   imposed before.

25             JUSTICE GORSUCH:  Ah, exactly, "had."
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1    Not "has."  I can't see a judge, after a vacated

2    sentence, saying that a sentence has been

3    imposed for the very offense that he's about to

4    sentence for.

5              MR. McGINLEY:  So, just with respect,

6    Your Honor, I think, actually, there's a very

7    easy way.  You can say:  A sentence has been

8    imposed as of 2018.  That sentence was later

9    vacated, and I now impose a new sentence.

10             JUSTICE GORSUCH:  That's -- that's a

11   very strange locution, though, isn't it --

12             MR. McGINLEY:  I -- I --

13             JUSTICE GORSUCH:  -- to say that a

14   sentence was imposed or had been imposed?  But

15   you can't -- I mean, 3582, you can't modify an

16   existing sentence, right?  I mean, that's --

17   that's black letter law.  You -- you'd agree

18   with that?

19             MR. McGINLEY:  I -- I do agree with

20   that, but that's because, if you look at 3582 --

21             JUSTICE GORSUCH:  I mean, the whole

22   point of resentencing is that there is no

23   sentence.  That's the only way in which a judge

24   can issue a sentence.

25             MR. McGINLEY:  Right.  And I might
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1   agree with you if this statute did not say "as

2   of the date of enactment." If this statute

3   instead said whether or not -- if -- if a

4   sentence has not been imposed up until the

5   present day, I still think that the --

6   JUSTICE GORSUCH: You agree that --

7   MR. McGINLEY: -- the historical

8   reading is correct, but --

9   JUSTICE GORSUCH: -- you agree that

10   most -- most statutes are supposed to be read at

11   the time they're being applied?

12   MR. McGINLEY: If there's no other

13   contextual clue, then I do think that that's the

14   normal way it's interpreted. Here, there is a

15   contextual clue that's quite explicit in the

16   statutory text.

17   JUSTICE JACKSON: Mr. McGinley, I -- I

18   guess what is troubling me about your

19   argument -- and I raised it with your friends on

20   the other side -- is that the line that you seem

21   to suggest that Congress is drawing doesn't seem

22   to have any rational relevance to what the

23   statute is doing, what Congress's goals are.

24   I mean, they -- the other side has a

25   pretty clear, principled distinction. They say

1   that Congress is drawing a line between those

2   who have yet to be sentenced and those who

3   have -- are serving final sentences in the sense

4   that they would need to be reopened in order to

5   take advantage of the First Step Act.

6   Do you concede that if that is what

7   Congress was doing or wanted to do, that these

8   Petitioners fall in the category of people who

9   have yet to be sentenced for this offense?

10   MR. McGINLEY: I don't, Your Honor.

11   And, in fact, I'm glad you asked the question

12   because I think that there is a very clear

13   explanation for what Congress is doing here, and

14   I think it's treating similarly situated people

15   alike.

16   And the question is: Who are the

17   similarly situated people to those who have

18   received sentences like Petitioners here? And

19   those are the people who committed their crimes

20   at the same time and were initially sentenced at

21   the same time. That's when the full machinery

22   of --

23   JUSTICE JACKSON: But why is that

24   the -- I don't understand why that -- if you

25   think about what Congress was doing to carve out

 1   these people and give them the benefit, why

 2   would it matter that they initially received

 3   their sentence? "Initial" is not in the

 4   statute. And I don't understand why that would

 5   be a factor. What difference does it make?

 6   They're saying the key factor is

 7   whether the court has to give this person a

 8   sentence, whether their case is pending. And,

 9   in any pending cases after the First Step Act is

10   enacted, when a -- when you come to the court

11   for resentencing, this statute says you get the

12   benefit.

13   MR. McGINLEY: So, with respect,

14   that's not what the statute says. And, in fact,

15   when Congress wants to do that, it phrases the

16   statute differently. It phrases it to say, for

17   example, a sentence imposed after the date of

18   enactment. That's essentially how 402(b), which

19   deals with the saving statute, speaks of it.

20   There, it's talking about a conviction.

21   But I went back and looked, and

22   when -- in 1994, when Congress created the

23   safety valve, they actually used precisely this

24   language. And I can give you the citation,

25   which is Public Law 103-322, Section 80001(c),

 1   where Congress said that the safety valve would

 2   apply to "all sentences imposed on or after 10

 3   days after enactment." That means that all --

 4   JUSTICE JACKSON: Yeah, but that --

 5   but there --

 6   MR. McGINLEY: -- future -- I'm sorry.

 7   I didn't mean to --

 8   JUSTICE JACKSON: Go ahead. That

 9   means that -- I'm sorry.

10   MR. McGINLEY: That means that all

11   initial sentencings and resentencings will get

12   the benefit of the safety act. That is not how

13   Congress constructed it here.

14   JUSTICE JACKSON: I understand, but --

15   but your conception of it doesn't have any

16   logical application. I mean, if you think about

17   the category of people that Justice Kagan was

18   trying to isolate in her intuition, which is

19   people -- we're starting with the universe of

20   people who committed their offense before this

21   statute was enacted. Traditionally, the rule

22   would be none of them get the benefit.

23   Congress is then carving out, giving

24   the benefit to people who are yet to be

25   sentenced. They have not been sentenced as of

          1   the date of the enactment of this statute.

          2   That's the work, I think, of "as of the date of

          3   this enactment." Your sentencing is coming even

          4   though you previously offend -- you -- you

          5   previously committed the offense.

          6   What -- you're right about treating

          7   similarly situated people similarly. And what I

          8   can't understand is why people in the universe

          9   of sentencing to be coming, why there's a

         10   difference between people who have sentencing to

         11   be coming because their prior sentence was

         12   vacated versus people who have sentencing to be

         13   coming because they weren't sentenced before.

         14   If you can't give an answer to that, I

         15   don't understand how you can win.

         16   MR. McGINLEY: No, I can give you two

         17   answers to that --

         18   JUSTICE JACKSON: Okay.

         19   MR. McGINLEY: -- at least.

         20   JUSTICE JACKSON: Okay.

         21   MR. McGINLEY: The first goes to

         22   Justice Kavanaugh's example. And I think --

         23   where you could have people who committed less

         24   crimes. We say this in the brief. Let me give

         25   you -- even just on the facts of this case.

1   Imagine one of these three defendants had not

2   engaged in the conspiracy, okay?

3   They all are convicted, they're all

4   sentenced initially on the same day, but one of

5   them who committed fewer crimes in the bundle of

6   events does not get the benefit of Davis, does

7   not get to vacate the sentence 12 years later,

8   and does not get resentencing under the First

9   Step Act. That person who committed fewer

10   crimes gets dramatically -- a dramatically

11   higher sentence.

12   JUSTICE JACKSON: Yes, but I'm -- I'm

13   positing that what Congress cared about was

14   reopening the sentence. This is what your

15   colleague on the other side says is the finality

16   concern.

17   Congress is not looking at or caring

18   about what is happening to individual defendants

19   and what they're ultimately going to get on --

20   in sentencing in this particular scenario. This

21   carveout is about making sure that people who

22   still have to be sentenced get the benefit of

23   this, but people whose sentences are closed

24   don't have them reopened.

25   Start with that premise --

1   MR. McGINLEY: Sure.

2   JUSTICE JACKSON: -- and tell me how

3   these people whose sentences have been vacated

4   and still have to be sentenced are any

5   different.

6   MR. McGINLEY: Sure. So here's my

7   second answer, which is that if you're asking

8   who's similar -- similarly situated, you can be

9   sure that people who have not yet been initially

10   sentenced as of -- who have committed the

11   crime --

12   JUSTICE JACKSON: Yes.

13   MR. McGINLEY: -- but have not yet

14   been initially sentenced as of the date of

15   enactment, that's going to be a small universe

16   of people, all of whom committed their crimes

17   very close in time to each other, whereas, here,

18   you have people who committed crimes decades ago

19   that will receive the benefit of a change that

20   makes them very differently situated in terms of

21   how they're punished than the people who did

22   commit the crime in close proximity to them.

23   I also would --

24   JUSTICE KAGAN: Mr. McGinley --

25   MR. McGINLEY: Yeah.

1   JUSTICE KAGAN: I'm sorry.

2   MR. McGINLEY: Go ahead, Your Honor.

3   JUSTICE KAGAN: I -- I want to ask you

4   about this brief we have from four members of

5   Congress. So Senators Durbin, Grassley, Booker,

6   Lee, these are not guys who link arms very

7   often.

8   (Laughter.)

9   JUSTICE KAGAN: And I think everybody

10   understands them to be the drivers of this piece

11   of legislation. I mean, that's what they were

12   in the Senate. And they seem to think that

13   Mr. Kimberly's position is what they meant. I

14   mean, they state this in no uncertain terms,

15   that both with respect to their understanding of

16   the text, their understanding of the purpose,

17   their understanding of the background rule, that

18   everything lines up to give these Petitioners

19   relief.

20   And I know that we don't usually,

21   like, think about the sort of after-the-fact

22   comments of -- but this is so strong both in the

23   certitude in which this is expressed and in who

24   these people are and the coalition they

25   represented in the Senate at least that I'm

 1   wondering whether we, like, don't really have to

 2   give this more respect than maybe we usually do.

 3   MR. McGINLEY: So, with respect to

 4   those four Senators, and I mean that genuinely,

 5   I don't think you do. They're four Senators who

 6   are offering you the equivalent of

 7   after-the-fact legislative history in an amicus

 8   brief. We know that earlier versions of the

 9   bill would have granted broader retroactive

10   effect than Congress actually provided here.

11   And so saying -- and, obviously, the sponsors of

12   a bill are the ones who want to extend the

13   purpose as far as possible.

14   This Court has repeatedly said that no

15   statute pursues its purpose at all costs, and so

16   what the Court instead has to do is look at the

17   words that were --

18   JUSTICE KAGAN: But I -- I don't think

19   that they're suggesting that it pursues its

20   purpose at all costs. I think what they're

21   suggesting is something along the lines of what

22   Justice Jackson was saying, is that this statute

23   was motivated by a very clear purpose, which is:

24   We don't want these first offenders to be

25   getting these hundred-year sentences.

1   We also understand that there are

2   finality interests involved, but where we can

3   prevent this practice without interfering with

4   finality interests, that's what we want to do.

5   And that's the whole purport of this statute.

6   MR. McGINLEY: Right. And if --

7   JUSTICE KAGAN: And these people, the

8   Petitioners, fit that understanding of the

9   statute, as well as the people who just hadn't

10   been sentenced at all yet when the statute was

11   enacted.

12   MR. McGINLEY: So I don't think they

13   fit that. I -- what I will tell you, though, is

14   if that's what Congress had intended to do, if

15   that's what those four drafters had intended to

16   do, there's a very simple way they could have

17   done it. They did it in 402(b). They could

18   have constructed the sentence to say that 403(a)

19   applies to any sentence imposed after the date

20   of enactment.

21   As I mentioned, that's how Congress in

22   1994 applied the safety valve to all sentences,

23   initial and resentencing, after the date of

24   enactment. But that's not what they did here.

25   And Congress always legislates against

1   the backdrop, in this particular setting,

2   against 109, which says that without a clear

3   indication to the contrary, the court should not

4   assume that a repeal applies retroactively to

5   reduce the penalties incurred by a defendant

6   under the previous regime.

7   JUSTICE KAVANAUGH: On your point

8   about treating similarly situated people the

9   same, I think both sides fail on that in this

10   case because there are going to be, as I've

11   said, discrepancies, disparities, no matter

12   what.

13   So then you need another reason, I

14   think, for the line that you say is meant and

15   stated in the statute. And I thought Congress

16   might have just wanted an easily administered

17   line and chose -- chose that, it's easily --

18   easily administered.

19   The other side, though, then says:

20   Well, the broader purpose, evident from the

21   text, is, as I said before Justice Kagan was

22   just saying, was the balance of fairness and

23   finality. And why isn't that the -- so, to me,

24   it comes down to: Do they just want easily

25   administered, or were they looking at this

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1      fairness versus finality?  And if -- why -- why

2      is the fairness versus finality not the -- the

3      purpose that's more evident from the text?

4                  MR. McGINLEY:  So I think it's

5      probably a mix of all of those things that they

6      were looking at.

7                  And so what they're asking is:

8      What -- who are similarly situated?  I -- I

9      provided the answer to Justice Jackson.  I think

10     your example, Your Honor, shows why that

11     matters.

12                 But then also, with regard to

13     administrability, if you adopt our position, you

14     know that the universe closes very quickly after

15     enactment.  That respects finality.  It also

16     respects administrability.  Whereas, if you

17     adopt the other side's argument -- and the

18     government concedes this -- that there will be

19     people that spring into this largely by virtue

20     of this Court's decisions, you know, for years

21     and years and years to come.

22                 Obviously, at some point, that will

23     end because there will cease being people who

24     were originally sentenced under the Deal

25     stacking regime, but it's going to be a long
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1   time.

2   And so, if you're looking at

3   administrability, this is -- Congress was

4   setting a set universe of people at the time of

5   enactment.

6   JUSTICE KAVANAUGH: And your point

7   there is each time we have a new decision like

8   Davis or something akin to that, we'll spring

9   into effect a whole new round of times where

10   there are going to be 2255s, and that defeats

11   finality? Is that your point?

12   MR. McGINLEY: That's correct. And

13   it -- and then it just exacerbates your point

14   about people how committed more crimes are more

15   likely to get the benefit of resentencing.

16   JUSTICE SOTOMAYOR: I don't understand

17   this. This does nothing to change that, meaning

18   finality is destroyed by changes in law, like

19   Davis, by us randomly. We do it. We don't do

20   it on the basis of how we read this statute,

21   meaning this statute is not what's opening up

22   the sentence. What's opening up the sentence

23   was Davis. And Davis ordered a new sentencing.

24   So I'm not sure why you're reading

25   respects finality.

1   MR. McGINLEY: It -- so, Your Honor,

2   the question, of course, is what did Congress

3   construct here. And Congress chose not to draw

4   a strict finality line because they chose to

5   apply it retroactively to a small set of people.

6   And the question is: Where did they

7   draw that line and why did they draw that line?

8   The text tells you where they --

9   JUSTICE SOTOMAYOR: But I think you're

10   miss -- you're missing my point, which is our

11   reading does nothing to finality. What does to

12   finality or what undoes to finality is

13   Congress's choice to make this retroactive,

14   correct?

15   MR. McGINLEY: That's correct. But

16   the question, of course, is how retroactive did

17   they make it.

18   JUSTICE SOTOMAYOR: Why does that

19   matter to finality? Meaning nothing about this

20   law is changing the finality of the conviction

21   qua the crime. It was Davis that did that.

22   Davis ordered the resentencing.

23   You're looking at finality as if it's

24   the finality of how you do that resentencing.

25   MR. McGINLEY: Okay. I understand,

1   Your Honor. And I -- maybe I should clarify.

2   My responses to Justice Kavanaugh were

3   about administrability and similar situation.

4   Congress has obviously already made the decision

5   not to have a strict line of finality.

6   JUSTICE SOTOMAYOR: Right. And

7   administrability. The resentencing has to occur

8   here. So we're not serving any administrative

9   purpose by ruling this way because the

10   resentencing wasn't ordered by the First Step

11   Act. It was ordered by Davis. Correct?

12   MR. McGINLEY: That's correct.

13   JUSTICE SOTOMAYOR: All right. Thank

14   you, counsel.

15   MR. McGINLEY: Thanks.

16   JUSTICE JACKSON: Can I just -- I

17   don't understand your argument about Congress

18   saying "after the date of enactment" and that

19   that somehow would solve this problem because it

20   seems to me that a statute that says this

21   applies to sentences imposed after the date of

22   enactment, which is what you say they could say

23   to make it clear, is materially

24   indistinguishable from a statutory statement

25   that this doesn't apply if a sentence has been

 1   imposed as of the date of enactment, which is

 2   the statute that we have here.

 3   They're just the flip side. It's the

 4   same thing. So I don't understand how "after

 5   the date of enactment" helps you at all.

 6   MR. McGINLEY: I don't think they're

 7   the flip side.

 8   I want to make sure I understand your

 9   question. Here, what it's saying is if a

10   sentence for the offense has not been imposed as

11   of the date of enactment. Here, a sentence was

12   imposed, twice, in fact, for each of these

13   defendants.

14   If, instead, it had said that the --

15   that 403(a) applies to any sentence imposed

16   after the date of enactment, then we would agree

17   that that includes resentencing. And that's why

18   I pointed to the safety valve's retroactivity

19   provision, because that's clearly what Congress

20   wanted there. But, here, it drew a very differ

21   line.

22   And I think it's meaningful that in

23   402(b), when setting forth the retroactivity of

24   the safety valve changes, it used a different

25   construction. Here, it uses this construction.

1   I also just want to make sure I point

2   out that Footnotes 4 and 5 of our brief point to

3   a number of statutes that use precisely the same

4   construction, largely in the context of statute

5   of limitations, which makes sense because

6   what -- similar to a retroactivity provision in

7   a statute of limitations provision, what

8   Congress is trying to define is whether or not

9   the statute -- some -- a statute applies if an

10   event has occurred as of a certain date.

11   JUSTICE JACKSON: But what -- can you

12   think of any other regime in which the mere

13   historical fact in this way has this kind of

14   implication?

15   MR. McGINLEY: Sure. So, I mean, I

16   think the government concedes that in 922(g) and

17   in the predecessor felon in possession

18   statute --

19   JUSTICE JACKSON: Those are status --

20   those are status. They're different.

21   MR. McGINLEY: But I think, on the

22   government's view of what it means for a

23   sentence to be imposed, it's a status here as

24   well. And a status at the time of enactment of

25   this statute was that they had a sentence

 1   imposed.

 2   And even on the government's reading,

 3   that sentence remained imposed as of that date

 4   of enactment, which is why I don't think the

 5   government can -- can win in this case on their

 6   reading unless you read the words "as of the

 7   date of enactment" out of the statute.

 8   JUSTICE JACKSON: And it would matter

 9   to Congress that that historical fact occurred

10   with respect to their resentencing why?

11   MR. McGINLEY: Well, for the same

12   reason that in 3742(g)(1), Congress said that

13   when a sentence is vacated on appeal and you are

14   resentenced under the guidelines, the guidelines

15   that exist -- that were in effect at the time of

16   your initial sentencing apply.

17   And so it's clear that Congress does

18   at times want old sentencing regimes to apply.

19   Also, against the backdrop of one --

20   JUSTICE JACKSON: In the context of a

21   statute where they're clearly carving out the

22   old sentencing regime as unfair?

23   MR. McGINLEY: So, in that context,

24   it's -- it's guidelines, right?

25   So I want to be clear. 3742(g)(1) is

1   about the guidelines. And, there, if there is a

2   retroactive change to the guidelines after a

3   sentence is vacated on appeal, that retroactive

4   change does not apply.

5   And so we are not arguing 3742(g)(1)

6   is -- governs this case. But you're asking a

7   question: Has Congress ever done this before?

8   And the answer is: Yes, it has done it before.

9   And all of that, at the end of the

10   day, because we're here talking about statutory

11   minimums, you have to interpret all of it

12   against the backdrop of 109. And 109 tells you

13   that --

14   JUSTICE JACKSON: This isn't a

15   carveout to -- I thought this was -- this was

16   engaging with 109 in saying --

17   MR. McGINLEY: So --

18   JUSTICE JACKSON: -- that we don't

19   want that to apply.

20   MR. McGINLEY: So we agree that for

21   people who have not yet received any sentence,

22   109 is satisfied. But the question here is

23   whether the different set of people who were --

24   who did receive a sentence before date of

25   enactment but later had it vacated, whether they

1   qualify. 109 tells you that if there's any

2   ambiguity, you have to go against retroactivity.

3   I think the government conceding that

4   there's ambiguity here, which I didn't

5   understand them to be conceding in their brief,

6   actually just loses the case for them because

7   109 would then mean that the ambiguity cuts

8   against retroactive applications.

9   JUSTICE GORSUCH: Mr. McGinley, would

10   you agree that the present-perfect tense usually

11   refers to something that has continuing effect?

12   MR. McGINLEY: I think the Chicago

13   Manual of Style says it either can be that or

14   something that has been completed.

15   JUSTICE GORSUCH: But it often -- I

16   mean -- I mean, isn't that how you learned your

17   high school grammar, that you don't use the

18   present-perfect tense for something that's

19   wholly completed and in the past? With no

20   continuing effect?

21   MR. McGINLEY: I think if you have a

22   date reference, as you do here, then I think it

23   is a very normal construction to say that

24   something has --

25   JUSTICE GORSUCH: Okay.

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 1                    MR. McGINLEY:  -- been done as of a
 2      certain date.
 3                    JUSTICE GORSUCH:  All right.  So you
 4      disagree with that?  You think it's possible?
 5                    MR. McGINLEY:  I think it's possible.
 6                    JUSTICE GORSUCH:  Okay.  If it's
 7      possible, you don't -- I just want to go back to
 8      3582(c) because you don't address it in your
 9      brief directly.  And 3582(c) uses the
10      present-perfect tense, "has been imposed."
11                    And it -- and it says you can't mess
12      with the sentence once it's -- has been imposed.
13      And it would be the most natural thing in the
14      world to think that perhaps that statute uses
15      the present-perfect tense in the same way it's
16      used here, right?
17                    MR. McGINLEY:  Yes, although obviously
18      the -- the statutory --
19                    JUSTICE GORSUCH:  But you're asking --
20      you're asking us to interpret the words
21      differently.
22                    MR. McGINLEY:  No, Your Honor.  What
23      we're saying is those are two different
24      statutory provisions with different surrounding
25      words, different constructions addressing
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1   different circumstances.

2   JUSTICE GORSUCH: We're talking about

3   whether a statute has been imposed. It's pretty

4   darn similar.

5   MR. McGINLEY: Well, right, but this

6   one says as of a certain date, and it's about

7   retroactivity. 3582 cannot --

8   JUSTICE GORSUCH: Right. And one can

9   either read it to be something wholly in the

10   past, as you suggest, or something with

11   continuing effect. And we know in 3582(c) it

12   has to have continuing effect because you can

13   modify a vacated sentence, right?

14   MR. McGINLEY: So that's one way to

15   read 3582(c). I actually don't know that that's

16   the only way to read 3582(c) because you could

17   also view it as historical fact, and the reason

18   why is because you only ever are going to be

19   talking about modifying a sentence under 3582(c)

20   if it -- if that sentence has not been vacated.

21   JUSTICE GORSUCH: Ah, but once it's

22   vacated -- once it's vacated, I can do something

23   with it. If it hasn't been vacated, I can't do

24   something --

25   MR. McGINLEY: Well, no, because you

 1   --

 2   JUSTICE GORSUCH: -- with it, right?

 3   MR. McGINLEY: Sorry. You -- you

 4   would not be modifying the sentence that was

 5   vacated at that point. You would just be

 6   imposing a new sentence.

 7   JUSTICE GORSUCH: A new sentence.

 8   It's possible to mess with it, but it's not

 9   possible to mess with it if it has continuing

10   legal effect.

11   MR. McGINLEY: I don't want to quarrel

12   with you here, I -- but I do --

13   JUSTICE GORSUCH: Quarrel away.

14   MR. McGINLEY: But I do think --

15   (Laughter.)

16   MR. McGINLEY: I do enjoy it, but I do

17   think --

18   JUSTICE GORSUCH: I know you do.

19   (Laughter.)

20   MR. McGINLEY: I -- I do think that

21   under either reading of the present-perfect

22   tense, 3528(c) still works because what it's

23   saying is that once it's been imposed, you can't

24   modify it, which could also mean that before

25   it's been imposed, you could modify it. And so

1   the judge could -- maybe there was a colloquy

2   and the judge thought he was -- he or she was

3   going to impose a certain sentence, changed his

4   or her mind, and that's perfectly fine before

5   the imposition, which, as I said, was a

6   historical act. 3553(c) makes that clear.

7   I'd also point you to Judge

8   Kethledge's opinion in the -- in the Carpenter

9   case below, which I think does a really nice job

10   of articulating that principle.

11   JUSTICE KAVANAUGH: I think, in

12   response to Justice Sotomayor, you acknowledged,

13   I think correctly, that there's not so much of a

14   finality problem with the other side's position.

15   Your -- your position is that it's easily

16   administered, but the reopenings -- the new

17   sentencing proceedings are going to happen

18   either way.

19   I guess there's a small point that you

20   had there that there'd be more for the

21   sentencing judge to do, I suppose, if the other

22   side prevailed, but it's going to be reopened.

23   Either -- I mean, there's going to be a new

24   sentencing proceeding either way.

25   MR. McGINLEY: So I want to make sure

1   I don't -- I don't give away too much. Maybe

2   I'd say it's a small "f" finality concern

3   because, yes, there's going to have to be some

4   form of new sentence imposed, although I will go

5   back to Justice Alito's point that it's not

6   required that a sentence -- that a judge vacate

7   and --

8   JUSTICE KAVANAUGH: Right.

9   MR. McGINLEY: -- order plenary

10   resentencing. I think that actually creates

11   another anomaly here where you could have some

12   judges who say -- particularly if you adopt the

13   other side's view, some judges might say -- may

14   I finish the --

15   CHIEF JUSTICE ROBERTS: Certainly.

16   MR. McGINLEY: Some judges might say,

17   well, I'm not going to vacate for plenary

18   resentencing because that means that these

19   people will get the benefit of 403(a), and

20   instead I'll just correct the sentence, as they

21   could have done here, whereas other judges might

22   open for plenary resentencing, then you have a

23   whole other similarly situated anomaly.

24   CHIEF JUSTICE ROBERTS: Thank you,

25   counsel.

1   Justice Thomas?

2   Justice Alito?

3   JUSTICE ALITO: Well, it's always fun

4   to talk about grammar and --

5   (Laughter.)

6   JUSTICE ALITO: -- and usage. But I

7   wonder if you would agree with me that the

8   present-perfect tense sometimes means in

9   context, sometimes suggests in context that the

10   past event continues to have present effect.

11   Mr. Kimberly gave an example, sort of

12   along these lines. Anybody who would be -- this

13   is similar. Anybody who won a gold medal at the

14   Olympics can participate in a particular parade.

15   And in context, that would probably mean that

16   somebody who won a gold medal that was later

17   revoked due to violation of doping rules would

18   not be entitled to march in the parade. Okay.

19   But there are -- I could give you a

20   thousand examples of situations in which

21   present-perfect tense is used to refer to an

22   event that doesn't have continuing -- that does

23   not continue up to the present.

24   Were you ever employed as a

25   dishwasher? Yes, somebody who washed dishes in

           1   college would answer yes. Were you ever a

           2   member of the Communist Party? Have you ever

           3   been a student at X college? On and on and on.

           4   Have you ever been employed by a particular law

           5   firm?

           6   So it all depends on the context. So

           7   what is it about the context -- and -- and it

           8   seems to me that the relevant question is

           9   whether, for the purpose in question, the

          10   purpose at issue, does the past event -- does it

          11   matter whether the past event has a present

          12   effect?

          13   Would you agree with all that?

          14   MR. McGINLEY: I would agree with all

          15   that. And could -- and could I say one more

          16   thing, Your Honor? I think that "as of the date

          17   of enactment" is critical in that sense.

          18   JUSTICE ALITO: So why would the past

          19   event have a -- have relevance in this

          20   situation? I -- I could see it where the past

          21   -- where the -- the sentence was vacated because

          22   it was invalid.

          23   But I find it harder to understand why

          24   that would be relevant, why a present effect

          25   would be -- why the -- why it would be relevant

          1   when the sentence was never invalid?

          2   MR. McGINLEY: I agree with that, Your

          3   Honor. And I'd point you, in addition to the

          4   "as of" language. Of course the statute says

          5   it's a sentence for the offense. And so it's

          6   specific to the offense at issue. Here the

          7   offense at issue were the 924(c) violations

          8   related to the bank robbery. There -- no one

          9   has ever suggested that those were invalid when

         10   they were entered in 2010 or in 2012.

         11   JUSTICE ALITO: Thank you.

         12   JUSTICE KAGAN: But your --

         13   CHIEF JUSTICE ROBERTS: Justice

         14   Sotomayor?

         15   Justice Kagan?

         16   JUSTICE KAGAN: But -- but -- but your

         17   understanding of the statute would apply just as

         18   well to people whose sentences were invalid?

         19   MR. McGINLEY: That is correct, Your

         20   Honor, but I think under -- what Justice Alito

         21   is asking --

         22   JUSTICE KAGAN: Yeah, it's just that

         23   --

         24   MR. McGINLEY: -- it may -- yeah.

         25   JUSTICE KAGAN: I guess what I'm sort

1   of suggesting is that that's an orthogonal

2   point. Your --

3   MR. McGINLEY: Perhaps.

4   JUSTICE KAGAN: So -- so I'll just ask

5   Justice Alito's questions with that sort of

6   taken out of the picture. Like, let's just

7   pretend that this sentence was invalid in the

8   first place.

9   What purpose are you going to give me

10   that -- that would satisfy his view of how to

11   figure this contextual question out?

12   MR. McGINLEY: Sure. It's the same

13   purpose that underlies 3742(g)(1), right,

14   because in 3742(g)(1), Congress is accepting

15   that the sentence at issue was vacated for some

16   legal flaw, yet when it goes back down, the

17   judge is supposed to apply the guidelines that

18   existed at the time of the initial sentencing.

19   We're not saying that that's always

20   the best policy decision that Congress should

21   make, but it is a policy decision Congress has

22   made before, and we say it's a policy decision

23   that it made here.

24   CHIEF JUSTICE ROBERTS: Justice

25   Gorsuch?

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1                    Justice Barrett?

2                    JUSTICE BARRETT:  No.

3                    CHIEF JUSTICE ROBERTS:  Justice --

4                    JUSTICE JACKSON:  Can I just get your

5        reaction to one quick thought on

6        administrability?  Why wouldn't it be harder for

7        a judge, a district judge who day-to-day is

8        applying the First Step Act to new offenders who

9        come before them, to do something different with

10       respect to this person who's coming back?  It

11       seems to me administrability cuts against you.

12                   MR. McGINLEY:  I don't think that's

13       right, Your Honor, I think for two reasons.

14       One, under the historical fact analysis, it's a

15       very simple analysis.  You ask, has a sentence

16       been imposed before December 21st, 2018.  If the

17       answer is yes, then you apply the --

18                   JUSTICE JACKSON:  The old regime that

19       we're not used to applying because we're

20       ordinarily in the flow of just doing the regular

21       First Step Act analysis.

22                   MR. McGINLEY:  Well, perhaps, except I

23       do think, with respect to this regime, most

24       judges are familiar with it.  I also think that

25       with respect to administrability, it's -- it's
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1   also a question of was Congress trying to define

2   a set that could be knowable or at least defined

3   as of the date that it enacted it, which I think

4   is why they used the word "as of the date of

5   enactment." It's why you find similar

6   constructions in statute of limitations.

7   JUSTICE JACKSON: Thank you.

8   MR. McGINLEY: So -- thank you.

9   CHIEF JUSTICE ROBERTS: Thank you,

10   counsel.

11   MR. McGINLEY: Thank you.

12   CHIEF JUSTICE ROBERTS: Rebuttal,

13   Mr. Kimberly?

14   REBUTTAL ARGUMENT OF MICHAEL B. KIMBERLY

15   ON BEHALF OF THE PETITIONERS

16   MR. KIMBERLY: Thank you, Mr. Chief

17   Justice. A few brief points.

18   As Justice Sotomayor's colloquy laid

19   out, the word "imposed" can mean either a

20   singular past event that happened at some

21   discrete point in the past, or it can mean sort

22   of an ongoing application.

23   Here Congress didn't say initial

24   sentence and it didn't say final sentence. So

25   we've got an uncertainty about which it meant.

1   And so to break that sort of linguistic tie, if

2   you will, I think it makes sense, as we've said,

3   to refer to background legal conventions.

4   Now, Justice Barrett, you asked what

5   kind -- earlier, of me, you asked what kinds of

6   background conventions apply in -- in this sort

7   of not immediately textual interpretive way.

8   And I mentioned statutes of limitations are

9   presumed to incorporate equitable tolling.

10   Another example from Your Honor's

11   opinion was that the substantive criminal laws

12   are presumed to include culpable mental states.

13   That's also not an interpretation directly of

14   the language. It's simply a background

15   principle with which Congress is presumed to

16   comply.

17   Bond itself, which is this Court's

18   most recent application of this principle,

19   concerned the notion that Congress is presumed

20   to respect basic federalism principles.

21   All of this indicates that really the

22   background legal principle that a vacatur treats

23   a sentence as though it never was imposed is a

24   rule that Congress would have understood to

25   apply when it referred to a sentence that has

 1   been imposed.

 2   Now, amicus says that background legal

 3   principles can't override text. But that gets

 4   matters backward. Our view is that this

 5   background legal principle sheds light on the

 6   text. It tells you how to interpret it.

 7   But even if I don't have you on that,

 8   then at the very least what this principle does

 9   is it overrides the facts of a particular case.

10   A vacatur is -- it is an equitable principle

11   that brings to bear a legal fiction, which is an

12   assumption that some true fact is, in fact, not

13   true for some limited legal purpose, so as to

14   accomplish justice.

15   And I think equitable tolling is a

16   good example of this. When equitable tolling

17   applies, the clock doesn't literally stop. You

18   know, time doesn't actually stop. It's a legal

19   fiction. And it's a legal fiction that is

20   presumed to be incorporated into Congress's

21   enactments. And the same is true here.

22   Now, if the Court were to say

23   otherwise, I worry about the -- the trouble that

24   it will cause throughout the remainder of the

25   Court's criminal cases.

1   922(g)(1) uses straightforward

2 language that refers to a past event. It says:

3 It shall be unlawful for any person who has been

4 convicted in any court of a felony to possess a

5 firearm.

6   That is a historical factual question.

7 Has someone been convicted? The -- a vacatur of

8 that conviction prior to the possession of a

9 firearm, by operation of law, undoes that fact.

10 We are asking only for application of that

11 settled principle in this case.

12   Thank you.

13   CHIEF JUSTICE ROBERTS: Thank you,

14 counsel.

15   Mr. McGinley, this Court appointed you

16 to brief and argue this case as an amicus curiae

17 in support of the judgment below. You have ably

18 discharged that responsibility, for which we are

19 grateful.

20   The case is submitted.

21   (Whereupon, at 11:35 a.m., the case

22 was submitted.)

23

24

25

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