Nos. 23-1002, 23-1150

IN THE

Supreme Court of the United States

TONY R. HEWITT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

COREY DEYON DUFFEY AND JARVIS DUPREE ROSS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF TEXAS, CATO INSTITUTE, DUE PROCESS INSTITUTE, FAMM, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

The **American Civil Liberties Union** is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The **ACLU of Texas** is a state affiliate of the national ACLU. Since its founding more than 100 years ago, the ACLU has appeared before this Court in numerous cases, both as direct counsel and as *amicus curiae*, including in cases involving federal sentencing law. *See, e.g.*, *Concepcion v. United States*, 597 U.S. 481 (2022); *Dorsey v. United States*, 567 U.S. 260 (2012); *Kimbrough v. United States*, 552 U.S. 85 (2007).

The **Cato Institute** is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

Due Process Institute is a nonprofit, bipartisan, public interest organization that works to honor,

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[1] Pursuant to Supreme Court Rule 37.6, *amici* certify that no counsel for any party authored this brief in whole or in part, and that no party or counsel other than the *amici curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

preserve, and restore procedural fairness in the U.S. criminal legal system. Founded in 2018, it is guided by a bipartisan Board of Directors and supported by bipartisan staff. Due Process Institute creates and supports achievable bipartisan solutions for challenging criminal legal policy concerns through advocacy, litigation, and education.

FAMM, previously known as "Families Against Mandatory Minimums," is a national, nonprofit, nonpartisan organization whose primary mission is to promote fair and rational criminal justice policies and to challenge inflexible and excessive penalties required by mandatory and extreme sentencing laws. Founded in 1991, FAMM currently has more than 75,000 members around the country. By mobilizing currently and formerly incarcerated people and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the public and through selected *amicus* filings in important cases. FAMM submits this brief cognizant of the toll that mandatory minimums exact upon its members in prison, their loved ones, and our communities. FAMM is invested in ensuring that the First Step Act's sentencing reforms apply to the extent Congress intended.

The **National Association of Criminal Defense Lawyers (NACDL)** is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL's members represent many individuals seeking relief under the First Step Act, and therefore, NACDL has a keen interest in the application of sections 401 and 403.

INTRODUCTION AND SUMMARY OF ARGUMENT

The First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 ("FSA" or the "Act"), was a landmark, bipartisan reform to the federal criminal justice system passed by an overwhelming majority of Congress.[2] The sentencing amendments in sections 401 and 403 played a critical role in the law's passage.

[2] The vote was 87–12 in the Senate and 358–36 in the House of Representatives. 164 Cong. Rec. S,7,781 (daily ed. Dec. 18, 2018); 164 Cong. Rec. H10,430 (daily ed. Dec. 20, 2018).

The consolidated cases before the Court involve the application of section 403 of the Act, which seeks to ameliorate unfairness in the pre-FSA regime of "stacked" mandatory minimums for certain firearm offenses. Because sections 401 and 403 have identical language governing their applicability to pending cases, the Court's interpretation of section 403 will also affect individuals with vacated sentences seeking to benefit from section 401, which reformed sentence enhancements for certain drug offenses. *United States v. Bethea*, 841 F. App'x 544, 548 n.5 (4th Cir. 2021); *accord United States v. Mitchell*, 38 F.4th 382, 389 (3d Cir. 2022).

Sections 401 and 403 "apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment [December 21, 2018]." FSA §§ 401(c), 403(b). The question presented here is whether this language applies to people who were originally sentenced before the effective date of the Act, but whose sentences were vacated (for reasons unrelated to the FSA) and remanded for resentencing after the Act's effective date. The answer has major implications, often meaning a sentencing differential of decades.

The FSA made critical progress on sentencing reform following half a century of failed policies and a ballooning prison population. The pre-FSA mandatory minimums had resulted in extraordinarily long sentences that judges repeatedly decried as, among other things, "irrational," "unduly harsh," "cruel and unusual, unwise and unjust." Judge Paul Cassell,

Statement on Behalf of Judicial Conf. of United States from U.S. District Judge Paul Cassell before House Judiciary Comm. Subcomm. on Crime, Terrorism, and Homeland Sec., 19 Fed. Sent. R. 344, 344 (2007). Congress responded in the FSA with strong reforms designed to ameliorate these excesses. The courts of appeals have split, however, over whether Congress intended those reforms to apply to people originally sentenced prior to the effective date of the Act, but whose sentences were vacated and remanded for plenary sentencing after the effective date. Now this Court can ensure that people in all circuits properly benefit from the FSA, as Congress intended.

The rule adopted by the Fifth Circuit below is not only contrary to the language of the statute but is also irrational. As Petitioners and the United States explain, the Act's plain language and logical structure dictate that sections 401 and 403 apply when a defendant is before a district court for sentencing, whether for an original sentence or for resentencing after a general vacatur. *See* Hewitt Br. 17–35; Duffey & Ross Br. 16–42; U.S. Br. 16–23. That makes sense, because in both circumstances there is no interest in finality weighing against the imposition of a sentence based on current law.

When deciding how to apply changes in criminal law, courts must balance the interest in finality in criminal cases against the "imperative to ensure that criminal punishment is imposed only when authorized by law." *Welch v. United States*, 578 U.S. 120, 131 (2016). This balancing often weighs against reopening final sentences because of the institutional costs of undermining the finality of sentences that

were legal at the time they were imposed. When a sentence has been vacated, however, there is no finality interest to maintain. A vacated sentence has long been understood to be a legal nullity, "wip[ing] the slate clean," *Pepper v. United States*, 562 U.S. 476, 507 (2011), and requiring the district court to sentence the individual anew. Because the defendant is *already* back before the court for resentencing, there is no cost to applying current law as set out in the First Step Act.

In addition, there is an important interest in giving due weight to Congress's intent to correct an unfair sentencing regime that had resulted in absurdly long mandatory sentences. Requiring courts to apply a now-rejected sentencing scheme when freshly resentencing defendants serves no interest and contravenes Congress's direction.

The language of sections 401 and 403 clearly extends the FSA's reforms to sentences issued before the Act's passage that were vacated post-enactment. But if this Court determines the applicability provisions in sections 401 and 403 are ambiguous, the rule of lenity requires a ruling in Petitioners' favor. Consistent with lenity's purpose in ensuring that criminal sanctions are imposed only as expressly provided by Congress, this Court has repeatedly applied the rule of lenity to the interpretation of both sentencing statutes and laws defining criminal offenses. Lenity recognizes that Congress must speak "plainly and unmistakably" if an individual is to face a harsher interpretation of criminal sentencing law. *United States v. Bass,* 404 U.S. 336, 348 (1971) (quoting *United States v. Gradwell*, 243 U.S. 476, 485

(1917)). If the Court regards sections 401 and 403 as having two plausible interpretations, it must select the less punitive one and apply the FSA's ameliorative sentencing provisions at Petitioners' plenary resentencings.

ARGUMENT

I. The First Step Act Ameliorated Unduly Harsh Features of Federal Sentencing.

Throughout much of the 20th century, about 100 in every 100,000 people in the U.S. were incarcerated.[3] But starting in the mid-1970s, the prison population increased significantly: by 2009, roughly 525 of every 100,000 people were in prison,[4] and the overall number of people behind bars had grown by a factor of roughly 6.7.[5] This explosion in the

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[3] Tanya Golash-Boza, *5 Charts Show Why Mandatory Minimum Sentences Don't Work*, The Conversation (May 29, 2017), https://perma.cc/3PME-BJ84. *Compare* Bureau of Justice Statistics, Dep't of Justice, *Historical Statistics on Prisoners in State and Federal Institutions, Yearend 1925–1986* (1989), https://perma.cc/GEW4-57DK [hereinafter BJS 1989] (evaluating the national trends in prisoner populations), *with* U.S. Census Bureau, *Historical Population Change Data (1910-2020),* https://perma.cc/5XL3-MTP8.

[4] *Compare* Bureau of Justice Statistics, Dep't of Justice, *Prisoners in 2009 (Revised)*, https://perma.cc/5GAN-5VH5 [hereinafter BJS 2009], *with* World Bank, *Population, Total*, https://data.worldbank.org/indicator/SP.POP.TOTL?locations=US.

[5] *Compare* BJS 1989, *supra* note 3 (recording prison population in 1975), *with* BJS 2009, *supra* note 4 (recording prison population in 2009).

nation's prison population was "historically unprecedented and internationally unique."[6]

The shift toward higher rates of imprisonment began in the 1960s and 1970s, when changes in the country's political climate opened the floodgates for a series of policy choices that promoted mass incarceration. *Id.* Criminal sentences were imposed with a greater focus on retribution than rehabilitation.[7] Both at the federal and state levels, mandatory minimum sentences proliferated during the 1980s and 1990s. Nat'l Research Council, *supra* note 6, at 3.

A. Pre-FSA Drug and Firearm Cases Reflect the Excesses Congress Intended to Ameliorate.

The punishments under 18 U.S.C. § 924(c) and 21 U.S.C. § 841(b) for certain firearm and drug offenses, respectively, reflected the country's harsher sentencing trends and inflicted drastic human costs.

1. Section 924(c) penalizes the use, carrying, or possession of a firearm in furtherance of a drug trafficking crime or crime of violence. For example, a

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[6] Nat'l Research Council, Nat'l Acads. of Scis., Eng'g & Med., *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 2 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014), https://nap.nationalacademies.org/read/18613/chapter/2#6 [hereinafter Nat'l Research Council].

[7] Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. Crim. L. & Criminol. 691, 698 (2010), https://perma.cc/53YL-TY4F.

violation under section 924(c)(1)(A)(i) requires a mandatory minimum of five years for an individual's first section 924(c) offense. 18 U.S.C. § 924(c)(1)(A)(i). The individual's next section 924(c) offense triggers a 25-year mandatory minimum. *Id.* § 924(c)(1)(C)(i) (as amended, 1998). Prior to the FSA's reforms, the 25-year mandatory minimum for second or subsequent convictions applied even to counts in the same indictment rising from the same facts. *Deal v. United States*, 508 U.S. 129, 134–35 (1993). Thus, for example, a first-time section 924(c) offender convicted of three section 924(c) possession counts in a single indictment would be sentenced to a mandatory minimum of 55 years for the firearms counts—on top of the sentence for the underlying crime of violence or drug trafficking. Because these penalties were "stacked" (that is, consecutive not only to any other sentence, but also to one another), they often produced sentences "certain to outlast the defendant's life and the lives of every person now walking the planet." *United States v. Smith*, 756 F.3d 1179, 1181 (10th Cir. 2014) (Gorsuch, J.).

Consider the case of Marion Hungerford, convicted for her part in a series of robberies. At age 52, she had no criminal record, and she "never touched [the] gun" carried by her co-defendant. *United States v. Hungerford*, 465 F.3d 1113, 1119 (9th Cir. 2006) (Reinhardt, J., concurring). Even the principal in the crime testified that she "had nothing to do with the firearm." *Id.* But she was convicted of seven section 924(c) counts and ultimately sentenced to a mandatory term of over 159 years in prison—in other words, until she reached the age of 208. *Id.* at 1119. She refused to reach a plea agreement with the

government, asserting her innocence even after her conviction. *Id.* at 1121. The principal in the robberies made a deal and received 32 years in prison. *Id.* As one judge objected, the fact that this punishment could be levied on Ms. Hungerford, despite her severe mental illness and "extremely limited role" in a first-time offense, "should shock the conscience of anyone who believes that reasonable proportionality between a crime and the sentence is a necessary condition of fair sentencing." *Id.* at 1119.

The magnitude of Ms. Hungerford's sentence was far from unique. *See, e.g.*, *United States v. Ezell*, 417 F. Supp. 2d 667, 671 (E.D. Pa. 2006) (reluctantly applying mandatory 132-year sentence for six section 924(c) counts), *aff'd*, 265 F. App'x 70 (3d Cir. 2008); *United States v. Davis*, 785 F.3d 498, 500 & n.2 (11th Cir. 2015) (en banc) (reviewing 161-year sentence, 157 years of which were attributable to seven section 924(c) counts). For instance, one first-time offender convicted of conspiracy and attempt offenses and six section 924(c) counts received a sentence of 161 years and 10 months, of which 130 years stemmed from the section 924(c) convictions. *United States v. Rivera-Ruperto*, 852 F.3d 1 (1st Cir. 2017). Such sentences lacked proportionality; they were substantially longer, for example, than the punishment under federal law for hijacking an airplane, detonating a bomb in a public place, attacking a person of color with racial animus and the intent to kill, or committing second-degree murder or rape. *Id.* at 31 (Torruella, J., dissenting) (citing *United States v. Angelos*, 345 F. Supp. 2d 1227, 1244–45 (D. Utah 2004)).

Judges understandably bridled at this regime, decrying extremely long mandatory minimums as "unduly harsh," *Ezell*, 417 F. Supp. 2d at 669, "unjust and unreasonable," *United States v. Roberson*, 573 F. Supp. 2d 1040, 1047 (N.D. Ill. 2008), "draconian," *United States v. Hebert*, 131 F.3d 514, 526 (5th Cir. 1997) (DeMoss, J., dissenting in part), and "not commensurate with the crime," *United States v. Hunter*, 770 F.3d 740, 747 (8th Cir. 2014) (Bright, J., concurring). As Justice Kennedy noted, such federal mandatory minimum statutes resulted in outcomes that were "unwise and unjust." *Hungerford*, 465 F.3d at 1121 (quoting Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003)).

2. People convicted of drug offenses, who make up the largest category of people in federal prison,[8] also faced severe punishments that the First Step Act sought to ameliorate. Section 841(b) and section 960(b) of title 21 of the U.S. Code, which were amended by the FSA, impose mandatory minimum sentences for violations. 21 U.S.C. §§ 841(b), 960(b). Prosecutors may invoke the procedures in 21 U.S.C. § 851 to seek sentence enhancements for second and subsequent violations of the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, and the Controlled Substances Import and Export Act, 21 U.S.C. § 951 *et*

[8] Federal Bureau of Prisons, *Offenses* (Sept. 17, 2024), https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp. Individuals imprisoned for drug offenses constitute 44% of inmates. *Id.* Those in prison for weapons, explosives, and arson make up the next largest category at roughly 22% of inmates. *Id.*

seq.[9] Sentencing enhancements for prior drug convictions are therefore known as "851 enhancements."[10]

These 851 enhancements force judges to levy harsh penalties on certain people convicted of drug offenses. For example, before the First Step Act's passage, a person with a single qualifying prior drug offense faced a mandatory minimum of twenty years in cases where the applicable mandatory minimum would otherwise be ten years. 21 U.S.C. § 841(b)(1)(A) (as amended, 1994). If the person had two or more prior offenses, the mandatory sentence became life imprisonment. *Id.* Moreover, the old law set a low bar for what constituted a qualifying "felony drug offense." *Id.* § 841(b)(1)(A), 841(b)(1)(B) (as amended, 1994). Section 802 defined the term as any drug crime punishable by more than a year's imprisonment, including simple possession in some cases. *See id.* § 802(44). This definition swept in people who were actually sentenced to less than a year, those released before a year was up, and even those sentenced to probation alone. An individual who had been convicted of one prior felony drug offense decades earlier could get the same sentence enhancement as

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[9] *See* 21 U.S.C. §§ 851, 962. Section 962 of the Controlled Substances Act incorporates by reference the procedures stated in 21 U.S.C. § 851, making Section 851 the operative provision across both statutes. *Id.* § 962.

[10] *See, e.g.*, U.S. Sentencing Comm'n, *Application and Impact of Section 851 Enhancements* (July 2018), https://perma.cc/7NXA-4ZLP.

someone who had been found guilty of the same violation only recently.

These enhancements were not only severe—they were also invoked inconsistently, leading to arbitrary outcomes. A study in 2011 found that in six districts, more than 75% of those eligible received an 851 enhancement—but in eight other districts, no one eligible received an enhancement.[11] In 2018, prior to the FSA's passage, the Sentencing Commission again confirmed that application of the enhancements varied dramatically.[12] When prosecutors chose not to seek enhanced sentences in eligible cases under the previous system, the average sentence was seven years. *Id.* at 7. By contrast, when prosecutors sought the enhancement, it added an average of twelve years to the sentence, more than doubling the individual's time in prison. *Id.* Further, the Sentencing Commission unearthed troubling racial disparities. Black people accounted for 42% of those who qualified for sentence enhancements but made up 58% of those who received enhancements. *Id.* at 34 tbl.5. By comparison, although 26% of white people were eligible for enhancements, they represented 24% of those who received them. *Id.* The data depicted an unpredictable regime where punishment often turned more on the prosecutor and district in which that

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[11] U.S. Sentencing Comm'n, *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 260–61 (2011), https://perma.cc/DT3U-D3RR.

[12] U.S. Sentencing Comm'n, *Application and Impact of 21 U.S.C. § 851: Enhanced Penalties for Federal Drug Trafficking Offenders* 6 (July 2018), https://perma.cc/Y62Q-NZ93.

person was sentenced than on the individual's conduct.

3. The story of Frederick Turner, who, in early 2018, was convicted under 18 U.S.C. § 924(c) and 21 U.S.C. § 841(a)(1), illustrates the severity and unfairness prior to the FSA. Mr. Turner was known as a kind man who "had a gift for caring for people."[13] Over the years, he looked after his aging grandmother with dementia, nursed his mother dying of ALS, and helped his sister care for a nephew with autism and another nephew born with no arms. *Id*. After several deaths in the family, Mr. Turner's mental health worsened. *Id*. He slid into drug use and started working with a drug dealer. *Id*. On one occasion and at the dealer's request, Mr. Turner packaged up drugs and a gun for an undercover detective posing as a customer.[14] He was also involved in a second sale of one ounce of methamphetamine where firearms were present.[15] *See also* Indictment, *United States v. Turner*, No. 1:17-cr-244-TSE (E.D. Va. Dec. 5, 2017), ECF No. 18.

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[13] *Rick Turner: Lost in the System*, FAMM.org (archived Sept. 19, 2024), https://perma.cc/7ELG-T4NU.

[14] Rachel Weiner, *Judge Laments 40-Year Sentence for Meth Dealer As* '*Excessive*' *and* '*Wrong*,' Wash. Post (July 2, 2018).

[15] Tana Ganeva, *The Tragic Story of Rick Turner's Descent into Meth, Prison, and Death*, Vice.com (July 12, 2019), https://perma.cc/YDB5-JRXV.

Although all his co-conspirators took plea deals,[16] Mr. Turner exercised his Sixth Amendment right to a fair trial.[17] He was convicted and sentenced to 40 years in prison based on the mandatory minimums: 30 years for two counts of having a firearm while dealing drugs (five years plus 25 years) and 10 years for the drug crimes. Weiner, *supra* note 14. No one else involved, "including major drug traffickers linked to deadly shootings, face[d] a mandatory minimum sentence as high as the one imposed on Turner." *Id*. The kingpin himself got less than half of Mr. Turner's sentence. *Id*. The judge criticized Mr. Turner's mandatory minimum punishment as "excessive" and "wrong," and a juror regretted that the sentence "was simply unjust." Weiner, *supra* note 14; St. Louis, *supra* note 17. "If I could go back in time, and if I knew Turner faced 40 years, I would nullify," the juror wrote. Weiner, *supra* note 14.

While awaiting trial, Mr. Turner was released and held two jobs, passed his drug tests, took part in Narcotics Anonymous, and attended church. Ganeva, *supra* note 15; *see also* Order Setting Conditions of Release, *United States v. Turner*, No. 1:17-cr-244-TSE (E.D. Va. Sept. 28, 2017), ECF No. 12. Upon his conviction, and although he had no prior criminal record or history of violence, he was sent to a

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[16] C.J. Ciaramella, *Congressman Asked Bureau of Prisons Three Times About Nonviolent Offender Who Later Died in Maximum Security Lockup*, Reason.com (July 16, 2019), https://perma.cc/KM6B-PBUD

[17] Paul St. Louis, *Opinion: A Man I Found Guilty of Dealing Drugs Died in Prison. I Wish I Could Take That Verdict Back*, Wash. Post (July 9, 2019).

maximum-security prison because of the length of his sentence. Ciaramella, *supra* note 16. The prison was dominated by a gang and a drug cartel, but Mr. Turner refused to join either group. Ganeva, *supra* note 15. After almost a year of living in constant fear and begging to be transferred somewhere safer, Mr. Turner was found dead in his cell. Ciaramella, *supra* note 16; Ganeva, *supra* note 15.

B. Congress Enacted the FSA to Begin Mending a Broken Sentencing Regime.

For years, many had urged Congress to soften the severe sentencing provisions in sections 924(c) and 841(b). *See, e.g.*, Nat'l Research Council, *supra* note 6, at 7, 9 (concluding that lawmakers should "reexamine policies regarding mandatory prison sentences" due to their "wide range of unwanted social costs"); U.S. Sentencing Comm'n, *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 360–61 (2011) ("[T]he Judicial Conference has urged Congress on at least two occasions to amend the 'draconian' penalties established at section 924(c) by making it a 'true recidivist statute, if not rescinding it all together'"); *id.* at 356 (calling on Congress to change the recidivist provisions in sections 841 and 960 given the "disproportionate and excessively severe" mandatory minimum penalties). In 2018, Congress acted.

In passing the First Step Act, Congress sought to ameliorate some of these flaws in federal sentencing. The Act blunted the "stacking" effect of section 924(c) offenses, "help[ing] ensure that sentencing enhancements for repeat offenses apply only to true

repeat offenders." 164 Cong. Rec. S7,737, S7,744 (daily ed. Dec. 18, 2018) (statement of Sen. Cardin). Conduct charged in the same indictment could no longer trigger the 25-year mandatory minimum for someone with no previous section 924(c) convictions. *Id.* That tougher punishment was reserved for true recidivists: those who violated the law "after a prior conviction under this subsection has become final." FSA § 403(a). *See also* 164 Cong. Rec. S7,648, S7,649 (daily ed. Dec. 17, 2018) (statement of Sen. Grassley) ("[T]he legislation clarifies that enhanced penalties for using a firearm during a crime of violence or drug crime should be reserved for repeat offenders of such crimes.").

The law also overhauled sentencing for a subset of people convicted of drug offenses. As Senator Durbin—one of the sponsors of the legislation—recognized, "[i]nflexible mandatory minimum sentences" for people convicted of nonviolent offenses had triggered "an explosion in our Federal prisons," while failing to "deter drug use or drug crime." 164 Cong. Rec. S7,648, S7,644 (daily ed. Dec. 17, 2018) (statement of Sen. Durbin). The Act changed what types of prior convictions could serve as predicates for 851 enhancements. Drug offenses that were more than fifteen years old, and drug or violent crime offenses for which the person had not actually served more than a year, could no longer support an enhanced sentence. FSA § 401(a)(1); *see* 21 U.S.C. § 802(57), (58) (added, 2018). Moreover, the FSA reduced the severity of these sentence enhancements when they did apply. FSA § 401(a), (b). For a person convicted under 21 U.S.C. § 841(b)(1)(A) who had a single prior qualifying offense, the mandatory

minimum enhancement dropped from twenty to fifteen years. *Id.* § 401(a)(2)(A)(i). If the same person instead had two prior qualifying offenses, the enhanced mandatory minimum changed from life in prison to twenty-five years. *Id.* § 401(a)(2)(A)(ii). Thus, by narrowing the pool of people eligible for, and lessening the length of, enhanced sentences, these reforms helped mitigate some of the old system's worst excesses.

The First Step Act's bipartisan appeal came in large part from these targeted sentencing revisions, recognized as some of the Act's "most important reforms." 164 Cong. Rec. S7,648, S7,748 (daily ed. Dec. 17, 2018) (statement of Sen. Klobuchar). According to the lead sponsors of the bill, without the sentencing reforms, "much of the Act's support would have fallen away." Brief for United States Senators Richard J. Durbin et al. as *Amici Curiae* Supporting Defendant-Appellant 1–2, *Terry v. United States*, 141 S. Ct. 1858 (2021) (No. 20-5904). Indeed, "[t]he Act might not have passed at all." *Id.* at 2.

At its signing, the President hailed the Act as "an incredible moment" for criminal justice reform and noted the law's "unheard of" level of bipartisan support. Remarks by President Trump at Signing Ceremony for S. 756, the "First Step Act of 2018" and H.R. 6964, the "Juvenile Justice Reform Act of 2018," 2018 WL 6715859, at *16 (Dec. 21, 2018). The FSA was a "historic" example of Congress "putting [its] words into action" after "years talking about reducing crime, enacting fair sentencing laws, and restoring lives." 164 Cong. Rec. H10,364 (daily ed. Dec. 20, 2018) (statement of Rep. Sensenbrenner). Its passage

showcased bipartisan legislating "on a scale not often seen in Washington these days." 164 Cong. Rec. S7,823, S7,839 (daily ed. Dec. 19, 2018) (statement of Sen. Grassley).

Today, the Act's sentencing reforms promise "more individuals the chance to avoid one-size-fits-all mandatory minimums." *Pulsifer v. United States*, 601 U.S. 124, 155 (2024) (Gorsuch, J., dissenting). In the years since its enactment, the Act's changes have positively affected numerous individuals. Overall, 15% fewer people convicted of drug offenses received enhanced penalties in the first year of the Act's implementation.[18] People with two prior qualifying convictions were spared the life sentences they would have received before the FSA. *Id.* And after the First Step Act limited 25-year "stacked" penalties to true recidivists, those severe punishments went from being imposed in most cases involving multiple section 924(c) counts to being imposed in very few instances. *Id.*

Accordingly, applying the Act when an individual's original sentence is vacated can have a meaningful impact. In Petitioners' cases, for example, it would reduce each of their mandatory-minimum sentences under section 924(c) by 80 years—from 105 years to 25 years. Hewitt Br. 10; Duffey & Ross Br. 12. For many people, that can make the crucial difference between being sentenced to certain death in prison

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[18] *See* U.S. Sentencing Comm'n, *The First Step Act of 2018: One Year of Implementation* (Aug. 2020), https://perma.cc/NL6T-D48W.

versus serving a still long but survivable term of incarceration. Even for vacated sentences with just two or three section 924(c) counts, the effect of applying the First Step Act at resentencing is stark. *See, e.g.*, *Mitchell*, 38 F.4th at 386 ("Mitchell received a mandatory-minimum sentence of fifty-five years' imprisonment for his three § 924(c) offenses rather than a sentence of fifteen years' imprisonment for these offenses pursuant to the provisions of the [First Step] Act."); *United States v. Howell*, No. CR 17-260-2, 2022 WL 484895, at *2 (W.D. Pa. Feb. 15, 2022) ("The implications of this Court's decision on this issue will significantly impact the sentencing ranges of Defendant, with a delta of approximately 25 years in his potential sentence.").

The FSA's sentencing changes for drug offenses under section 841 have also transformed people's lives. In one case in South Carolina, for example, the district court initially gave Mr. Rayco Bethea a statutorily mandated life sentence under the pre-First Step Act version of the law. The judge proclaimed that it was "one of the saddest cases [he's] had in a long time," but that "[his] hands [we]re tied." Sentencing Tr. at 12, 18, *United States v. Bethea*, No. 3:14-cr-430 (D.S.C. Aug. 21, 2015), ECF No. 829. In 2019, after the enactment of the FSA, the court vacated the sentence to remedy an ineffective-assistance-of-counsel claim and imposed a new sentence. On appeal, the Fourth Circuit held that the First Step Act should apply to the new sentence. Thus, at resentencing, Mr. Bethea received a within-Guidelines sentence of 15 years and eight months instead of spending his life in prison.

United States v. Bethea, 54 F.4th 826, 830 (4th Cir. 2022).

The FSA's remedial changes have thus helped move federal sentencing "in the direction of justice." 164 Cong. Rec. S7,753, S7,781 (daily ed. Dec. 18, 2018) (statement of Sen. Cruz).

II. The Fifth Circuit's Rule Serves No Purpose Because Applying the First Step Act at Plenary Resentencing Does Not Burden Courts or Undermine the Interest in the Finality of Sentences.

As explained by Petitioners and the United States, the FSA's text dictates that sections 401 and 403 apply when a pre-Act sentence has been vacated and the individual faces post-Act resentencing. Hewitt Br. 15–31; Duffey & Ross Br. 16–36; U.S. Br. 16–20. In addition to misreading the statutory text, the Fifth Circuit's rule is irrational because people in Petitioners' position will be sentenced anew in any event. Congress would have had no reason to deny the benefit of the First Step Act's ameliorative scheme at such resentencings.

Whenever the criminal law changes, it is necessary to "balance . . . first, the need for finality in criminal cases, and second, the countervailing imperative to ensure that criminal punishment is imposed only when authorized by law." *Welch*, 578 U.S. at 131. Yet finality interests are not at stake in the case of a vacated sentence for the simple reason that such a sentence ceases to be final. Vacatur and remand for plenary resentencing "wipe[] the slate clean," *Pepper*,

562 U.S. at 507, and require the district court to sentence the person anew. Sections 401 and 403 of the First Step Act should be read against this fundamental backdrop. Because the finality of the prior vacated sentence has already been disturbed, there is no cost—and much benefit—to sentencing someone under the law as it stands now.

A. The Role of Vacatur Is Well-Understood by Courts and Congress.

Vacating a former judgment has long been understood as "render[ing] it null and void" such that "the parties are left in the same situation as if no trial had ever taken place[.]" *United States v. Ayers*, 76 U.S. 608, 610 (1869). For centuries, courts have "uniformly understood that, under the law, a vacated order never happened." *Mitchell*, 38 F.4th at 392–93 (3d Cir. 2022) (Bibas, J. concurring) (collecting cases). *See also* Hewitt Br. 18–19. Likewise, a vacated sentence "must, from the moment it was vacated and set aside, be regarded as a nullity." *Ex parte Lange*, 85 U.S. 163, 189 (1873); *see also Vacate*, *Black's Law Dictionary* (12th ed. 2024) ("To nullify or cancel; make void; invalidate").

Indeed, other legal doctrines, such as the rule of double jeopardy, depend on the fact that a vacated sentence is treated as if it never happened. *See, e.g.*, *Bravo-Fernandez v. United States*, 580 U.S. 5, 18 (2016) (The "'continuing jeopardy' rule neither gives effect to the vacated judgment nor offends double jeopardy principles."); *Ball v. United States*, 163 U.S. 662, 672 (1896) ("[I]t is quite clear that a defendant who [by taking an appeal] procures a judgment

against him upon an indictment to be set aside may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted."). *See also* Hewitt Br. 20–21, 25; Duffey & Ross Br. 17–25.

"Congress is understood to legislate against a background of common-law adjudicatory principles" *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). This includes the well-established role of vacatur in American law.

B. There Is No Finality Interest in a Vacated Sentence and Thus No Reason to Withhold Application of Sections 401 and 403 at Plenary Resentencing.

Sections 401 and 403 reflect Congress's considered approach to sentencing reform in the context of the FSA. The default rule, under 1 U.S.C. § 109, is that new penalty provisions apply only to offenses committed on or after the date of the revised law. 1 U.S.C. § 109. Here, however, Congress expressly departed from that background rule, providing that sections 401 and 403 shall apply "to any offense that was committed *before* the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." FSA §§ 401(c), 403(b) (emphasis added). The Act's text strikes an intentional balance. While rejecting full retroactivity, which would have reopened all pending sentences under the revised provisions, Congress directed that its sentencing reforms should apply to conduct committed before enactment where the sentence was imposed after enactment. Where, as here, a pre-FSA

sentence has been vacated and the slate has been wiped clear, the defendant should be subject to sentencing under the FSA, because there are no finality concerns to be weighed with respect to a vacated sentence.

The "presumption of finality," *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983), that attaches to final criminal convictions and sentences has been justified by the need to avoid the "significant costs," inefficiency, and uncertainty that would be wrought by perpetual relitigation. *Calderon v. Thompson*, 523 U.S. 538, 556 (1998). But vacatur of a prior sentence "wipe[s] the slate clean," *Pepper* 562 U.S. at 507, such that no final sentence exists at all. Once a person is before the court for plenary resentencing, there is no cost to applying the current law, and "little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in the judgment).

Everyday resentencing procedures illustrate this commonsense principle. "[W]hen a defendant's sentence is set aside on appeal, the district court at resentencing can (and in many cases, must) consider the defendant's conduct and changes in the Federal Sentencing Guidelines since the original sentencing." *Concepcion v. United States*, 597 U.S. 481, 486 (2022). The district court will consider arguments already rejected, and even evidence of new conduct—such as post-sentencing rehabilitation—that were not before the court in the first instance. *Pepper*, 562 U.S. at 481. Given the district court's "duty . . . to sentence the defendant as he stands before the court on the day of

sentencing," *id.* at 492 (cleaned up), no finality interest is at stake at resentencing.[19]

Moreover, weighty interests counsel against "imposing upon the pre-Act offender a pre-Act sentence at a time after Congress had specifically found . . . that such a sentence was unfairly long." *Dorsey v. United States*, 567 U.S. 260, 277 (2012). "[T]he public legitimacy of our justice system relies on [sentencing] procedures that are neutral, accurate, consistent, trustworthy, and fair." *Rosales-Mireles v. United States*, 585 U.S. 129, 141 (2018) (internal quotation marks and citation omitted). "[U]nnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 140. Because "[p]re-Act offenders whose sentences have been vacated are similarly situated to individuals who have never been sentenced," there is no sense in "inflict[ing] on them the exact harsh and expensive mandatory minimum sentences" that Sections 401

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[19] Contrast this with the instances in which courts have recognized that the FSA *does not* apply, where finality interests are at play: "[T]he Act does not apply to a direct appeal by a defendant sentenced before its enactment." *United States v. Merrell*, 37 F.4th 571, 574 (9th Cir. 2022). Nor does it apply if a previously vacated sentence has been reimposed prior to the Act's passage. *United States v. Ruff*, 795 F. App'x 796, 797 (11th Cir. 2020). But following vacatur, a person with a pre-enactment offense has a *pending* and *unsentenced* case that does not implicate any finality concerns. *Merrell*, 37 F.4th at 577 n.7 ("[W]hen individuals . . . have their original sentence nullified by the district court, it is not the [First Step Act] that reopens their sentence." (quoting *Bethea*, 841 F. App'x at 550) (alteration in original)).

and 403 sought to change. *United States v. Uriarte*, 975 F.3d 596, 603 (7th Cir. 2020) (en banc).[20]

Congress would have no reason to require courts resentencing someone anew to apply a repealed law no longer in effect at the time of sentencing. *Cf. Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 (1974) (reciting "the principle that a court is to apply the law in effect at the time it renders its decision"). Put simply, there is no finality interest in a vacated sentence. The sentence is null and void.

"[I]t is this Court's job to follow the policy Congress has prescribed." *SAS Inst. Inc. v. Iancu*, 584 U.S. 357, 368 (2018). "And whatever its virtues or vices, Congress's prescribed policy here is clear." *Id.* It drafted sections 401 and 403 to apply under cases such as Petitioners' where finality was not at issue. Applying the law now in place at the time of sentencing—the reduced mandatory minimums in the First Step Act—avoids a result that "would be fundamentally at odds with the First Step Act's ameliorative nature." *Uriarte*, 975 F.3d at 603.

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[20] The background principle respecting finality of sentences addresses the "difficult line-drawing in applying the [sentencing] reduction" to differently situated defendants. *Uriarte*, 975 F.3d at 610 (Barrett, J., dissenting). A defendant whose prior sentence was vacated and who had a new sentence imposed *prior* to the effective date of the Act must contend with the government's interest in finality of that sentence. An otherwise similarly situated defendant resentenced *after* the effective date of the Act does not, because there is no final judgment in place at the time of resentencing and thus no constraint on the court's obligation to impose a new, fair sentence at that proceeding.

III. The Rule of Lenity Resolves Any Residual Doubt in Petitioners' Favor.

Amici agree with Petitioners and the United States that the plain language of the FSA resolves this case in Petitioners' favor. But if this Court is still "left with a reasonable doubt about" which is the "the better reading of the law[,] . . . another rule of construction supplies an answer. It is lenity." *Pulsifer*, 601 U.S. at 184 (Gorsuch J., dissenting). If the FSA's applicability provisions are deemed ambiguous, the rule of lenity breaks the tie in Petitioners' favor.

Lenity was first recognized in the English courts prior to the Founding, "justified in part on the assumption that when Parliament intended to inflict severe punishments it would do so clearly." *Wooden v. United States*, 595 U.S. 360, 389 (2022) (Gorsuch, J., concurring in the judgment). To avoid imposing harsh sentences without clear authority, English judges "strictly construed" criminal statutes against the government. 1 William Blackstone, *Commentaries on the Laws of England* *88 (1765); *see also* 2 Matthew Hale, *History of the Pleas of the Crown* 335 (1736) (felonies "are construed literally and strictly"); *see generally* David S. Romantz, *Reconstructing the Rule of Lenity*, 40 Cardozo L. Rev. 523, 526–27 (2018). The rule's rationale "embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.'" *Bass*, 404 U.S. at 348 (quoting H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967)).

Lenity is a rule about as old "as the task of statutory "construction itself," and it applies "at the end of the process of construing what Congress has expressed." *Callanan v. United States*, 364 U.S. 587, 596 (1961) (citing *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.)). Following that practice, this Court has long applied lenity whenever it has "reasonable doubt[]" about the application of a penal statute. *Harrison v. Vose*, 50 U.S. (9 How.) 372, 378 (1850). ("In the construction of a penal statute, it is well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent.").[21] Under the rule, "ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 588 U.S. 445, 464 (2019).

This Court has long held that the rule of lenity applies equally to "sentencing as well as substantive provisions" of criminal statutes. *United States v. Batchelder*, 442 U.S. 114, 121 (1979). *See also*, *e.g.*, *Hughey v. United States*, 495 U.S. 411, 422 (1990); *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *Busic v. United States*, 446 U.S. 398, 406–07 (1980); *Bell v. United States*, 349 U.S. 81, 83 (1955). The doctrine "means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual" when the Court

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[21] While this Court has on occasion suggested that lenity is reserved only for "grievous ambiguity" in criminal statutes, that terminology does not establish some higher standard; it simply underscores the importance of adopting the construction favorable to the defendant where a reasonable doubt remains after consulting "context, precedent, and statutory design." *Brown* v. *United States*, 602 U.S. —, 144 S. Ct. 1195, 1210 (2024).

confronts an ambiguous sentencing provision. *Ladner v. United States*, 358 U.S. 169, 178 (1958). Lenity protects a basic tenet of our constitutional structure: that Congress—not the courts—may create criminal offenses and prescribe their punishments. *Wiltberger*, 18 U.S. (5 Wheat.) at 95; *see United States v. Hudson*, 11 U.S. (7 Cranch) 32, 32 (1812).

Thus, lenity can be applied to the FSA's sentencing provisions here. *See Pulsifer*, 601 U.S. at 152 (considering whether lenity applied to the FSA's safety-valve sentencing reforms but declining to apply it because statute not ambiguous); *Deal*, 508 U.S. at 131 (considering whether lenity applied to mandatory-minimum sentencing provision in 18 U.S.C. § 924(c) but declining to apply it because statute not ambiguous). Indeed, lower courts have applied lenity as an alternate means of interpreting the very provision at issue in this appeal. *United States v. Henry*, 983 F.3d 214, 225 (6th Cir. 2020) (interpreting the plain language of FSA section 403(b) in the defendant's favor but alternately explaining that, even if the provision were ambiguous, lenity would require interpreting it in defendant's favor); *Uriarte*, 975 F.3d at 604 n.7 (same); *see also United States v. Hernandez*, 107 F.4th 965, 980 (11th Cir. 2024) (Rosenbaum, J., dissenting) (applying lenity to resolve any ambiguity in FSA section 403(b)).

Lenity demands that Congress speak "plainly and unmistakably" if an individual is to face a harsher interpretation of criminal sentencing laws such as Sections 401 and 403 of the FSA. *Bass,* 404 U.S. at 348 (quoting *Gradwell*, 243 U.S. at 485). Thus, to the extent that the applicability provisions are deemed

ambiguous after construing the Act's text, such ambiguity should be resolved in favor of those resentenced following the vacatur of their pre-FSA sentences. "Especially in light of the broad remedial goals of the First Step Act, [the Court] should construe any ambiguity in favor of" Petitioners. *Henry*, 983 F.3d at 225.

Accordingly, if this Court finds the applicability provisions in sections 401 and 403 to be ambiguous, lenity compels the adoption of the construction most favorable to Petitioners: a construction that directs courts to apply the FSA's reforms to anyone sentenced after its enactment, whether on initial sentencing or on resentencing following vacatur.

CONCLUSION

For the reasons set forth above, the opinion and judgment of the court of appeals should be reversed.

Respectfully submitted,

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