Nos. 19-3623, 19-3711

In the

United States Court of Appeals

For the Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee / Cross-Appellant

v.

KENNETH JACKSON, JR.,
Defendant-Appellant / Cross-Appellee

On Appeal from the United States District Court
for the Northern District of Ohio

Brief of *Amici Curiae* the American Civil Liberties Union, the National Association of Criminal Defense Lawyers, the American Civil Liberties Union of Ohio Foundation, Due Process Institute, R Street Institute, and Americans for Prosperity Foundation in Support of Defendant/Cross-Appellee

Emma Andersson
Nathan Freed Wessler
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
eandersson@aclu.org
nwessler@aclu.org

Jonathan D. Hacker
O'Melveny & Myers LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300
jhacker@omm.com

Alec Schierenbeck
O'Melveny & Myers LLP
7 Times Square
New York, NY 10036
(212) 326-2000
aschierenbeck@omm.com

Counsel for Amici Curiae

Stephen Ross Johnson
Ritchie, Dillard, Davies & Johnson, PC
Amicus Committee, Sixth Circuit Vice Chair
National Association of Criminal Defense Lawyers
606 W. Main Street, Suite 300
Knoxville, TN 37902
(865) 243-3510
johnson@rddjlaw.com

Elizabeth A. Blackwood
Counsel & Director of First Step Act Resource Center
National Association of Criminal Defense Lawyers
1660 L Street NW, 12th Floor
Washington, DC 20036
(202) 465-7665
eblackwood@nacdl.org

Freda J. Levenson
American Civil Liberties Union of Ohio Foundation
4506 Chester Avenue
Cleveland, OH 44193
(614) 568-1972
flevenson@acluohio.org

David J. Carey
American Civil Liberties Union of Ohio Foundation
1108 City Park Avenue, Suite 203
Columbus, Ohio 43206
(614) 586-1972
dcarey@acluohio.org

Shana-Tara O'Toole
Due Process Institute
700 Pennsylvania Avenue SE #560
Washington, DC 20003
(202) 558-6683
shana@idueprocess.org

CORPORATE DISCLOSURE STATEMENT

Amici Curiae the American Civil Liberties Union, the National Association of Criminal Defense Lawyers, the ACLU of Ohio Foundation, Due Process Institute, R Street Institute, and Americans for Prosperity Foundation are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent of more of any stake or stock in *amici curiae*.

/s/ Alec Schierenbeck

Alec Schierenbeck

TABLE OF CONTENTS

TABLE OF AUTHORITIES **Page(s)**

Cases

Statutes

Other Authorities

Rules

INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, non-partisan public interest organization dedicated to defending the civil liberties guaranteed by the Constitution and laws of the United States. The ACLU of Ohio Foundation is an affiliate of the national ACLU. Both organizations seek to promote sensible interpretations of ameliorative sentencing legislation that fulfills the legislature's purpose to avoid unduly harsh sentences.

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 files numerous amicus briefs each year seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system.

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[1] Pursuant to Rule 29(a), counsel for *amici curiae* certify that all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

Amici file this brief in support of defendant Kenneth Jackson's opposition to the Government's Cross-Appeal. Accordingly, under Rule 29(b)(6), this brief was timely filed within seven days of the filing of Mr. Jackson's principal brief with respect to the Government's Cross-Appeal.

Due Process Institute is a nonprofit, bipartisan, public interest organization that works to honor, preserve, and restore procedural fairness in the criminal justice system. Founded in 2018 and guided by a bipartisan Board of Directors and supported by bipartisan staff, the Due Process Institute creates and supports achievable bipartisan solutions for challenging criminal legal policy concerns through advocacy, litigation, and education.

R Street Institute is a nonprofit, nonpartisan, public-policy research organization. R Street's mission is to engage in policy research and educational outreach that promotes free markets, as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty.

Americans for Prosperity Foundation is a nonprofit organization committed to promoting a free-and-open society, to which the First Step Act contributes.

STATEMENT REGARDING ORAL ARGUMENT

Amici curiae submit that oral argument is warranted in this case because the question on appeal is an issue of significant importance and has not yet been resolved in this Circuit. *Amici curiae* respectfully seek leave to participate in oral argument on the question whether §403 applies on resentencing because their participation may be helpful to the Court in addressing the novel and important issues presented by this appeal. *See* 6 Cir. R. 29.

SUMMARY OF ARGUMENT

In the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (the "First Step Act" or the "Act"), Congress significantly altered how mandatory minimum penalties attach to repeat violations of 18 U.S.C. §924(c). Instead of treating §924(c) convictions in a single proceeding as automatically qualifying a defendant as a repeat offender subject to consecutive 25-year mandatory minimums for each additional count, Congress required that a prior conviction must have become "final" before a second conviction is subject to these greatly enhanced minimum penalties. First Step Act §403(a). In making this change, Congress determined that federal judges should have greater sentencing discretion for this category of cases, rather than applying an automatic recidivist enhancement.[2] Congress also expressly addressed the new rule's "applicability to pending cases:" so long as "a sentence for the offense has not been imposed" as of the date of enactment, the First Step Act's amended penalties "shall apply." §403(b). The question here is whether the Act's sentencing amendments apply to a defendant whose original pre-Act sentence was vacated on appeal, and who

[2] *See, e.g.*, 164 Cong. Rec. S7753-01, S7774 (2018) (statement of Sen. Cardin); 164 Cong. Rec. H10346, 10362 (2018) (statement of Rep. Nadler); *cf. United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004) (characterizing a 55-year mandatory-minimum sentence required by the pre-First Step Act recidivist rule as "unjust, cruel, and even irrational").

is thus before the district court for a *de novo* post-Act resentencing. The answer is yes.

Section 403(b)'s text reflects a congressional intent to apply the Act's ameliorative changes whenever a court imposes a sentence after the date of enactment—whether it is an original sentence, or, as here, the product of resentencing. Section 403(b) applies when a "sentence for the offense has not been imposed." That is the case when an appellate court vacates a prior sentence and orders *de novo* resentencing: a sentence has not been "imposed" until the resentencing takes places. The Government's contrary view—that Section 403 does not apply at resentencing because a now-vacated sentence was imposed before the Act's effective date—lacks support in the text, structure, and purpose of the First Step Act and defies a logical understanding of what it means to impose a sentence. Once a prior sentence has been vacated, there is no "sentence" that has been imposed; rather, the district court must then "impose[]" a lawful "sentence for the offense." §403(b); *see* 18 U.S.C. §3742(g) ("[a] district court to which a case is remanded … shall resentence a defendant in accordance with section 3553"); *id.* §3553(a) ("[t]he court shall impose a sentence …").

The Government's position also runs counter to two background principles that inform the interpretation of legislation. *First*, when an

appellate court "set[s] aside" a sentence and "remand[s] for a *de novo* resentencing," it has "wiped the slate clean." *Pepper v. United States*, 562 U.S. 476, 507 (2011). "[A] district court [has] authority to redo the entire sentencing process," as if the prior sentence never occurred. *United States v. McFalls*, 675 F.3d 599, 606 (6th Cir. 2012). Accordingly, Congress scarcely could have intended a vacated sentence—in effect, a legal nullity—to determine what may well be the most important issue at a *de novo* resentencing: what mandatory minimum sentences should apply. *Second*, in light of the general "principle that a court is to apply the law in effect at the time it renders its decision," *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 (1974), no reason exists to think Congress wanted courts to apply now-repealed sentencing laws when imposing *new* sentences.

The general savings statute, 1 U.S.C. §109, does not create an opposite presumption, in favor of applying old law even in pending cases. Section 109 is a default rule that is displaced whenever Congress provides otherwise, *Dorsey v. United States*, 567 U.S. 260, 274 (2012), and here Congress has done just that: it specifically provided that the new rules will apply to pre-Act offenses, so long as a sentence "has not been imposed." §403(b).

Finally, the Government's reading serves no purpose. Whenever the criminal law changes, the interest in finality of sentences must be balanced

against the imperative to correct judgments that are now understood to rest on rules deemed unjust. The Government's interest in finality is at its height when reopening past cases would require investing new resources to redo otherwise-valid final sentences, such as when a criminal judgment is on collateral view. But in a pending case, when a prior sentence has already been wiped away, any interest in finality is at its nadir. Because a defendant already stands before the court for *de novo* resentencing, neither the court nor the government bears any costs in applying a proper sentence, and the interest in accurate sentencing is paramount. And given Congress's judgment in the First Step Act that the prior sentencing regime was overly punitive and unjust, there is no reason to think it wanted courts to continue to apply those rules when handing down new sentences.

In accordance with the text, context, and purpose of the First Step Act, this Court should hold that the sentencing amendments in §403 apply to sentences imposed after the First Step Act's effective date, including at a *de novo* resentencing.

ARGUMENT

I. The Text of §403(b) Applies The Sentencing Amendments To §924(c) At Resentencing

Section §403(b) of the First Step Act provides that the sentencing amendments to §924(c) "shall apply" to all "pending cases" where the

"offense … was committed before the date of enactment of th[e] Act" so long as "a sentence for the offense has not been imposed as of" the Act's effective date. Under a straightforward reading of §403(b), the First Step Act's reduced penalties apply whenever a sentence is imposed after the law went into effect.

A. The Text of §403(b), Not the Savings Statute, Governs Application of The Sentencing Amendments

When Congress amends a criminal statute to reduce the penalties that attach to an offense and remains silent about its application to pre-Act offenders, the federal savings statute, 1 U.S.C. §109, sets out the default rule: the penalties that apply are those in effect when the offender "commits the underlying conduct that makes the offender liable." *Dorsey*, 567 U.S. at 272. But when a statute expressly provides how the new penalties apply to pre-Act offenses, that "default rule" is "overcome." *United States v. Blewett*, 746 F.3d 647, 650 (6th Cir. 2013) (en banc); *see Great Northern Ry. Co. v. United States*, 208 U.S. 452, 465 (1908) (Section 109 "must be enforced unless, either by express declaration or necessary implication," the new law provides otherwise); 1 U.S.C. §109 (savings statute applies "*unless* the [new law] shall so expressly provide").

Here, in §403(b), Congress indisputably addressed the question of how the sentencing amendments should apply to pre-Act offenses. *See United*

States v. Richardson, 948 F.3d 733, 748 (6th Cir. 2020) (in §403(b), "Congress itself addresse[d] the Act's applicability to pending cases."). And Congress clearly rejected the default rule: under the savings statute, the penalties that apply are those in effect when the offense was committed, *Dorsey*, 567 U.S. at 272, but §403(b) expressly allows those who committed an offense *before* the Act's enactment to benefit from the new rules so long as they are sentenced *after* the Act goes into effect.

Accordingly, the Government's frequent reliance on §109's "presumption" against application to pre-Act conduct is unfounded. *See* Gov't Br. 17, 21, 24. Because Congress has directly spoken to the issue, the question of how the Act's amendments apply at resentencing turns on the "plain language of section 403(b)." *Richardson*, 948 F.3d at 748 n.1. That presents an ordinary task of statutory interpretation. No lingering "presumption" against applying the Act to pending cases exists—and no thumb on the scale weighs in favor of the Government's position.

B. The Text of §403(b) Makes Clear that the Sentencing Amendments Apply to Resentencing

1. *The District Court "Imposes" "Sentence for the Offense" At Resentencing*

When an appellate court vacates a prior sentence and orders *de novo* resentencing, the "sentence for the offense" is the one the district court

imposes upon remand. §403(b). The entire purpose of vacating an erroneous sentence and remanding to a district court is so that the district court can impose a new, lawful sentence. *See* 18 U.S.C. §3742(f) ("If the court of appeals determines that … the sentence was imposed in violation of law … the court shall remand the case for further sentencing with such instructions as the court considers appropriate."). That procedural understanding must inform the interpretation of §403: a "sentence has not been imposed" under that provision until the district court in resentencing imposes the sentence.

That commonsense reading flows from the nature of resentencing. "[A]n order vacating a sentence and remanding the case for resentencing directs the sentencing court to *begin anew*." *United States v. Garcia-Robles*, 640 F.3d 159, 166 (6th Cir. 2011) (emphasis in original). The sentencing court must ascertain the applicable mandatory minimum under §924(c) in light of its mission: to "impose a sentence" for that offense. 18 U.S.C. §3553(a). Section 403(b) directs the court to apply the First Step Act where "a sentence for the offense has not been imposed." §403(b). Given that (1) the appellate court vacated the prior sentence and (2) it is up to the district court to now impose a new sentence, §403(b) directs the court to use the new rules: a sentence "has not been imposed" because the district court is *about to impose* the sentence. For this reason, the Government's repeated

insistence that a sentence was "imposed" by a district court does not help its position. Gov't Br. 25–28. That is true as a historical fact, but it has no legal significance. When a resentencing is at issue, a sentence has not been "imposed" until the court acts, and the "sentence" under §403(b) is the one the district court imposes following a remand.

The statutory context confirms that when a district court conducts a resentencing, the legally relevant sentence is the one the district court imposes at resentencing. Section 3742(g), which governs "[s]entencing upon remand," directs the district court to "resentence a defendant in accordance with [18 U.S.C. §]3553," 18 U.S.C. §3742(g), and §3553 sets out the rules to govern a district court's "[i]mposition of a sentence," *id.* §3553; *see id.* §3553(a) ("The court shall impose a sentence…"). Section 3742 also provides for the right of a defendant or the Government to appeal a sentence if it "was imposed in violation of law." 18 U.S.C. §§3742(a), (b). Following a resentencing, if a party believes that the sentence "imposed" "was in violation of the law" and takes an appeal, the court of appeals reviews that new sentence—not a prior, vacated sentence. *Id.* §§3742(e)-(e)(1); *see, e.g.*, *United States v. Jeross*, 521 F.3d 562, 569 (6th Cir. 2008) (reviewing sentence "imposed" at resentencing). All of those provisions take as the "sentence . . . imposed" "for the offense" the current, binding sentencing—

which does not exist until the resentencing takes place. And courts "normally presume" that words "carry the same meaning when they appear in … related sections." *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 536 (2013).

Reading 403(b)'s reference to a "sentence … imposed" as the vacated sentence, as opposed to the sentence imposed at resentencing, would conflict with other provisions. For example, the time to file an appeal from a sentence imposed at resentencing runs from the date of the entry of judgment on resentencing, not the date of a prior-vacated sentence. *See Gillis v. United States*, 729 F.3d 641, 644 (6th Cir. 2013) ("Gillis was resentenced on December 10, 2009, and the time to file a notice of appeal expired on December 26, 2009."); Fed. R. App. P. 4(b)(1)(A) . But under the Government's view, if the "sentence … imposed" that triggers the right to appeal is the *first* sentence imposed, even after it is vacated, no appeal of a sentence imposed at resentencing would be timely. 18 U.S.C. §3742(a)-(b).

All of these anomalies are resolved by the more natural reading of §403(b): the sentencing amendments in §403 apply whenever a sentence is imposed after the First Step Act's effective date—even if that sentence is, as here, a resentencing.

2. The Indefinite Article Cuts Against the Government's View

Weighed against all of this, §403(b)'s use of the "indefinite article 'a' to modify the word 'sentence'"—as opposed to the definite article "the"—cannot justify the government's position. Gov't Br. 28; *see* §403(b) ("…if *a* sentence for the offense has not been imposed…") (emphasis added). According to the Government, the "a" in §403(b) means "any," such that if *any* prior sentence for the offense was imposed, the sentencing reductions do not apply, even if that prior sentence is now a legal nullity. *Id.* (citing Webster's New World College Dictionary 1 (3d ed. 1996)). But if the indefinite article in §403(b) means "any," then the provision applies the sentencing amendments whenever "[any] sentence for the offense has *not* been imposed." After a general remand, that is the case. It is unquestionably true that *some* sentence "for the offense has not been imposed"—namely, the sentence the district court *will* impose upon remand. *Id.*

II. Background Principles Confirm that §403 Applies At Resentencing

"Part of a fair reading of statutory text is recognizing that Congress legislates against the backdrop of certain unexpressed presumptions." *Bond v. United States*, 572 U.S. 844, 857 (2014); *see Young v. Unites States*, 535 U.S. 43, 49 (2002) ("Congress must be presumed to draft … in light of this background principle."). This is equally true when interpreting a criminal

sentencing statute. In such cases, courts "assume that Congress was aware of" relevant "background sentencing principle[s]." *Dorsey*, 567 U.S. at 275. And courts do not lightly conclude that Congress "intended to apply an unusual modification of those rules." *Meyer v. Holley*, 537 U.S. 280, 286 (2003); *see id.* at 287 ("Where Congress … has not expressed a contrary intent, the Court has drawn an inference that it intended ordinary rules to apply.").

Here, the Government's reading requires this Court to conclude that Congress silently intended to depart from two established principles of law. But the Supreme Court has instructed otherwise: Even if the Government's interpretation of §403(b) were, "linguistically speaking," tenable (and it is not, *see supra* I.B.), these principles confirm that §403(b) speaks to the sentence imposed upon remand, rather than a vacated, prior sentence. *Dorsey*, 567 U.S. at 280.

First, it is well established that a general remand for resentencing "wipe[s] the slate clean." *Pepper*, 562 U.S. at 507; *see McFalls*, 675 F.3d at 606 ("A general remand effectively wipes the slate clean."). In contrast to a limited remand, where the district court's authority is more restrained, "an order vacating a sentence and remanding the case for resentencing directs the sentencing court to *begin anew*." *Garcia-Robles*, 640 at 166 (emphasis

in original); *see also United States v. Stinson*, 97 F.3d 466, 469 (11th Cir. 1996) ("[W]hen a criminal sentence is vacated, it becomes void in its entirety; the sentence—including any enhancements—has been wholly nullified.") (internal quotation marks and citation omitted); Black's Law Dictionary (11th ed. 2019) (defining "vacate" as "[t]o nullify or cancel; make void."). The court of appeals has "set aside [the] entire sentence and remanded for a *de novo* resentencing." *Pepper*, 562 U.S. at 507; *Garcia-Robles*, 640 F.3d at 166 (a general remand "require[es] the district court to conduct resentencing *de novo*."). Even prior rulings of the district court—typically law of the case—no longer bind the court on resentencing. *Pepper*, 562 U.S. at 507.

Given this basic rule that a vacated sentence has no bearing on resentencing, no justification exists for concluding that Congress would have wanted a vacated sentence to determine what may well be the most important issue at resentencing: what mandatory minimum sentences should apply. Nothing in the text suggests a congressional intent to work an "unusual modification" of the rules of resentencing. *Meyer*, 537 U.S. at 286. Yet this is precisely the Government's position. Although the government provides no reason, it posits that Congress meant §403(b) to quietly upend the "background norm" of resentencing. *Dorsey*, 567 U.S. at 275.

Second, the Government's reading runs up against the venerable "principle that a court is to apply the law in effect at the time it renders its decision." *Bradley*, 416 U.S. at 711. This obligation generally holds even when the law changes while a case is on appeal.[3] *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801) (Marshall, C.J.); *see Henderson v. United States*, 568 U.S. 266, 271 (2013) ("[T]he general rule … is that an appellate court must apply the law in effect at the time it renders its decision.") (internal citation and quotation marks omitted). That presumption equally holds true in lower courts. *See Patel v. Gonzalez*, 432 F.3d 685, 690 (6th Cir. 2005) ("Courts generally apply the law existing at the time of the decision as opposed to the law existing at the time that the conduct giving rise to the case occurred."). And it has particular force at sentencing. "A court's duty is always to sentence the defendant as he stands before the court on the day of the sentencing.'" *Pepper*, 562 U.S. at 492 (quoting *United States v. Bryson*, 229 F.3d 425, 426 (2d Cir. 2000) (per curiam)); *United States v. Grimes*, 142

[3] This Court's decision in *Richardson*, 948 F.3d 733, is not to the contrary. In *Richardson*, this Court concluded that the "text makes clear" that §403(b) does not apply on direct appeal. 948 F.3d at 748. Here, however, the text points in the opposite direction, and it is reinforced by multiple background rules.

F.3d 1342, 1351 (11th Cir. 1998) ("[T]he general rule is that defendant should be sentenced under the law in effect at the time of sentencing.").[4]

According to the Government, however, Congress intended for courts to apply not the rules in effect on the date of a resentencing, but those in effect as of the date of a *prior* sentencing. That assumed intention has no legal foothold in any longstanding or recognized principle. It certainly does not draw support from the federal savings statute, which draws the line based on when the *offense occurred*, not the date of an initial sentencing. *See Dorsey*, 567 U.S. at 272. And if Congress had wanted to freeze the law at a prior, vacated sentencing, it had a ready model for achieving that effect. *See* 18 U.S.C. §3742(g)(1) (providing for the prior version of the *Guidelines* to apply on resentencing). It did not avail itself of that text, and courts should not assume that it silently intended to reject settled background principles.

[4] The savings statute, 1 U.S.C. §109, underscores the general presumption that courts apply the law in effect at the time of decision. Historically, the savings statute was necessary only because, in its absence, courts deemed changes in criminal laws to affect all prosecutions not yet final. *See Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 660 (1974) ("Congress enacted its first general savings provision ... to abolish the common-law presumption that the repeal of a criminal statute resulted in the abatement of all prosecutions which had not reached final dispositions at the highest court authorized to review them.") (internal quotation marks omitted). Here, *see supra* I.A., the savings statute has no application because Congress displaced it.

III. The Government's Rule Serves No Purpose

The Government's argument that Congress intended §403 not to apply in a *de novo* sentencing when a previous—but vacated—sentence had been entered before the Act's effective date is contrary to another guide to statutory interpretation: the Government's view would serve no purpose. *See Abramski v. United States*, 573 U.S. 169, 179 (2014) (courts must "interpret the relevant words not in a vacuum, but with reference to the statutory context, structure, history, and purpose") (internal quotation marks omitted).

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 the criminal punishment is imposed only when authorized by law." *Welch v. United States*, 136 S. Ct. 1257, 1266 (2016). Finality interests are at their zenith when applying new rules would require reopening final judgments and "force" the Government "to marshal resources to keep in prison defendants whose trials and appeals conformed to then-existing … standards." *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opinion). In view of the "government['s] … strong interest in the finality of sentences," this Court has noted that it is hardly "irrational[]" for

Congress to "fail[] to make" reduced sentencing provisions "fully retroactive." *Blewett*, 746 F.3d at 659.[5]

But in a pending case, once a court of appeals vacates a criminal sentence and remands for a resentencing, any interest in finality is moot. With a general remand for resentencing, the district court must begin the sentencing process "anew." *Garcia-Robles*, 640 F.3d at 166. In keeping with the nature of a *de novo* proceeding, the district court will consider arguments already rejected, and even evidence of new conduct—such as postsentencing rehabilitation—that necessarily was not before the court in the first instance. *Pepper*, 562 U.S. at 481. Given the "court's duty … to sentence the defendant as he stands before the court on the date of sentencing," *id.*, at 492, Congress would have no reason to insist that it arbitrarily apply harsher law as it stood at a prior date.

[5] The Government's inaccurately characterizes *Blewett* as deciding that "the Fair Sentencing Act new mandatory minimums did not apply retroactively to defendants who *had already been sentenced*." Gov't Br. 32. That case did not address the difference (if any) between an initial sentencing and a resentencing in a pending case. Rather, it addressed whether new mandatory minimum penalties could alter already *final* cases following a motion for a sentence reduction under 18 U.S.C. §3582(c)(2). The Court took pains to contrast the "limited scope and purpose of §3582(c)(2)" with the kind of "plenary resentencing proceeding[]" relevant here. *Blewett*, 746 F.3d at 657 (internal quotation marks and citation omitted).

Nor would applying §403 to resentencing call into question §924(c) sentences in other contexts, where the finality interests may be more weighty. To affirm the sentence on review, this Court need only recognize that in a *pending* case where a prior sentence has *already been* vacated, a defendant should be resentenced under the amendments to §924(c). Nothing about that decision will require reopening a single past case, or vacating a single otherwise-valid sentence.

IV. The Government's Contrary Arguments Fail

A. Direct Review Critically Differs From Resentencing

According to the Government (at 24), its reading of the statute is supported by decisions, such as this Court's opinion in *Richardson*, 948 F.3d 733, holding that the §924(c) amendments do not apply to defendants sentenced before the First Step Act's effective date and seeking the benefit of §403 on direct appeal. In fact, *Richardson* is not only consistent with applying §403 on resentencing, its reasoning underscores that the sentencing amendments apply when a defendant is resentenced.

Richardson concerned a defendant sentenced before the First Step Act, who then saw the Act go into effect while his appeal was pending. 948 F.3d at 746. On appeal, Richardson argued that, in light of §403, his sentence should be vacated and remanded for resentencing under the sentencing

amendments to §924(c). He contended that "a sentence is not *imposed* until the defendant has exhausted his direct appeals." *Richardson*, 948 F.3d at 748 (emphasis in original). This Court disagreed. As it explained, "a sentence is 'imposed' when the trial court announces it, not when the defendant has exhausted his appeals from the trial court's judgment." *Id.* It added that the relevant statutes "repeatedly use[] derivations of the word 'impose' to denote the moment that the district court delivers the defendant's sentence." *Id.* "Most telling[ly,]" under 18 U.S.C. §3742(a), an appellate court reviews a sentence that a defendant argues was "imposed in violation of law." *Id.* As such, "the date that matters" for §403(b) "is the one on which the district court sentenced" the defendant. *Id.* at 750.

That logic illustrates the crucial difference between a sentence on direct appeal and a remand for resentencing after a sentence has been vacated. On direct appeal, an appellate court asking whether a "sentence has … been imposed" under §403(b) must look to the very district court sentence on review. *Richardson*, 948 F.3d at 748 (explaining that the court of appeals reviews a sentence imposed by the district court). The sentence reviewed on appeal remains in effect as the sentence "imposed" unless and until the appellate court vacates it and remands. *See* 18 U.S.C. §§3742(f)-(f)(1) ("If the court of appeals determines that … the sentence was imposed in violation

of law … the court shall remand the case" to district court). By contrast, when a sentence is vacated and the case remanded for resentencing, the prior sentence is legally void, and it is up to the district court on *resentencing* to impose a sentence. *Id.* §3742(g). And, for the reasons explained above, it makes little sense to say that the district "has … imposed" that sentence before it does so. *See supra* I.B. If, as *Richardson* counsels, the "date that matters" for purposes of §403(b) "is the one in which the district court sentenced [the defendant]," 948 F.3d at 750, the relevant date for a resentencing is the date of the resentencing.[6]

Richardson's procedural posture reinforces that §403's application turns on the date of resentencing—not the time of a prior vacated sentence. In that case, the sentence on review was itself the product of a resentencing: the defendant was first sentenced in 2013, and then resentenced in 2017 after this Court vacated the original sentence and remanded the case for resentencing. *Richardson*, 948 F.3d at 737-38. The sentence at issue on appeal was thus the one that resulted from this *resentencing*. *Id.* Accordingly, in explaining why Richardson could not benefit from §403,

[6] This same is true of *United States v. Wiseman*, 932 F.3d 411 (6th Cir. 2019), which concerned application of §401 of the First Step Act. As in *Richardson*, the defendant there invoked the sentencing amendments on a direct appeal, after the Act went into effect while his appeal was pending. *Id.* at 417. The court did not analyze §401 as applied to a plenary resentencing.

Richardson noted the date of the resentencing, not the former, vacated sentence: "The district court imposed Richardson's sentence in September 2017, making him ineligible for relief under the First Step Act." *Id.* at 750. What was obvious in *Richardson* should be obvious here: the relevant sentence is the one imposed on resentencing.

B. This Court's Decision in *Hughes* Is Inapposite

The Government's reliance (at 32) on this Court's decision in *United States v. Hughes*, 733 F.3d 642 (6th Cir. 2013), is unavailing. In *Hughes*, this Court held that the more lenient sentences in the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010), did not apply to those *first* sentenced before that statute went into effect, but *resentenced* after the statute became effective. 567 U.S. at 644. The Government reads *Hughes* to suggest that "date of [a defendant's] initial sentencing … even if he was granted a resentencing" should similarly determine the rules in effect under the First Step Act. Gov't Br. 32 (internal citation and quotation marks omitted). That is wrong for at least three reasons.

First, unlike the First Step Act, at issue here, the Fair Sentencing Act did not expressly address whether its reduced penalties applied to offenses committed before the statute went into effect. *Hughes*, 733 F.3d at 644 ("Congress elected not to include a retroactivity provision in the Act."). As a

result, the Court approached the question in *Hughes* in light of the federal savings statute's "default rule" against application to pre-act offenses. *Id.* at 644. Here, by, contrast Congress has extended the sentencing amendments to offenses committed before the First Step Act's enactment. *See* §403(b). Because Congress has directly spoken to the matter, the default rule of §109 rule has no application. *See supra* I.A.

Second, because it lacked clearer guidance within the Fair Sentencing Act itself, *Hughes* inferred that Congress would not have wanted that statute's penalties to apply at resentencing based on 18 U.S.C. §3742(g)(1), which specifies that, at a resentencing, "the court shall apply the *guidelines* issued by the Sentencing Commission … that were in effect on the date of the previous sentencing … prior to the appeal." (emphasis added); *see Hughes*, 733 F.3d at 645. But §3742(g)(1) has nothing to do with the question in this case. That provision concerns how the *guidelines* should apply at resentencing, and here the question is how *statutory mandatory minimums* should apply. The Government has pointed to no statutory provision—because none exists—in which Congress has specified that the mandatory minimums that should apply at resentencing are those in effect at a prior sentencing.

Third, even if the guidelines provision in §3742(g)(1) had some bearing on the interpretive question in this case, it too would confirm that the sentencing amendments in §924(c) apply at resentencing. Section 3742(g)(1) states that on resentencing a court should "apply the guidelines … that were in effect on the date of the previous sentencing." Here, both at the time of initial sentencing, and at the time of resentencing,[7] the relevant guidelines provision, U.S.S.G. §2K2.4, stated that "the guideline sentence" for a violation of §924(c) "is the minimum term of imprisonment required by statute." The guidelines therefore direct the district court to the mandatory minimums in §924(c) to determine the appropriate sentence—and at the time of resentencing, those minimums reflected the amendments in §403 of the First Step Act.

C. The Government's Analogies to Other Provisions Fail

The Government also argues (at 29) that if Congress had intended the sentencing amendments to apply on resentencing, it would have employed different language, used in certain other statutes. It suggests that in drafting §403 Congress could have the borrowed the limitations period that applies to federal habeas petitions, 28 U.S.C. §2255(f)(1), which states that a collateral attack on a federal conviction should be filed within one year of

[7] The current version of the U.S.S.G. §2K2.4 was promulgated in 2011.

"the date on which the judgment of conviction becomes final." Gov't Br. 29. But §403(b) is directed to "pending cases"—not cases that are already final. Accordingly, it would have been senseless for Congress in §403 to take language from a provision providing for limited review of already-final judgments.[8] The provisions use different words because they accomplish different ends.

The Government's second comparison—to the "safety valve" provision in the Violent Crime Control and Law Enforcement Act of 1994 ("VCCA"), Pub. L. No. 103-322, §80001, 108 Stat. 1796, 1985-86 (1994)—is even less apt. Gov't Br. 29. That statute provides that certain amendments to mandatory minimum sentences apply "to all sentences imposed on or after the 10th day beginning after the date of enactment of this Act." VCCA §80001(c). According to the Government, that provision, unlike §403(b), clearly "appl[ies] to cases remanded for resentencing." Government Br. 29. But if the VCCA's reference to "all sentences imposed" after enactment applies to resentencing, it refutes the Government's position. The VCCA is phrased in the positive (applying to "all sentences imposed") and §403(b) in

[8] The Government suggests that the language in §2255(f)(1) applies "to all cases that [are] *not* final." Gov't Br. 29 (emphasis added). But §2255(f)(1) expressly states that it applies only *after* a conviction "becomes final."

the negative (applying to any sentence "not … imposed"), but the logic of both is identical: if a sentence *follows* the effective date, the amendments apply.

D. The Legislative History Provides No Support To The Government

The Government also argues (at 33) that its interpretation of §403(b) is bolstered by differences between the First Step Act that Congress enacted and a prior, unenacted version of that legislation. As a preliminary matter, "mute intermediate legislative maneuvers," such as the "unexplained disappearance" of a provision "from an unenacted bill[,] …. are not reliable aids to statutory interpretation." *Milner v. Department of Navy*, 562 U.S. 562, 572 (2011) (internal quotation marks and citation omitted).

In any event, the drafting history on which the Government relies does not support its position. The Government states that the unenacted bill, the Sentencing Reform and Corrections Act of 2017, S. 1917, 115th Cong. (2017), contained "broad[er] retroactive language," the deletion of which suggests the "limited retroactivity" of §403(b). But as relevant here, the unenacted bill employed the *exact same* language in describing how the amendments to §924(c) would apply to "pending cases." *Compare* S. 1917, 115th Cong. §104(b)(1) ("[T]he amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.")

with §403(b) (same). And although that 2017 bill included an additional provision directed to "past cases," S. 1917, 115th Cong. §104(b)(2), which expressly allowed a defendant to seek a reduction under the §924(c) amendments even if his case was no longer "pending," *id.* §104(b)(1), Congress's ultimate decision not to include a provision directed to past cases in the First Step Act says nothing about the scope of §403(b)'s application to a pending case, like the one at issue here.[9]

V. Congress Enacted the First Step Act To Reform §924(c)

Finally, the Government's reading is at odds with the basic purpose of the First Step Act: to eliminate the very sentencing rules that the Government seeks to impose. *See Abramski*, 573 U.S. at 179 ("purpose" must be considered in interpreting a statute).

As in *Dorsey*, 567 U.S. 260, Congress's purpose to reform the sentencing laws counsels against reading §403(b) as "imposing upon the pre-Act offender a pre-Act sentence at a time after Congress had specifically found in the [Act] that such a sentence was unfairly long." *Dorsey*, 567 U.S.

[9] Likewise, the Government is wrong to suggest that §404 of the First Step Act, which extends unrelated sentencing amendments to *past* cases, implies anything about the scope of §403(b) with respect to *pending* cases. Gov't Br. 32-33. This case is not about whether Congress intended "full retroactive application" of the Act's §924(c) amendments, *id.* at 32, but about the effect of those amendments on pending cases slated for plenary resentencing.

at 277. This case illustrates the substantial impact of adhering to the pre-Act scheme that Congress revamped. Under the pre-Act rules, applied at his initial sentencing, Jackson was subject to a 25-year mandatory minimum sentence on his second and third convictions as a repeat offender under §924(c) even though all convictions were entered in a single proceeding. *United States v. Jackson*, 918 F.3d 467, 477 & n.3 (6th Cir. 2019). But at resentencing, that 25-year minimum was reduced to seven because he committed all of his Section 924(c) violations before being convicted of any. R. 224. The difference is hardly "minor" (*Dorsey*, 567 U.S. at 277)—not to Jackson, not to the Congress that passed the First Step Act, and not to the discretion of the sentencing court charged with fashioning a sentence sufficient, but not greater than necessary, to fulfill the purposes of sentencing.[10]

Although any provision short of full retroactivity will create some "prechange/postchange discrepancies, the imposition of … disparate

[10] Here, the district court fashioned a sentence that combined two consecutive seven-year mandatory minimum §924(c) sentences with sentences on the non-§924(c) counts to reach a total of 23 years' imprisonment—a sentence it deemed sufficient but not greater than necessary in light of the §3553(a) factors. (R. 224: Resentencing Trans., PageID 2932-52). *Cf. Greenlaw v. United States*, 554 U.S. 237, 253 (2008). A mandatory consecutive 25-year sentence on the second §924(c) conviction would have produced a term greatly in excess of what the court deemed sufficient.

sentences" in "roughly contemporaneous sentencing, *i.e.*, the same time, the same place, and even the same judge" entails "a kind of unfairness that modern sentencing statutes typically seek to combat." *Dorsey*, 567 U.S. at 277; *see also Pepper*, 562 U.S. at 502 (distinguishing between disparity caused by "arbitrary or random sentencing practices," and that caused by "the ordinary operation of appellate sentencing review"). Yet that would be the consequence of the Government's rule. There is no reason—in the text, structure, history, or purpose of the First Step Act—to think Congress desired that anomalous result.

CONCLUSION

This Court should hold that the sentencing amendments in §403 apply to any sentence imposed after the First Step Act's effective date, including sentences imposed at a *de novo* resentencing hearing.

Respectfully Submitted,

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By: /s/ Alec Schierenbeck

Emma Andersson
Nathan Freed Wessler
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
eandersson@aclu.org
nwessler@aclu.org

Jonathan D. Hacker
O'Melveny & Myers LLP
1625 Eye Street, N.W.
Washington, DC 20006
(202) 383-5300
jhacker@omm.com

Alec Schierenbeck
O'Melveny & Myers LLP
7 Times Square
New York, NY 10036

(212) 326-2000
aschierenbeck@omm.com

Stephen Ross Johnson
Ritchie, Dillard, Davies & Johnson, PC
Amicus Committee, Sixth Circuit Vice Chair
National Association of Criminal Defense Lawyers
606 W. Main Street, Suite 300
Knoxville, TN 37902
(865) 243-3510
johnson@rddjlaw.com

Elizabeth A. Blackwood
Counsel & Director of First Step Act Resource Center
National Association of Criminal Defense Lawyers
1660 L Street NW, 12th Floor
Washington, DC 20036
(202) 465-7665
eblackwood@nacdl.org

Freda J. Levenson
American Civil Liberties Union of Ohio Foundation
4506 Chester Avenue
Cleveland, OH 44193
(614) 568-1972
flevenson@acluohio.org

David J. Carey
American Civil Liberties Union of Ohio Foundation
1108 City Park Avenue, Suite 203
Columbus, Ohio 43206
(614) 586-1972
dcarey@acluohio.org

Shana-Tara O'Toole
Due Process Institute
700 Pennsylvania Avenue SE
#560
Washington, DC 20003
(202) 558-6683
shana@idueprocess.org

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) because it contains 6,499 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(b)(f).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Georgia front.

/s/ Alec Schierenbeck

Alec Schierenbeck

April 21, 2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of April, 2020, the foregoing *Amici Curiae* Brief for the American Civil Liberties Union, the National Association of Criminal Defense Lawyers, the ACLU of Ohio Foundation, Due Process Institute, R Street Institute, and Americans for Prosperity Foundation was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system.

/s/ Alec Schierenbeck

Alec Schierenbeck

Counsel for Amici Curiae

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Description of Entry	Record Entry Number	Page ID Range
Resentencing Transcript	224	2932-52