No. _____

In the
Supreme Court of the United States

DEVAN PIERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Section 401(c) of the First Step Act of 2018, Pub. L. No. 115-394, provides: "This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." The first question presented is whether a sentence is "imposed" within the meaning of §401(c) when it is first issued by the district court, or when it becomes final following exhaustion of the direct-appeal process.

2. In its recent decision in *Rehaif v. United States*, this Court concluded that, to prove a status-based possession charge under §922(g), the government "must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." 139 S. Ct. 2191, 2194 (2019). The government did not endeavor to make that showing in this case. The second question presented is whether petitioner is entitled to a grant, vacate, and remand for reconsideration in light of *Rehaif*.

PARTIES TO THE PROCEEDING

Petitioner, the defendant-appellant below, is Devan Pierson. Respondent, the plaintiff-appellee below, is the United States of America.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Southern District of Indiana and the United States Court of Appeals for the Seventh Circuit:

- *United States of America v. Pierson*, No. 18-1112 (7th Cir. May 31, 2019)
- *United States of America v. Pierson*, No. 1:16CR00206-001 (S.D. Ind. Jan. 12, 2018)

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii). Other cases that petitioner has identified that raise the same issues as in this case include the following:

Cases related to the first question presented:

- *United States v. Aviles*, 938 F.3d 503 (3d Cir. 2019)
- *United States v. Wiseman*, 932 F.3d 411 (6th Cir. 2019)
- *Wheeler v. United States*, No. 18-7187 (U.S. June 3, 2019)
- *Richardson v. United States*, No. 18-7036 (U.S. June 17, 2019)
- *Huskisson v. United States*, No. 19-527 (U.S. Oct. 17, 2019)

Cases related to the second question presented:

- *Allen v. United States*, No. 18-7123 (U.S. June 28, 2019)
- *Reed v. United States*, No. 18-7490 (U.S. June 28, 2019)

- *Moody v. United States*, No. 18-9071 (U.S. June 28, 2019)
- *Hall v. United States*, No. 17-9221 (U.S. June 28, 2019)
- *Humbert v. United States*, No. 18-8911 (U.S. Oct. 7, 2019)
- *Contreras v. United States*, No. 18-9425 (U.S. Oct. 7, 2019)
- *Greer v. United States*, No. 18-9444 (U.S. Oct. 7, 2019)
- *Gilbert v. United States*, No. 18-9589 (U.S. Oct. 7, 2019)
- *Cook v. United States*, No. 18-9707 (U.S. Oct. 7, 2019)
- *Hale v. United States*, No. 18-9726 (U.S. Oct. 7, 2019)
- *Robinson v. United States*, No. 19-5196 (U.S. Oct. 7, 2019)
- *Jackson v. United States*, No. 19-5260 (U.S. Oct. 7, 2019)
- *McCormick v. United States*, No. 19-5270 (U.S. Oct. 7, 2019)
- *Parks v. United States*, No. 19-5330 (U.S. Oct. 7, 2019)
- *Donate-Cardona v. United States*, No. 19-5014 (U.S. Oct. 15, 2019)
- *Thomas v. United States*, No. 19-5025 (U.S. Oct. 15, 2019)
- *Stacy v. United States*, No. 19-5383 (U.S. Oct. 15, 2019)
- *McCants v. United States*, No. 19-5456 (U.S. Oct. 15, 2019)
- *Atkinson v. United States*, No. 19-5572 (U.S. Oct. 15, 2019)

- *Perez v. United States*, No. 19-5565 (U.S. Oct. 15, 2019)
- *Cox v. United States*, No. 19-5027 (U.S. Oct. 15, 2019)
- *Johnson v. United States*, No. 19-5181 (U.S. Oct. 21, 2019)
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PETITION FOR WRIT OF CERTIORARI

Petitioner was sentenced to a mandatory term of life imprisonment under a statute that is no longer in effect. While his case was pending on direct appeal before the Seventh Circuit, the President signed into law the First Step Act of 2018. The Act reduced the life sentence required under the former sentencing scheme to "a term of imprisonment of not less than 25 years." Pub. L. No. 115-391, §401(a)(2)(A)(ii), 132 Stat. 5194, 5220 (2018). The Act also applied this reduction to pending cases; specifically, §401(c), titled "Applicability to Pending Cases," provides that "[t]his section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment."

Although petitioner's sentence is not yet final, the Seventh Circuit determined that petitioner is not entitled to a resentencing under the new Act, holding that, under §401(c), his sentence was "imposed" when the district court sentenced him. In so holding, the court expressly disagreed with the Sixth Circuit's interpretation of the word "imposed" in a very similar federal sentence-reducing statute to mean "finally imposed" after exhaustion of the direct-appeal process. The Seventh Circuit also reached a result at odds with the firmly established presumption that a legislature's repeal of a punishment applies to all cases pending on direct appeal, as well as the rule of lenity, which instructs courts to construe ambiguous statutes in the favor of criminal defendants.

Although the courts of appeal that have considered this question have so far agreed with the Seventh Circuit, time is running out for defendants like petitioner to benefit from the First Step Act through the appellate process if those courts are incorrect. This case thus presents an opportunity for this Court to address this issue before it is too late for a favorable decision to have a meaningful impact for defendants whose sentences were not yet final when the First Step Act took effect.

As a separate matter, while petitioner's case was pending on appeal, this Court decided *Rehaif v. United States*, holding that, in a prosecution under 18 U.S.C. §922(g), the government "must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." 139 S. Ct. 2191, 2194 (2019). At trial, the government did not prove that petitioner knew of his status as a felon. As the Court already has done in at least two dozen cases, the Court should vacate and remand this case for the courts below to reconsider petitioner's §922(g) conviction in light of *Rehaif*.

OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit's opinion is reported at 925 F.3d 913 and is reproduced at Pet.App.1-26.

JURISDICTION

The Seventh Circuit issued its opinion on May 31, 2019. Justice Kavanaugh extended the time for filing a petition for certiorari to and including October 28, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On November 8, 2017, a jury convicted petitioner of (1) knowingly possessing with intent to distribute heroin, cocaine, or 50 grams or more of methamphetamine in violation of 21 U.S.C. §841(a)(1); (2) knowingly possessing a firearm in furtherance of the Count 1 drug-trafficking charge in violation of 18 U.S.C. §924(c)(1)(A); and (3) knowingly possessing a firearm while having been previously convicted of a felony in violation of 18 U.S.C. §922(g)(1). Pet.App.3-5. The district court sentenced him on January 10, 2018. Pet.App.39. Pursuant to the version of 21 U.S.C. §841(b)(1)(A) in effect at the time, the court issued a life sentence without release on the drug-trafficking charge. Pet.App.27-39. Petitioner appealed to the Seventh Circuit. District.Dkt.76.

Meanwhile, on December 21, 2018—while petitioner's direct appeal was pending—the First Step Act of 2018 took effect. Among other things, the Act amended 21 U.S.C. §841(b)(1)(A) to reduce the mandatory minimum sentence from life in prison to "a term of imprisonment of not less than 25 years." Pub. L. No. 115-391, §401(a)(2)(A)(ii). The Act applied this reduction to pending cases: Section 401(c), titled "Applicability to Pending Cases," provides that "[t]his section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment."

With leave of court, the parties filed supplemental briefs addressing the applicability of the First Step Act to petitioner's case, and petitioner argued that he was

entitled to a sentencing reduction on account of the change in the law. Cir.Dkt.47, 48. The Seventh Circuit disagreed. Pet.App.26. Specifically, the court held that, because §401(c) applies only "if a sentence has not been imposed as of such date of enactment," a defendant may not benefit from the Act if the district court issued a sentence before the Act took effect, even if that sentence remains subject to challenge on direct appeal. Pet.App.24. In so holding, the court relied on what it characterized as the "common usage [of the word 'imposed'] in federal sentencing law," citing several federal statutes and rules. *Id.*

The Seventh Circuit acknowledged that its interpretation of "imposed" conflicted with the interpretation embraced by the Sixth Circuit in *United States v. Clark*, 110 F.3d 15, 17 (6th Cir. 1997), *superseded by regulation on other grounds*, U.S.S.G. §1B1.10(b)(2)A. Pet.App,25-26. In that case, the Sixth Circuit considered materially analogous language in a 1994 act that created the "safety valve" mechanism for reducing sentences of first-time offenders. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §80001(c), 108 Stat. 1796. That act likewise said that it applied "to all sentences imposed on or after the date of enactment," and the Sixth Circuit interpreted "imposed" to include all sentences that had not yet reached final disposition in the highest reviewing court. *Clark*, 110 F.3d at 17. The Seventh Circuit identified no basis for distinguishing *Clark*, but instead simply "respectfully decline[d] to extend *Clark*'s reasoning to § 401(c) of the First Step Act." Pet.App.26.

Shortly after the Seventh Circuit issued its decision, this Court issued its decision in *Rehaif v. United States*, which held that, to prove a status-based possession charge under 18 U.S.C. §922(g), the government "must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." 139 S. Ct. at 2194. The jury was not required to make any such finding in this case.

REASONS FOR GRANTING THE PETITION

Twice during the course of petitioner's criminal proceedings, the law governing those proceedings has changed. First, while petitioner's direct appeal was pending, Congress enacted the First Step Act and altered the mandatory minimum sentence for one of the offenses of which petitioner was convicted. Then, mere weeks after the Seventh Circuit issued its decision in this case, this Court issued its decision in *Rehaif*, which altered what the government must prove to convict petitioner of the §922(g) offense with which he was charged. This petition provides an opportunity to determine whether petitioner (and, as to the first question presented, similarly situated defendants) is entitled to the benefit of either or both of those changes in the law.

As to the First Step Act, the Seventh Circuit concluded that the Act's retroactive reach is confined to defendants who had not yet been sentenced at all when the Act took effect, as opposed to defendants who (like petitioner) still had direct appeals pending when the Act took effect. Although the courts that have addressed this question so far have agreed, there is a substantial question whether that conclusion is

correct, as evidenced by the contrary reasoning of the Sixth Circuit in a case involving a materially analogous federal sentence-reducing act. And this is not an issue that the Court can afford to allow to continue to percolate, for time is running out for the Act to provide any meaningful benefit to defendants with pending appeals if that was indeed Congress's intent. Accordingly, the Court should grant certiorari to determine the retroactive reach of §401(c) of the First Step Act.

Wholly apart from that question, petitioner is at a minimum entitled to a GVR in light of this Court's decision in *Rehaif*. This Court has already GVR'd at least two dozen cases in light of *Rehaif*, and many of those cases were indistinguishable from petitioner's case—*i.e.*, they involved felon-in-possession convictions under §922(g), and defendants who were pressing the *Rehaif* issue in a plain-error posture. Accordingly, just as it already has done in all of those materially analogous cases, the Court should vacate and remand this case for the courts below to reconsider petitioner's §922(g) conviction in light of *Rehaif*.

I. The Court Should Grant Certiorari To Decide Whether §401(c) Of The First Step Act Applies To Defendants Whose Direct Appeals Remain Pending.

Since Congress enacted the First Step Act, this Court has vacated and remanded multiple cases for lower courts to determine whether the Act's sentence-reducing amendments apply to defendants who were sentenced before the Act was passed, but whose direct appeals have not yet concluded. As the Court

recognized in doing so, this is a substantial question, and it is a time-sensitive one for impacted defendants. The Court should grant certiorari to resolve that question and hold that the answer is yes.

A. Section 401(c) of the First Step Act Is Best Read As Applying to Cases Pending on Direct Appeal.

As a general matter, "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases … pending on direct review or not yet final." *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987); *see also Hamm v. City of Rock Hill*, 379 U.S. 306 (1964). "[A]n action or suit is 'pending' from its inception until the rendition of final judgment." *Swartz v. Meyers*, 204 F.3d 417, 421 (3d Cir. 2000) (emphasis omitted) (quoting *Pending*, Black's Law Dictionary 1134 (6th ed. 1990)). A "final judgment," in turn, is "one where 'the availability of appeal' has been exhausted or has lapsed, and the time to petition for certiorari has passed." *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 n.14 (1974) (quoting *Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965)). Thus, until a case has "reached final disposition in the highest court authorized to review [it]," an intervening remedial change in the law should apply. *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 660 (1974) (quoting *Bradley v. United States*, 410 U.S. 605, 607 (1973)); *see also Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 841 n.1 (1990) (Scalia, J., concurring) (noting that presumption of retroactivity applies to repeal of punishments).

Congress embraced this background principle in §401(c) of the First Step Act. In a section entitled

"Applicability to Pending Cases," Congress provided: "This section, and the amendments made by this section, shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment." Pub. L. No. 115-391, §401(c). Thus, by the plain language of subsection (c), the remedial, punishment-reducing amendments in §401 are retroactive. And while that language plainly precludes prisoners from invoking the Act in 28 U.S.C. §2255 proceedings, 18 U.S.C. §3582(c) motions, and other collateral challenges, it should not be read as precluding application of the Act to pending cases like petitioner's—*i.e.*, cases in which a sentence is not yet final.

That is the conclusion that the Sixth Circuit reached when faced with a materially analogous provision of another sentence-reducing federal statute. *See Clark*, 110 F.3d at 17. In *Clark*, while the defendant's direct appeal was pending, Congress enacted the safety-valve statute, 18 U.S.C. §3553(f), which permitted district courts to sentence defendants below mandated minimums for first-time drug offenses. *See id.* at 16. The defendant argued that, because her appeal had not yet concluded, the new law should apply. The Sixth Circuit agreed.

The court noted that the safety-valve statute applied "to all sentences imposed on or after" the effective date. *Id.* at 17 (quoting Pub. L. No. 103-322, §80001(a)). The court concluded that "[t]he initial sentence has not been finally 'imposed' within the meaning of the safety valve statute" while a direct appeal of that sentence remains pending "because it is

the function of the appellate court to make it final after review or see that the sentence is changed if in error." *Id.* The court found that conclusion most consistent with the laws' remedial purpose, as evidenced in the legislative history. *See id.* And the court found further support in the resentencing practices of other circuits, which required district courts to apply §3553(f) on remand. *See United States v. Flanagan*, 80 F.3d 143, 144-45 (5th Cir. 1996); *United States v. Polanco*, 53 F.3d 893, 898-99 (8th Cir. 1995).

Section 401(c) of the First Step Act operates the same way as the safety-valve statute—*i.e.*, it applies so long as a "sentence for the offense has not been imposed" by the effective date. Pub. L. No. 115-391, §401(c). Because a sentence is not imposed until it has reached final disposition in the highest reviewing court, §401(c) applies to cases pending on direct appeal—just like the safety-valve statute did. Indeed, there is no meaningful distinction between the "imposed" qualifier in the First Step Act and in the safety-valve statute at issue in *Clark*. Congress could have departed from the safety-valve statute's language by using "first imposed" or "imposed in the district court." But Congress did not do so. Instead, Congress's decision to apply the Act to "pending cases," coupled with its decision not to qualify the word "imposed," reflects a deliberate choice to adopt the same background principle that the Sixth Circuit found controlling in *Clark*: "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases … pending on direct review or not yet final." *Griffith*, 479 U.S. at 328.

B. The Decision Below Is Inconsistent With *Clark*, Congress's Intent, and Settled Rules of Statutory Construction.

Despite these background principles, the Seventh Circuit adopted a narrower reading of §401(c) in the decision below, holding that it does not apply to cases pending on direct appeal. Pet.App.24-26.[1] According to the Seventh Circuit, because the word "imposed" is commonly used in federal sentencing law to refer to a district court's sentencing of a defendant, §401(c) should read as covering only defendants who have not yet been sentenced at all, not defendants whose sentences remained pending on direct appeal when the First Step Act went into effect. Pet.App.26. In reaching that conclusion, the Seventh Circuit made no attempt to distinguish *Clark*; it simply declined to follow it. Pet.App.26. In doing so, the court reached a conclusion that is at odds not only with *Clark*, but with the statutory structure, the remedial purpose of the First Step Act, and the rule of lenity.

1. The structure of the First Step Act reinforces the conclusion that Congress intended "imposed" to have the same meaning here that the Sixth Circuit gave it in *Clark*—*i.e.*, it applies to *all* defendants whose sentences are not yet final, not just those defendants who did not yet have any sentence when the Act took effect. When Congress intended certain sections of the Act not to apply to cases pending on

[1] So, too, have the other courts that have had occasion to address this question in the wake of the First Step Act. *See, e.g.*, *United States v. Aviles*, 938 F.3d 503, 510 (3d Cir. 2019); *United States v. Wiseman*, 932 F.3d 411, 417 (6th Cir. 2019). Notably, the Sixth Circuit panel made no mention of *Clark* in *Wiseman*.

appeal, it said so. For example, §402(b), titled "Applicability," provides that amendments to the safety-valve statute "shall apply only to a *conviction entered* on or after the date of enactment of this act." (emphasis added). A conviction is entered when the judgment of conviction is entered on the district court's criminal docket. *See* Fed. R. Crim. P. 32(k)(1); Fed. R. App. P. 4(b)(6); *Conviction*, Black's Law Dictionary (11th ed. 2019) ("1. The act or process of judicially finding someone guilty of a crime; the state of having been proved guilty. 2. The judgment (as by a jury verdict) that a person is guilty of a crime."). Unlike §401(c), then, §402(b) applies only if the district court had not yet entered a conviction when the First Step Act took effect.

When Congress intended defendants whose sentences have already become final to benefit from the Act, it said so as well. The Act allows defendants who were sentenced before the Fair Sentencing Act's effective date to seek reductions to their final sentences. *See* Pub. L. No. 115-391, §404. Specifically, in §404(b), titled "Defendants Previously Sentenced," Congress provided that a district court that already sentenced a defendant "may, on motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court, impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 … were in effect at the time the covered offense was committed." On its face, that provision is not confined to pending cases, and thus applies to any defendant who already has a sentence, whether final or not.

Section 401(c), by contrast, takes a different tack, applying to all cases in which a "sentence for the offense has not been imposed." Particularly when read both in conjunction with the background presumption that governs remedial criminal legislation, and contrasted with the differing language of its neighboring provisions, §401(c) is best read as applying to all pending cases—*i.e.*, all defendants whose sentences have not yet been finally imposed. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another … it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (alterations in original).

2. The Seventh Circuit's reading of §401(c) is also inconsistent with the First Step Act's remedial purpose and the rule of lenity. A remedial statute "should be construed liberally to carry out the wise and salutary purposes of its enactment." *Stewart v. Kahn*, 78 U.S. 493, 504 (1870). Here, those purposes support reading §401(c) to apply to all defendants who do not yet have finally imposed sentences.

When Congress passed the Act, the House Judiciary Committee's principal concern was the fiscal cost of the ever-growing prison population. *See* H.R. Rep. No. 115-699, at 23 (2018) ("[T]he Committee is deeply concerned with the increased burden to taxpayers for the burgeoning costs of inmate incarceration, which has also led to increased pressure on the [DOJ's] budget and other important [DOJ] priorities being forced into competition for these limited funds."). The committee observed that prison

costs are "becoming a real and immediate threat to public safety" as they "consum[e] an ever-increasing percentage of the Department of Justice's budget." *Id.* Part of how Congress addressed this problem is by reducing the mandatory sentence of life imprisonment for defendants like petitioner.

The Senate Judiciary Committee likewise stated that the Act "is a landmark opportunity to increase fairness in prison sentencing" and that the reforms were intended to "relieve our overcrowded prisons, redirect funding to addiction treatment, help keep our communities safe, and restore faith in our justice system." Committee on the Judiciary, *Senators Unveil Revised Bipartisan Prison, Sentencing Legislation* (Nov. 15, 2018), https://bit.ly/2pezr0L. The President too embraced the bill as an opportunity to afford prisoners a second chance at life. *See 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"*, The White House (Dec. 21, 2018), https://bit.ly/2N8Thm6; *President Donald J. Trump Is Committed to Building on the Successes of the First Step Act*, The White House (Apr. 1, 2019), https://bit.ly/2N5iCxa ("The First Step Act is providing prisoners with a second chance through rehabilitative programs, fair sentencing, and smart confinement.").

Defendants like petitioner are the precise target of this legislation. Petitioner was imprisoned in 2017 at the age of 35. The average annual cost to incarcerate a federal inmate that year was $36,299.25. 83 Fed. Reg. 18,863, 18,863 (Apr. 30, 2018). At that cost, should petitioner live to be 80, taxpayers will

have spent more than *$1.6 million* in today's dollars imprisoning him. With a national debt now approaching $23 trillion, Congress concluded that taxpayers simply cannot afford to keep defendants like petitioner behind bars for the rest of their lives for committing nonviolent drug crimes. The Seventh Circuit's contrary conclusion inhibits Congress's twin goals—(1) giving prisoners another chance, and (2) reducing overcrowded prisons and associated costs.

Moreover, to the extent §401(c) is ambiguous, the rule of lenity warrants interpreting it to apply to all pending cases. The rule of lenity instructs that, when a criminal statute has two possible readings, courts should not "choose the harsher alternative" unless Congress has "spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347 (1971). The rule exists to ensure "that legislatures, not courts, define criminal liability." *Crandon v. United States*, 494 U.S. 152, 158 (1990). While §401(c) can and should be read to apply to pending cases as a matter of text and structure, any "ambiguity concerning the ambit of [the Act] should be resolved in favor of lenity." *Skilling v. United States*, 561 U.S. 358, 410 (2010).

That conclusion also would avoid anomalous results. If the application of §401's changes really is dependent on the happenstance of when a defendant's sentencing took place, that potentially would subject defendants who committed the same offense on the same day to two different sentencing regimes. While some potential for anomalous results may exist when it comes to defendants whose sentences are already final versus those whose are not, that is consistent

with longstanding rules treating finality as a critical dividing point in who gets the benefit of changes in the law. But those same rules cut exactly the other way when it comes to treating defendants differently even though neither of their cases is final.

3. The Seventh Circuit seemed to view this Court's decision in *Dorsey v. United States*, 567 U.S. 260 (2012) as compelling the conclusion that §401(c) covers only defendants who have not yet been sentenced. It does not.

Dorsey concerned the then-newly enacted Fair Sentencing Act of 2010, which reduced the disparity between the amounts of crack and powder cocaine needed to trigger statutory minimum sentences. *Id.* at 264. The Court was tasked with determining whether the Act's more-lenient sentencing provisions applied to defendants whose conduct predated the act but who were sentenced after the act's August 3, 2010 effective date. *Id.*

The Court answered in the affirmative, holding that the act's new statutory minimums applied "to all of those sentenced after August 3, 2010." *Id.* at 282. In reaching that conclusion, the Court focused on the interplay between the new act and the general saving statute, which provides that a statute repealing an older statute does not extinguish penalties already incurred "unless the repealing Act shall so expressly provide." *Id.* at 272 (quoting 1 U.S.C. §109). The Court acknowledged that "[c]ase law makes clear that the word 'repeal' applies when a new statute simply diminishes the penalties that the older statute set forth" and "that penalties are 'incurred' under the older statute when an offender becomes subject to

them, *i.e.*, commits the underlying conduct that makes the offender liable." *Id.* But the Court concluded that Congress did not intend for the rule set forth in §109 to govern in the Fair Sentencing Act.

Although that act did not *expressly* state that it applied to pre-act offenders, and hence was not governed by §109, the Court concluded that it did not have to do so: Congress's intent for the act to apply retroactively could be manifested either by an express statement or by "necessary implication," "clear implication," or "fair implication." *Id.* at 273-74. And the Court found sufficiently clear evidence that Congress intended the sentencing changes to apply to at least some defendants whose penalties had already been "incurred." In the absence of any clear guidance from Congress on the *extent* to which the law should apply retroactively, however, the Court had to decide for itself which defendants should get the benefit of the new sentencing laws. Observing that "the ordinary practice" under the federal sentencing guidelines "is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced," *id.* at 280, the Court decided that the amendments should apply to those offenders whose crimes preceded the new law but who were not sentenced until after its effective date. *Id.* at 273.

While *Dorsey* reached a different conclusion than petitioner presses here, it did so in the absence of any direct guidance from Congress on the retroactivity question. Here, by contrast, the First Step Act specifically includes a subsection titled "Applicability to Pending Cases" and states that §401 "shall apply to

any offense that was committed before the date of enactment." Pub. L. No. 115-391, §401(c). And it is Congress's intent as manifested in §401(c), not this Court's analysis of a law that contained no materially analogous language in *Dorsey*, that should control the analysis. Because Congress made manifest its intent that §401 should apply to pending cases, defendants like petitioner are entitled to the benefits of the First Step Act.

C. This Question Is Important and Time-Sensitive.

None can dispute the import of the First Step Act, which constitutes the most sweeping prison-reform legislation since the Fair Sentencing Act of 2010. The Act's twin goals are to offer inmates a second chance and to reduce costs associated with incarceration. Both goals are frustrated if defendants like petitioner are destined to languish behind bars for the rest of their lives for committing nonviolent drug crimes.

Recognizing the importance and substantiality of whether that was indeed Congress's intent, this Court already has remanded cases to two circuits to consider the First Step Act's retroactive reach. *See* Order Vacating Judgment and Remanding Case to Third Circuit, *Wheeler v. United States*, No. 18-7187 (U.S. June 3, 2019); Order Vacating Judgment and Remanding Case to Sixth Circuit, *Richardson v. United States*, No. 18-7036 (U.S. June 17, 2019). While those courts have since indicted in other cases that they agree with the Seventh Circuit's view of the First Step Act, *see supra* n.1, the frequency with which this issue has arisen since the Act became law well-illustrates its importance.

Moreover, time is running out for defendants like petitioner to benefit from the First Step Act through the appellate process. Generally, a defendant sentenced on a federal conviction has 14 days to file a notice of appeal. Fed. R. App. P. 4(b)(1)(A)(i). After the notice is filed, appellate courts typically dispose of the case within nine months. *See* U.S. Court of Appeals, *Judicial Caseload Profile* 2, https://bit.ly/343MErN (last visited Oct. 28, 2019). A defendant then has 90 days to petition for a writ of certiorari. Sup. Ct. R. 13(1). And after the petition is granted, this Court on average renders a decision within nine months. *See* Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—and an Alternative*, 107 Mich. L. Rev. 711, 745 (2009). In sum, the entire direct-appellate process typically concludes within two years. By December 2020, then, the time to invoke the First Step Act through a direct appeal will have run for most, if not all, defendants sentenced under the former sentencing scheme. Accordingly, if this Court is ever to resolve this question, the time do so is now.

II. This Court Should Grant, Vacate, And Remand For Consideration Of Whether Petitioner's §922(g) Felon-In-Possession Conviction Can Be Sustained After *Rehaif*.

Wholly independent from the First Step Act issue, the decision below must be vacated. On June 21, 2019, while petitioner's direct appeal was pending, this Court decided *Rehaif v. United States* and held that, to prove a status-based possession charge under §922(g), the government "must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed

it." 139 S. Ct. at 2194. Because the government did not prove that the defendant in that case knew that he was illegally in the United States, the Court reversed the appellate court's judgment and remanded the case. *Id*. at 2200.

As Justice Alito observed in his dissent, "[t]hose for whom direct review has not ended will likely be entitled to a new trial" because of the Court's decision. *Rehaif*, 139 S. Ct.at 2213 (Alito, J., dissenting). And indeed, this Court has already issued at least two dozen orders since *Rehaif* granting certiorari, vacating the judgment, and remanding for reconsideration in cases where the defendant was convicted of a §922(g) offense but the jury was not required to find that the defendant knew that he had the relevant status.[2]

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[2] *See Allen v. United States*, No. 18-7123 (U.S. June 28, 2019); *Reed v. United States*, No. 18-7490 (U.S. June 28, 2019); *Moody v. United States*, No. 18-9071 (U.S. June 28, 2019 Order); *Hall v. United States*, No. 17-9221 (U.S. June 28, 2019); *Humbert v. United States*, No. 18-8911 (U.S. Oct. 7, 2019); *Contreras v. United States*, No. 18-9425 (U.S. Oct. 7, 2019); *Greer v. United States*, No. 18-9444 (U.S. Oct. 7, 2019); *Gilbert v. United States*, No. 18-9589 (U.S. Oct. 7, 2019); *Cook v. United States*, No. 18-9707 (U.S. Oct. 7, 2019); *Hale v. United States*, No. 18-9726 (U.S. Oct. 7, 2019); *Robinson v. United States*, No. 19-5196 (U.S. Oct. 7, 2019); *Jackson v. United States*, No. 19-5260 (U.S. Oct. 7, 2019); *McCormick v. United States*, No. 19-5270 (U.S. Oct. 7, 2019); *Parks v. United States*, No. 19-5330 (U.S. Oct. 7, 2019); *Donate-Cardona v. United States*, No. 19-5014 (U.S. Oct. 15, 2019); *Thomas v. United States*, No. 19-5025 (U.S. Oct. 15, 2019); *Stacy v. United States*, No. 19-5383 (U.S. Oct. 15, 2019); *McCants v. United States*, No. 19-5456 (U.S. Oct. 15, 2019); *Atkinson v. United States*, No. 19-5572 (U.S. Oct. 15, 2019); *Perez v. United States*, No. 19-5565 (U.S. Oct. 15, 2019); *Cox v. United States*, No. 19-5027 (U.S. Oct. 15, 2019); *Johnson v. United States*, No. 19-5181 (U.S. Oct. 21, 2019); *Watkins v. United States*, No. 19-5217

Many of these cases involved §922(g)(1) felon-in-possession convictions, and while the issue was raised for the first time before this Court in many of them, the Court has not treated that as an obstacle to obtaining a remand.

Here, too, petitioner was convicted of a §922(g) offense, but the jury was not required to find that he knew that he had the relevant status. Accordingly, as it already has done in these analogous cases, the Court should grant, vacate, and remand for the lower courts to reconsider petitioner's conviction in light of *Rehaif*.

CONCLUSION

For the foregoing reasons, this Court should grant this petition.

Respectfully submitted,

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(U.S. Oct. 21, 2019); *Legrier v. United States*, No. 19-5623 (U.S. Oct. 21, 2019).