No. 19-566

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

REPLY BRIEF FOR PETITIONER

ZACHARY A. CIULLO
KIRKLAND & ELLIS LLP
300 N. LaSalle Street
Chicago, IL 60654

ERIN E. MURPHY
Counsel of Record
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
erin.murphy@kirkland.com

Counsel for Petitioner

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As explained in the petition (at 18-20), petitioner's conviction under 18 U.S.C. §922(g) for possessing a firearm as a felon is invalid under this Court's recent decision in *Rehaif v. United States* because, at trial, the government failed to prove that petitioner "knew he had the relevant status when he possessed it." 139 S. Ct. 2191, 2194 (2019). The government agrees, acknowledging that "the appropriate course is to grant the petition for a writ of certiorari, vacate the decision below, and remand the case for further consideration in light of *Rehaif*." BIO.3. On that basis alone, the decision below must be vacated.

Wholly independent from that issue, the Court should grant certiorari to address whether petitioner is entitled to relief under §401 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 5221. The government notes that, in the intervening months since this petition was filed, the courts of appeals that have considered this question have agreed with the Seventh Circuit that §401 does not apply to defendants who were initially sentenced before the Act's enactment date. *See* BIO.1-2. But the lack of a circuit split does not preclude this Court from granting review. *See, e.g.*, *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 505-06 (2007) (granting certiorari notwithstanding the absence of conflicting decisions given "the unusual importance of the underlying issue"). Indeed, this Court granted certiorari in *Rehaif* even though the lower courts had unanimously concluded that a defendant's knowledge of his relevant status was not an element of a §922 charge, and the Court ultimately reversed that lower-court consensus.

Here, there is eminently good reason to grant review now: if the Court does not, then any review will likely come too late to matter. The question here is whether a defendant who, like petitioner, was sentenced before Congress enacted the First Step Act but whose direct appeal remained pending is entitled to the relief the Act provides. As explained in the petition (at 17-18), time is running out for such defendants to get an answer to that question. By December of this year, 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. And whether defendants can get any relief under the Act is a matter of profound importance. In this case, the Court's resolution of this issue will determine whether a prisoner in his mid-30's must spend the rest of his life behind bars, or whether he might one day see freedom. If this Court is ever to resolve this question, it should do so now.

There is also good reason to question whether the conclusion the lower courts have so far reached is correct. In the section entitled "Applicability to Pending Cases," the First Step Act 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." Pub. L. No. 115-391, §401(c), 132 Stat. at 5220. Particularly when read against the presumption of retroactivity in criminal cases, *see, e.g.*, *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), and the rule of lenity, that

language can and should be read to provide relief to any defendant whose sentence was not yet final when the Act was enacted.

That reading is consistent with Congress' application of the Act applies to "pending cases." *Swartz v. Meyers*, 204 F.3d 417, 421 (3d Cir. 2000) ("[A]n action or suit is 'pending' from its inception until the rendition of final judgment.") (quoting *Pending*, Black's Law Dictionary 1134 (6th ed. 1990)); *Bradley v. Sch. Bd. of Richmond*, 416 U.S. 696, 711 n. 14 (1974) (holding that a "final judgment" is "one where 'the availability of appeal' has been exhausted or has lapsed, and the time to petition for certiorari has passed"). It is consistent with the rule that a criminal sentence in a pending case does not become final—or *imposed*—until it has "reached final disposition in the highest court authorized to review [it]." *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 660 (1974) (quoting *Bradley v. United States*, 410 U.S. 605, 607 (1973)). And it is consistent with the qualification in §401(c) that the amendments apply only "if a sentence for the offense has not been imposed as of such date of enactment," as that carve-out can be read to preclude prisoners from invoking the Act in 28 U.S.C. §2255 proceedings, 18 U.S.C. §3582(c) motions, and other collateral challenges, rather than in pending direct appeals.

The government argues that, so long as the sentence itself was "imposed" by the time Congress enacted the First Step Act, a defendant is not entitled to resentencing under §401(c). BIO.1-2. But the term "imposed" is not uniformly understood to refer to the imposition of a sentence; it has also been interpreted

to mean when a sentence becomes final. *See, e.g.*, *United States v. Clark*, 110 F.3d 15 (6th Cir. 1997) (interpreting phrase "all sentences imposed on or after" in remedial sentencing statute to include sentences as to which direct appeals remained pending), *superseded by regulation on other grounds*, U.S.S.G. §1B1.10(b)(2)A. The government also invokes this Court's decision in *Dorsey v. United States*, 567 U.S. 260, 280 (2012). BIO.2. But although *Dorsey* observed that "the ordinary practice" under federal sentencing guidelines "is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced," 567 U.S. at 280, the Court reached that conclusion in the absence of any direct guidance from Congress on the retroactivity question. For the same reason, the federal saving statute, 1 U.S.C. §109, does not aid the government, for that statute is relevant only when Congress has not directly spoken to the question.

In addition, the line the government seeks to draw leads to inequitable results. Indeed, some district courts have concluded that defendants already sentenced may benefit from the First Step Act upon resentencing. *See United States v. Uriarte*, 2019 WL 1858516 (N.D. Ill. Apr. 25, 2019); *United States v. Jackson*, 2019 WL 2524786 (N.D. Ohio June 18, 2019). For example, in *Jackson*, the Northern District of Ohio determined that a defendant sentenced on August 23, 2017—several months before petitioner here was sentenced—could benefit from the Act's remedial provisions because his initial sentence had been vacated. *Jackson*, 2019 WL at *3. If the *Jackson* defendant—whose sentence predates petitioner's—

can benefit from the Act, petitioner should benefit from the Act, too.

In short, there is good reason to doubt the lower courts' conclusion that the First Step Act does not embrace the bedrock principle that "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). And if this Court is ever to resolve that question, now is the time to do it. Accordingly, the Court should grant certiorari on the first question presented, but at a minimum should GVR in light of *Rehaif*.

CONCLUSION

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

Respectfully submitted,

ZACHARY A. CIULLO
KIRKLAND & ELLIS LLP
300 N. LaSalle Street
Chicago, IL 60654

ERIN E. MURPHY
Counsel of Record
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
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