No. 19-6264

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IN THE SUPREME COURT OF THE UNITED STATES

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ORANE NELSON, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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# BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether Section 403 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5221, which applies to pre-enactment offenses only "if a sentence for the offense has not been imposed as of [the] date of [the Act's] enactment," § 403(b), 132 Stat. 5222, applies to petitioner's sentence, which was imposed more than a year before the Act's enactment.

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is not published in the Federal Reporter but is reprinted at 756 Fed. Appx. 87.

## JURISDICTION

The judgment of the court of appeals was entered on March 6, 2019. A petition for rehearing was denied on June 3, 2019 (Pet. App. B1). The petition for a writ of certiorari was filed on August 29, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiring to distribute cocaine base and to possess cocaine base with intent to distribute, in violation of 21 U.S.C. 841(b)(1)(A) (2012) and 21 U.S.C. 846; one count of using and possessing a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c) (2012); and two counts of using and possessing a firearm during and in relation to a drug-trafficking crime resulting in death, in violation of 18 U.S.C. 924(c) (2012) and 18 U.S.C. 924(j). Judgment 1-2. The district court sentenced petitioner to 65 years of imprisonment, to be followed by five years of supervised release. Judgment 3. The court of appeals affirmed. Pet. App. A1-A4.

1. From at least 2011 to 2013, petitioner participated in a drug-trafficking conspiracy in the Bronx. Gov't C.A. Br. 2-3. He oversaw multiple co-conspirators, maintained a stash apartment, and carried guns to protect his drug business. Ibid. One of petitioner's crack cocaine suppliers was Jonathan Sambula. Id. at 3. After Sambula was arrested on January 8, 2013, his brother, Jason Rivera, tried to collect Sambula's debts. Id. at 4. Petitioner owed Sambula $1820, and Rivera threatened to shoot petitioner if he did not make good on his debt. Id. at 4-5.

On the evening of January 15, 2013, petitioner agreed to meet with Rivera, ostensibly to pay the debt. Gov't C.A. Br. 5. Rivera's cousin, Jennifer Rivera, went with him to the meeting so that she could get snacks from a store. Id. at 5-6. Around midnight, the Rivera cousins picked up petitioner and another man. After they drove to a second location, petitioner pulled out a handgun and shot both Jason and Jennifer Rivera in the back of the head. Id. at 6. Petitioner and his accomplice then fled the scene. Ibid.

2. A grand jury in the Southern District of New York returned an indictment charging petitioner with one count of conspiring to distribute cocaine base and to possess cocaine base with intent to distribute, in violation of 21 U.S.C. 841(b)(1)(A) (2012) and 21 U.S.C. 846; one count of using and possessing a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c) (2012); and two counts of using and possessing a firearm during and in relation to a drug-trafficking crime resulting in death, in violation of 18 U.S.C. 924(c) (2012) and 18 U.S.C. 924(j). Gov't C.A. Br. 1-2. The case proceeded to trial, and petitioner was convicted on all counts. Ibid.; Judgment 1-2.

The district court sentenced petitioner on June 28, 2017. Gov't C.A. Br. 2. For petitioner's Section 924(c) convictions, the court imposed the statutory minimum sentence of five years of

imprisonment on the first conviction and 25 years of imprisonment on each of the successive convictions, all to run consecutively. Judgment 3; see 18 U.S.C. 924(c)(1)(C)(i) (2012). The court imposed a total sentence of 65 years of imprisonment, to be followed by five years of supervised release. Judgment 3-4.

3. The court of appeals affirmed in an unpublished summary order. Pet. App. A1-A4. In the appeal, petitioner raised several challenges to his convictions, but he "d[id] not challenge his sentence of 65 years' imprisonment." Id. at A1.

ARGUMENT

Petitioner does not contend that the court of appeals' decision is incorrect, nor does he contend that it conflicts with any decision of this Court or any other court of appeals. Instead, petitioner requests (Pet. 4-7) that this Court grant his petition for a writ of certiorari, vacate the judgment below, and remand the case to the court of appeals for consideration of an argument that he did not previously raise -- namely, whether the amendments made by Section 403 of the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5221, apply to this case. That request should be denied. Petitioner relinquished his First Step Act argument by failing to raise it in the court of appeals in a timely manner. And in any event, the amendments made by Section 403 apply to an offense committed before the enactment of the First Step Act, such as petitioner's, only "if a sentence for the offense has not been

imposed as of" the enactment of the Act on December 21, 2018. § 403(b), 132 Stat. 5222. Petitioner's sentence was imposed well before that, in June 2017. Judgment 1. This Court has recently denied certiorari in multiple cases presenting the same issue -- or the analogous issue under Section 401 of the First Step Act, the applicability of which also turns on whether a sentence was already "imposed" before the enactment of the Act, § 401(c), 132 Stat. 5221. See Sanchez v. United States, No. 19-6279 (Nov. 25, 2019); Coleman v. United States, No. 19-5445 (Nov. 25, 2019); Smith v. United States, No. 18-9431 (Nov. 4, 2019); Pizarro v. United States, 140 S. Ct. 211 (2019) (No. 18-9789).* The same course is warranted here.

1. The amendments made by Section 404 of the First Step Act do not apply to petitioner's pre-enactment offenses under the plain terms of the Act. At the time petitioner used a firearm to execute Jason and Jennifer Rivera in January 2013, as well as at the time of his sentencing in June 2017, Section 924(c) provided for a mandatory minimum sentence of 25 years of imprisonment "[i]n the case of a second or subsequent conviction" under Section 924(c). 18 U.S.C. 924(c)(1)(C) (2012). This Court had interpreted that provision to apply when a defendant was convicted of the "second

* A similar question is presented in Jefferson v. United States, petition for cert. pending, No. 18-9325 (filed May 15, 2019); McDaniel v. United States, petition for cert. pending, No. 19-6078 (filed Sept. 24, 2019); Pierson v. United States, petition for cert. pending, No. 19-566 (filed Oct. 28, 2019).

or subsequent" violation of Section 924(c) in the same proceeding as the defendant's first Section 924(c) violation. See Deal v. United States, 508 U.S. 129, 132-137 (1993). In the First Step Act, Congress amended Section 924(c)(1)(C) by striking the prior reference to a "second or subsequent conviction" and instead specifying that the enhanced mandatory penalty applies to a "violation of [Section 924(c)] that occurs after a prior conviction under [Section 924(c)] has become final." § 403(a), 132 Stat. 5221-5222. Congress also specified, however, that those amendments "shall apply to any offense that was committed before the date of enactment of [the First Step Act], if a sentence for the offense has not been imposed as of such date of enactment." § 403(b), 132 Stat. 5222. The First Step Act was enacted into law on December 21, 2018. 132 Stat. 5194. Petitioner's sentence had already been "imposed" more than a year earlier, on June 28, 2017. Judgment 1; see 18 U.S.C. 3553(a) (procedures for district court to "impose a sentence"). The amendments made by Section 403 are thus inapplicable to this case.

Petitioner contends (Pet. 5) that Section 403 of the First Step Act applies "while a case is on direct review and before a judgment is final." The plain language of Section 403(b) refutes that contention. As explained above, the statute specifies that the amendments on which petitioner relies apply to pre-enactment offenses only if "a sentence for the offense has not been imposed"

as of the enactment of the Act. § 403(b), 132 Stat. 5222. Petitioner's contention is also inconsistent with the "ordinary practice" in federal sentencing "to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced." Dorsey v. United States, 567 U.S. 260, 280 (2012). That practice is codified in the saving statute, which specifies that the repeal of any statute will not operate "to release or extinguish any penalty, forfeiture, or liability incurred under such statute" unless the repealing act so provides. 1 U.S.C. 109.

Petitioner further contends that the "repeal of a criminal statute abates all prosecutions that have not reached final disposition on appeal," and that the same principle applies "'even when the penalty is reduced.'" Pet. 5 (quoting Bradley v. United States, 410 U.S. 605, 608 (1973)) (brackets omitted). For purposes of federal law, however, the saving statute "abolish[ed] the common-law presumption" that petitioner invokes. Warden v. Marrero, 417 U.S. 653, 660 (1974) (citing Bradley, 410 U.S. at 607); see ibid. ("To avoid such abatements -- often the product of legislative inadvertence -- Congress enacted 1 U.S.C. § 109, the general saving clause[.]"). The saving statute thus ensures that a "convicted criminal defendant does not fortuitously benefit from more lenient laws that may be passed after he or she has been convicted." United States v. Smith, 354 F.3d 171, 174 (2d Cir.

2003) (Sotomayor, J.). As relevant here, "the saving clause has been held to bar application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of an offense." Marrero, 417 U.S. at 661. In any event, Section 403 of the First Step Act itself dictates that the amendments made by that provision do not apply to a Section 924(c) conviction, like the ones at issue here, for which a sentence was already imposed before the enactment of the Act. The Act thus provides clear "statutory direction" about its applicably to pending cases, Bradley v. School Bd. of the City of Richmond, 416 U.S. 696, 711 (1974), and that direction should be given effect.

Finally, petitioner contends (Pet. 6) that the rule of lenity supports applying Section 403 to cases pending on direct appeal when the First Step Act was enacted. But the rule of lenity applies only if, after the application of the traditional tools of statutory construction, a court concludes that a statute contains "grievous ambiguity," such that the court "can make no more than a guess as to what Congress intended." Muscarello v. United States, 524 U.S. 125, 138-139 (1998) (citations and internal quotation marks omitted). Section 403 does not contain any such ambiguity, particularly in light of the savings statute.

2. As petitioner observes (Pet. 6-7), shortly after the First Step Act was enacted, this Court granted two petitions for writs of certiorari, vacated the respective judgments, and

remanded to the courts of appeals to consider the application of Section 401 or Section 403 of the Act on direct appeal. See Richardson v. United States, 139 S. Ct. 2713 (2019) (No. 18-7036); Wheeler v. United States, 139 S. Ct. 2664 (2019) (No. 18-7187). The Court did so notwithstanding the government's observation that those defendants' sentences had been imposed before the enactment of the Act. See Br. in Opp. at 12-16, Richardson, supra (No. 18-7036); Br. in Opp. at 22-25, Wheeler, supra (No. 18-7187). More recently, however, the Court has repeatedly declined to grant, vacate, and remand in cases like this one. See p. 5, supra. A similar denial of certiorari is warranted here.

First, unlike the defendants in Richardson and Wheeler, petitioner had the opportunity to present his First Step Act claim to the court of appeals, but he failed to do so. As petitioner acknowledges (Pet. 3), the Act was enacted while his appeal was pending in the court of appeals, more than two months before the court entered its judgment. See Pet. App. A1. Although the principal briefs in the case had already been filed, petitioner could have raised the issue by other means -- for example, by requesting leave to file a supplemental brief addressing the applicability of Section 403. Cf. Cassidy v. Chertoff, 471 F.3d 67, 74 n.1 (2d Cir. 2006) (granting leave to file supplemental briefs after oral argument regarding impact of recent decision by court of appeals). Indeed, petitioner filed a supplemental letter

brief in the court of appeals after oral argument on an unrelated issue, C.A. Doc. 101-1 (Jan. 22, 2019), and a petition for rehearing or rehearing en banc, C.A. Doc. 113 (Apr. 19, 2019), but petitioner at no time attempted to raise a claim under the First Step Act in the court of appeals. By failing to avail himself of the opportunity to present the First Step Act issue to the court of appeals, petitioner has forfeited the argument. See Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 75-76 & n.5 (2010) (observing that the respondent forfeited an argument in the court of appeals when he "could have submitted a supplemental brief" addressing the issue in the period between the intervening legal development and the court of appeals' entry of judgment).

Second, since the Court's disposition of the petitions in Richardson and Wheeler, the courts of appeals that have decided the issue have uniformly determined that Sections 401 and 403 of the First Step Act, which have identically-worded applicability provisions, do not apply to offenses for which a defendant was already sentenced before the enactment of the First Step Act. See Young v. United States, 943 F.3d 460, 462-463 (D.C. Cir. 2019); United States v. Aviles, 938 F.3d 503, 510 (3d Cir. 2019); United States v. Wiseman, 932 F.3d 411, 417 (6th Cir. 2019); United States v. Pierson, 925 F.3d 913, 928 (7th Cir. 2019), petition for cert. pending, No. 19-566 (filed Oct. 28, 2019); cf. United States v. Hunt, No. 19-1075, 2019 WL 5700734, at *3 (10th Cir. Nov. 5, 2019);

United States v. Melvin, 777 Fed. Appx. 652, 653 (4th Cir. 2019) (per curiam); United States v. Means, No. 19-10333, 2019 WL 4302941, at *2 (11th Cir. Sept. 11, 2019) (per curiam).

Because petitioner's First Step Act claim is both forfeited and without merit, no reasonable probability exists that the court of appeals would remand this case for resentencing in light of that statute. The appropriate course is accordingly to deny certiorari. See Greene v. Fisher, 565 U.S. 34, 41 (2011) (explaining that this Court will not grant, vacate, and remand in light of an intervening development unless, as relevant here, "a reasonable probability" exists that the court of appeals will reach a different conclusion on remand) (quoting Lawrence v. Chater, 516 U.S. 163, 167 (1996) (per curiam)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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