No. _____

In the
Supreme Court of the United States

CARLOS CRUZ-RIVERA,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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August 29, 2020

QUESTION PRESENTED

Whether 18 U.S.C. § 924(c)(1)(C), which as clarified and as amended by the First Step Act of 2018, precludes aggravated punishment for second firearms convictions unless the second violation "occurs after a prior conviction" "becomes final," and expressly applies to "pending cases" involving offenses "committed before the date of enactment," should have invalidated two 25-year stacked sentences in this case where the defendant had been sentenced, but his convictions were not final, on the date of enactment.

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PETITION FOR A WRIT OF CERTIORARI

Carlos Cruz-Rivera respectfully petitions for a writ of certiorari to review a published order of the United States Court of Appeals for the First Circuit, denying a motion to recall the mandate in this case. The petition raises important questions of statutory interpretation of Section 403 of the First Step Act of 2018.

OPINION BELOW

The First Circuit's published order denying the motion to recall the mandate is reported at United States v. Cruz-Rivera, 954 F.3d 410 (1st Cir. April 1, 2020). (App., infra, 1a.) The First Circuit's opinion affirming Mr. Cruz-Rivera's convictions on direct appeal is reported at United States v. Cruz-Rivera, 904 F.3d 63 (1st Cir. 2018).

JURISDICTION

The First Circuit had jurisdiction under 28 U.S.C. § 1291 and entered judgment affirming Mr. Cruz-Rivera's convictions on September 14, 2018. Mr. Cruz-Rivera did not seek rehearing. Mr. Cruz-Rivera petitioned this Court for a writ of certiorari on February 11, 2019, raising the First Step Act. (See Petition in No. 18-7974.) This Court denied the Petition on March 25, 2019. Mr. Cruz-Rivera's motion to recall the mandate, filed *pro se* in the First Circuit on September 20, 2019, and supplemented by counseled filings and a court-ordered government response, was denied in a published order on

April 1, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This petition is timely under Supreme Court Rule 13, and under this Court's Order of Thursday, March 19, 2020, extending the deadline to file any petition for a writ of certiorari due on or after the date of the order to 150 days from the date of the lower court judgment, or order denying discretionary review.

STATUTORY PROVISIONS INVOLVED

Section 924(c)(1)(A) of Title 18 of the U.S. Code states in relevant part:

> [A]ny person who, during and in relation to a crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, [ ] or who in furtherance of any such crime, possesses a firearm, [violates this section].

Section 924(c)(1)(C), until it was both clarified and amended by the First Step Act of 2018, provided, in relevant part:

> (C) In the case of a second or subsequent conviction under this subsection, the person shall –
>
> (i) be sentenced to a term of imprisonment of not less than 25 years; and
>
> (ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

The First Step Act of 2018, Title IV, Section 403, enacted on December 21, 2018, promulgated the following clarification and amendment to § 924(c)(1)(C):

> Clarification of section 924(c) of title 18, United States Code.
>
> (a) In general. Section 924(c)(1)(C) of title 18, United States

Code, is amended, in the matter preceding clause (i), but striking "second or subsequent conviction under this subsection" and inserting "violation of this subsection that occurs after a prior conviction under this subsection has become final."

(b) Applicability to pending cases. 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 has not been imposed as of such date of enactment.

First Step Act of 2018, Pub. L. No. 115-391.

Section 924(c)(1)(C), incorporating the clarification and amendment by the First Step Act of 2018, now provides, in relevant part:

(C) In the case of a second or subsequent conviction that occurs after a prior conviction under this subsection has become final, the person shall –

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

STATEMENT OF THE CASE

Mr. Cruz-Rivera, who is currently 45 years old, is serving an 872-month (or 72.6-year) sentence, of which 684 months (57 years) represent three stacked 18 U.S.C. § 924(c) sentences for three simultaneously charged convictions for brandishing a weapon during a crime of violence. The first § 924(c) conviction carried a seven-year sentence, and the second and third convictions each carried consecutive 25-year sentences. This is essentially a life sentence for Mr. Cruz-Rivera. His expected release date is September 9, 2079, when Mr. Cruz-Rivera, if he outlives his sentence, would be 104 years old. If Mr. Cruz-Rivera were resentenced with the benefit of the clarified provisions of § 924(c), his sentences on the second and third weapons counts would each be a consecutive seven years, resulting in a total 440-month sentence, or almost 37 years.

His final judgment of conviction was entered in the United States District Court for the District of Puerto Rico, following a straight plea on October 6, 2015 to three counts of carjacking, two under 18 U.S.C. § 2119(1) and one under 18 U.S.C. § 2119(2), and following guilty verdicts rendered on October 15, 2015, at the conclusion of a three-day jury trial on three § 924(c)(1)(A)(ii) counts for brandishing a firearm in relation to a crime of violence, and one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

At the time of trial, Mr. Cruz-Rivera was 41 years old, and Mr. Cruz-Rivera had already spent approximately 23 years of his life incarcerated.

Three carjacking victims testified that Mr. Cruz-Rivera entered their car with what appeared to be a weapon, and directed them to an ATM to withdraw cash. One victim was raped during the carjacking. There was no expert evidence other than lay-witness testimony that the three different objects Mr. Cruz-Rivera used appeared to be a weapon. Mr. Cruz-Rivera introduced evidence that he had access to a BB-gun belonging to his cousin, who used the BB-gun as a prop in his strip shows, and a photograph of the BB-gun, which demonstrated it matched one of the victim's description of the object Mr. Cruz-Rivera was holding during the carjacking. The jury convicted him on all the weapons counts.

The first assistant federal public defender in Puerto Rico unsuccessfully moved to dismiss three § 924(c) weapons charges on grounds the underlying federal carjacking offenses categorically failed to qualify as a crime of violence under both the "force" and "residual" clauses of that statute.

Mr. Cruz-Rivera appealed his § 924(c) convictions and sentences, and his appeal and briefing were stayed pending this Court's decision in Sessions v. Dimaya, 138 S. Ct. 1204 (April 17, 2018). Following an expedited briefing schedule, Mr. Cruz-Rivera appealed on grounds federal carjacking

categorically did not qualify as a crime of violence under § 924(c)'s force clause and that the residual clause was unconstitutionally vague and void, on grounds § 924(c) exceeds Congress' Commerce Clause Power, and on grounds the evidence was insufficient to establish a real firearm was used in the carjacking and that the standard of proof in the First Circuit requires less than proof beyond reasonable doubt that a weapon is real. The First Circuit's decision affirming the convictions issued September 14, 2018. Mr. Cruz-Rivera did not seek rehearing, and the First Circuit issued its mandate.

On December 21, 2018, the First Step Act was enacted. Mr. Cruz-Rivera's petition for a writ of certiorari, filed February 11, 2019, sought application of the newly clarified and newly enacted § 924(c) penalty provisions to lower his sentence on direct appeal. The Petition was denied March 25, 2019. Three months after the Petition was denied, this Court granted, vacated, and remanded to the Sixth Circuit a petition raising the identical issue under the First Step Act, in Richardson v. United States, S. Ct. Dkt. No. 18-7036, 139 S. Ct. 2713 (June 17, 2019), remanding to 6th Cir. Dkt. No. 17-2157. Mr. Cruz-Rivera moved to recall the First Circuit's mandate on September 20, 2019, citing the First Step Act. On January 13, 2020, this Court issued a second GVR order in Jefferson v. United States, S. Ct. Dkt. No. 18-9325, 2020 WL 129507 (Jan. 13. 2020), remanding to the Tenth Circuit, Dkt. No. 17-3150. After considering briefing by both parties, the First Circuit denied Mr. Cruz-Rivera's motion to recall the mandate,

holding that Congress did not intend § 403(a) to compel the re-opening of sentencing proceedings concluded prior to the new law's effective date, in an order published on April 1, 2020.

This second Petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

This Court should grant *certiorari* to hold that under 18 U.S.C. § 924(c)(1)(C), as clarified, and as amended by the First Step Act of 2018, Mr. Cruz-Rivera's two stacked 25-year sentences are illegal and violate due process, and remand for reconsideration of the motion to recall the mandate. Section 924(c) requires the vacation of the stacked sentences and resentencing, because that provision, both as written prior to the First Step Act, and as written today, prohibits a consecutive 25-year sentence absent an intervening final conviction on a first offense, and only permits conviction and sentence under § 924(c)(1)(A) for simultaneously charged offenses. The circuits interpreting § 924(c) following enactment of the First Step Act have, to date, decided that the amendment's application when a sentence "has not been imposed," means it has no application to a direct appeal where the district court pronounced a sentence before the date of enactment. Many district courts considering re-sentencing following either a successful appeal or a successful § 2255 motion, or other motions, have applied the new First Step Act sentencing provisions, and refused to stack sentences under the previous judicial interpretation of § 924(c), while others have not. This

Petition urges that the Court should read § 924(c) in light of Congress' express intent to clarify § 924(c) as written prior to enactment, and consider the Act's broad remedial purpose to stem mass incarceration and end draconian, and sometimes life-long, stacked sentences under § 924(c), and overrule Deal v. United States, 508 U.S. 129 (1993). In short, myopic statutory interpretation in various circuits and a few district courts has subverted Congressional intent, and circuits have failed to recognize § 403 as a clarification of what the law meant *ab initio*. The questions raised herein, because they implicate criminal defendants' liberty and decades of incarceration, are matters of exceptional importance which warrant granting the petition, even if the circuits, to date, are uniform in interpreting the clarified § 924(c) in the context of direct appeals not involving resentencing. This Court has not hesitated to address important questions of law even when circuits were uniform. See e.g., Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 505-06 (2007) (granting certiorari despite absence of circuit split in light of "unusual importance of the underlying issue"); Rehaif v. United States, 139 S. Ct. 2191 (2019). This Court should grant this Petition for Certiorari to address these important questions of statutory interpretation, on which years of incarceration hinge, and resolve the ambiguity evidenced by division among lower court authorities applying the Act.

18 U.S.C. § 924(c)(1)(C), BOTH AS CLARIFIED, AND AS AMENDED BY THE FIRST STEP ACT OF 2018, EXPRESSLY APPLIES TO PENDING, NON-FINAL CRIMINAL CASES ON DIRECT APPELLATE REVIEW AND SHOULD BE APPLIED TO REDUCE THE SENTENCE IN THIS CASE.

Section 403 of the First Step Act plainly and expressly states that its clarification and amendment of § 924(c) applies to "any offense that was committed before the date of enactment of this Act," and thus there is no question its remedial, punishment-reducing effects have retrospective application to past conduct. The disputed question is whether the rewritten statute under the Act has drawn a line in the sand separating defendants entitled to the Act's ameliorative penalties by the date their sentences were pronounced. The circuits that claim to see the line clearly drawn, however, are embracing a literalism that subverts Congressional intent and are consciously ignoring an ambiguity that this Court should resolve in criminal defendants' favor, because justice and lenity require it. They are also ignoring the Act's intent to clarify the law as written *ab initio*.

Norms of statutory construction require that interpretation begin with the statutory text, read as a whole, informed by express statutory purpose and context. Robinson v. Shell Oil Co., 519 U.S. 337 (1997). Contrary to these norms, the First Circuit and several other circuits pin their entire construction of the statute's application on a single word read in isolation, and urge that the passage describing a sentence as "imposed" can only have a

single literal meaning, the pronouncement of sentence by a district court, regardless of finality, based on analogies to, and usage in, statutes addressing sentencing, and not sentencing reform. However, "[i]t is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute." Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983). A court should "not look merely to a particular clause" but also "take in connection with it the whole statute and the objects and policy of the law." Id.; Dolan v. USPS, 546 U.S. 481, 486 (2006) (interpretation of a word must consider "whole statutory text, considering the purpose and context of the statute" and the "definition of words in isolation . . . is not necessarily controlling").

Section 403 is a clarification.

Congress has expressly identified Section 403 of the First Step Act as a "Clarification of section 924(c) of title 18, United States Code," and it is the only section of the First Step Act bearing that title. The use of the word "clarification" signifies congressional intent to remedy a prior judicial misinterpretation of the statute, and the congressional purpose for inserting new words to ensure the statute would never be misinterpreted again.

"Clarification, effective *ab initio*, is a well recognized principle," and "[s]ubsequent legislation declaring the intent of an earlier statue is entitled to great weight in statutory construction." Liquilux Gas Corp. v. Martin Gas

Sales, 979 F.2d 887, 890 (1st Cir. 1992) (holding that a Puerto Rican statutory amendment, though silent on retroactivity and substantive in effect, was "a clarification that did not alter the law, and merely explicated it" and applied retroactively); Fiore v. White, 531 U.S. 225, 228 (2001) (ruling clarifying statutory language stated law as of the date defendant's conviction became final and because it was "not new law, this case presents no issue of retroactivity"); United States v. Monroe, 943 F.2d 1007, 1015-16 (9th Cir. 1991) (1988 amendments to money laundering and transportation of stolen property statutes were clarifying and had retroactive effect).

Again, § 403 is the only provision in the First Step Act that Congress chose to title as a "Clarification," and this Court should consider this clearly expressed intent in interpreting its provisions. See Church of Holy Trinity v. United States, 143 U.S. 457, 462 (1892) ("Among other things which may be considered in determining the intent of the legislature is the title of the act."); see also Brown v. Thompson, 374 F.3d 253, 259-61 & n. 6 (4th Cir. 2004) (Congress expressly provided Medicare amendments were "clarifying," and panel noted Congress may amend "to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases" and "need not *ipso facto* constitute a change in meaning or effect," and amendment "may be passed purely to make what was intended all along even more unmistakably clear.") Here, Congress's First Step Act clearly intended to clarify what

§ 924(c)(1)(C) meant before the Supreme Court interpreted it in Deal v. United States, 508 U.S. 129 (1993), where the Court resolved a circuit split regarding its meaning, and rejected the Tenth Circuit's interpretation in United States v. Abreu, 962 F.2d 1447 (10th Cir. 1992), which held that § 924(c)(1)(C) required a prior conviction. The First Step Act's language clearly corrects and clarifies that the statute, *ab initio*, and before the amendment, was not intended to permit stacked convictions without an intervening final conviction. This Court must now overrule Deal. Under § 403 it is no longer good law.

The First Circuit erroneously dismissed the significance of this title as lacking force of law and lacking any significance because it found it was overcome by the section's supposed "operative text," a single undefined phrase, erroneously viewed in isolation. The government, hoping to avoid the implications of a clarification, failed to even address it in its briefing to the First Circuit. The First Circuit also erroneously failed to engage in any consideration of the remedial purposes of the statute, and while citing Dorsey v. United States, 567 U.S. 260 (2012), failed to engage in any analysis resembling the multi-factor analysis in Dorsey. By ignoring the significance of the clarification title, the First Circuit also ignored that the federal saving statute, 1 U.S.C. § 109, does not apply to clarifications of law.

The Sixth Circuit in United States v. Richardson recognized that the use of the word "Clarification" can be significant, for "a clarification spells out

the statute's original meaning," as opposed to effecting a substantive change. United States v. Richardson, 948 F.3d 733, 746 (6th Cir. 2020). But that circuit also disregarded the significance of the express clarification. While the Sixth Circuit dismissed the clarification title as inconclusive and inoperative[1] until a court declared that Congress intended what it expressly states, 948 F.3d at 748, this Court has held that "[s]ubsequent legislation which declares the intent of an earlier law" while it "is not, of course, conclusive in determining what the previous Congress meant," it "is entitled to weight when it comes to the problem of construction" and the "purpose of the Act, its [] construction, and the meaning which a later Congress ascribed to it," all guide a court's interpretation. Fed. Hous. Admin. v. Darlington, Inc., 358 U.S. 84, 90 (1958). In other words, Congress has told us how it intended § 924(c) to be understood, as originally written. If § 403's express declaration that § 924(c) is clarified is insufficient to abrogate Deal, this Court must hold that Deal is overruled and no longer good law.

[1] The circuits discounting the significance of the clarification are: United States v. Cruz-Rivera, 954 F.3d 410 (1st Cir. 2020); United States v. Hodge, 948 F.3d 160 (3d Cir. 2019); United States v. Jordan, 952 F.3d 160 (4th Cir. 2020); United States v. Gomez, 960 F.3d 173 (5th Cir. 2020); United States v. Richardson, 948 F.3d 733 (6th Cir. 2020); and United States v. Buckner, 808 F. Appx. 755 (11th Cir. 2020). The matter has been briefed for the Tenth Circuit in United States v. Jefferson, No. 17-3150; and the Ninth Circuit will consider briefing addressing § 401, that also touches on § 403, in United States v. Mapuatuli, No. 19-10233, which includes an amicus brief by three U.S. Senators.

Before the Supreme Court's interpretation of § 924(c) in Deal, § 924(c) was susceptible of two interpretations – it either did, or did not, require a prior final conviction before a second conviction could carry additional, consecutive punishment. In other words, Section 924(c) was ambiguous until this Court's decided Deal. Justice Steven's dissent in Deal made the ambiguity clear when he lamented that the "subsequent conviction" as used in § 924(c) "clearly is intended to refer to a conviction for an offense committed after an earlier conviction has become final" and, "[e]ven assuming, however, that the meaning of § 924(c)'s repeat offender provision is not as obvious as I think, its history belies the notion that its text admits of only one reading." Deal, 508 U.S. at 142.

To accept Congress' intent to clarify what § 924(c) was always intended to mean is not incompatible with accepting the new words inserted by Section 403 as a clarifying amendment, i.e., an amendment that makes Congressional intent clear and expressly precludes successive punishment without an intervening prior conviction. Section 403 signifies that § 924(c) was always meant to require a final conviction on a first offense, and its amending language now ensures that its text is no longer susceptible of two interpretations.

Application to a "pending case."

Furthermore, Section 403 plainly articulates that the "applicability" of § 924(c) as rewritten, is "to pending cases" and that its new language applies

"if a sentence for the offense has not been imposed as of such date of enactment." The phrase "pending cases" should be construed, as it always has been, to mean cases that have not completed direct review or judicial review. A criminal sentence does not have finality and has not been finally imposed until the completion of review. Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987) ("By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied."); United States v. Pelaez, 196 F.3d 1203 (11th Cir. 1999) (sentence "imposed" upon entry of final judgment for safety valve purposes). If the First Step Act is susceptible to two interpretations of what constitutes a pending case, or varying interpretations of the definition of when a sentence is "imposed," the Supreme Court should resolve the ambiguity. The Third Circuit in United States v. Hodge recognized that the First Step Act did not define or use any modifiers to make precise whether "a sentence," as used in the Act, means "an ultimate sentence, or a final sentence," and simply chose to construe it to mean a defendant "initially sentenced" before enactment, even though the First Step Act does not expressly use the words "initially sentenced." Hodge, 948 F.3d at 163.

Furthermore, counsel is not aware of any authority for dividing the field of "pending cases" with a sentencing date demarcation line. The use of the phrase "pending cases" must therefore cast doubt on the certainty with

which circuits see a sentencing date as the termination date for when a case is deemed "pending" under the Act.

Congress is presumed to legislate with existing statutory definitions of when a case is deemed "pending" in mind. See McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991) (Congress presumed to legislate with knowledge of existing statutes and rules of statutory construction); Albernaz v. United States, 450 U.S. 333, 340-42 (1981).

It is widely accepted that finality of judgment, in federal courts, is "the date on which the judgment became final by the conclusion of direct review or the expiration of time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Federal Rule of Civil Procedure 62(d) describes circumstances warranting a stay when an "appeal is pending." Fed. R. Civ. P. 62(d). The First Step Act, if ambiguous on whether a pending case includes a case where a sentence is not yet final, or is subject to review, should -- under the rule of lenity -- be construed in a defendant's favor.

This Court should decide this issue and remand for reconsideration.

The Supreme Court has decided petitions before it "on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley v. Richmond Sch. Bd., 416 U.S. 696, 711 (1974) (holding legislation awarding attorney fees, enacted during appeal permitted award of fees to litigants). In Hamm v.

Rock Hill, the Supreme Court held that petitioners' "still-pending convictions" for violating state trespass statutes were abated by passage of the Civil Rights Act of 1964, even though the conduct (refusal to leave lunch counters that denied them services) occurred prior to enactment. Hamm, 379 U.S. 306, 308-09 (1964). Citing Justice Marshall in United States v. Schooner Peggy, the Court reasoned "if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed." Id. at 312 (citing Schooner Peggy, 1 Cranch 103, 110 (1801).) The Hamm Court "imput[ed] to Congress an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose, and would be unnecessarily vindictive," noting this was a principle "to be read wherever applicable as part of the background against which Congress acts." Id. at 313-14. A remedial clarification, and a remedial change in statutory language, should, at minimum, be applied to cases pending on direct appeal, because a sentence has not "reached final disposition in the highest court authorized to review" it. Bradley v. United States, 410 U.S 605, 607 (1973).

Here, the amendments in Section 403 apply to conduct predating enactment, and should be construed to apply where a sentence is not finally imposed and subject to judicial review, because this reading of the plain text comports with statutory intent to abate the harsh punishment imposed by § 924(c)(1)(C) that Congress has determined serves no legislative purpose, and

to restrict its application to recidivists with a prior final conviction. This Court should overrule Deal, because this clarification abrogates its interpretation, and indicates it was wrongly decided; and even if it does not overrule Deal, this Court should hold the newly enacted language of Section 403 applies, at minimum, to cases that were pending on direct review on the date of its enactment, grant the petition, and remand to the First Circuit to reconsider its ruling on the motion to recall the mandate.

There are no constitutional concerns with retrospective application of the First Step Act's remedial amendment to cases that were on direct review when the First Step Act was enacted. As this Court has held, only ex post facto laws, and not all retrospective laws, are prohibited. "[T]here are cases in which laws may justly, and for the benefit of the community, and also of individuals, related to a time antecedent to their commencement; as statutes of oblivion, or of pardon." Calder v. Bull, 3 U.S. 386, 391 (1798). The Court did not consider prohibited any law "that mollifies the rigor of the criminal law." Id.

Congressional intent.

Courts have held "an amendment may apply retroactively where the Legislature enacts an amendment to clarify an existing statute and to resolve a controversy regarding its meaning." Perlin v. Time, Inc., 237 F. Supp. 3d 623, 630 (E.D. Mich. 2017). The legislative history of Section 403 indicates Congress intended to alter the interpretation given to § 924 in Deal v. United

States, 508 U.S. 129 (1993), where this Court held a consecutive (then) 20-year sentence for a "second or subsequent conviction" did not require an intervening final conviction. See Sentencing Reform Act of 2015, 114 H. Rpt. 888, 2016 WL 7471588, at *20 (noting clarification adopted because "courts have interpreted 'second or subsequent' to include multiple charges in the same indictment" resulting in "inappropriately lengthy sentences"); see also 162 Cong. Rec. S5045 (July 13, 2016) (Sponsor Senator Lee's statements regarding unjust application of mandatory consecutive sentences and noting the statute as interpreted meant judges "didn't have a choice" to impose less excessive sentences); see also 164 Cong. Rec. S7753, 7774 (Dec. 18, 2018) (Statement of Sen Cardin) ("the legislation eliminates the so-called stacking provision…which helps ensure that sentencing enhancement for repeat offenses apply only to true repeat offenders" and the "legislation clarifies that sentencing enhancements cannot unfairly be 'stacked,' for example, by applying to conduct within the same indictment"); 164 Cong. Rec. H10346, 10362 (Dec. 20, 2018) (statement of Rep. Nadler) (law "crucial first step toward addressing grave concerns about our sentencing laws, which have for years fed a national crisis of mass incarceration" and reforms include "stopping the unfair 'stacking' of mandatory sentencing enhancements for certain repeat firearms offenders").

It is also clear that Congress intended the new language in Section 403 to remediate and reduce punishment for cases that are subject to judicial

review and not yet final. A more limited application would fail to further the Act's goals. As Judge Weinstein noted in United States v. Simons, 375 F. Supp. 3d 379, 385 (E.D.N.Y. April 22, 2019), a "[g]rowing prison population and the high costs of incarceration – averaging more than $ 30,000 per year for each prisoner in federal custody – were a motivating consideration for the Act." Furthermore, a House Judiciary Committee report expressed concern that rising prison costs had to be stemmed because "the Department [of Justice] cannot solve this challenge by spending more money to operate federal prisons unless it is prepared to make drastic cuts to other important areas of the Department's operations." Id.

Even if the legislative intent to apply the statute retrospectively to cases pending review were otherwise in question -- and it is not because Congress included plain language that requires it to operate retrospectively -- here, by labeling the law as "clarifying" Congress ensured there was no question of its retrospective application. A statute that "provides that it clarifies or declares existing law, it is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action," and a court "must give effect to this intention unless there is some constitutional objection thereto." Vazquez v. N. County Transit Dist., 292 F.3d 1049, 1057 (9th Cir. 2002). There are no ex post facto concerns regarding Section 403 because it is a remedial statute that decreases punishment, rather than increase it. The passage of this law was intended to

ensure that 924(c)(1)(C)'s draconian consecutive term be only used to punish real recidivism, not multiple instances of the same conduct.

Differing interpretations highlight ambiguity.

There is a division of authority in the district courts as they resentence defendants under the First Step Act, which demonstrates that § 403's application provision is susceptible to two interpretations. The fact that so many district courts must consider application of the Act warrants granting the petition in this case.

Many district courts are applying § 403's anti-stacking amendment at re-sentencing proceedings, following remands from successful appeals, successful § 2255 motions, or in resentencing under § 404(b),[2] with some explicitly rejecting government arguments that reduced sentences should be unavailable to resentenced defendants because their initial sentences were "imposed" before the First Step Act's date of enactment. See, e.g., United States v. Brown, S.D.N.Y. Dkt. No. 7:14-cr-00509 (11/06/19 Minute Entry noting district curt "rules that the First Step Act applies to Defendant's re-sentencing" and Doc. 88, Amended Judgment in a Criminal Case Pursuant to the First Step Act of 2018); United States v. Crowe, No. 2:11-cr-20481-AJT-MKM (E.D. Mich.) (Doc. 287); United States v. Jackson, No. 1:15-cr-453-001, 2019 U.S. Dist. LEXIS 102563 (N.D. Ohio June 18, 2019) (appeal to 6th Cir.

[2] The question of whether defendants are entitled to resentencing under the First Step Act also arises in a resentencing following a motion under 18 U.S.C. § 3582, and 28 U.S.C. § 2241.

pending in No. 19-3623); United States v. Uriarte, No. 09-CR-332-03, 2019 U.S. Dist. LEXIS 70363 (N.D. Ill. Apr. 25, 2019) (appeal to 7th Cir. pending in 19-2092); United States v. Jones, 431 F. Supp. 3d 740 (E.D. Va. 2020); United States v. Jones, No. 1:97-cr-00118-RLY-1 (S.D. Ind.) (Doc. 82 at 28-35); United States v. McCoy, No. 1:92-cr-00096-SEB-DKL (S.D. Ind.) (Doc.15); United States v. Robinson, No. 5:02-cr-80 (E.D.N.C.) (403 applied following successful § 2255, no appeal); United States v. Joyner, No. 1:15-cr-255-1 (N.D. Ga.); Acosta v. United States, No. 3-cr-11, 2019 WL 4140943 (W.D.N.Y. Sept. 2, 2019) (parties settled in light of holding). Some are applying § 401 at resentencings. See, e.g., United States v. Ortega, No. CR 10-825-R, (C.D. Ca.); United States v. Beneby, No. 1:13-cr-20577-MCG (S.D. Fla.) (11th Cir. No. 19-11387). See Summaries of many of these cases at App. 5a, 9a.

Other courts have refused to give defendants the benefits of the new law at resentencing. See, e.g., United States v. Hodge, 948 F.3d 160 (3d Cir. 2020) (in context of limited remand); United States v. Mapuatuli, No. 12-cr-01301 (D. Haw.) (refusing to apply § 401) (appeal pending in 9th Cir. No. 19-10233); United States v. Jefferson, No. 3:03-cr-63-MHT, 2020 U.S. Dist. LEXIS 140464 (M.D. Ala. Aug. 6 2020); United States v. Bryant, No. 6-cr-17-LTS, 2020 U.S. Dist. LEXIS 43728 (S.D.N.Y. Mar. 10, 2020).

The fact that many courts have rejected the government's, and various circuits', interpretation of the initial imposition of sentence as the demarcation line between cases that benefit from the First Step Act and

those that don't means the First Step Act is ambiguous. The ambiguity should be resolved by this Court. And lenity requires that the First Step Act be read in favor of criminal defendants.

This Court has recognized that the rule of lenity is a principle of statutory construction which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. Bifulco v. United States, 447 U.S. 381, 387 (1980). Lenity requires that a "Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." Id. The plain text and legislative intent undergirding Congress' clarification of § 924(c) make clear Congress intended to eliminate aggravated punishment absent an intervening final conviction and to give judges judicial discretion. The construction circuits have given § 403 ignores its ambiguity and does not comport with lenity. Lenity "is founded on the 'the tenderness of the law for the rights of individuals' to fair notice of the law 'and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.'" United States v. Davis, 139 S. Ct. 2319, 2333 (2019).

To say defendants with pending cases are barred from the ameliorative effects of the Act because their non-final sentences were declared prior to enactment is illogical, and disconsonant with legislative intent undergirding a statute that is clearly meant to have immediate remedial effect. The First

Circuit erred in failing to recall the mandate, and erred as a matter of law in ruling that the First Step Act was not intervening legislation that invalidated Mr. Cruz-Rivera's fifty-year stacked sentences.

Mr. Cruz-Rivera's petition should be granted. This Court should rule that Section 403 invalidates Mr. Cruz-Rivera's stacked sentences, and that they violate due process, that Deal v. United States is overruled, and the case should be remanded in light of that holding so the First Circuit can reconsider its refusal to recall the mandate.

CONCLUSION

This Court should grant the petition for a writ of certiorari and set the case for argument.

Respectfully submitted,

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August 29, 2020